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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KEVIN COOPER,

Petitioner,

vs.

JILL L. BROWN, Acting Warden, San
Quentin State Prison,

Respondent.

CAPITAL CASE

CASE NO. 04-CV-656 H
Related cases 98-CV-818-H
92-CV-427-H

**Order Denying Successive
Petition for Writ of Habeas
Corpus**

Petitioner Kevin Cooper, a California state prisoner, brings this successive petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He challenges his capital conviction for the first-degree murders of Franklyn Douglas Ryen (“Doug”), Peggy Ryen, his wife, Jessica Ryen, their 10-year-old daughter, and Christopher Hughes, an 11-year-old neighborhood friend, and the attempted murder of Joshua Ryen, the 8-year-old son of Doug and Peggy Ryen.

Petitioner’s successive petition challenges post-conviction DNA test results that confirm that Petitioner is responsible for the Ryen/Hughes murders. (DOJ Physical Evidence Report dated July 2, 2002; Supplemental DOJ Physical Evidence Exam Report

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1 dated Sept. 24, 2002.)¹ These DNA tests were done pursuant to a Joint DNA Forensic
2 Testing Agreement (“Joint DNA Agreement”) entered on May 10, 2001.² Those results
3 provide strong evidence of Petitioner’s DNA from blood inside the Ryen residence (one
4 in 310 billion), from saliva on two cigarette butts recovered from the stolen Ryen station
5 wagon (one in 19 billion and one in 110 million), and from a T-shirt found on the side
6 of a road that contained Petitioner’s blood (one in 110 million) and victim Doug Ryen’s
7 blood (one in 1.3 trillion). (Supplemental DOJ Physical Evidence Exam Report dated
8 Sept. 24, 2002.) In addition to the DNA evidence inculcating Petitioner, DNA profiles
9 of blood taken from a hatchet that was taken from the house where Petitioner hid after
10 his escape from prison matched that of several of the victims including Doug and Jessica
11 Ryen and Chris Hughes. (Supplemental DOJ Physical Evidence Exam Report dated Sept.
12 24, 2002.)

13 On February 9, 2004, the Ninth Circuit granted Petitioner’s request to file a
14 successive petition for writ of habeas corpus in federal court and remanded the successive
15 petition to this Court. Cooper v. Woodford, 358 F.3d 1117 (9th Cir. 2004.) The Ninth
16 Circuit stated that Petitioner’s guilt may be resolved through two scientific tests: (1)
17 mitochondrial DNA testing of hairs found on the victims and (2) testing of the T-shirt for
18 ethylene-diamine-tetra-acetic acid (“EDTA”) blood preservative. Id. at 1123-24.
19 Having conducted mitochondrial DNA testing and EDTA testing, reviewed the parties’
20 papers, heard testimony from forty-two witnesses, reviewed numerous exhibits,
21 considered the prior record, and listened to the parties’ oral arguments, this Court
22 DENIES the successive petition for writ of habeas corpus.

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25 ¹ (92-CV-427, Third Supplemental Notice of Lodgment (“NOL”) filed Jan. 23, 2004, Ex. No.
26 4, DOJ Physical Evidence Exam Report dated July 2, 2002 (“DOJ Physical Evidence Report dated July
27 2, 2002”); 92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Ex. No. 5, Supplemental DOJ
Physical Evidence Exam Report dated Sept. 24, 2002 (“Supplemental DOJ Physical Evidence Exam
Report dated Sept. 24, 2002”).)

28 ² (92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Ex. No. 23, Joint Forensic DNA
Testing Agreement dated May 10, 2001.)

1 **PROCEDURAL HISTORY**

2 On February 19, 1985, Petitioner was convicted of four counts of first-degree
3 murder (Cal. Penal Code § 187(a)) of Doug Ryen, his wife Peggy Ryen, their 10-year-old
4 daughter Jessica Ryen and a neighborhood friend, 11-year-old Christopher Hughes.
5 Petitioner was also convicted of attempted murder in the first degree (Cal. Penal Code
6 §§ 664,187(a), 1200.7) of the Ryens’ eight-year-old son Joshua, the severely wounded
7 sole survivor. Petitioner also pled guilty to escape from a state prison. (Cal. Penal Code
8 § 4530(b).) The jury found true an allegation of the special circumstance of multiple
9 murders, (Cal. Penal Code § 190.2(a)(3)), as well as the allegation that Petitioner
10 intentionally inflicted great bodily injury on the sole survivor, Joshua Ryen (Cal. Penal
11 Code § 12022.7). The jury determined the penalty as death. On May 15, 1985, the trial
12 court sentenced him to death.

13 On May 6, 1991, the California Supreme Court affirmed the judgment of
14 conviction and sentence of death. People v. Kevin Cooper, 53 Cal.3d 771 (1991). On
15 June 26, 1991, the California Supreme Court denied Petitioner’s petition for rehearing
16 and issued its remittitur. On December 16, 1991, the United States Supreme Court
17 denied Petitioner’s first petition for writ of certiorari. Cooper v. California, 502 U.S.
18 1016 (1991).

19 On March 24, 1992, Petitioner requested appointment of counsel and a stay of
20 execution from this Court. On March 26, 1992, the first in a series of stays of execution
21 was issued by this Court. Cooper v. Calderon, Case No. 92-CV-427 (“Cooper I”).

22 On August 11, 1994, Petitioner filed his first petition for writ of habeas corpus in
23 this Court. Cooper I, 92-CV-427. On April 12, 1996, Petitioner filed an amended
24 petition for writ of habeas corpus in this Court. Cooper I, 92-CV-427, Doc. No. 123.
25 On June 20, 1997, Petitioner filed a supplemental petition for writ of habeas corpus with
26 this Court. On August 25, 1997, following an evidentiary hearing, this Court denied
27 Petitioner’s first federal petition for writ of habeas corpus. Cooper I, 92-CV-427, Doc.
28 No. 165. On September 16, 1997, Petitioner filed a motion and objections to the entry

1 of judgment in this Court. Cooper I, 92-CV-427, Doc. No. 202. The Court denied
2 Petitioner's motion on November 7, 1997. Cooper I, 92-CV-427, Doc. No. 208.

3 On April 4, 1996, Petitioner filed his first of seven state petitions for writ of habeas
4 corpus in the California Supreme Court. In re Cooper, Case No. S052741. The
5 California Supreme Court denied the first petition for writ of habeas corpus on February
6 19, 1997. (Answer, Ex. 1.)

7 On March 12, 1997, Petitioner filed a motion to recall the remittitur in the direct
8 appeal in the California Supreme Court. People v. Cooper, Case No. S004687. The
9 California Supreme Court denied Petitioner's motion to recall the remittitur on March 26,
10 1997. (Answer, Ex. 2.)

11 On September 12, 1997, Petitioner filed his second state petition for writ of habeas
12 corpus in the California Supreme Court. (Answer, Ex. 3.) On September 30, 1997,
13 Petitioner filed his second motion to recall the remittitur in the California Supreme Court,
14 which was denied October 15, 1997. (Answer, Ex. 4.)

15 On April 26, 1998, during the pendency of his appeal to the Ninth Circuit Court
16 of Appeals from this Court's denial of his first federal habeas petition, Petitioner filed a
17 second petition for writ of certiorari in the United States Supreme Court in case number
18 97-8837 regarding this Court's denial of his first federal petition for writ of habeas
19 corpus. On June 26, 1998, the United States Supreme Court denied the petition. Cooper
20 v. Calderon, 524 U.S. 963 (1998).

21 On April 30, 1998, Petitioner filed a second federal petition for writ of habeas
22 corpus in this Court. See Cooper v. Calderon, Case No. 98-CV-818 ("Cooper II"). On
23 June 15, 1998, this Court dismissed Petitioner's second petition for writ of habeas corpus
24 for lack of jurisdiction and as impermissibly successive under 28 U.S.C. § 2244(b)(1).
25 Cooper II, 98-CV-818, Doc. No. 3. On June 25, 1998, Petitioner filed a motion in this
26 Court to alter or amend the judgment dismissing his second federal petition for writ of
27 habeas corpus. This Court denied the motion on June 30, 1998. Cooper II, 98-CV-818,
28 Doc. No. 6.

1 On December 23, 1998, Petitioner filed his third state petition for writ of habeas
2 corpus in the California Supreme Court. In re Cooper, Case No. S075527. On March 15,
3 1999, Petitioner filed a supplemental petition for writ of habeas corpus in the California
4 Supreme Court in his third state habeas proceeding. In re Cooper, Case No. S075527.
5 On March 26, 1999, while his third state habeas petition was still pending, Petitioner
6 filed a fourth state habeas corpus petition in the California Supreme Court. In re Cooper,
7 Case No. S077408. On April 14, 1999, the California Supreme Court denied Petitioner's
8 third and fourth state petitions for writ of habeas corpus. (Answer, Exs. 5, 6.) On May
9 7, 1999, Petitioner filed a motion for clarification of rulings regarding his third state
10 petition for writ of habeas corpus. The motion was denied on May 12, 1999. (Answer,
11 Ex. 7.)

12 On July 9, 1999, Petitioner filed a third petition for writ of certiorari in the United
13 States Supreme Court in case number 99-5303, challenging the denial of his third state
14 habeas petition by the California Supreme Court. The United States Supreme Court
15 denied the petition on October 4, 1999. Cooper v. California, 528 U.S. 897 (1999).

16 The Ninth Circuit affirmed the Court's denial of Petitioner's first federal habeas
17 petition on July 9, 2001. Cooper v. Calderon, 255 F.3d 1104 (9th Cir. 2001), cert.
18 denied, 537 U.S. 861 (2002). On August 29, 2001, Petitioner filed a petition for
19 rehearing and rehearing en banc. On January 8, 2002, the Ninth Circuit denied the
20 petition.

21 On December 21, 2001, the Ninth Circuit denied Petitioner's request for
22 authorization to file a second petition for writ of habeas corpus. Cooper v. Calderon, 274
23 F.3d 1270 (9th Cir. 2001). On February 4, 2002, Petitioner filed a petition for rehearing
24 and rehearing en banc from the denial of authorization to file a second petition. The
25 Ninth Circuit denied Petitioner's request on October 18, 2002. Cooper v. Calderon, 308
26 F.3d 1020 (9th Cir. 2002), cert. denied, 538 U.S. 984 (2003). On November 21, 2002,
27 the Ninth Circuit denied Petitioner's motion to reconsider or vacate the order denying his
28 motion to stay the mandate pending the filing of a petition for writ of certiorari and

1 request for en banc review regarding the denial of authorization to file a second federal
2 habeas petition. Cooper v. Calderon, Case No. 98-99023.

3 On April 18, 2002, Petitioner filed his fourth petition for writ of certiorari in the
4 United States Supreme Court in case number 01-10742. This fourth petition challenged
5 the Ninth Circuit's affirmance of this Court's denial of Petitioner's first federal petition
6 for writ of habeas corpus. See Cooper, 255 F.3d 1104. On October 7, 2002, the United
7 States Supreme Court denied the petition. Cooper v. Calderon, 537 U.S. 861 (2002).

8 On February 11, 2003, Petitioner filed another petition for writ of habeas corpus
9 in the United States Supreme Court in case number 02-9051. See Cooper, 274 F.3d at
10 1272. The United States Supreme Court denied the additional petition for writ of habeas
11 corpus on April 21, 2003. In re Cooper, 538 U.S. 976 (2003).

12 On February 14, 2003, the Ninth Circuit denied Petitioner's authorization to file
13 a third federal petition for writ of federal petition for writ of habeas corpus in the District
14 Court. Cooper v. Calderon, Case No. 99-71430. On April 7, 2003, the Ninth Circuit
15 denied Petitioner's petition for rehearing and rehearing en banc from the denial of
16 authorization to file a third federal petition for writ of habeas corpus. On February 20,
17 2003, Petitioner filed a fifth petition for writ of certiorari in the United States Supreme
18 Court in case number 02-9050, regarding the Ninth Circuit's denial of authorization to
19 file a second federal habeas petition in this Court. On April 21, 2003, the United States
20 Supreme Court denied the petition. Cooper v. Calderon, 538 U.S. 984 (2003).

21 On May 15, 2003, Petitioner filed his second petition for writ of habeas corpus in
22 the United States Supreme Court in case number 02-10760. The United States Supreme
23 Court denied the petition on October 6, 2003. In re Cooper, 540 U.S. 808 (2003).

24 On June 13, 2003, the San Diego County Superior Court denied Petitioner's
25 petition for writ of habeas corpus. (Answer, Ex. 8.) On October 22, 2002, Petitioner
26 filed a motion seeking post-conviction mitochondrial DNA testing of hairs. On June 16,
27 2003, Petitioner filed a motion for post-conviction testing of a T-shirt to show evidence
28 tampering by law enforcement personnel. (Answer, Ex. 9.) The Honorable William H.

1 Kennedy of the San Diego County Superior Court held an evidentiary hearing on
2 Petitioner's claim of evidence tampering and request for mitochondrial DNA testing on
3 June 23-25, 2003. Following this post-conviction evidentiary hearing, the San Diego
4 County Superior Court denied Petitioner's motions relating to evidence tampering and
5 post-conviction DNA testing. (Answer, Ex. 9.)

6 On June 24, 2003, Petitioner filed his fifth state petition for writ of habeas corpus
7 in the California Supreme Court. On October 22, 2003, the California Supreme Court
8 denied the petition. (Answer, Ex. 10.) On July 22, 2003, Petitioner filed a petition for
9 writ of mandate in the California Supreme Court, relating to the denial of his
10 post-conviction DNA motion. Cooper v. Superior Court, Case No. S117675. The
11 California Supreme Court denied the motion on October 22, 2003. (Answer, Ex. 11.)

12 On September 2, 2003, Petitioner filed a third motion to recall the remittitur in the
13 California Supreme Court. People v. Cooper, Case No. S004687. On October 22, 2003,
14 the California Supreme Court denied the motion. (Answer, Ex. 12.)

15 On December 17, 2003, the California Superior Court issued an execution date of
16 February 10, 2004. (See Cal. Crim. Case No. 72787 filed Dec. 17, 2003.)

17 On January 20, 2004, Petitioner filed his sixth petition for writ of certiorari in the
18 United States Supreme Court, in case number 03-8513, challenging the California
19 Supreme Court's denial of his fifth state petition for writ of habeas corpus and an
20 application for a stay. Cooper v. California, Case No. 03-8513. The United States
21 Supreme Court denied the petition and the application for a stay on February 9, 2004.
22 Cooper v. California, 540 U.S. 1172 (2004).

23 On January 22, 2004, this Court held a telephonic status conference to set an
24 expedited briefing schedule to allow for meaningful appellate review prior to the
25 impending execution. Petitioner's counsel represented that the filings would not be done
26 in the Southern District of California. Nevertheless, the Court urged the parties to
27 proceed in an expeditious manner to permit an orderly and reasoned review of the issues.

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1 On February 2, 2004, Petitioner filed a complaint in the United States District
2 Court for the Northern District of California, pursuant to 42 U.S.C. § 1983, seeking a
3 temporary restraining order, preliminary injunction, and expedited discovery on a claim
4 that California's use of lethal injection violates the Eighth Amendment. Cooper v.
5 Rimmer, Case No. 04-436. On February 6, 2004, the Honorable Jeremy Fogel, United
6 States District Court Judge, issued an order denying the motions for temporary
7 restraining order, preliminary injunction, and expedited discovery. On February 8, 2004,
8 the Ninth Circuit panel affirmed the district court's order. Cooper v. Rimmer, 358 F.3d
9 655 (9th Cir. 2004).

10 On February 2, 2004, Petitioner filed his sixth petition for writ of habeas corpus
11 and an emergency application for a stay of execution in the California Supreme Court.
12 In re Cooper, Case No. S122389. The California Supreme Court denied the petition on
13 the merits on February 5, 2004. (Answer, Ex. 13.)

14 On February 5, 2004, Petitioner filed a sixth volume of exhibits with the
15 California Supreme Court in support of his sixth state habeas petition after the denial of
16 his sixth petition. On February 6, 2004, the California Supreme Court deemed the
17 submission a seventh state habeas corpus petition. In re Cooper, Case No. S122507.
18 The California Supreme Court denied the seventh state habeas petition on the merits on
19 February 9, 2004. (Answer, Ex. 14.)

20 On February 6, 2004, Petitioner filed an application for authorization to file a
21 successive petition for writ of habeas corpus in the Ninth Circuit Court of Appeals.
22 Cooper v. Woodford, Case No. 04-70578. On February 8, 2004, a three-judge panel
23 denied Petitioner's application for authorization to file a successive petition. On
24 February 7, 2004, Petitioner filed his seventh petition for writ of certiorari with the
25 United States Supreme Court. Cooper v. California, 03-8773. The United States
26 Supreme Court denied Petitioner's petition and application for stay on February 9, 2004.
27 Cooper v. California, 540 U.S. 1172 (2004). On February 9, 2004, the Ninth Circuit sua
28 sponte agreed to hear Petitioner's application en banc. Cooper v. Woodford, 357 F.3d

1 1019 (9th Cir. 2004). On February 9, 2004, the en banc Ninth Circuit granted Petitioner
2 authorization to file his third habeas corpus petition with this Court. Cooper v.
3 Woodford, 358 F.3d 1117 (9th Cir. 2004).

4 On March 19, 2004, Respondent filed a petition for writ of certiorari with the
5 United States Supreme Court, challenging the jurisdiction of the en banc court to grant
6 authorization to file a successive petition in this Court. This petition for certiorari was
7 denied on May 17, 2004. Woodford v. Cooper, Case No. 03-1328.

8 On March 2, 2004, the mandate of the Ninth Circuit issued to this Court regarding
9 the authorization to file a successive habeas petition. On April 2, 2004, Petitioner filed
10 his third petition for writ of habeas corpus with this Court. Between April 2, 2004 and
11 April 1, 2005, the Court ordered mitochondrial DNA testing, EDTA testing, heard
12 testimony from forty-two witnesses, and reviewed numerous exhibits and extensive
13 briefing. On April 22, 2005, the Court heard final argument on the successive petition
14 and denied the petition on the merits, and alternatively, denied the petition on procedural
15 grounds as reflected in this order.

16 **FACTS**

17 Petitioner was sentenced to death for the “massacre of a mother, father, daughter,
18 and houseguest in the sanctity of their home, and the attempted murder of the young son,
19 the only person to survive.” Cooper, 53 Cal.3d at 793. “The jury convicted Cooper of
20 hacking to death Franklyn Douglas Ryen (Doug) and Peggy Ryen, their 10-year-old
21 daughter Jessica, and an 11-year-old houseguest, Christopher Hughes (Chris), inside the
22 Ryen home near the California Institute for Men (CIM), a state prison in Chino.
23 Eight-year-old Joshua Ryen (Josh), although severely injured, survived. Two days
24 before this execution of the innocent, defendant had escaped from CIM.” Cooper, 53
25 Cal.3d at 794. The California Supreme Court noted the “sheer volume and consistency
26 of the evidence is overwhelming.” Cooper, 53 Cal.3d at 837.

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1 After escaping from CIM prison on June 2, 1983, Petitioner hid in a vacant house
2 owned by Larry Lease and brothers Roger and Kermit Lang (“hideout house”) for two-
3 and-one-half days before entering the Ryen house. Cooper, 53 Cal.3d at 795-801;
4 Cooper, 255 F.3d at 1107-08; Cooper I, 92-CV-427, Aug. 25, 1997 Order at 2-3; (see
5 also 87 RT 2959-62, 2967-70, 2991.) The hideout house was next door to the Ryen
6 house, just 126 yards away. (4/22/05 Reporters’ Transcript of Evidentiary Hearing
7 (“HRT”) 60; Cooper, 53 Cal.3d at 795.); Cooper, 255 F.3d at 1107; Cooper I, 92-CV-
8 427, Aug. 25, 1997 Order at 2, 22, 23.



23 At the time of these attacks, Petitioner was an escapee of both CIM, where he
24 escaped by foot on June 2, 1983, and from custody in Pennsylvania. Cooper, 53 Cal.3d
25 at 876. In Pennsylvania, Petitioner kidnaped, raped, assaulted, and stole a car from a
26 teenage girl who interrupted him while he was committing yet another residential
27 burglary. Cooper, 53 Cal.3d at 840; Cooper I, 92-CV-427, Aug. 25, 1997 Order at 48.
28 He threatened to kill the victim during the attack. He had escaped from custody in

1 Pennsylvania numerous times so that his escape from CIM was his twelfth escape.
2 Cooper I, 92-CV-427, Aug. 25, 1997 Order at 22. Prior to his arrival in California,
3 Petitioner had also been arrested, charged, and convicted several times of theft-related
4 offenses. Cooper, 53 Cal.3d at 802, 840, 841; Cooper I, 92-CV-427, Aug. 25, 1997
5 Order at 25.

6 In California, Petitioner was arrested, charged, and sentenced to state prison for
7 two counts of residential burglary in Los Angeles County. Cooper, 53 Cal.3d at 802.
8 Petitioner lied about his identity, background, and criminal history by using the false
9 name of David Trautman. (92-CV-427, Third Supplemental NOL filed Jan. 23, 2004,
10 Ex. 44, Case No. A-386448). Following his burglary conviction, Petitioner was
11 designated to CIM on April 29, 1983, still using the false name of David Trautman. On
12 June 1, he was transferred to a minimum-security portion of the prison from which he
13 subsequently escaped. (85 Trial Reporters' Transcript ("RT")³ 2596-97.)

14 On June 2, 1983 Petitioner arrived at the hideout house. Petitioner's own
15 testimony and the physical evidence, including fingerprints, confirmed that Petitioner
16 was at the hideout house next to the Ryen house at the time of the murders. (87 RT
17 2959-62, 2967-70, 2991.) The hideout house was down the hill and nearest to the Ryen
18 house.



28 ³ The Reporters' Transcripts from the original trial are designated by a "RT" and are lodged with the Court. Respondent used the photos in this order in its final habeas argument on April 22, 2005.

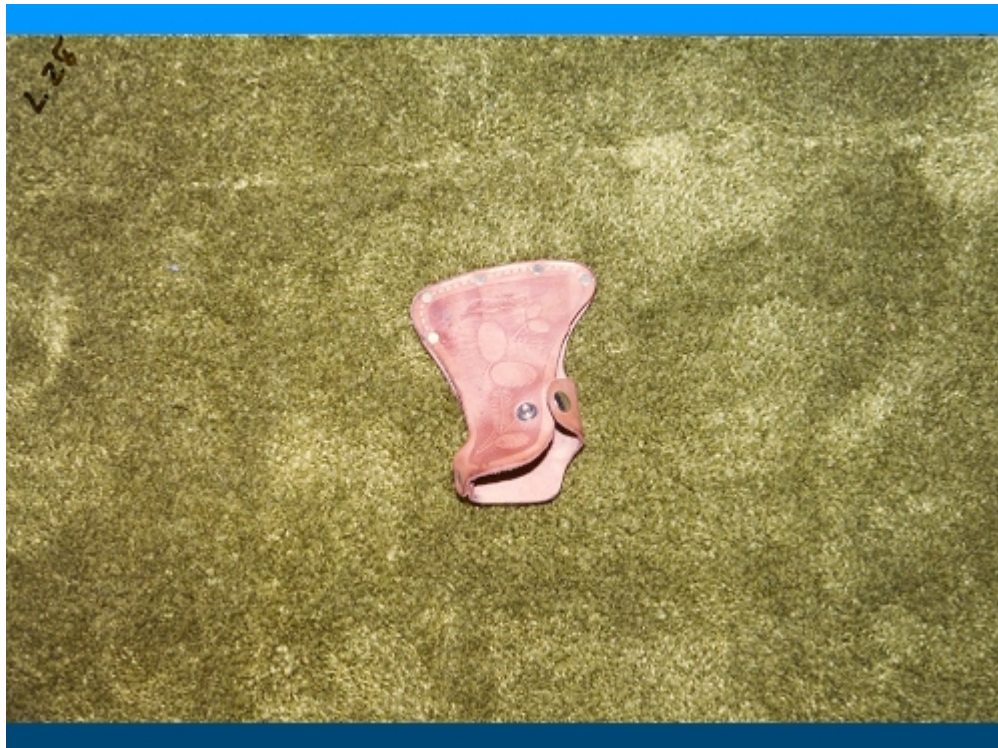
1 One of the murder weapons, a hatchet covered with dried blood and human hair,
2 came from the hideout house where Petitioner hid. (87 RT 3004, 3072; 90 RT 3796-97.)
3 Witnesses identified the hatchet as the one missing from the hideout house after the
4 killing. (87 RT 3004, 3072.)



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18 A local citizen discovered the hatchet on June 5, 1983 on the side of English
19 Road, the only paved road leading from the Ryen home out of the immediate area. (89
20 RT 3519; 90 RT 3791.) The hatchet was covered by bloodstains; its head was covered
21 by dried blood and human hairs. (90 RT 3797.) Some of the hairs were consistent with
22 those of Doug and Josh Ryen. (96 RT 5015-16.) Dr. Irving Root, who performed the
23 autopsies, concluded that the hatchet could have inflicted the chopping wounds suffered
24 by the victims. (90 RT 3870.) Post-conviction DNA testing confirmed that the blood
25 came from the murder victims. (Supplemental DOJ Physical Evidence Exam Report
26 dated Sept. 24, 2002.)

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1 The hatchet had been kept in a sheath by the fireplace in the hideout house. (86
2 RT 2685, 2715, 2878-79, 3004.) On June 7, two employees of the owner of the hideout
3 house, Richard Sibbitt and Perry Burcham, discovered the sheath to the hatchet lying
4 on the floor near the bedroom where Petitioner slept. The bedroom had been previously
5 occupied by Kathleen Bilbia, who lived in the hideout house in May. (86 RT 2859-60.)
6 Bilbia recalled seeing it by the fireplace when she was cleaning the house. (86 RT
7 2685.) The sheath was not on the floor when Bilbia vacated the room. (86 RT 2677,
8 3004-05.)



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23 Buck knives, an eleven-inch hunting knife, and ice picks were missing from the
24 hideout house. (86 RT 2860; 87 RT 3002-04.) The hunting knife could have inflicted
25 the remaining injuries. (91 RT 3957.) A strap fitting one of the missing buck knives
26 was found on the floor by the Bilbia bedroom closet where Petitioner slept. (87 RT
27 3073.)

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1 The victims died from numerous chopping and stabbing injuries from a hatchet.
2 (90 RT 3835.) Doug Ryen suffered at least thirty-seven separate wounds. (90 RT
3 3835-71.) Two separate chop injuries fractured his skull. (90 RT 3838-39.) Five chop
4 wounds to Mr. Ryen’s skull were in a “tight pattern,” indicating his skull was stationary
5 when the blows were delivered. (90 RT 3841.) The blows appear to have been
6 administered in rapid succession, within a second or two, as Mr. Ryen was kneeling by
7 the side of the bed. (90 RT 3841.) One blow administered to Mr. Ryen’s skull was
8 consistent with being struck by the blunt side of a hatchet, causing a depressed skull
9 fracture, where the bone was pushed into his head. (90 RT 3849.)

10 Mr. Ryen sustained numerous stabbing injuries. (90 RT 3852- 68.) Mr. Ryen’s
11 right middle finger was amputated by a chopping blow. (90 RT 3846.) His severed
12 finger was on the floor inside the Ryen bedroom closet. (90 RT 3381-82.) He sustained
13 another chopping injury to his right ring finger. (90 RT 3846.) Another chop wound cut
14 clear through the bone of his right forearm. (90 RT 3837.) One stab wound penetrated
15 his sternum entering his heart. (90 RT 3853-55.) One stab wound punctured his lung
16 and cut one of his ribs. (90 RT 3861.) There was a slicing injury to the right side of Mr.
17 Ryen’s cheek. Before he died, Mr. Ryen was stabbed on the left side of his neck,
18 severing his carotid artery and cutting his trachea. (90 RT 3858.) Mr. Ryen also sustained
19 deep incisions into his right thigh, his left leg and his buttocks area. (90 RT 3866, 3868.)

20 Peggy Ryen suffered thirty-two separate identified wounds. (90 RT 3872-96.)
21 Mrs. Ryen was five feet, eight inches tall and weighed 140 pounds. (90 RT 3924.) A
22 series of three chopping wounds to the right side of Mrs. Ryen’s head were consistent
23 with having been administered while she was standing. (90 RT 3874.) Two chopping
24 wounds nearly formed an upside down “V” on her forehead. (90 RT 3872.)

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1 One triangular defect in her skull, inflicted before death, was consistent with
2 having been made by the tip of the hatchet. (90 RT 3874-75.) Mrs. Ryen sustained a
3 chopping wound at the midline of the back of her head. (90 RT 3876.) Mrs. Ryen had
4 a defensive wound to her right thumb. (90 RT 3878.) Mrs. Ryen also suffered wounds
5 to her chest, stomach, breast, and neck areas. (90 RT 3882-94.)

6 Jessica Ryen suffered forty-six separate identified wounds, consisting of a
7 combination of chopping and stabbing or incision wounds. (90 RT 3896-23.) Jessica
8 was four feet, eleven inches tall, and weighed eighty pounds. (90 RT 3924.) Two
9 wounds were from a single blow that formed a “V” in her forehead. (90 RT 3896-97.)
10 A chopping blow to the right side of her nose and cheek fractured her jaw. A chopping
11 injury to the top of Jessica’s head resulted in a fracture. (90 RT 3898.)

12 A wound to Jessica’s lower left back was consistent with the knife being drawn
13 across her back and then inserted into her back. The bruising associated with the wound
14 showed that it was one of the earlier wounds suffered by Jessica. (90 RT 3908-09.)
15 Jessica suffered a stab wound to her neck. The wound resulted in massive bleeding.
16 Unconsciousness from the wound would have occurred in as little as thirty to sixty
17 seconds, and would have been fatal in a couple of minutes. (90 RT 3903-04.) Three stab
18 wounds to Jessica’s chest were in close proximity to each other, suggesting the wounds
19 were delivered in rapid succession. The wounds were consistent with having been
20 delivered while Jessica was in the position in which she died. (90 RT 3905-06.)

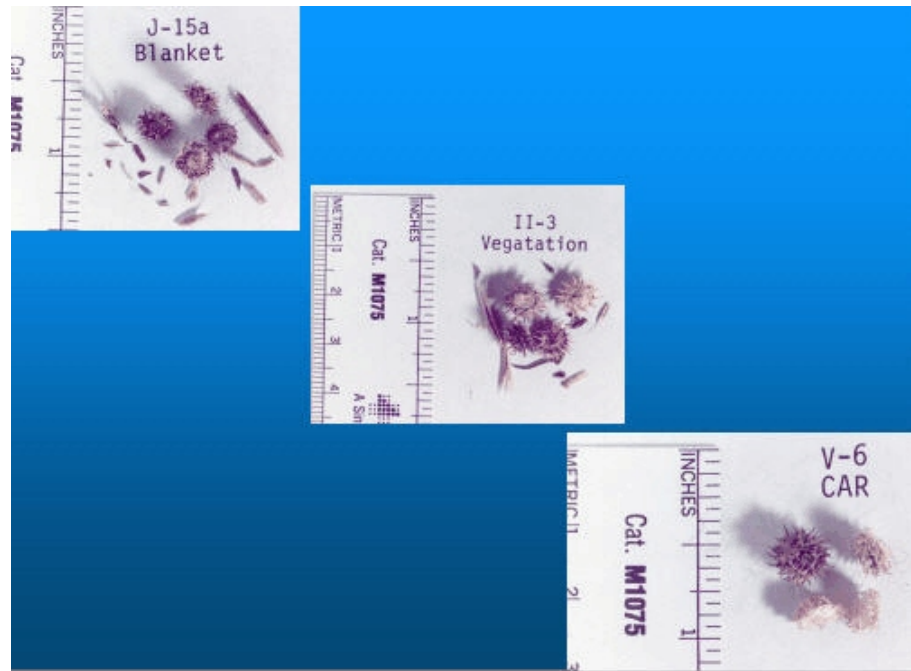
21 Jessica suffered a grouping of twenty separate carving injuries on her chest. Some
22 were associated with slight bleeding, but most apparently occurred after Jessica had
23 stopped bleeding. The injuries were consistent with an ice pick, a nail, or an awl having
24 been used. These injuries were primarily inflicted while Jessica was in the position in
25 which she died. (90 RT 3910-12.)

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1 Plant burrs were found inside Jessica Ryen's nightgown that were similar to the
2 burrs on the blanket inside the closet where Petitioner slept, (106 RT 7678-81), burrs
3 from the vegetation between the hideout house and the Ryen house, and in the car.



17 Chris Hughes suffered twenty-five separate identifiable wounds. (90 RT 3924-45.)
18 Chris was four feet, eleven inches tall, and weighed eighty-six pounds. (90 RT 3924.)
19 A chopping wound to his right wrist went through the bone of his forearm, almost
20 severing his hand from his wrist. (90 RT 3925.) A chopping wound almost amputated
21 his right second finger, leaving the finger attached to the hand by only a small portion
22 of skin. (90 RT 3926.) Chris also suffered a chopping injury to his right hand. The
23 injuries were consistent with Chris placing his hand by the right side of his head in an
24 effort to protect his head. (90 RT 3926-27).

25 Chris suffered six parallel chopping wounds with fractures down the side of his
26 head, extending from the front to the back of his head. There was little bleeding
27 associated with the series of chopping wounds, indicating that Chris was dying or
28 already dead when they were administered. (90 RT 3927-28.) Chris suffered a

1 chopping or incision wound that fractured the facial bones and cut his nose. (90 RT
2 3929.) Chris suffered a chopping injury to the top of his head, and stab wounds to his
3 chest, back, head and arms. (91 RT 3932-36, 3939-40.) Chris suffered two post-mortem
4 wounds in his right armpit area, from a “pushing” action of the knife. (91 RT 3943-44.)

5 Josh’s injuries included a hatchet wound to the top of his head, a stab wound to
6 his throat, and a hatchet wound near his left ear. (Trial Exs. 478-81, 699, 706A-H, 709,
7 726, 727; 88 RT 3354-56.) Dr. Root, who performed the autopsies, believed the injuries
8 could have been inflicted quickly, within one minute for each of the victims. (91 RT
9 3957-58.) He opined each victim would have died within minutes after being attacked.
10 (91 RT 3959-61.) All of the victims had a moderate amount of food in the stomach,
11 indicating that death probably occurred about one to three hours after they had eaten
12 last. (91 RT 3961-62.)

13 Prior to the murders, the Ryens and Chris Hughes attended an annual barbecue,
14 on June 4, 1983, at the home of George Blade in Los Serranos, a few miles from the
15 Ryen home in Chino. (88 RT 3177, 3179, 3181.) Chris had received permission from
16 his parents to spend the night with the Ryens. (88 RT 3188.) They left the Blade
17 residence to drive to the Ryen home sometime around 9:00 p.m. (88 RT 3182.) The
18 Ryens’ neighbor, Larry Lease, saw the Ryen truck returning sometime between 9:00 and
19 9:30 p.m. (86 RT 2757-58, 2780.) Except for Josh, they were never seen alive again.
20 Cooper, 53 Cal.3d at 794.

21 The next morning, June 5, 1983, Chris’ mother, Mary Ann Hughes, became
22 concerned when he did not come home. (88 RT 3189-90.) She called the Ryen residence
23 a number of times, but only heard busy signals. (88 RT 3190.) Shortly after 9:00 a.m.,
24 Mrs. Hughes went to the Ryen home. (88 RT 3190.) She noted the barn was closed and
25 it did not look like the horses had been fed. She only saw the Ryens’ truck at the house.
26 (88 RT 3190-91.)

27 At about 11:30 a.m., Mr. Hughes went to the Ryen home to investigate. (88 RT
28 3191.) He noticed the Ryen truck, but did not see their station wagon. (88 RT 3195,

1 3202-03.) Mr. Hughes went to the kitchen door, looked inside, tried the door, but it was
2 locked. The Ryens were in the habit of leaving their doors unlocked when they were at
3 home. (88 RT 3194.) He continued around the outside of the house until he reached the
4 sliding-glass door leading into the Ryen master bedroom. (88 RT 3197.) He looked
5 inside the sliding glass door and saw the body of his son, Chris, the unclothed bodies of
6 Doug and Peggy Ryen, and Josh Ryen laying on the floor between his mother and Chris.
7 (88 RT 3198-99.) Of the four people he could see, only Josh appeared to be alive. (88
8 RT 3199.)

9 Mr. Hughes frantically tried to open the sliding door. (88 RT 3200, 3203.) Josh
10 looked up as Mr. Hughes shook the sliding glass door. Mr. Hughes asked Josh if he
11 could open the door. (88 RT 3199.) Mr. Hughes rushed to the kitchen door, kicked it
12 in, and entered. (88 RT 3204.) As he approached the master bedroom, he found Jessica
13 on the floor in the hallway, also apparently dead. (88 RT 3205.) In the bedroom, Mr.
14 Hughes touched the body of his son. It was cold and stiff. (88 RT 3205.) Mr. Hughes
15 asked Josh who had done it. (88 RT 3205.) Josh appeared stunned; he tried to talk but
16 could only move his lips. (88 RT 3205-06.)

17 Mr. Hughes tried to use a telephone in the house, but it did not work. He drove
18 to a neighbor's house, seeking help. (88 RT 3206-07.) The police arrived shortly. (88
19 RT 3211-12.) Doug, Peggy, Chris, and Jessica were dead. The first three were in the
20 master bedroom and Jessica was on the floor in the hallway that leads into the master
21 bedroom. (88 RT 3214-18.) Josh was on his side in a fetal position. His eyes were
22 open, but he was unable to speak or move. (88 RT 3221, 3258.) He had difficulty
23 breathing. Josh's neck wound was not bleeding at the time and paramedics tried
24 unsuccessfully to find a pulse in Josh, symptoms consistent with severe shock. (88 RT
25 3313-17.) Josh was flown by helicopter to Loma Linda University Hospital. (88 RT
26 3321.)

27 Josh had a limited memory of the attack. During the night of the murder, Josh
28 woke up by a scream. (95 RT 4955-56.) He walked down the hall, stopping at the

1 laundry room. Josh saw Jessica lying right by the bedroom door in the hallway. (95 RT
2 4956-58.) When he saw Jessica, he saw a “shadow or something” by the bathroom. It
3 was dark. Josh could not see what the shadow was or what it was doing. (95 RT
4 4969-70.) There were no sounds from his parents and Josh could not see them. (95 RT
5 4958-59.)

6 The next thing he remembered was “[j]ust waking up” surrounded by the bodies
7 of his parents. (95 RT 4959-62.) Josh’s first memory after waking up was Mr. Hughes
8 asking him if he could open the sliding glass door to the master bedroom. (95 RT 4962.)

9 Kathleen Bilbia, an employee of Larry Lease, had been living in the hideout house
10 in May, and she had used the bedroom Petitioner later slept in (the “Bilbia bedroom”).
11 (86 RT 2665.) She moved out of the house during May. By May 27, most of her
12 belongings had been removed. (86 RT 2665.) On May 30 and June 1, Ms. Bilbia
13 vacuumed and cleaned portions of the house, including the bathroom she had used. She
14 cleaned the countertop, sinks, showers, and shower doors in the Bilbia bathroom. (86
15 RT 2666-68.) Petitioner slept in the closet of the bedroom nearest the garage where Ms.
16 Bilbia used to sleep. (86 RT 2693-94; 97 RT 5284-85.) The window by the hideout
17 house fireplace provided a view of the Ryen house. (86 RT 2693-94; 97 RT 5284-85.)



27 The hideout house had two telephones: one in the Bilbia bedroom and another in
28 the kitchen. (86 RT 2669-70.) Petitioner admitted that he called Yolanda Jackson and

1 Diane Williams from the hideout house and asked for their help, but they declined. (97
2 RT 5404-07; 86 RT 2792.) Telephone records and Ms. Jackson's testimony showed
3 that two calls were made from the hideout house to the Los Angeles area telephone
4 number of Yolanda Jackson. The first call lasted 110 minutes beginning on June 3 at
5 12:17 a.m., and the second call lasted four minutes beginning at 2:26 a.m. the same
6 morning. (87 RT 2898-2900, 86 RT 2790; 2794; 86 RT 2790.) Two calls were also
7 made from the hideout house to Diane Williams in Pittsburgh, Pennsylvania. The first
8 call lasted three minutes beginning on June 3 at 11:46 a.m., and the second lasted thirty-
9 four minutes beginning on June 4 at 7:53 p.m. (87 RT 2896-2901; Trial Ex. 82.)
10 Petitioner admitted that he called Diane Williams at about 8 p.m. on Saturday, June 4,
11 1983, the night of the murders. (97 RT 5435.) Diane Williams told Petitioner she did
12 not have any money for him. (97 RT 5435-36.) Petitioner decided to leave the hideout
13 house after the phone call. "This final call was only an hour or so before the Ryens and
14 Chris Hughes left the Blade house for their unsuspected rendezvous with death."
15 Cooper, 53 Cal.3d at 796. Petitioner testified that he put on his prison clothes including
16 prison-issued tennis shoes, camp jacket, and some clothes he found at the hideout house.
17 (97 RT 5436.) He put other clothes he had into a bag he was carrying right before he left
18 the hideout house, including a blue prison shirt. (99 RT 5852.)

19 A search after the murders of the hideout house located a portion of a Viceroy
20 cigarette butt (J-20) in the headboard in the Bilbia bedroom. (87 RT 3076-77.) Mr.
21 Lang's Viceroy cigarettes were missing from the kitchen drawer. (86 RT 2854, 2860.)
22 Ms. Bilbia did not smoke and, to her knowledge, no one smoked in her bedroom during
23 the eighteen months she lived there. (86 RT 2668.) San Bernardino County Sheriff's
24 Crime Lab criminalist Daniel Gregonis performed an analysis of the saliva on the
25 cigarette butt which was consistent with a non-secreter such as Petitioner. (93 RT
26 4474-75.) Only twenty percent of the population are non-secretors. (94 RT 4707). A
27 belt belonging to Mrs. Lang was found in the closet of the Bilbia bedroom. (87 RT
28 3076.) The size 30 belt contained two hand-made holes in it in addition to the five

1 manufactured holes with which it came. (87 RT 2973, 2994; Trial Ex. 77.) Petitioner's
2 waist was approximately thirty-two inches in June of 1983. He was issued size-32 pants
3 at CIM. (98 RT 5562-63.)

4 Petitioner's fingerprint was positively identified on a jar of Coffee Mate in the
5 kitchen of the hideout house. (87 RT 2960.) A footprint was found on the Bilbia
6 bathroom shower sill, separating the inside of the shower from the rest of the bathroom.
7 (87 RT 2943-44.) The shower footprint was determined to have been left by Petitioner.
8 (87 RT 2961-62.)

9 Police recovered a blanket with a semen stain that was part of the bedding in the
10 closet of the Bilbia bedroom. Petitioner's genetic profile was consistent with his having
11 deposited the semen stain on the blanket. (93 RT 4459-65.) A bloodstained khaki green
12 button was found on the rug in the Bilbia bedroom. (87 RT 3072-73; Trial Exs. 45, 49,
13 97.) It was identical in appearance to buttons on field jackets inmates wore at CIM,
14 including one Petitioner was seen wearing shortly after his escape. (85 RT 2398, 2417.)
15 A coiled, bloodstained rope was found in the Bilbia bedroom closet. (86 RT 2682,
16 2842.) The rope was similar to rope kept elsewhere in the hideout house and
17 surrounding property. (86 RT 2733, 2778.)



27 A criminalist from the San Bernardino County sheriff's crime laboratory sprayed
28 various areas of the hideout house with luminol, a substance used to detect the presence

1 of blood not visible to the naked eye. (87 RT 3079.) A positive reaction consisting of
2 an even “glow” ranging from about two feet to five feet above the floor was obtained on
3 the shower walls in the Bilbia bathroom. (87 RT 3080.) There were also four positive
4 reactions to the luminol on the rug in the hallway leading to the Bilbia bedroom that
5 appeared to be foot impressions. (87 RT 3081.) Other positive reactions were obtained
6 in the bedroom closet and bathroom sink. (87 RT 3082-83.) The reactions did not prove
7 the presence of blood, but were “an indication that it could be blood.” (87 RT 3082.)

8 Investigators recovered hair samples from the sink and debris from the shower
9 drain. (87 RT 3084.) Some hair in the bathroom sink trap was matted and appeared to
10 have been there a long time. (96 RT 5017.) Other hair was not matted and a
11 microscopic examination of that hair revealed characteristics similar to Jessica’s head
12 hair. (96 RT 5017-18.) A hair removed from the bathroom shower had characteristics
13 similar to Doug Ryen’s head hair. (96 RT 5017.)

14 Investigators found three significant shoe-print impressions: a partial sole
15 impression on a spa cover outside the Ryen master bedroom (88 RT 3363), a partial
16 bloody shoe print on a sheet on the Ryen bedroom waterbed (89 RT 3506), and a nearly
17 complete shoe-print impression in the game room of the hideout house. (87 RT 2925.)
18 All three appeared to come from tennis shoes. (88 RT 3364-65; 89 RT 3504-07.)

19 Two partial shoe prints and one nearly complete shoe print found in the Ryens’
20 house were consistent both with Petitioner’s size and the Pro-Keds shoes issued at CIM.
21 Petitioner testified that his shoe size was between a 9 and a 10. (98 RT 5532-33.) James
22 Taylor, an inmate at CIM, met Petitioner when both were in medium security at CIM.
23 (85 RT 2508-09.) Taylor testified that he issued Petitioner a pair of Pro-Keds Dude
24 tennis shoes. (85 RT 2510-11.)

25 The Stride Rite Corporation sold Pro-Keds Dude tennis shoes to state and federal
26 governments for use in institutions such as CIM. (86 RT 2620-24.) All “Dude” tennis
27 shoes contain the same diamond sole pattern. The general merchandise manager for
28 Stride Rite testified that this pattern is not found on any other shoe that the company

1 manufactures nor, to his knowledge, on any other shoe. (86 RT 2620-24.) At trial,
2 contracts showing the purchase of the Dude tennis shoes by CIM were admitted into
3 evidence. (See Trial Ex. 84-88.)

4 Most of the blood at the scene of the crime was consistent with having come from
5 one or more of the victims. (92 RT 4401-25.) Significantly, a drop of blood (item A-41)
6 found on the hallway wall opposite the door to the Ryens' master bedroom belonged to
7 an African-American male, which is consistent with Petitioner. (89 RT 3511-12; 88 RT
8 3373.) Crime scene deputies recovered A-41 at 12:25 a.m. on June 6, 1983, shortly after
9 the police arrived at the crime scene. (89 RT 3511-12.)

10 Criminalist Gregonis examined this drop of blood and concluded from
11 electrophoretic testing that the blood could not have come from any of the victims. (93
12 RT 4426.) Based upon results obtained for several enzymes, Mr. Gregonis also
13 concluded that the drop was consistent with Petitioner's blood. (93 RT 4433, 4426-29.)
14 Because of various characteristics, the blood was from an African-American person such
15 as Petitioner. (93 RT 4424.)

16 Mr. Gregonis and Dr. Edward Blake, an expert employed by the defense, further
17 tested A-41. Because of the limited amount of the remaining sample, Dr. Blake
18 performed tests that the defense believed had the best chance of excluding Petitioner as
19 a possible donor. (105 RT 7411-12.) The transferrin test was chosen because it had an
20 excellent chance of excluding Petitioner if he was not the donor of A-41. However, the
21 transferrin test was consistent with Petitioner's genetic profile. The transferrin test
22 indicated that the person who left A-41 was a person of African-American heritage.
23 (105 RT 7405.) The transferrin test excluded any of the Ryens or Chris Hughes from
24 being the source of A-41. (105 RT 7404-05.) The peptidase A type (2-1) of A-41 also
25 matched the peptidase A type of Petitioner. The peptidas A type (2-1) of A-41 also
26 meant that the person who deposited A-41 was a "person of black ancestry." (105 RT
27 7409.) The haptoglobin type of A-41 also indicated a person of African-American
28 heritage. (105 RT 7409-10.) The additional tests included Petitioner as a possible

1 donor. (105 RT 7411-12.) Petitioner's expert, Dr. Blake, was not able to exclude
2 Petitioner as the source of A-41, but was able to exclude A-41 as having come from a
3 Caucasian or Hispanic. (105 RT 7431-32.) Post-conviction DNA testing confirmed that
4 Petitioner is the source of A-41 (one in 310 billion). (Supplemental DOJ Physical
5 Evidence Exam Report dated Sept. 24, 2002.)

6 Electrophoretic testing also established the blood on the rope found in the Bilbia
7 bedroom closet could have come from one of the victims but not Petitioner. The
8 bloodstains on the rope were consistent with being a mixture of blood from either Jessica
9 and Doug Ryen, or from Peggy and Doug Ryen. (93 RT 4404-05.) There was a positive
10 luminol reaction in the area of the Ryen driveway where the rope was found. There was
11 also a small luminol trail produced leading up to the rope, which was consistent with the
12 bloodstained rope having been dragged along the driveway. (89 RT 3560-61.)

13 A luminol test on the sink in the Ryen master bathroom was positive, indicating
14 the presence of blood. The nature of the luminol result was consistent with blood having
15 been diluted with water in the sink and diluted blood having flowed down toward the
16 sink drain, as if someone had washed blood off their hands in the sink. (89 RT 3558-60.)
17 Tests revealed the presence of blood in the shower and bathroom sink of the hideout
18 house, and hair found in the bathroom sink was consistent with that of Jessica and Doug
19 Ryen. (96 RT 5017-18.)

20 The Ryens' vehicle was missing from the house when the bodies were discovered
21 but was later found in Long Beach. The police found loose tobacco on the front
22 passenger seat and floorboard. Possible blood stains were observed on the front
23 passenger seat and driver's side-door jam. The car did not appear to have been
24 hot-wired. (92 RT 4205-10, 4217-21.)

25 Two cigarette butts were recovered from the station wagon. (92 RT 4287, 4290.)
26 A hand-rolled cigarette (V-12) was found in the crevice formed by the vertical and
27 horizontal portions of the front passenger seat. (92 RT 4287.) Some loose "Role-Rite"
28 tobacco, that is provided free to CIM inmates and not available at retail, was on the

1 floorboard just to the right of the front passenger seat. (92 RT 4287-90, 5067.) Similar
2 loose-leaf tobacco, identified as being Role-Rite, was found in the bedroom of the
3 hideout house where Petitioner had stayed. (96 RT 5065.) San Bernardino County
4 Sheriff's Crime Lab Criminalist Craig Ogino examined visually and microscopically the
5 two samples of the loose tobacco and the tobacco from the hand-rolled cigarette. Each
6 sample was consistent with each other and with Role-Rite tobacco. (96 RT 5069.) In
7 addition, Aubrey Evelyn, a manager with the company that manufactures Role-Rite
8 tobacco, also testified that the tobacco found in the Ryen car was consistent with
9 Role-Rite. (95 RT 4898.) A witness testified that Petitioner smoked hand-rolled
10 cigarettes using Role-Rite tobacco. (85 RT 2505-06.) Petitioner had no money in his
11 prison account during May and June of 1983 with which to purchase commercially made
12 cigarettes. (85 RT 2600.) A manufactured cigarette butt (V-17) was also found in the
13 front passenger seat area. (92 RT 4289.)

14 A hair fragment discovered in the car was consistent with Petitioner's pubic hair
15 and a spot of blood found in the car could have come from one of the victims but not
16 from Petitioner. (95 RT 4828-33.) Luminol testing resulted in very light positive
17 reactions in portions of the car, some of which were consistent with the light presence
18 of blood. (92 RT 4293-97.) One of the stains on the driver's door jamb (W-3) was
19 found to be human blood, ABO type AB, consistent with being the blood of Peggy and
20 Jessica, but inconsistent with Petitioner's ABO type, which is type A. (93 RT 4478-79.)

21 Saliva tests on the two cigarette butts in the Ryen station wagon were consistent
22 with both cigarettes having been smoked by a non-secretor such as Petitioner. (93 RT
23 4472-77.) Only twenty percent of the population are non-secretors. (94 RT 4707.) The
24 ABO blood type of the person who smoked V-17, the manufactured cigarette butt, was
25 determined to be type A, which is also consistent with Petitioner's blood type. (94 RT
26 4725-26.) Post-conviction DNA tests confirmed that the cigarette butts were Petitioner's
27 (one in 19 billion and one in 110 million). (Supplemental DOJ Physical Evidence Exam
28 Report dated Sept. 24, 2002.)

1 Several hairs were recovered from the vehicle and two criminalists
2 microscopically compared the hairs with Petitioner’s hair. One believed that one of the
3 hairs (V-19) probably came from an African-American, and that “there was enough
4 similarity between . . . the hairs from Mr. Cooper and the unknown hair that I felt the
5 unknown hair was consistent with coming from Mr. Cooper.” (95 RT 4833.) The
6 second criminalist also found it was consistent with Petitioner’s hair. Both believed it
7 was most likely pubic hair. (95 RT 4828-33.)

8 Plant burrs were recovered from the Ryen station wagon. The burrs were similar
9 to plant burrs found on the inside of Jessica Ryen’s nightgown and numerous plant burrs
10 found on the blanket inside the Bilbia closet which was part of the bedding found in the
11 closet. (106 RT 7678-81.) The burrs were also similar in appearance to the burrs from
12 parts of vegetation samples taken from the area between the Ryen home and the hideout
13 house. All of the burrs were macroscopically and microscopically similar. (106 RT
14 7677-81, 7687.) An expert for the defense, Dr. John Thornton, concluded the burrs
15 were all the same type, known as Medicago. He agreed that the burrs from the blanket
16 in the Bilbia closet were “virtually identical” to the two burrs found on the inside of
17 Jessica’s nightgown. (105 RT 7521-22, 7541-43.) Dr. Thornton agreed that Jessica’s
18 killer had moved her nightgown up on her body after she was already dead in order to
19 inflict a series of post-mortem wounds on her chest with an ice-pick or similar
20 instrument. (105 RT 7526-28.) The position in which Jessica was found was consistent
21 with her killer getting down on his knees to inflict cuts in her chest after she was dead.
22 (105 RT 7529.)

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1 Petitioner admitted drinking beer at the hideout house. (98 RT 5613-14.) A
2 six-pack of Olympia Gold beer with one can missing was found in the refrigerator of the
3 Ryen house. One bloodstained can was hanging over the edge of a shelf. (88 RT 3375.)
4 A nearly empty can of Olympia Gold beer similar in appearance to those in the Ryen
5 refrigerator was found in a plowed horse-training arena about midway between the Ryen
6 home and hideout house. (90 RT 3800-03.)



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15 After the murders, Petitioner escaped to Tijuana, Mexico. (98 RT 5450-60.)
16 Petitioner checked into a hotel in Tijuana at around 4:00 p.m. on Sunday, June 5, 1983
17 using the false name of Angel Jackson. (98 RT 5462.) Tijuana is only two hours by car
18 from the San Bernardino area, leaving ample time for Petitioner to commit the murders
19 the night of June 4, 1983, drive to Long Beach and escape to Mexico on June 5, 1983.
20 On June 6, at about 10:00 p.m., Ms. Williams received a collect call from Petitioner in
21 Tijuana, Mexico. (88 RT 3175-76; Trial Ex. 113.)

22 From Tijuana, Petitioner made his way to Ensenada, Mexico. (98 RT 5468.) On
23 June 9, 1983, he met Owen and Angelica Handy in Ensenada. Cooper, 53 Cal.3d at 800;
24 95 RT 4838-40, 4874-75. Petitioner again lied about his identity to the Handys when he
25 met them, claiming to be Angel Jackson when he asked them for work. (95 RT 4839-
26 40.) Petitioner worked on the Handys' boat, which was in dry dock. The Handys then
27 set sail for San Francisco and Petitioner went with them. (95 RT 4841.) The Handys
28 saw Petitioner in possession of numerous items identified as having been taken from the

1 hideout house. Petitioner had Mrs. Lang's blue sweat pants and gloves. (95 RT 4849-54,
2 4876-78.) When they stopped at various places along the way, Petitioner stayed on the
3 boat and did not go ashore. They were in Santa Barbara for three or four days. (95 RT
4 4843-44.)

5 On July 30, 1983, Santa Barbara County Sheriff's Department responded to a call
6 for assistance of an attempted rape on a boat docked next to the Handys' boat in Pelican
7 Cove. The 26-year-old female victim reported that Petitioner attempted to rape her at
8 knife point. (04-CV-656, NOL filed April 15, 2005, Resp't CIM Vault, Notebook 3 at
9 431.) Petitioner tried to flee when the authorities came to the dock to arrest him. The
10 Sheriff's observed Petitioner throw an object into the water before he dove off of the
11 Handy's boat, swam to a dinghy, and started to row for shore. (95 RT 4846.) The
12 sheriffs recovered a knife from the water where Petitioner attempted his unsuccessful
13 escape.⁴

14 At trial, Petitioner admitted that he was at the hideout house, just 126 yards from
15 the crime scene, but denied he committed the murders. The jury evaluated his credibility
16 and concluded that there was proof beyond a reasonable doubt that Petitioner committed
17 the murders. Petitioner testified he was at CIM under a false name, David Trautman, as
18 a result of pleading guilty to two counts of residential burglary in Los Angeles County.
19 (97 RT 5327-29; 98 RT 5499, 5875.) Petitioner admitted escaping from CIM, eluding
20 CIM personnel, and hiding in a lumber yard until he was able to make his way on foot
21 under the cover of darkness to the hideout house. (97 RT 5362-85.) He admitted hiding
22 out close to the Ryen home, and sleeping in the Bilbia bedroom. (97 RT 5382-5417.)
23 Petitioner testified that he slept on the Langs' bed in the hideout house on Thursday
24 night, June 2, 1983, but when he woke up Friday morning, June 3, 1983, he realized he
25 could have been seen in their bedroom, and decided to stay in the Bilbia bedroom closet.
26 (97 RT 5408, 5414-15.)

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28 ⁴ At trial, the prosecution presented evidence of Petitioner's arrest, but not the report of the rape
at knife point or the knife that was recovered from the water.

1 Petitioner admitted he was wearing his prison camp jacket at the time of his
2 escape, and prison-issued tennis shoes but denied ever receiving any tennis shoes from
3 inmate Taylor. (97 RT 5349, 5350-51, 5356-58, 5385-89.) Petitioner testified the pair
4 of shoes he was wearing were a size 9. (98 RT 5555-56.) Petitioner’s prison-issued
5 shoes were never recovered. Petitioner testified that he threw the prison-issued shoes
6 along with other prison clothing into the ocean when the Handys’ boat sailed into United
7 States’ waters. (98 RT 5892-95.)

8 Petitioner indicated that he drank beer that was in the garage refrigerator at the
9 hideout house. The first thing Petitioner did at the hideout house was “[w]ent and had
10 me a beer.” (98 RT 5613-14.) Petitioner admitted having some “roll-your-own” (i.e.,
11 Role-Rite) tobacco with him when he escaped, as well as fifteen Kool cigarettes. (97 RT
12 5362-63.)

13 On Saturday night, after Ms. Williams told him she didn’t have any money,
14 Petitioner claimed he left the hideout house and “went back down the hill” on foot at
15 night in the same manner as when he walked up the hill to hide out following his escape
16 from CIM. (97 RT 5435-38.) He stated he stopped drivers and asked them for
17 directions to Mexico. (98 RT 5449-50.) The jury rejected Petitioner’s implausible
18 testimony that he left on foot and asked drivers in the area at night for directions to
19 Mexico.

20 Petitioner denied going to the Ryen house and denied killing anyone in the house.
21 (97 RT 5327; 98 RT 5492.) Petitioner admitted watching television to check for possible
22 news reports about his escape. (97 RT 5416-17, 5425-26.) Petitioner admitted taking
23 two pairs of gloves from the Langs’ bedroom, but denied wearing them in the hideout
24 house, or making any effort to avoid leaving fingerprints. (98 RT 5513.) The only
25 fingerprint left by Petitioner in either the Ryen home or the hideout house was on a
26 Coffee Mate jar in the kitchen in the hideout house. (87 RT 2956-60.) He explained that
27 he took the gloves only to wear as he left the hideout house to protect his hands because

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1 he hurt his hands when he fell while coming up the hill to the hideout house following
2 his escape from CIM. (98 RT 5513.)

3 Petitioner denied bringing the bloodstained nylon rope into the closet in the Bilbia
4 bedroom. (97 RT 5419; 99 RT 5834-36.) He denied smoking a Viceroy cigarette and
5 putting it in a napkin in the Bilbia headboard. (97 RT 5418-19.) Petitioner denied
6 bringing Mrs. Lang's belt into the Bilbia bedroom closet. (97 RT 5415; 99 RT
7 5834-36.)

8 Petitioner denied that he left the semen stain on the blanket in the Bilbia closet.
9 (98 RT 5523.) He denied using the Bilbia bathroom for the three days he was in the
10 hideout house, other than once to test the water in the shower. He testified he always
11 used the Langs' bathroom instead, even though he was sleeping in the Bilbia bedroom
12 and all of his personal items were in the Bilbia bedroom. (98 RT 5682; 99 RT 5808.)
13 Petitioner did not see any blood in the Bilbia bathroom while he was at the hideout
14 house. (99 RT 5808-09.)

15 The prosecution effectively cross-examined Petitioner by pointing out
16 inconsistencies in Petitioner's account and questioning Petitioner's credibility. After
17 due deliberation, the jury concluded that Petitioner committed the murders.

18 In the penalty phase of the trial, the defense presented several friends and relatives
19 of Petitioner who testified about his good qualities and their continuing love for him.
20 The prosecution presented evidence that on October 8, 1982, a man stipulated to be
21 Petitioner burglarized a home in Pennsylvania, assaulted a high-school student who
22 interrupted the burglary, kidnapped and raped her, and then stole her car. (107 RT
23 7956-66.) Petitioner took the teenager to a secluded portion of a park, threatened her,
24 and ordered her to remove her jeans and underpants. He grabbed her by her hair and
25 forced her face down to the ground. She could feel a screwdriver against the back of her
26 neck as she lay face down, nude from the waist down, upset and crying. Petitioner took
27 down his pants and raped her vaginally from behind. (107 RT 7965-66.)

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1 Petitioner told her to keep her face down, got up, pulled up his pants, jumped into
2 her car and drove off. Before leaving Petitioner said, “I should kill you.” (107 RT
3 7966.) She ran to a nearby house and called the police. Petitioner was identified from
4 a thumb print on the outside of the dining-room window of the house he was
5 burglarizing when he kidnapped his victim. (107 RT 7977-78.) He also left a palm print
6 on the automatic gearshift lever of his victim’s car. (107 RT 7979-81.) The jury was
7 also allowed to consider as an aggravating factor Petitioner’s prior conviction of two
8 counts of burglary in Los Angeles. Cooper, 53 Cal.3d at 802.

9 The jury carefully considered the evidence in aggravation and mitigation and
10 returned a verdict of death. The death penalty was confirmed by the trial judge, and
11 affirmed by the state and federal courts. (107 RT 8144-40); Cooper, 53 Cal.3d 771
12 (1991); Cooper I, 92-CV-427, Aug. 25, 1997 Order; Cooper v. Calderon, 255 F.3d 1104
13 (9th Cir. 2001); Cooper v. Calderon, 537 U.S. 861 (2002).

14 Petitioner’s trial was conducted in 1984-1985, prior to the advent of DNA testing.
15 In post-conviction proceedings, Petitioner sought DNA testing to prove his innocence.
16 Subsequent to the passage of California Penal Code section 1405, the People agreed to
17 have certain DNA testing performed in 2001. (See Joint DNA Agreement.) Petitioner,
18 with the assistance of his post-conviction counsel and two nationally recognized DNA
19 experts, entered into a Joint DNA Agreement to test the evidence. The Joint DNA
20 Agreement specified the items of evidence to be tested: remaining blood from the drop
21 of blood, A-41, found in the hallway on the wall directly across from the doorway to the
22 Ryen master bedroom; one hand-rolled and one manufactured cigarette butt found inside
23 the Ryen station wagon after it was recovered in Long Beach; the hatchet; the T-shirt
24 found near the Canyon Corral Bar; a button found in the Bilbia bedroom; and hair
25 recovered from the hands of the victims. (Answer, Ex. 86 at 11.) The Agreement
26 provided that STR Profiler Plus DNA testing be performed by the Department of Justice
27 Berkeley DNA Laboratory (“DOJ Berkeley”) on the specified items of evidence in two
28 stages: “blind” STR Profiler Plus DNA testing was to be performed on the specified

1 pieces of crime scene evidence, followed by STR Profiler Plus DNA testing on the
2 known exemplars from Petitioner and the victims. (Answer, Ex. 86 at 11.) The “blind”
3 test results from the crime scene evidence would then be compared with the results
4 obtained from the known reference samples from Petitioner and the victims. Petitioner’s
5 own post-conviction DNA expert, Dr. Blake, identified the drop of blood (A-41) and the
6 two cigarette butts recovered from the stolen Ryen station wagon as “the most relevant
7 biological evidence” in the case. (Answer, Ex. 89 at 4.) Additionally, Petitioner had the
8 assistance of Christopher Plourd, a nationally recognized DNA expert, in support of his
9 post-conviction DNA testing.

10 Petitioner’s successive petition challenges the results of this post-conviction DNA
11 testing. These DNA results provide strong evidence that Petitioner is the killer and sole
12 person responsible for the Ryen/Hughes murders. (DOJ Physical Evidence Exam Report
13 dated July 2, 2002; Supplemental DOJ Physical Evidence Exam Report dated Sept. 24,
14 2002.) Specifically the results established that Petitioner was the donor of the DNA
15 found on the following items:

- 16 (1) a bloodstain in the Ryen home near the master bedroom where the
17 victims were attacked matched Cooper’s DNA profile and was found
18 to occur at random in the population with a frequency of
approximately 1 in 310 billion for African Americans, 1 in 270 billion
for Caucasians, and 1 in 340 billion for Western Hispanics;
- 19 (2) two cigarette butts found in the stolen Ryen station wagon when it was
20 recovered in Long Beach had Cooper’s DNA, with one cigarette
21 having enough DNA sample that it would occur at random in the
22 population with a frequency of about 1 in 19 billion African
23 Americans, 1 in 11 billion for Caucasians, and 1 in 15 billion for
Western Hispanics; and the other cigarette having enough DNA
sample that it would occur at random in the population with a
frequency of about 1 in 110 million African Americans, 1 in 16
million for Caucasians, and 1 in 12 million for Western Hispanics; and
- 24 (3) a bloodstain on a [T-] shirt found on the side of a road within two
25 miles of the Ryen home had DNA matching Cooper’s and partial
26 DNA profiles matching that of two of the victims, Doug and Peggy
27 Ryen. The DNA matching Cooper’s found on the t-shirt occurs at
28 random in the population with a frequency of about 1 in 110 million
for African Americans, 1 in 16 million for Caucasians, and 1 in 12
million for Western Hispanics.

1 (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002 at 1-4.) In
2 addition to the DNA evidence inculpatng Petitioner, DNA profiles of blood taken from
3 a hatchet that was taken from the house where Petitioner hid after his escape from
4 prison matched that of several of the victims including Doug Ryen, Jessica Ryen and
5 Chris Hughes. (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24,
6 2002 at 4.)

7 Petitioner requested a hearing in the Superior Court of California regarding the
8 DNA results. Judge Kennedy of the San Diego Superior Court held an evidentiary
9 hearing on June 23-25, 2003. Petitioner called witnesses, including DNA expert
10 Christopher Plourd. (92-CV-427, NOL filed Feb. 3, 2004, Reporters' Tr., Vols. 1-3
11 dated June 23-24 and 25, 2003 before Hon. William H. Kennedy in Case No. CR
12 72787; 92-CV427, NOL filed Jan. 23, 2004, Ex. 6, Judge Kennedy Order filed July 2,
13 2003 at 4.) Three of the original crime scene criminalists, persons from the San
14 Bernardino Sheriff's Property Division, a Supervisor from the Diego Superior Court
15 Exhibit Room and DOJ criminalist Steven Meyers also testified. (92-CV-427, NOL
16 filed Feb. 3, 2004, Reporters' Tr., Vols. 1-3 dated June 23, 24 and 25, 2003 before Hon.
17 William H. Kennedy in Case No. CR-72787; NOL filed Jan. 23, 2004, Ex. 6, Judge
18 Kennedy Order dated July 2, 2003 at 4.) Judge Kennedy listened to all of the sworn
19 testimony, including criminalist Gregonis and determined that, "Petitioner has not
20 made any showing that law enforcement personnel tampered with or contaminated any
21 evidence in his case." (92-CV-427, NOL filed Jan. 23, 2004, Ex. No. 6, Judge Kennedy
22 Order dated July 2, 2003 at 10.) After reviewing written motions, listening to the
23 testimony presented by both sides and hearing arguments, Judge Kennedy denied
24 Petitioner's request for further DNA testing and found no merit to his allegations of
25 evidence tampering. (92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Ex.
26 6, Judge Kennedy Order dated July 2, 2003 at 10, 11.)

27 Nearly six months after Judge Kennedy issued his ruling, Petitioner filed a
28 petition for writ of habeas corpus in the California Supreme Court. On February 5,

1 2004, the California Supreme Court denied Petitioner’s claims on the merits and as
2 procedurally barred, finding that “[a]s with the previous five petitions for writ of habeas
3 corpus that petitioner has filed in this court challenging the judgment, this petition casts
4 no doubt on petitioner’s guilt or the validity of the judgment.” In re Cooper, Case No.
5 S122389.

6 Petitioner then filed a request with the Ninth Circuit to file a successive habeas
7 corpus petition in federal court. The Ninth Circuit granted this request on February 9,
8 2004, and remanded the successive petition to this Court.

9 STANDARDS OF REVIEW

10 I. The Antiterrorism and Effective Death Penalty Act of 1996

11 “[The Antiterrorism and Effective Death Penalty Act of 1996] AEDPA []
12 govern[s] any habeas appeal commenced after its effective date, April 24, 1996, without
13 regard to when the petition was filed.” Cooper v. Calderon, 255 F.3d 1104, 1107 (9th
14 Cir. 2001); Cooper v. Calderon, 274 F.3d 1270, 1272 (9th Cir. 2001). In Petitioner’s
15 previous request to file a successive petition in 1998, the Ninth Circuit determined that
16 AEDPA governed stating:

17 We must first determine whether AEDPA applies to Cooper's new
18 petition. In United States v. Villa-Gonzalez, 208 F.3d 1160, 1163-64 (9th
19 Cir. 2000), we held that AEDPA’s provisions governing second or
20 successive petitions apply to a new petition filed after the date of
AEDPA’s enactment, even if the original petition was filed before. Under
Villa-Gonzalez, we must apply AEDPA to Cooper's new petition.

21 Cooper, 274 F.3d at 1272.

22 Petitioner’s third federal habeas corpus petition in this Court was filed on April
23 1, 2004, long after the effective date of AEDPA, April 24, 1996. As such, the provisions
24 of AEDPA govern this latest habeas petition. See Penry v. Johnson, 532 U.S. 782, 792
25 (2001) (“Because [petitioner] filed his federal habeas petition after the enactment of
26 [AEDPA], the provisions of that law govern the scope of our review.”); Lindh v.
27 Murphy, 521 U.S. 320, 326 (1997) (AEDPA applies to all habeas petitions filed after
28 April 24, 1996).

1 **A. AEDPA’s Standard for Habeas Relief**

2 The Ninth Circuit’s authorization which enabled Petitioner to file a successive
3 habeas petition pursuant to 28 U.S.C. § 2244(b) with this Court does not relieve
4 Petitioner of his burden of demonstrating compliance with those requirements before
5 this Court. Petitioner’s burden in seeking authorization from the Ninth Circuit was
6 merely to make a prima facie showing of compliance with § 2244(b) for gatekeeper
7 purposes. 28 U.S.C. § 2244(b)(3)(C). Now that he is before this Court, he must
8 actually show that each claim in his pending petition satisfies the statutory
9 requirements. Tyler v. Cain, 533 U.S. 656, 661, n.3 (2001). While the gatekeeper
10 authorization allowed Petitioner to file any and all claims in a successive petition upon
11 a prima facie showing that any one claim satisfies the requirements of 28 U.S.C. §
12 2244(b), Nevius v. McDaniel, 104 F.3d 1120 (9th Cir. 1996), Petitioner must now
13 satisfy the requirements of 28 U.S.C. § 2244(b) as to each claim before that claim can
14 be considered by this Court.

15 **1. Claims Presented in a Prior Application are to be Dismissed**

16 First, any claim “presented in a second or successive habeas corpus application
17 under section 2254 that was presented in a prior application shall be dismissed.” 28
18 U.S.C. § 2244(b)(1). The only exception that has been recognized by the Ninth Circuit
19 to the requirement of dismissal for previously presented claims is in “extremely narrow
20 circumstances” where the claim presented in the previous petition was held to be
21 premature. Babbitt v. Woodford, 177 F.3d 744, 745 (9th Cir. 1999) (citing
22 Martinez-Villareal v. Stewart, 118 F.3d 628, 630 (9th Cir. 1997), aff’d, 523 U.S. 637
23 (1998)).

24 A claim is not newly presented merely because the petitioner offers new factual
25 bases in support of a legal claim that has already been raised. The Ninth Circuit held
26 that it would not “consider new factual grounds in support of the same legal claim” that
27 was previously presented, reasoning as follows:

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1 A “ground is successive if the basic thrust or gravamen of the legal claim
2 is the same, regardless of whether the basic claim is supported by new and
3 different legal arguments Identical grounds may often be proved by
4 different factual allegations”

4 Id. (quoting United States v. Allen, 157 F.3d 661, 664 (9th Cir. 1998)).

5 **2. New Claims in a Successive Application Must Meet a Rigid**
6 **Standard under AEDPA**

7 Second, even if the claim has not been previously presented in a federal habeas
8 petition, it must nevertheless be dismissed unless it falls within one of two narrow
9 exceptions:

10 (A) the applicant shows that the claim relies on a new rule of
11 constitutional law, made retroactive to cases on collateral review by the
12 Supreme Court, that was previously unavailable; or

12 (B)(I) the factual predicate for the claim could not have been discovered
13 previously through the exercise of due diligence; and

14 (ii) the facts underlying the claim, if proven and viewed in light of the
15 evidence as a whole, would be sufficient to establish by clear and
16 convincing evidence that, but for constitutional error, no reasonable
17 factfinder would have found the applicant guilty of the underlying offense.

16 28 U.S.C. § 2244(b)(2)(A)(B).

17 Petitioner does not rely on a new rule of Constitutional law, so his only possible
18 claim is under the newly discovered factual predicate prong. See 28 U.S.C.
19 2244(b)(2)(B).

20 **B. State Court Determinations Enjoy a Heavy Deference under AEDPA**

21 **1. Factual Determinations, Both Express and Implied, Enjoy a**
22 **Heavy Deference**

23 Challenges to the state court finding of facts are governed by 28 U.S.C. §
24 2254(e)(I). As to factual determinations, “[i]n a proceeding instituted by an application
25 for a writ of habeas corpus by a person in custody pursuant to the judgment of a State
26 court, a determination of a factual issue made by a State court shall be presumed to be
27 correct. The applicant shall have the burden of rebutting the presumption of
28 correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

1 The express and implied factual determinations by the state trial court and
2 California Supreme Court are entitled to deference. “Factual determinations by state
3 courts are presumed correct absent clear and convincing evidence to the contrary.”
4 Miller-El v. Cockrell, 537 U.S. 322, 340 (2003); 28 U.S.C. § 2254(e)(1). “Clear and
5 convincing evidence” within the meaning of § 2254(e) “requires greater proof than
6 preponderance of the evidence” and must produce “an abiding conviction” that the
7 factual contentions being advanced are “highly probable.” Sophanthavong v.
8 Palmateer, 378 F.3d 859, 866 (9th Cir. 2004) (quotation omitted).

9 The presumption of correctness applies not only to express findings of fact, but
10 also applies equally to unarticulated findings that are necessary to the state court’s
11 conclusions of mixed questions of fact and law. See Marshall v. Lonberger, 459 U.S.
12 422, 433 (1983) (application of presumption to a credibility determination which was
13 implicit in rejection of defendant’s claim). Where there are two permissible views of
14 the evidence, a fact finder’s choice between them cannot be clearly erroneous. Amadeo
15 v. Zant, 486 U.S. 214, 226 (1988)

16 2. The State Court Legal Determinations Also Enjoy Heavy 17 Deference

18 Because each of Petitioner’s claims have been raised in the California Supreme
19 Court and denied on the merits, this Court must apply the highly deferential standard
20 set forth in AEDPA. See Lindh v. Murphy, 521 U.S. 320, 333 (1997).

21 Title 28, United States Code, section 2254(a), sets forth the following scope of
22 review for federal habeas corpus claims:

23 The Supreme Court, a Justice thereof, a circuit judge, or a district court
24 shall entertain an application for a writ of habeas corpus in behalf of a
25 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.

26 28 U.S.C. § 2254(a). The standard provides:

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

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

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

5 28 U.S.C. § 2254(d).

6 To obtain federal habeas relief, Petitioner must satisfy either § 2254(d)(1) or
7 § 2254(d)(2). See Williams v. Taylor, 529 U.S. 362, 403 (2000). The threshold
8 question is whether the rule of law was clearly established at the time petitioner’s state
9 court conviction became final. Id. at 406. Clearly established federal law, as determined
10 by the Supreme Court of the United States “refers to the holdings, as opposed to the
11 dicta, of this Court’s decisions as of the time of the relevant state court decision. Id.
12 at 412; see also Lockyer v. Andrade, 538 U.S. 63, 71 (2003). Ninth Circuit case law
13 may be “persuasive authority for purposes of determining whether a particular state
14 court decision is an ‘unreasonable application’ of Supreme Court law, and also may
15 help us determine what law is ‘clearly established.’” Duhaime v. Ducharme, 200 F.3d
16 597, 600 (9th Cir. 2000). Only after the clearly established federal law is identified can
17 the court determine whether the state court’s application of that law “resulted in a
18 decision that was contrary to, or involved an unreasonable application of” that clearly
19 established federal law. See Lockyer, 538 U.S. at 71-72.

20 This Court must identify the relevant United States Supreme Court authority and
21 then apply that law to the record in the light most favorable to the state court decision.
22 Such an approach embodies the longstanding principle that unarticulated findings that
23 are necessary to the state court’s conclusions of mixed questions of fact and law are
24 presumed correct. See Marshall, 459 U.S. at 433 (application of presumption to
25 credibility determination which was implicit in rejection of defendant’s claim).
26 Moreover, anything less deferential would undermine the law that federal courts “avoid
27 attributing constitutional error to the state court.” Himes v. Thompson, 336 F.3d 848,
28 854 (9th Cir.2003); see also Woodford v. Visciotti, 537 U.S. 19, 24 (2003).

1 The “contrary to” and “unreasonable application” clauses contained in 28 U.S.C.
2 § 2254(d) have distinct meanings. Williams, 529 U.S. at 404. A decision is “contrary
3 to” United States Supreme Court authority if it fails to apply the correct controlling
4 authority, or if it applies the controlling authority to a case involving facts materially
5 indistinguishable from those in a controlling case, but reaches a different result. Id. at
6 405-06. A decision is an “unreasonable application” of clearly established federal law
7 when the state court identifies the correct governing legal principle, but unreasonably
8 applies that principle to the facts of that case. Id. at 407. Under Williams, an
9 application of federal law is unreasonable only if it is “objectively unreasonable.” Id.
10 at 409.

11 Although the Ninth Circuit previously analyzed habeas cases for “clear error,” the
12 Supreme Court disapproved this approach. Lockyer, 538 U.S. at 75 (rejecting Van Tran
13 v. Lindsey, 212 F.3d 1143 (9th Cir. 2000)). Rather, when a petitioner does not challenge
14 the state court’s determination of the evidence, he may receive relief “only if” he
15 establishes that the state court decisions were “contrary to, or involved an unreasonable
16 application of, clearly established federal law, as determined by the Supreme Court of
17 the United States.” See Price v. Vincent, 538 U.S. 634, 640-41 n.2 (2003).

18 When there is a federal question but no controlling Supreme Court authority on
19 point, a state court’s merits determination is not “contrary to” any decision within the
20 meaning of the AEDPA. Mitchell v. Esparaza, 540 U.S. 12, 17 (2003). In the absence
21 of controlling authority, federal courts should defer to a state court’s reasonable
22 interpretation of the Constitution. Id. at 17-18; Penry v. Johnson, 532 U.S. 782, 795
23 (2001) (holding that a Texas court’s decision was not unreasonable where there was no
24 squarely controlling authority).

25 “An unreasonable application of federal law is different from an incorrect
26 application of federal law.” Williams, 529 U.S. at 410; Clark v. Murphy, 331 F.3d 1062,
27 1067 (9th Cir. 2003). A federal habeas court may not issue the writ simply because that

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1 court concludes in its independent judgment that the state court decision is wrong. See
2 Bell v. Cone, 535 U.S. 685, 698-99 (2002); Williams, 529 U.S. at 411. The state court
3 decision must be affirmed unless it is “objectively unreasonable.” Bell, 535 U.S. at 699;
4 Woodford, 537 U.S. at 24. Where a state court finds a constitutional error to be harmless
5 beyond a reasonable doubt, a federal court may not grant relief unless the state court’s
6 harmless error decision is objectively unreasonable. Mitchell, 540 U.S. at 12.

7 A state court’s decision “based on a factual determination will not be overturned
8 on factual grounds unless objectively unreasonable in light of the evidence presented in
9 the state court proceeding.” Miller, 537 U.S. at 340 (2003); 28 U.S.C. § 2254(d) (2);
10 Wiggins v. Smith, 539 U.S. 510, 528 (2003).

11 Even if the state court fails to cite or acknowledge United States Supreme Court
12 authority, a federal court may not grant habeas relief unless the state court’s reasoning
13 or result contradict clearly established United States Supreme Court precedent. Early, 537
14 U.S. at 8. The Ninth Circuit has held that where there is no reasoned state court decision
15 on one or more issues raised in the federal petition, the federal court must conduct an
16 independent review of the record to determine whether the state court decision was
17 contrary to, or an unreasonable application of, controlling United States Supreme Court
18 precedent. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000). A federal court must
19 “presume, of course, that state courts ‘know and follow the law’[.]” Himes v. Thompson,
20 336 F.3d 848, 853 (9th Cir. 2003) (citing Woodford, 537 U.S. at 24.) De novo review
21 of a state court’s adjudication is not appropriate. Id. at 854 n.3.

22 The deference accorded to state court decisions by AEDPA is intended to prevent
23 federal habeas “retrials” and ensures that state court convictions are “given effect to the
24 extent possible under law.” Bell, 535 U.S. at 693; see Clark, 331 F.3d at 1067. The
25 AEDPA deference standard demands that federal courts give state court decisions “the
26 benefit of the doubt.” Woodford, 537 U.S. at 24.

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1 **II. Alternative Habeas Standards under Schlup and Herrera**

2 Finally, if AEDPA does not apply to this successive petition, then the gateway
3 claims presented by Petitioner are governed by Schlup v. Delo, 513 U.S. 298 (1998) and
4 the claims of actual innocence are governed by Herrera v. Collins, 506 U.S. 390 (1993).

5 The United States Supreme Court has held that a claim of actual innocence can be
6 raised “to avoid a procedural bar to the consideration of the merits of [the petitioner’s]
7 constitutional claims.” Schlup, 513 U.S. at 326-27.

8 To make a successful claim under Schlup, a petitioner must show that in
9 light of all the evidence, including new evidence, it is more likely than not
10 that no reasonable juror would have found petitioner guilty beyond a
reasonable doubt.

11 Cooper, 358 F.3d at 1119 (citation omitted.) To be reliable, a claim of actual innocence
12 must be based on “new reliable evidence—whether it be exculpatory scientific evidence,
13 trustworthy eyewitness accounts, or critical physical evidence—that was not presented
14 at trial.” Schlup, 513 U.S. at 324.

15 The Ninth Circuit did not decide whether the Schlup standard of actual innocence
16 applies. The Schlup standard requires a showing that it “in light of all the evidence,
17 including new evidence, it is more likely than not that no reasonable juror would have
18 found petitioner guilty beyond a reasonable doubt,” or whether the more stringent
19 standard under 28 U.S.C. § 2244(b)(2)(B) applies, which requires a “factual claim [] not
20 discoverable through the exercise of due diligence” that establishes by “clear and
21 convincing evidence that, but for constitutional error, no reasonable factfinder would
22 have found the applicant guilty of the underlying offense.” Cooper, 358 F.3d at 1119-20
23 (citation omitted, emphasis in original).

24 In Petitioner’s previous request to file a successive petition, the Ninth Circuit held
25 that AEDPA governs a successive petition filed after the effective date of AEDPA.
26 Therefore, the Court concludes that AEDPA applies to this successive petition.

27 But even if Schlup applies, the Court concludes that Petitioner has not established
28 in light of all the evidence, including new evidence, that it is more likely than not that

1 no reasonable juror would have found him guilty beyond a reasonable doubt. Under
2 Schlup, if Petitioner meets his burden of establishing actual innocence, then the Court
3 is to evaluate the alleged violation under Brady v. Maryland, 373 U.S. 83 (1963) or under
4 Strickland v. Washington, 466 U.S. 668 (1984). As stated by the Supreme Court in
5 Schlup, it is only after a sufficient showing of actual innocence that the court is permitted
6 to consider the other constitutional claims on the merits:

7 Schlup’s claim of innocence does not by itself provide a basis for relief.
8 Instead, his claim for relief depends critically on the validity of his
9 Strickland and Brady claims. Schlup’s claim of innocence is thus not itself
10 a constitutional claim, but instead a gateway through which a habeas
11 petitioner must pass to have his otherwise barred constitutional claim
12 considered on the merits... [I]f a petitioner such as Schlup presents
13 evidence of innocence so strong that a court cannot have confidence in the
14 outcome of the trial unless the court is also satisfied that the trial was free
15 of nonharmless constitutional error, the petitioner should be allowed to pass
16 through the gateway and argue the merits of his underlying claims.

13 Schlup, 513 U.S. at 315-16. The actual innocence exception should “remain rare” and
14 “only be applied in the extraordinary case.” Schlup, 513 U.S. at 321.

15 If AEDPA does not apply to Petitioner’s claims of actual innocence, then
16 Petitioner must meet the test of Herrera, which requires

17 a truly persuasive demonstration of “actual innocence” . . . [and] because of
18 the very disruptive effect that entertaining claims of actual innocence would
19 have on the need for finality in capital cases, and the enormous burden that
20 having to retry cases based on often stale evidence would place on the
21 States, the threshold showing for such an assumed right would necessarily
22 be extraordinarily high.

21 Herrera, 506 U.S. at 417. This “contemplates a stronger showing than insufficiency of
22 the evidence to convict” or “doubt about his guilt.” Carriger v. Stewart, 132 F.3d 463,
23 476 (9th Cir. 1997). Under these standards, a petitioner must affirmatively prove that he
24 is probably innocent. Id.

25 Moreover, Herrera requires that there is “no state avenue open to process such a
26 claim.” Id. In this case, the California Supreme Court denied Petitioner’s actual
27 innocence claims on the merits, (see Sixth State Habeas Pet. at 12-37; Answer, Ex. 13),
28 and the Governor of California denied Petitioner’s application for clemency.

1 But even if upon an evaluation of the merits of Petitioner’s claims of actual
2 innocence, the Court concludes that Petitioner has not meet his burden under AEDPA,
3 which requires among other things, a “factual claim [] not discoverable through the
4 exercise of due diligence" that establishes by "clear and convincing evidence that, but for
5 constitutional error, no reasonable factfinder would have found the applicant guilty of
6 the underlying offense.” 28 U.S.C. § 2244(b). For the same reasons, the Court also
7 concludes that Petitioner has not met the requirements of Herrera, which requires an
8 “extraordinarily high” showing of “a truly persuasive demonstration of ‘actual
9 innocence.’” Herrera, 506 U.S. at 417.

10 Title 28 U.S.C. section 2244(b)(3)(B) directs that "[a] motion in the court of
11 appeals for an order authorizing the district court to consider a second of successive
12 application shall be determined by a three-judge panel of the court of appeals."
13 According to the statute, only a three-judge panel is allowed to review an application for
14 a successive petition. However, in this case, the en banc panel sua sponte granted
15 Petitioner’s application to file a successive petition under the authority of Thompson v.
16 Calderon, 151 F.3d 918, 922 (9th Cir. 1998).

17 **III. State Procedural Bars Preclude Review**

18 Petitioner has not established cause and prejudice as to any claim the state court
19 found procedurally barred. When considering claims on habeas corpus, this Court must
20 first address the state’s argument that a claim is procedurally defaulted. Lambrix v.
21 Singletary, 520 U.S. 518, 524 (1997). Procedural defaults are resolved before Teague
22 issues. Id. This is so even if the state court has also denied the claim on the merits.
23 Bennett v. Mueller, 322 F.3d 573, 580 (9th Cir. 2003).

24 A federal court is precluded from reviewing the merits of a claim when the state
25 court has denied relief on the basis of an independent and adequate state procedural
26 default. Coleman v. Thompson, 501 U.S. 722, 731-732 (1991); Vansickel v. White, 166
27 F.3d 953, 957 (9th Cir. 1999). The state procedural bar must be “independent” of the
28 federal question and “adequate to support the judgment.” Coleman, 501 U.S. at 729. A

1 state procedural rule constitutes an “adequate” bar to federal court review if it was
2 “firmly established and regularly followed” at the time it was applied by the state court.
3 Ford v. Georgia, 498 U.S. 411, 423-424 (1991); Poland v. Stewart, 169 F.3d 573, 577
4 (9th Cir. 1999). A state procedural rule constitutes an “independent” bar if it is not
5 interwoven with federal law or dependent upon a federal constitutional ruling. Ake v.
6 Oklahoma, 470 U.S. 68, 75 (1985); Michigan v. Long, 463 U.S. 1032, 1040-41 (1983);
7 La Crosse v. Kernan, 244 F.3d 702, 704 (9th Cir. 2001).

8 Under the Ninth Circuit’s decision in Bennett, 322 F.3d 573, once the state raises
9 the existence of an independent and adequate state procedural ground as a defense, the
10 petitioner must then raise “specific factual allegations that demonstrate the inadequacy
11 of the state procedure, including citation to authority demonstrating inconsistent
12 application of the rule.” Bennett, 322 F.3d at 584, 586 (quoting Hooks v. Ward, 184 F.3d
13 1206, 1217 (10th Cir. 1999)). Otherwise, Petitioner must establish cause and actual
14 prejudice to avoid imposition of the bar. Rich v. Calderon, 187 F.3d 1064, 1066 (9th Cir.
15 1999).

16 **IV. Brady v. Maryland**

17 In this successive petition, Petitioner alleges a violation of Brady v. Maryland, 373
18 U.S. 83 (1963). Under Brady, the prosecution’s suppression of evidence favorable to an
19 accused “violates due process where the evidence is material either to guilt or to
20 punishment irrespective of the good faith or bad faith of the prosecution.” Id. at 87. The
21 three components or essential elements of a Brady prosecutorial misconduct claim are
22 (1) favorable evidence (2) that is withheld by the prosecution (3) that results in prejudice:

23 The evidence at issue must be favorable to the accused, either because it is
24 exculpatory, or because it is impeaching; that evidence must have been
25 suppressed by the State, either willfully or inadvertently; and prejudice must
26 have ensued.... Corresponding to the second Brady component (evidence
27 suppressed by the State), a petitioner shows “cause” when the reason for his
28 failure to develop facts in state-court proceedings was the State’s
suppression of the relevant evidence; coincident with the third Brady
component (prejudice), prejudice within the compass of the “cause and
prejudice” requirement exists when the suppressed evidence is “material”

1 for Brady purposes.... [T]he materiality standard for Brady claims is met
2 when the favorable evidence could reasonably be taken to put the whole
case in such a different light as to undermine confidence in the verdict.

3 Banks v. Dretke, 540 U.S. 668,691 (2004) (quotations omitted).

4 Favorable evidence is material, and its suppression is unconstitutional, “if there
5 is a reasonable probability that, had the evidence been disclosed to the defense, the result
6 of the proceeding would have been different.” United States. v. Bagley, 473 U.S. 667,
7 682 (1985). Reasonable probability is a probability sufficient to undermine confidence
8 in the outcome.” Id.

9 Materiality “must be evaluated in the context of the entire record.” United States
10 v. Agurs, 427 U.S. 97, 112 (1972). The mere possibility that undisclosed information
11 might have helped the defense, or might have affected the outcome of the trial, is
12 insufficient to establish materiality in the constitutional sense. Id. at 109-10. In addition,
13 in order to be material information within the meaning of Brady, the undisclosed
14 information or evidence acquired through that information must be admissible. United
15 States v. Kennedy, 890 F.2d 1056, 1059 (9th Cir. 1989). Petitioner must show how the
16 information or evidence would be both material and favorable to his defense.
17 Pennsylvania v. Ritchie, 480 U.S. 39, 58 n.15 (1987).

18 **V. Ineffective Assistance of Counsel**

19 The clearly established United States Supreme Court law governing ineffective
20 assistance of counsel claims is set forth in Strickland v. Washington, 466 U.S. 668
21 (1984). Baylor v. Estelle, 94 F.3d 1321, 1323 (9th Cir. 1996) (stating that Strickland
22 “has long been clearly established federal law determined by the Supreme Court of the
23 United States”); Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir. 1997). A habeas
24 petitioner must satisfy two requirements to demonstrate his assistance of counsel was so
25 defective that habeas relief is warranted. First, the petitioner must show that counsel’s
26 performance was deficient. Strickland, 466 U.S. at 687. “This requires showing that
27 counsel made errors so serious that counsel was not functioning as the ‘counsel’
28 guaranteed the defendant by the Sixth Amendment.” Id. Second, the petitioner must

1 show counsel’s deficient performance prejudiced the defense. Id. The test for prejudice
2 requires that the defendant show that there is a reasonable probability that, but for
3 counsel’s unprofessional errors, the outcome would have been different. Id. at 694. In
4 other words, petitioner must demonstrate his counsel’s error rendered the result
5 unreliable or the trial fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364, 372
6 (1993); Strickland, 466 U.S. at 694. Review of counsel’s performance is “highly
7 deferential” and there is a “strong presumption” that counsel rendered adequate
8 assistance and exercised reasonable professional judgment.” United States v. Ferreira-
9 Alameda, 815 F.2d 1251, 1253 (9th Cir. 1987); see Strickland, 466 U.S. at 690.
10 Petitioner must prove both elements. The court may reject his claim upon finding either
11 that counsel’s performance was reasonable or that the claimed error was not prejudicial.
12 Strickland, 466 U.S. at 700.

13 In this third federal habeas petition, Petitioner repeats several issues and arguments
14 raised in his trial, along with challenges already made on direct appeal and in prior post-
15 conviction challenges. Petitioner cannot be heard with respect to claims that have
16 already been adjudicated in his prior federal petition for habeas corpus relief. 28 U.S.C.
17 § 2244(b)(1). Even if Petitioner presents a claim that has not been previously adjudicated
18 by this Court, he must demonstrate that the factual predicate for the claim could not have
19 been discovered previously with due diligence; and he must also show by clear and
20 convincing evidence that if the facts underlying his claim are proven, and viewed in light
21 of the evidence as a whole, no reasonable factfinder would have found him guilty. 28
22 U.S.C. § 2244(b)(2). In addition, in order for the Court to consider his constitutional
23 claims, Petitioner must show it is more likely than not that no reasonable juror would
24 have found petitioner guilty beyond a reasonable doubt. See Schlup, 513 U.S. at 327.
25 As to each of his claims, Petitioner must demonstrate compliance with the requirements
26 of 28 U.S.C. § 2244(b).

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1 **DISCUSSION**

2 Petitioner is on death row because he is the person who brutally chose to slaughter
3 a father, a mother, and two children in the sanctity of the Ryen home, and leave another
4 child barely clinging to life. The post-conviction DNA testing has confirmed Petitioner’s
5 guilt, and the Court rejects Petitioner’s claims on the merits. After having conducted
6 mitochondrial DNA testing and EDTA testing, reviewed the parties’ papers, heard from
7 testimony from forty-two experts and witnesses, reviewed numerous exhibits, considered
8 the prior record, and listened to the parties’ oral arguments, the Court **DENIES**
9 Petitioner’s petition pursuant to 28 U.S.C. §§ 2254 and 2244, and on all grounds,
10 including Schlup v. Delo, Herrera v. Collins, Brady v. Maryland, and Strickland v.
11 Washington.

12 **I. Ninth Circuit’s En Banc Decision Regarding Mitochondrial DNA Testing and**
13 **EDTA Testing**

14 Petitioner’s successive petition challenges the post-conviction DNA evidence of
15 guilt by alleging that his blood was planted on a T-shirt, Trial Exhibit 169, and that
16 further testing of hairs would reveal the assailant. Based on representations made by
17 Petitioner regarding scientific testing capabilities, the Ninth Circuit en banc panel stated:

18 In his brief to us, Cooper states, “Through readily available mitochondrial
19 testing of blond hairs found in one of the victim’s hands, and testing for the
20 presence of the preservative agent EDTA on a T-shirt[] the State belatedly
claimed contained Mr. Cooper’s blood, the question of Mr. Cooper’s
innocence can be answered once and for all.”

21 The district court may be in a position to resolve this case very quickly. As
22 soon as Cooper’s application is filed, it should promptly order that these
two tests be performed in order to evaluate Cooper’s claim of innocence.

23 Cooper, 358 F.3d at 1124.

24 Therefore, on February 9, 2004, the Ninth Circuit issued an en banc decision that
25 allowed Petitioner to file a second or successive habeas corpus petition in this Court.
26 Cooper v. Woodford, 358 F.3d 1117 (9th Cir. 2004). Specifically, the Ninth Circuit

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1 stated that Petitioner’s guilt may be resolved through two scientific tests: (1)
2 mitochondrial DNA testing of hairs found on the victims, and (2) testing of the T-shirt
3 for EDTA preservative. Id. at 1123-24.

4 **II. Mitochondrial DNA Testing Fails to Establish that the Hairs in the Hands of**
5 **Jessica Ryen are from Other Potential Assailants**

6 The Court conducted mitochondrial DNA testing of hairs found in the hands of
7 the victims pursuant to the Ninth Circuit order. After remand, the Court held a tutorial
8 on April 2, 2004 regarding mitochondrial DNA and EDTA testing. Dr. Terry Melton,
9 President and CEO of Mitotyping Technologies, LLC; Dr. Kevin Ballard, Director of
10 Analytical Toxicology of National Medical Services; and Dr. Peter DeForest,⁵ a
11 criminalist, participated as Petitioner’s experts. Dr. Eva Steinberger, Assistant Chief for
12 New Programs at the California Department of Justice participated as Respondent’s
13 expert. (4/2/04 HRT.) On June 3-4, 2004, the Court held an evidentiary hearing where
14 Dr. Edward Blake, Dr. John Thornton and Mr. Steven Myers testified regarding previous
15 examination of the hair evidence for nuclear DNA testing in 2001. Dr. John Thornton
16 was a criminalist who was Petitioner’s expert at trial. Dr. Edward Blake was Petitioner’s
17 expert during the post-conviction DNA testing. Steven Myers is a Senior Criminalist at
18 the California Department of Justice Bureau of Forensic Services who was involved in
19 the post-conviction DNA testing.

20 **A. Post-Conviction DNA Testing of the Hairs**

21 At the evidentiary hearing, Dr. Blake and Mr. Myers testified regarding work
22 conducted during the post-conviction DNA testing and forensic examination of the hair
23 evidence. (See 6/03/04 HRT 135-178; 6/4/04 HRT 28-111.) In connection with the
24 hearing, Dr. Blake submitted a report detailing the previous forensic hair examination for
25 post-conviction DNA testing. (04-CV-656, Dr. Blake’s Report detailing Previous
26 Examination and Current Evaluation of the Hair Evidence dated 6/04/04, Doc. No. 161
27 (“Dr. Blake’s Report”).)

28 ⁵ Dr. DeForest appeared telephonically at the tutorial.

1 In post-conviction DNA testing in 2001, the hair was examined by highly qualified
2 scientists for suitability for nuclear DNA testing at the Department of Justice DNA
3 Laboratory in Richmond, California. (Dr. Blake’s Report at 2-18; 6/3/04 HRT 134-165;
4 6/4/04 HRT 31-91; 2 State Evidentiary Hr’g Reporters’ Tr. (“SEHRT”)⁶ 253-54.) The
5 selection and documentation of biological specimens suitable for DNA testing, including
6 hair, was done by Petitioner’s expert, Dr. Blake, DOJ Laboratory Director Gary Sims,
7 and Mr. Myers. (Dr. Blake’s Report at 2-18; Joint DNA Testing Agreement, ¶2.10.) Dr.
8 Blake and Mr. Myers looked at approximately 1,000 hairs visually and microscopically.
9 (Dr. Blake’s Report at 6-7; 6/3/04 HRT 140-41; 6/4/04 HRT 33-34; 2 SEHRT 275, 280.)
10 All of the hairs were examined using a stereomicroscope. Selected hairs were mounted
11 in order to be viewed under a compound microscope, which provides a higher
12 magnification. (Dr. Blake’s Report at 6-7; 6/3/04 HRT 157; 6/4/04 HRT 33-37; 2
13 SEHRT 278, 300.) There were only three hairs possessing anagen roots that were
14 identified by Dr. Blake and Mr. Myers for nuclear DNA testing.⁷ (Dr. Blake’s Report at
15 7-17; 6/3/04 RT 140-41; 6/4/04 RT 33-37; 2 SEHRT 281.) These hairs were two human
16 hairs collected from Doug Ryen’s right hand and a human hair collected from Chris
17 Hughes’ arm. (Dr. Blake’s Report at 17; see also 2 SEHRT 281.) The results of
18 the DNA testing of the there hairs were unsuccessful because no DNA was detected. (Dr.
19 Blake’s Report at 17; 6/3/04 RT 148, 156.)

20 Dr. Blake confirmed that the focus of the examination of the hair in 2001 was to
21 “identify, if possible, hairs recovered from the hands of the Ryen/Hughes victims that

22
23 ⁶ Reporters’ Transcripts of an evidentiary hearing before Judge Kennedy of the San Diego
24 Superior Court in 2003 are designated by a “SEHRT” and are lodged with the Court in Cooper I, 92-
CV-427, NOL filed Feb. 3, 2004, Reporter’s Tr., Vols. 1-3 dated June 23, 24 and 25, 2003 before Hon.
William H. Kennedy in Case No. CR-72787.

25 ⁷ “Hairs that are forcefully removed from the skin typically possess ribbon-like or club-like root
26 structures and a coating of root sheath cells . . . [and] called anagen roots. Hairs that have this type of
27 root structure contain moderate levels of nuclear DNA. When hair with this type of root structure also
28 possesses root sheath cells, the nuclear DNA levels may be quite large. Hairs that naturally fall out of
the skin after the hair root cells die and atrophy typically have the shape of the tip of a Q-tip swab; hair
roots with this type of root structure are called telogen roots. These hair roots do not possess any
significant amount of nuclear DNA.... Hair shafts and all hair roots contain at least some level of
detectable mitochondrial DNA.” (Dr. Blake’s Report at 6-7.)

1 possessed the properties of hair forcefully removed from the skin that would be expected
2 to be successful in a PCR based DNA analysis of nuclear genes.” (10 Resp. Evidentiary
3 Hr’g Ex. VV at 6; see Dr. Blake’s Report at 7; 6/4/04 HRT 33-37.)

4 Dr. Blake and Mr. Myers spent six days examining the hairs removed from the
5 hands of the victims in an effort to find hairs with anagen roots. (6/3/04 HRT 157-158.)
6 As Dr. Blake explained, during this forensic examination of the hair, Dr. Blake and Mr.
7 Myers were looking for pulled hairs from the hands of the victims and the arm of
8 Christopher Hughes so that they could potentially identify the assailant: “For the fairly
9 obvious reason that we were looking for here are hairs that may have come from the bad
10 guy or guys. So cut or broken hairs don’t fall into that category.” (6/4/04 HRT 38.) The
11 examination of the hairs in 2001 by Dr. Blake and Mr. Myers revealed only three anagen
12 hairs. (Dr. Blake’s Report at 17; 6/3/04 HRT 140-41; 6/04/04 HRT 34-37; 2 SEHRT
13 281.)

14 As Dr. Blake’s report detailing the previous examination and evaluation of the hair
15 evidence explains, there is no evidence to support the theory that hairs were pulled from
16 the assailant during the murders:

17 Hairs jerked from the scalp are expected to possess anagen root structures
18 and also frequently possess root sheath material at the hair root end.

19 . . .

20 The vast majority of the hairs associated with the hands of the Ryen/Hughes
21 victims of either broken or cut human hairs or animal hairs.

22 . . .

23 Since the vast majority of the hairs associated with the hands of the
24 Ryen/Hughes are either cut or broken human hairs or animal hairs, there is
25 no evidence to support the assertion that these hairs were pulled from the
26 scalp of an assailant or assailants.

27 (Dr. Blake’s Report at 17-18.)

28 From the previous forensic examination of the hairs by Dr. Blake and Mr. Myers,
29 three hairs possessing anagen roots were found and were tested for DNA extraction and
30 analysis. No human DNA was recovered from these hairs. (Dr. Blake’s Report at 17.)

31 ////

1 **B. Mitochondrial DNA Testing Results**

2 At the tutorial, Dr. Terry Melton, Petitioner’s mitochondrial DNA expert, testified
3 that mitochondrial DNA testing is different from nuclear DNA testing. (4/2/04 HRT 19-
4 25.) With nuclear DNA testing, it is possible to match with a high degree of specificity
5 an unknown sample of nuclear DNA to a reference sample of nuclear DNA. This is
6 because, except for twins, nuclear DNA is unique to the individual. (4/2/04 HRT 19.) In
7 contrast, mitochondrial DNA found in the hair is inherited maternally and is shared by all
8 maternal relatives. (4/2/04 HRT 19.) For this reason, mitochondrial DNA testing is not
9 able to conclusively identify the source of the hairs, but rather serves as an exclusionary
10 tool to rule out certain individuals as a possible donor of the hair:

11 [Mitochondrial DNA is] inherited from the mother. And all siblings of that
12 mother will have the same type. The mother will have the same type as her
13 mother and her grandmother and so forth. So, the primary difference
14 between nuclear and mitochondrial DNA, when it applies to forensics, is
15 that it is not a unique identifier. . . . It is a maternal lineage identifier. . . .

14 (4/2/04 HRT 19-25.)⁸

15 After considering the extensive post-conviction hair analysis done by Petitioner’s
16 expert and the testimony of Dr. Melton, Dr. Blake and Dr. Thornton, the Court ordered
17 mitochondrial DNA testing. The Court authorized Petitioner’s expert, Dr. Peter De Forest
18 to select ten hairs that were recovered from Jessica’s right and left hands and to select,
19 as a control, one animal hair covered with blood from the hair evidence sent from the
20 DOJ DNA Laboratory. (See 6/4/04 Order Re Mitochondrial DNA Testing, 04-CV-656,
21 Doc. No. 75.) In addition, the Court ordered testing of the two remaining hairs identified
22 in the 2001 post-conviction DNA testing as having anagen roots, D-4A (one hair from the
23

24 ⁸ Consistent with Dr. Melton’s testimony and verified by Dr. Edward Blake (6/4/04 HRT 59),
25 Mr. Steven Myers testified that up to seven percent of the Caucasian population have the most common
26 mitochondrial DNA sequence. (6/3/04 HRT 159.) Because mitochondrial DNA is unable to match an
27 unknown mitochondrial DNA type to a particular individual with an acceptable degree of certainty, this
28 testing is not able to positively identify the assailant of the Ryen/Hughes murders as contemplated by
the Ninth Circuit en banc order permitting a second or successive petition. In fact, mitochondrial DNA
testing cannot even positively identify whether any of the hairs are from one of the victims since
maternal relatives share a common mitochondrial DNA type. What the mitochondrial DNA testing may
do, however, is exclude people not sharing the mitochondrial DNA type found in the tested hairs.

1 right hand of Doug Ryen), E-1A (one hair from the arm of Chris Hughes) and D-4C,⁹ (one
2 hair from the right hand of Doug Ryen). (See 04-CV-656, Doc. No. 75, Order RE
3 Mitochondrial DNA Testing, filed 6/4/04.)

4 On August 2, 2004, Dr. Melton submitted a report regarding the results of the
5 mitochondrial DNA testing. (04-CV-656, Doc. No. 155, Mitochondrial DNA Testing
6 Report (“Dr. Melton’s Report”).) According to the report, the hairs contained in Jessica
7 Ryen’s hands were either animal hairs or hairs from Jessica herself or from someone
8 maternally related to her. (Dr. Melton’s Report at 6-8.) Two of the ten hairs selected by
9 Dr. DeForest, Petitioner’s expert, were from domestic dogs. (Dr. Melton’s Report at 3.)
10 The results confirmed that Jessica Ryen, Peggy Ryen, and Josh Ryen and their maternal
11 relatives could not be excluded as the donors of the tested hairs, including the hairs found
12 in Jessica Ryen’s hand. (Dr. Melton’s Report at 6-8.)

13 Six days of hair analysis in post-conviction DNA testing plus mitochondrial DNA
14 testing of hairs have been conducted to address Petitioner’s claim that a third-party
15 assailant committed the crime.¹⁰ This Court has responded fully to the concern expressed
16 by the Ninth Circuit regarding mitochondrial DNA testing of the blond or light brown
17 hair in Jessica’s left hand. In fact, this Court allowed Petitioner to test hairs from both
18 of Jessica’s hands. The Court also permitted the testing of two hairs from Doug Ryen’s
19 right hand and one hair from Christopher Hughes. The testing failed to identify another
20 assailant and confirmed that all tested hairs most likely came from one or more of the
21 victims.

22 This should not be surprising. The hairs adhered to the victims’ bodies, including
23 their hands, because there was a large amount of blood on the victims and a large amount
24 of hair on the debris-ridden carpet. Also, the victims each sustained hatchet wounds to
25

26 ⁹ It was acknowledged that D-4B was consumed in nuclear testing and had no root. Therefore,
27 the Court allowed testing of D-4C, a hair with a telogen root structure. (6/4/04 HRT 112.)

28 ¹⁰ Mitochondrial DNA analysis of one hair costs \$2,500. In total, analysis of the fourteen hairs
cost approximately \$50,000 which includes testing and analysis by Dr. Melton, who conducted the
mitochondrial DNA testing and Dr. De Forest, who selected the hairs.

1 the head, causing clumps of cut hair to fall to the ground. Both animal and human hair
2 were recovered from the hands of the victims. Just as with the animal hairs, the cut and
3 shed human hairs adhered to the bloodied victims' hands because the victims came in
4 contact with the carpet when they were dying on the floor. In this case, both the state and
5 federal courts have thoroughly reviewed the evidence, making reasoned decisions that the
6 evidence of Petitioner's guilt is overwhelming. The Court concludes that mitochondrial
7 DNA testing has failed to show that someone other than Petitioner committed the
8 murders.

9 **C. Ineffective Assistance of Counsel Regarding Hair Evidence**

10 Petitioner claims he received ineffective assistance of counsel regarding counsel's
11 failure to introduce photographic evidence regarding the hair evidence. Petitioner's claim
12 does not satisfy the requirements of 28 U.S.C. § 2254 or § 2244(b). The examination
13 of the hairs in 2001 by Dr. Blake and Mr. Myers revealed no pulled hairs, let alone
14 clumps of pulled hairs, in the hands of the victims. (Dr. Blake's Report at 17-18; 6/3/04
15 HRT 140-41; 6/4/04 HRT 34-37.)

16 Pursuant to this successive petition, the Court ordered mitochondrial DNA testing
17 of hair evidence. The mitochondrial testing results show that Jessica Ryen, Peggy Ryen,
18 and Josh Ryen and their maternal relatives cannot be excluded as the donors of the tested
19 hairs, including the hairs found in Jessica Ryen's hand. (Dr. Melton's Report at 6-8.)
20 Thus, Petitioner's "clutching" theory has no merit and is not a proper basis of an
21 ineffective assistance of counsel claim. Accordingly, the Court **DENIES** this claim on
22 the merits and under 28 U.S.C. § 2224(b).

23 **1. The Court DENIES the Claim of Ineffective Assistance of Counsel** 24 **Regarding Hair Evidence**

25 This Court accords deference to the California Supreme Court decision denying
26 Petitioner's claim on the merits. 28 U.S.C. § 2254(d). The state court's denial of
27 Petitioner's claim on the merits is not contrary to federal law as enunciated by the United
28 States Supreme Court in Strickland and does not rest on an unreasonable determination

1 of the facts within the meaning of 28 U.S.C. § 2254(d). As both the California Supreme
2 Court and this Court have already expressly found, Petitioner “received an
3 extraordinarily vigorous and able defense.” Cooper I, 92-CV-427, Aug. 25, 1997 Order
4 at 8 (quoting Cooper, 53 Cal.3d at 824). Defense trial counsel’s extensive educational
5 background and prior litigation experience were developed in the evidentiary hearing
6 before this Court in Cooper I, 92-CV-427, Aug. 25, 1997 Order at 8. Moreover, both this
7 Court and the California Supreme Court found the combination of evidence of Petitioner’s
8 guilt to be overwhelming. Cooper I, 92-CV-427, Aug. 25, 1997 Order at 8 (quoting
9 Cooper, 53 Cal.3d at 836). Accordingly, the California Supreme Court’s decision
10 rejecting the merits of Petitioner’s claim is not contrary to federal law, nor an
11 unreasonable determination of the facts, since defense counsel was not deficient, nor was
12 Petitioner prejudiced by his attorney’s failure to pursue an erroneous theory. This Court
13 therefore **DENIES** this claim pursuant to 28 U.S.C. § 2254(d).

14 **2. Petitioner Does Not Satisfy the Requirements of § 2244(b)**

15 If Petitioner has previously adjudicated a claim of ineffective assistance of counsel
16 in this Court, his pending claim of ineffective assistance of counsel must be dismissed.
17 28 U.S.C. § 2244(b). New factual grounds in support of a legal claim that has already
18 been presented, i.e., ineffective assistance, are not sufficient to evade the mandatory
19 dismissal requirement of 28 U.S.C. § 2244(b). See Babbitt, 177 F.3d at 746. Petitioner
20 already complained about his defense trial counsel’s performance in a myriad of claims
21 of ineffective assistance of trial counsel in his first habeas corpus petition, Cooper I, 92-
22 CV-427, Suppl. Pet. at 63-147, all of which were denied on the merits by this Court.
23 Cooper I, 92-CV-427, Aug. 25, 1997 Order at 7-33. The gravamen of the claim of
24 ineffective assistance of trial counsel is the same, regardless of whether Petitioner
25 presents new and different legal arguments or different factual allegations. See Babbitt,
26 177 F.3d at 746. Petitioner made allegations about trial counsel unreasonably failing to
27 advocate regarding forensic evidence. (See Cooper I, Suppl. Pet. at 121-141.) The thrust
28 of Petitioner’s attack on his defense counsel’s failure to advocate regarding the evidence

1 of the hair in the victims' hands is the same here. The Court therefore **DENIES** this claim
2 pursuant to 28 U.S.C. § 2244(b).

3 Petitioner's claim is also **DENIED** because he could have presented the legal and
4 factual basis of his claim previously with due diligence in the first petition. 28 U.S.C. §
5 2244(b). That hair was recovered from the victims' hands was a fact known to the
6 defense before and throughout the trial. (Answer, Ex. 103 (defense trial file).) Hair
7 evidence was collected from the victims during the autopsy and provided for examination
8 to Petitioner's defense trial expert Dr. Thornton, then a practicing criminalist and forensic
9 science professor.

10 Assuming arguendo that Petitioner could demonstrate that the factual and legal
11 basis of his claim could not have been discovered previously with due diligence, he would
12 still be required to demonstrate that the facts underlying his claim, if proven and viewed
13 in light of the evidence as a whole, would be sufficient to establish by clear and
14 convincing evidence that, but for the constitutional error, no reasonable juror would have
15 found him guilty of the Ryen/Hughes murders. 28 U.S.C. § 2244(b). Petitioner does not
16 meet this standard. The guilt of Petitioner was demonstrated by overwhelming evidence
17 at trial and reaffirmed through post-conviction DNA testing. Moreover, the mitochondrial
18 DNA testing failed to substantiate his theory of another assailant. Accordingly, the Court
19 **DENIES** his claim of ineffective assistance of counsel.

20 **III. EDTA Testing**

21 At trial, Petitioner introduced a T-shirt (Trial Exhibit 169) found within two miles
22 from the crime scene into evidence in support of his claim that it belonged to the real
23 killer. (Trial Ex. 169; 87 RT 3065; 105 RT 7587). This exhibit was never used by the
24 prosecution at trial as incriminating evidence, but solely by the defense. As a result, the
25 prosecution at trial did not link the T-shirt to Petitioner's judgment of conviction and
26 sentence of death.

27 The T-shirt was subject to DNA testing in 2001 at Petitioner's request. The results
28 of the DNA testing indicated that blood on the T-shirt belonged to Petitioner and the

1 victims. These DNA tests were done pursuant to a Joint DNA Forensic Testing
2 Agreement entered on May 10, 2001. (Joint DNA Agreement dated May 10, 2001.)

3 These results provide strong evidence of Petitioner's guilt. Specifically, as to the
4 T-shirt, the joint DNA testing report found the following:

5 a bloodstain on a tee shirt found on the side of a road within two miles of the Ryen
6 home had DNA matching Cooper's and partial DNA profiles matching that of two
7 of the victims, Doug and Peggy Ryen. The DNA matching Cooper's found on the
8 t-shirt occurs at random in the population with a frequency of about 1 in 110
9 million for African Americans, 1 in 16 million for Caucasians, and 1 in 12 million
10 for Western Hispanics.

11 (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002 at 1-4.)

12 Faced with the overwhelming evidence confirming Petitioner's guilt obtained from
13 the agreed-upon post-conviction testing, Petitioner claimed to the Ninth Circuit that the
14 blood on the T-shirt had been planted. Based on the last-minute representations made by
15 Petitioner regarding scientific testing capabilities, the en banc panel of the Ninth Circuit
16 concluded:

17 First, Cooper asks that the blood on the t-shirt be tested for the
18 presence of the preservative EDTA. The presence of such a
19 preservative would show that his blood was not on the t-shirt
20 at the time of the killings, but was rather placed there at some
21 later time.

22 Cooper, 358 F.3d at 1124.

23 In a separate concurring opinion, Judges Silverman and Rawlinson observed as
24 follows:

25 If the blood was planted, [Cooper] says, it will reflect a high
26 level of EDTA, a preservative agent contained in the vial in
27 which the blood was stored. A high level of EDTA will show
28 that the blood came from the vial rather than directly from him,
proving that the police tampered with evidence in an effort to
frame him. Conversely, if the blood is not contaminated by
EDTA, the shirt conclusively proves his guilt Since
Cooper's guilt can be quickly and definitively determined by
means of a simple test, there is no reason not to have it
performed prior to his execution.

Id. at 1125.

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1 Petitioner represented to the Ninth Circuit that Dr. Ballard and his lab could
2 perform a scientific test that would reveal whether tampering with the blood on the T-shirt
3 had occurred. According to Dr. Kevin Ballard's declaration:

4 NMS [National Medical Services] and myself specifically can perform the
5 EDTA test to determine whether the blood on the T-shirt . . . had been
previously stored in a test tube containing EDTA.

6 (Petitioner's Application to the Ninth Circuit, Appendix No. 42 at 3, 10.)

7 On remand, this Court complied with the Ninth Circuit's order to test the T-shirt
8 for elevated levels of EDTA to determine whether tampering occurred. Now, over one
9 year after the remand, the process has not been "quick," as Petitioner promised.
10 Nevertheless, the tests have not supported Petitioner's theory of evidence tampering.
11 Tests performed by Petitioner's chosen expert, Dr. Ballard, failed to find elevated levels
12 of EDTA in the subject stain. These results confirm that Petitioner's tampering theory
13 lacks merit, and supplement the already overwhelming evidence of Petitioner's guilt in
14 the murders of the Ryen family and Christopher Hughes.

15 **A. Development of the EDTA Testing Protocol**

16 On April 2, 2004, the Court held a tutorial presented by the parties which addressed
17 EDTA testing. Dr. Ballard participated in the tutorial for Petitioner and Dr. Eva
18 Steinberger participated in the tutorial for Respondent. Both experts testified that
19 the known concentration in one microliter of blood from a purple-topped tube ¹¹ was 1300
20 nanograms.¹² (See 4/2/04 HRT 54, ll. 22-25; 113, l. 9.)

21 Based on the recommendations of the parties, the Court adopted a "control" method
22 of testing in which the amount of EDTA detected in a stain would be compared to the

23
24 ¹¹ Petitioner alleged a theory of tampering involving blood from a purple-topped tube. (04-CV-
25 656, Doc. No. 97 at 8.) Following his arrest for the murders, Petitioner's blood was drawn into a purple-
26 topped tube for the San Bernardino County Sheriff's Crime Lab. (Id.) This purple-topped tube contains
only EDTA as a preservative. (Id.) The San Bernardino County Sheriff's crime lab records do not
reflect the receipt of any other samples. (Id.)

27 ¹² A nanogram is one billionth of a gram, a microgram is one millionth of a gram, and a milligram
28 is one thousandth of a gram. Similarly, a microliter is one millionth of a liter, or one thousandth of a
milliliter. (Tutorial Tr., April 2, 2004, at 55, ll. 11-24.)

1 amounts of EDTA found in various control swatches from other non-stained portions of
2 the T-shirt. This method was proposed by Dr. Ballard and by Mr. Marc LeBeau, Chief
3 of the Chemistry Unit of the FBI Laboratory in Quantico, Virginia. (04-CV-656, Doc.
4 No. 51, Ballard Decl. ¶ 3; Doc. No. 23, Ex. 2, LeBeau Decl. ¶¶ 7-10.) Dr. Ballard agreed
5 that “while it is always helpful if it is possible to measure the amount of blood,¹³ it is
6 actually not necessary because there are ways to determine whether or not EDTA findings
7 are meaningful, specifically through the appropriate use of unstained control specimens
8 from the same evidence item.” (04-CV-656, Doc. No. 51, Ballard Decl. ¶ 3.) Because
9 blood does not naturally contain any EDTA,¹⁴ the EDTA levels in the stain and the
10 background material should be comparable. If the EDTA found in the stain greatly
11 exceeded the amount of the EDTA found in the background material, Petitioner and Dr.
12 Ballard advanced that it may support a theory of planting. In this case, there appeared to
13 be an adequate area for control testing in the T-shirt, so that a control method of
14 comparison of relative levels of EDTA could theoretically be done consistent with the
15 Ninth Circuit order to conduct EDTA testing.

16 The Court reserved judgment on the admissibility of the test results under Daubert
17 v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), and ordered briefing and a hearing to
18 address the admissibility of EDTA evidence. (See 04-CV-656, Doc. Nos. 95 & 7.)
19 Respondent vigorously maintained that any EDTA testing ran afoul of Daubert. After
20 briefing was submitted by the parties, on June 17, 2004, the Court denied without
21 prejudice Respondent’s motion regarding inadmissibility of the EDTA evidence and
22 reserved the right to later rule on the admissibility of the EDTA testing evidence under
23 Daubert. (04-CV-656, Doc. No. 97.)

24 The EDTA protocol was developed by the parties and the Court over a three-month
25 period. By invitation of the Court, Petitioner filed the proposed protocol on June 4,

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27 ¹³ Dr. Ballard had offered to “eyeball” the volume of blood in a subject stain. (4/2/04 HRT 123.)
28 For obvious reasons, Dr. Ballard’s “eyeball” measurement of blood volume was not acceptable to the
Court.

¹⁴ EDTA is not a naturally occurring molecule. It is a synthetic chemical that was patented
in 1935. (4/2/04 HRT 54.)

1 2004,¹⁵ and Respondent filed its opposition on June 29, 2004. Respondent objected that
2 Petitioner’s proposed testing of “any areas that appear to contain blood that have not
3 previously been tested and, if possible, the remainder of any stains previously tested” was
4 vastly overbroad. (04-CV-656, Doc. No. 106 at 1.) The Court agreed that such expansive
5 testing was not warranted under Petitioner’s own theory. Because Petitioner’s theory was
6 that all stains containing his blood were planted, testing of any one of his known blood
7 stains from the post-conviction DNA testing should confirm or disprove Petitioner’s guilt.

8 The Court ordered Petitioner to submit a more detailed revised proposed protocol
9 for EDTA testing, which Petitioner filed on July 13, 2004. Respondent was then ordered
10 to submit a response, which Respondent filed on July 27, 2004. Petitioner filed a reply
11 to Respondent’s response on August 4, 2004. At the hearing on August 13, 2004, the
12 Court ordered that the parties meet and confer regarding the EDTA protocol and report
13 back to the Court on August 24, 2004. The Court held additional status conferences to
14 revise the EDTA testing protocol with the parties on August 25, 26, and 27, 2004 and
15 September 3 and 7, 2004 to finalize the EDTA testing protocol and discuss EDTA testing
16 procedures.

17 Petitioner consulted with experts for the development of the protocol. For example,
18 at a status conference on August 26, 2004, the Court provided the parties with a copy of
19 its proposed testing order and offered that “[w]e could just go through it right now and
20 get your comments . . . [and] incorporate it.” (8/26/04 HRT 209, ll. 17-18.) Petitioner
21 declined and asked for an additional day to review the proposed order so that he could
22 consult with Drs. De Forest and Ballard “to make sure that they don’t see any issues[.]”
23 (8/26/04 HRT 210, ll. 1-3.) At that time, an issue also arose as to the appropriate buffer
24 solution to use in testing, methanol or phosphate buffered saline (“PBS”). Before any
25 decision was made regarding the buffer solution, Petitioner’s counsel requested and was

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28 ¹⁵ The Court authorized over thirty hours for Petitioner to consult with Dr. Ballard prior to June 4, 2004, and twenty additional hours thereafter. In addition, the Court authorized \$12,063 for Dr. DeForest.

1 granted permission to consult with Dr. Ballard. (8/26/04 HRT 207, ll. 13-15.) On August
2 27, 2004, in another telephonic conference in which the parties had the opportunity to
3 comment on the proposed order, Petitioner's counsel explained that PBS rather than
4 methanol was the appropriate buffer, based on his consultations with his experts: "[Dr.
5 De Forest] actually expressed concern about the methanol issue and the like, and he gave
6 me a long discussion about it, and it was enough chemistry for me." (8/27/04 HRT 2, ll.
7 15-18.) Based on this recommendation, the Court adopted PBS as the appropriate buffer
8 solution for the EDTA protocol.

9 The record is replete with examples where Petitioner's counsel represented to the
10 Court that he was consulting with his experts on the details of the EDTA protocol. (See,
11 e.g., 8/27/04 HRT 7, ll. 12-19 ("I'd have to defer to . . . De Forest on that and . . . Dr.
12 Ballard."); 5/12/04 HRT 45, l. 25; 8/26/04 HRT 202, ll. 7-11; 9/3/04 HRT at 8-9.)

13 Following this extensive dialogue with the parties, on Aug. 27, 2004, the Court
14 issued an EDTA testing order detailing the procedure for EDTA testing to be conducted
15 on the T-shirt.¹⁶ In the original EDTA testing order, Petitioner's criminalist, Dr. Peter De
16 Forest, was designated to select the appropriate area of stain 6G for testing and to select
17 the appropriate control areas around 6G and to perform the extraction. (See 04-CV-656,
18 EDTA Testing Order filed August 27, 2004.) The Court selected 6G because previous
19 DNA testing had indicated that 6G contained Petitioner's blood as the sole, or major
20 donor and further nuclear DNA testing could potentially be avoided. The Court
21 recognized that any testing should resolve Petitioner's theory of tampering, which asserts
22 that all blood from Petitioner found on the T-shirt is necessarily planted.

23 After working with the parties for three months to develop the EDTA testing order,
24 the Court scheduled the testing to begin on September 7, 2004. On the evening of
25 September 3, 2004, the Friday before testing was to begin the following week, Dr. De
26 Forest informed the Court via fax that he did not wish to continue working on this case

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28 ¹⁶ At no time during this three-month period did Petitioner suggest the inclusion of presumptive
blood testing as part of the EDTA testing protocol, even for the control areas. In fact, Petitioner's expert
at the time, Dr. DeForest, recognized the protocol as "unusually detailed" in his letter dated July 20,
2004. (See 04-CV-656, De Forest Ltr. dated 7/20/04.)

1 based on the court-ordered protocol. Dr. De Forest stated that he would “not agree do
2 (sic) any sampling according to this protocol” and that “unless [he] ha[d] the freedom and
3 flexibility to design the sampling protocol in conjunction with a criminalist representing
4 the prosecution, [he] d[id] not wish to continue.” (04-CV-656, Ltr. from Dr. Peter R. De
5 Forest to Court dated Sept. 3, 2004 filed under seal on Nov. 9, 2004.)

6 Therefore, on September 7, 2004, the Court held a status conference concerning the
7 selection of another expert and laboratory to conduct the extraction part of the testing.
8 During that conference, the Court permitted the parties to suggest alternative labs of their
9 choosing but stated that “[i]n the absence of an agreement, I will choose Selmark (sic),
10 a reputable lab, to just do the prep.” (9/7/04 HRT 6, ll. 12-14.) At that time, Respondent
11 stated “we have no objections to Selmark (sic). We consider it to be a well-qualified and
12 respected lab.” (Id. at 7.) Petitioner also agreed that Cellmark is “very highly qualified”
13 with a “very high reputation.” (Id. at 13, l. 15.) Dr. Lewis Maddox of Cellmark was
14 designated to conduct the extraction, with Dr. Ballard and Dr. Gary Suizdak, Associate
15 Professor and Senior Director of the Mass Spectrometry Lab at the Scripps Research
16 Institute, to do separate EDTA testing. (Id. at 22.) On September 7, 2004, the Court
17 issued an amended EDTA Testing Order addressing the change in experts replacing Dr.
18 De Forest with Cellmark to conduct the extraction, and retaining Dr. Ballard as
19 Petitioner’s chosen expert for the EDTA testing.

20 **B. Administration of the EDTA Test**

21 On September 13, 2004, Cellmark’s Dr. Maddox and Respondent informed the
22 Court that area 6G had been consumed in prior testing and was not suitable for EDTA
23 testing and requested the Court’s guidance.¹⁷ The Court ordered Dr. Maddox, in

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28 ¹⁷ Petitioner’s post-conviction experts also knew that area 6G had been consumed in prior testing. In good faith, both sides mistakenly thought that 6G was still available.

1 consultation with Mr. Steven Myers,¹⁸ to select an appropriate stain area and to prepare
2 it for EDTA testing in accordance with the Amended EDTA Testing Order filed
3 September 7, 2004. (See 04-CV-656, Doc. No. 235.) Prior post-conviction DNA testing
4 done by Petitioner’s expert and Respondent showed that areas 6J and 6K “were consistent
5 with having Kevin Cooper as a clear majority contributor.” (Resp’t Opp. to Motion for
6 Order Re EDTA Testing, Ex. A ¶ 14.) Therefore, Dr. Maddox, in consultation with Mr.
7 Myers selected an area between stains 6J and 6K.¹⁹ (Id.)

8 After the extraction was completed, the vials containing the samples were shipped
9 to Dr. Ballard and Dr. Suizdak to conduct double-blind EDTA testing. The test results
10 were submitted to the Court on October 4, 2004. The Court issued an order regarding the
11 EDTA test results and provided the reports of Drs. Maddox, Ballard and Suizdak to the
12 parties. On October 29, 2004, Petitioner and Respondent filed their respective analyses
13 of the EDTA test results. On November 5, 2004, Respondent filed a response to
14 Petitioner’s analysis of the EDTA test results and Petitioner filed a response to
15 Respondent’s analysis of the EDTA test results on November 8, 2004.

16 On November 15, 2004, the Court held a hearing concerning EDTA testing results
17 of the T-shirt. The parties agreed that DNA testing was required to determine whether
18 the main stain fabric cut-out from the EDTA testing contained Petitioner’s blood.²⁰
19 Petitioner and Respondent concurrently filed a proposed protocol for DNA testing on
20

21 ¹⁸ The Court declined to fund a third expert on the short notice following Dr. DeForest’s decision
22 not to participate. This additional expenditure was not approved as part of the budget required to be
23 submitted to the Court, the Ninth Circuit Capital Committee and the Judicial Council. Petitioner had
24 already agreed to Cellmark as a “very highly qualified” and “very well respected” substitute (9/7/05 HRT
13, l. 15), and Dr. Maddox of Cellmark participated in the selection. Moreover, the stain selected by Dr.
Maddox and Mr. Myers had previously been identified by Petitioner’s DNA expert as having Petitioner
as the major donor.

25 ¹⁹ This was a logical choice. Because Petitioner’s claim is that only his blood was planted, this
26 theory would be most relevantly explored by testing an area known to contain Petitioner’s blood. As
27 Dr. Ballard has previously testified, “Once EDTA is extracted from a sample, the sample can no longer
be used for DNA testing.” See Pompey, No. S-1594-89 slip op. at 11.

28 ²⁰ Dr. Ballard did not inform this Court or the Ninth Circuit what he had previously testified to
in Pompey – that DNA testing cannot be performed on a sample following EDTA analysis. Pompey,
No. S-1594-89, slip op. at 11.

1 November 8, 2004 and both parties filed responses on November 12, 2004. On
2 November 19, 2004, the Court held a telephonic hearing about the proposed DNA
3 protocols. After discussion with the parties, the telephonic hearing was continued to
4 November 22, 2004 in order to allow the parties to further consult with their respective
5 experts. On November 24, 2004, based on the proposed protocols, the Court filed a
6 Protocol for DNA Testing of the Main Stain Fabric Cut-Out and Control. Steven Myers,
7 Respondent's expert, and Marc Taylor, Petitioner's expert, performed the DNA testing.

8 From the results of that testing, Petitioner cannot be excluded as a contributor of
9 the DNA extracted from the subject cut-out²¹ while Peggy Ryen, Jessica Ryen, Josh Ryen,
10 Doug Ryen, and Chris Hughes are each eliminated as a possible contributor of the
11 interpreted profile. (04-CV-656, Doc. No. 305, Physical Evidence Examination Report
12 and Report of Monitoring of DNA testing filed 12/23/04.)

13 **C. The EDTA Test Results Do Not Support Petitioner's Theory of**
14 **Tampering**

15 **1. Summary of the EDTA Test Results**

16 On September 13, 2004, Cellmark performed extraction procedures on the T-shirt
17 in accordance with the Court's September 7, 2004 order. The extracts were prepared in
18 PBS buffer from a stained area of the T-shirt and from five control areas of the T-shirt that
19 did not appear to be stained. (04-CV-656, Doc. No. 244, Report at 1.) A Control T-shirt
20 was prepared in compliance with the Court's order. (Id.) From that Control T-shirt,
21 extracts were prepared using a human blood stain containing EDTA, a human blood stain
22 without EDTA, and an area that was not stained with human blood. (Id.) A PBS buffer
23 reagent blank control that contained no EDTA was also prepared. In total, there were ten
24 extracts. The extracts were divided, the specimens coded to conceal their contents and
25 sent to the experts.

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²¹ The subject stain revealed a partial profile with interpretable results at four STR loci and amelogenin. (See 04-CV-656, Doc. No. 305, Physical Evidence Examination Report filed 12/23/04.)

1 Dr. Ballard's results were as follows:

| 2 Specimen No. | 3 Specimen Contents Prepared from: | 4 Approximate Amount of EDTA (in nanograms) on the Original Cloth Cutting ²² |
|-----------------|---|---|
| 5 F041568 01.2 | 6 Stained area of T-shirt | 7 110 |
| 8 F041568 02.2 | 9 Control 1 of T-shirt | 10 220 |
| 11 F041568 03.2 | 12 Control 2 of T-shirt | 13 360 |
| 14 F041568 04.2 | 15 Control 3 of T-shirt | 16 160 |
| 17 F041568 05.2 | 18 Control 4 of T-shirt | 19 110 |
| 20 F041568 06.2 | 21 Control 5 of T-shirt | 22 16 |
| 23 F041568 07.2 | 24 Stain made from unpreserved blood on the Control T-shirt | 25 7 |
| 26 F041568 08.2 | 27 Stain made from blood preserved in a purple-topped tube on the Control T-shirt ²³ | 28 1100 |
| 29 F041568 09.2 | 30 Unstained area from the Control T-shirt | 31 6 |
| 32 F041568 10.2 | 33 PBS Buffer Reagent Blank Control | 34 None detected |

35 (04-CV-656, Doc. No. 22, Dr. Ballard's Test Results at 2.)

36 Dr. Suizdak also conducted EDTA testing on the ten specimens. Dr. Suizdak was
37 without the benefit of Dr. Ballard's method for EDTA testing, as Dr. Ballard requested
38 that his EDTA testing methodology be sealed.²⁴ On October 27, 2004, after he had
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43 ²² Dr. Ballard estimated this total using the levels of EDTA he found in 100 microliters of
44 fluid to calculate the amount in the entire 600-microliter sample prepared by Cellmark from each
45 cloth cutting.

46 ²³ This blood contained the standard concentration of EDTA found in a purple-topped tube, 1300
47 ng/ μ L.

48 ²⁴ Although Dr. Suizdak, an Associate Professor and Senior Director of the Mass Spectrometry
49 Lab at the Scripps Research Institute (04-CV-656, Doc. No. 204), was qualified in mass spectrometry,
50 he had never done EDTA testing and analysis and agreed to participate based on the goal of publication.
51 (8/27/04 HRT at 22, ll. 203; 23, ll. 6-8.) One problem encountered in this case was while many labs like
52 the Scripps Research Institute possess the equipment for the test, there are no other scientists that
53 regularly perform this type of testing.

1 completed his EDTA testing and submitted his measurements to the Court, Dr. Suizdak
2 retracted his report based on EDTA contamination. (04-CV-656, Doc. No. 322, Ltr. from
3 Dr. Gary Suizdak to Court filed under seal on October 27, 2004). Dr. Suizdak had found
4 significant levels, 313 nanograms, of EDTA in the PBS buffer reagent blank control
5 sample where zero EDTA was the known control. PBS buffer reagent contains no EDTA.
6 If the test had been properly carried out, the PBS buffer reagent blank control sample
7 should have been found to contain zero nanograms of EDTA. According to both Dr.
8 Suizdak and Respondent's expert Terry D. Lee, Ph.D., the presence of EDTA in the
9 control sample indicates that Dr. Suizdak's samples were most likely contaminated by
10 EDTA present in his lab prior to his testing. (Resp't Analysis of EDTA Test Results filed
11 Oct. 29, 2004, Lee Decl. ¶ 6.) As Dr. Lee explained, "once a sample is contaminated,
12 there is no way to go back and obtain an accurate result." (Id.) Because, in the absence
13 of valid control specimens, the Court cannot rely on Dr. Suizdak's results, it will focus
14 its analysis on the results of Petitioner's chosen expert, Dr. Ballard.

15 **2. Analysis of EDTA Testing Results**

16 Petitioner's post-conviction DNA expert identified the area in between 6J and 6K
17 to have Petitioner as the majority contributor to those stains. This stain area ("subject
18 stain") was tested by Dr. Ballard, along with five control areas around the subject stain.
19 The testing conducted by Petitioner's expert, Dr. Ballard, is inconsistent with Petitioner's
20 theory of tampering. If Petitioner's theory were correct, there would be spiked levels of
21 EDTA in the subject stain on the shirt relative to the levels of EDTA found in the
22 background material. Dr. Ballard's testing revealed the opposite: that the subject stain
23 contains a level of EDTA (1) lower than most of the controls on the T-shirt, and (2)
24 dramatically lower than the level of EDTA expected in a tampering scenario involving
25 blood from a purple-topped tube.

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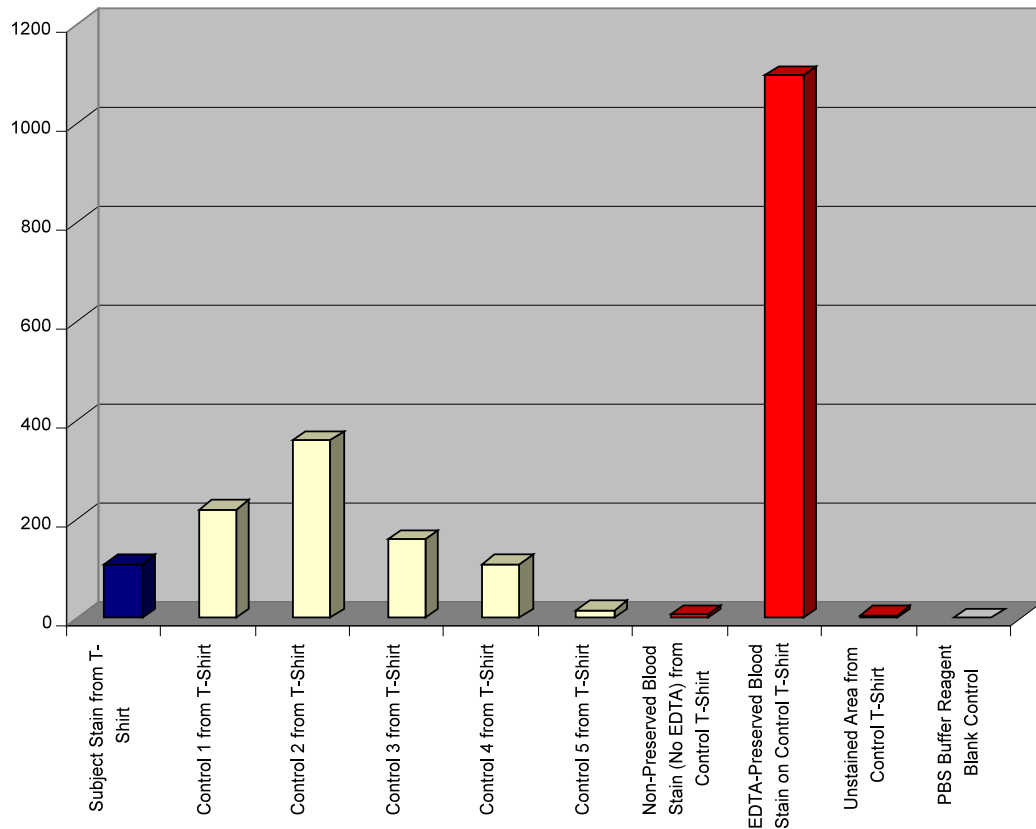
1 According to Dr. Ballard, approximately 110 nanograms of EDTA were present in
2 the subject blood stain. This amount was the second lowest for all of the samples taken
3 from the T-shirt. For the controls, the average amount of EDTA found was 173
4 nanograms, with a range from 16 to 360 nanograms. The EDTA in the subject blood stain
5 is below the average for all five control areas on the T-shirt. This similarity between the
6 level of EDTA found in the background and the level found in the subject stain does not
7 support Petitioner’s theory that the blood was planted. As Petitioner represented to the
8 Ninth Circuit, “[i]f the blood was planted . . . it will reflect a high level of EDTA.”
9 Cooper, 358 F.3d at 1124. But the flip side of that coin, as observed by Judges Silverman
10 and Rawlinson in their concurrence, is that “if the blood is not contaminated by EDTA,
11 the shirt conclusively proves [Cooper’s] guilt.” Dr. Ballard’s results place Petitioner
12 squarely within that second scenario. The EDTA level in the subject stain is not elevated,
13 but is instead lower than that of most of the control areas. As a result, the test refutes
14 Petitioner’s tampering theory.

15 The results from the subject stain dramatically differ from the results from the
16 Control T-shirt, on which blood was “planted” from a purple-topped tube. On the
17 Control T-shirt, blood from a purple-topped tube containing EDTA as a preservative was
18 “planted” in a stain similar in size to the subject stain. In that sample, Dr. Ballard found
19 1100 nanograms of EDTA, as expected. The “planted” blood on the control T-shirt
20 reflects an EDTA level ten times as great as the level of EDTA detected in the subject
21 stain (110 ng). If, as Petitioner contends, Petitioner’s blood had indeed been placed on
22 the T-shirt unnaturally, there should be a level of EDTA similar to--not dwarfed by--that
23 found in the “planted” blood on the Control T-shirt.

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Dr. Ballard's EDTA Test Results

(in nanograms)



The controls built into this testing process confirm Dr. Ballard's results. The PBS buffer reagent blank control contains no EDTA, and Dr. Ballard found none. (Resp't Analysis of EDTA Test Results filed Oct. 29, 2004, Lee Decl. ¶ 3.) The specimens from the unstained area of the Control T-shirt, as well as the area stained with blood without EDTA, had minuscule levels of EDTA--6 and 7 nanograms, respectively. The specimen created from the blood stain with EDTA had 1100 nanograms, which represents an 84% recovery of the expected amount of EDTA in that sample. (*Id.*) These controls confirm that the levels of EDTA in the T-shirt were accurately measured.

1 From the test data, the Court concludes that the level of EDTA in the subject stain
2 is 110 nanograms. Comparing the EDTA level of the subject stain to that for the control
3 specimens, the Court concludes there is no reliable evidence of tampering. Similarly,
4 when one compares the EDTA level in the subject stain to the high level present in the
5 preserved blood “planted” on the Control T-shirt, 1100 ng, tampering becomes even less
6 probable. In short, 110 ng of EDTA in the subject stain is not significant to show
7 tampering.

8 Further testing is unnecessary given Petitioner’s inability to show from these
9 results the support for his tampering theory. Accordingly, the Court finds Petitioner’s
10 theory of tampering to be without merit.

11 **D. EDTA Testing Falls Short of the Standards for Reliability**
12 **Set by Daubert and the Federal Rules of Evidence**

13 Although the absence of elevated levels of EDTA does not support Petitioner’s
14 theory of evidence tampering, the Court additionally concludes that EDTA testing lacks
15 sufficient indicia of reliability to be admissible under Daubert v. Merrell Dow
16 Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). When EDTA testing was presented as
17 an option to the en banc Ninth Circuit on the eve of execution, it was promoted as a
18 basic, reliable test that could be easily administered to establish Petitioner’s culpability
19 in the murders “once and for all.” Cooper, 358 F.3d at 1124. These representations
20 regarding the simplicity of EDTA testing in the forensic context were misleading.

21 Petitioner admits that EDTA testing has only been offered for admission in two
22 cases: People v. Orenthal J. Simpson, and State of New Jersey v. Josh Pompey, No. S-
23 1594-89 (N.J. Super. April 10, 1997). In Pompey, the EDTA test results were excluded
24 by the court after scathing criticism of Dr. Ballard’s credibility and scientific
25 methodology: “[Dr.] Ballard skewed the presentation of his data, obscured the
26 significance of his findings and changed his hypothesis to suit defendant’s tampering
27 theory[,]” rendering “his ultimate conclusions worthless.” Id. slip op. at 29. In the O.J.
28 Simpson case, neither side raised a scientific challenge for strategic purposes, although

1 its admissibility under the more lenient state-court Kelly/Frye standard was in question.
2 See Henry C. Lee, Ph.D. & Frank Tirnady, Blood Evidence, How DNA is
3 Revolutionizing the Way We Solve Crimes 279-80 (2003) [Blood Evidence] (Suppl. Ex.
4 to Resp't's Daubert Brief, Doc. No. 375 filed April 18, 2005.). While the extraction and
5 measurement of EDTA in a sample may theoretically be accomplished, the ubiquity of
6 EDTA in the environment prevents any meaningful interpretation of the significance of
7 an "elevated" level of EDTA within a forensic sample. This shortcoming is underscored
8 by the lack of acceptance of EDTA forensic testing in the scientific community.
9 Petitioner concedes that there has been no peer review or publication on the subject of
10 EDTA testing to prove tampering in the scientific community. (04-CV-656, Doc. No.
11 51, Ballard Decl. ¶ 8.) Lacking any evidence to show that EDTA testing is a reliable
12 means of determining whether a blood sample has been planted, the Court concludes that
13 Petitioner's EDTA evidence fails the Daubert test. Daubert, 509 U.S. at 590.

14 **1. Daubert and the Federal Rules of Evidence Control the**
15 **Admissibility of Expert Testimony**

16 In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993), a case
17 originating from this district, the United States Supreme Court held that Federal Rule of
18 Evidence 702 commands the primary focus for courts evaluating the admissibility of
19 expert testimony. Rule 702 provides: "[i]f scientific, technical, or other specialized
20 knowledge will assist the trier of fact to understand the evidence or to determine a fact
21 in issue," an expert "may testify thereto." Fed. R. Evid. 702. "Expert testimony is
22 admissible pursuant to Rule 702 if it is both relevant and reliable." Elsayed Mukhtar v.
23 California State University, Hayward, 299 F.3d 1053, 1063 (9th Cir. 2002) (citing
24 Daubert, 509 U.S. 589).

25 The trial court acts as a "gatekeeper" to exclude expert testimony that does not
26 meet the relevancy and reliability threshold requirements. Elsayed Mukhtar, 299 F.3d
27 at 1063. "A trial court not only has broad latitude in determining whether an expert's
28 testimony is reliable, but also in deciding how to determine the testimony's reliability."

1 Id. at 1064 (citations omitted); see also Hangarter v. Provident Life & Accident Ins. Co.,
2 373 F.3d 998, 1017 (9th Cir. 2004) (“[F]ar from requiring trial judges to mechanically
3 apply the Daubert factors . . . Kumho Tire heavily emphasizes that judges are entitled to
4 broad discretion when discharging their gatekeeping function.”) (quoting United States
5 v. Hankey, 203 F.3d 1160, 1168 (9th Cir. 2000)). “It is the proponent of the expert who
6 has the burden of proving admissibility.” Lust v. Merrell Dow Pharm., Inc., 89 F.3d
7 594, 598 (9th Cir. 1996); see Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1316
8 (9th Cir. 1995) (“Daubert II”) (“[T]he party presenting the expert must show that the
9 expert’s findings are based on sound science, and this will require some objective,
10 independent validation of the expert’s methodology.”).

11 As to the first prong of Daubert, relevance means that the evidence will assist the
12 trier of fact to understand or determine a fact in issue. Daubert, 509 U.S. at 591-92. The
13 evidence must logically advance a material aspect of the party’s case. Daubert II, 43
14 F.3d at 1315. “Encompassed in the determination of whether expert testimony is
15 relevant is whether it is helpful to the jury, which is the ‘central concern’ of Rule 702.”
16 Elsayed Mukhtar, 299 F.3d at 1063 n.7 (citation omitted). “Daubert [also] adds that the
17 gatekeeping inquiry must be ‘tied to the facts’ of a particular ‘case.’” Kumho Tire Co.,
18 Ltd. v. Carmichael, 526 U.S. 137, 150 (1999) (quoting Daubert, 509 U.S. at 591).

19 The proposed expert testimony must satisfy a second hurdle, reliability, before it
20 can be admitted. “The trial court must [also] act as a ‘gatekeeper’ to exclude ‘junk
21 science’ that does not meet Rule 702’s reliability standards by making a preliminary
22 determination that the expert’s testimony is reliable.” Elsayed Mukhtar, 299 F.3d at
23 1063. “Rule 702 demands that expert testimony relate to scientific, technical or other
24 specialized knowledge, which does not include unsubstantiated speculation and
25 subjective beliefs.” Diviero v. Uniroyal Goodrich Tire Co., 114 F.3d 851, 853 (9th Cir.
26 1997) (citing Daubert, 509 U.S. at 590).

27 Daubert provides the following non-exclusive list of factors to guide the
28 assessment of the reliability of scientific evidence: (1) whether a scientific theory or

1 technique can be (and has been) tested; (2) whether the theory or technique has been
2 subjected to peer review and publication; (3) the known or potential rate of error and the
3 existence and maintenance of standards controlling the technique’s operation; and (4)
4 whether the technique is generally accepted. Daubert, 509 U.S. at 593-94; see Kumho
5 Tire, 526 U.S. at 151 (“[Daubert] made clear that its list of factors was meant to be
6 helpful, not definitive. Indeed, those factors do not all necessarily apply even in every
7 instance in which the reliability of scientific testimony is challenged.”)

8 The Court’s analysis of the relevance and reliability of expert testimony is “vital
9 to ensure accurate and unbiased decision-making by the trier of fact.” Elsayed Mukhtar,
10 299 F.3d 1063. The goal is to “make certain that an expert . . . employs in the courtroom
11 the same level of intellectual rigor that characterizes the practice of an expert in the
12 relevant field.” Id. (quoting Kumho Tire, 526 U.S. at 152.). If evidence lacks either
13 reliability or relevance, it must be excluded.

14 **2. Dr. Ballard’s EDTA Testing Does Not Satisfy the Criteria for**
15 **Reliability Set Forth in Daubert**

16 Petitioner has argued repeatedly that this Court’s only inquiry under Daubert is
17 whether Dr. Ballard’s EDTA testing will “assist” the trier of fact in resolving the
18 ultimate issue – the likelihood of tampering. (See, e.g., 4/22/05 HRT 50, ll. 12-16.) This
19 grossly understates the level of scrutiny required by Daubert, which compels the Court
20 to look beyond whether expert testimony can merely “assist” the trier of fact, and
21 confirm that the expert uses a reliable and scientifically valid method. It is that second
22 inquiry, into reliability, that is dispositive in this case. Petitioner’s proposed EDTA
23 testing evidence unquestionably falls short of the standards set by Daubert for reliability.

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a. With Only One Exception, No Court has Admitted Either the Testimony of Dr. Ballard or his EDTA Test Results

This Court is not alone in its dubious view of EDTA forensic testing. To date, the sole case in which EDTA test results²⁵ have been admitted is People v. Orenthal James Simpson.²⁶ (4/22/05 at 50, ll. 17-19.) There, Dr. Ballard did not participate directly in the EDTA testing. (4/2/04 HRT 92 ll. 20-22.) In the only case where Dr. Ballard’s testing results were offered, New Jersey v. Josh Pompey, the New Jersey Superior Court soundly rejected both the credibility of Dr. Ballard and the reliability of EDTA testing in ruling that EDTA evidence was not admissible. Pompey, No. S-1594-89.

In the O.J. Simpson case, the FBI attempted to create a test that could differentiate preserved from fresh blood by analyzing EDTA content, but its witness was called by the defense at trial.²⁷ Blood Evidence, at 278-79. In contrast to this case, there was no objection raised to the admissibility of the EDTA test although the prosecution had been concerned that it was inadmissible under the state-court Kelly/Frye standard. Id. at 279-80.²⁸ No review of the scientific methodology of EDTA testing was conducted by the

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²⁵ The court notes that Petitioner concedes that no court has admitted Oxalic or Citric Acid testing into evidence. (See Pet’r’s Ex Parte Request for Further Testing and Budget filed under seal Jan. 7, 2005.)

²⁶ Petitioner also points to the Office of the Inspector General (“OIG”) report as “validation” of the forensic validity of EDTA testing. The Court has reviewed the report of the OIG, a non-scientific investigatory entity within the Department of Justice, and has concluded that it provides no such endorsement of the scientific reliability of Dr. Ballard and EDTA testing.

²⁷ The FBI no longer conducts EDTA testing.

²⁸ The state-court Kelly/Frye standard, 17 Cal.3d 24, 30 (1976); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), is less rigorous than Daubert. Under Kelly/Frye, “the proponent of evidence derived from a new scientific methodology must satisfy three prongs, by showing, first, that the reliability of the new technique has gained general acceptance in the relevant scientific community, second, that the expert testifying to that effect is qualified to do so, and, third, that correct scientific procedures were used in the particular case.” People v. Roybal, 19 Cal. 4th 481, 505 (1998).

1 parties or the Court in the O.J. case: “[T]he testing protocol . . . was never called into
2 question. It was simply a matter of interpretation.”²⁹ Id. at 280. “[T]he results of the
3 tests permitted both sides to claim a measure of victory.” Id.

4 In the only other case where the admissibility of EDTA test results has been
5 considered, New Jersey v. Pompey, Dr. Ballard conducted the testing and claimed to
6 have found “forensically significant” amounts of EDTA in several blood stains.
7 However, the Pompey court strongly rebuked Dr. Ballard for failing to “provide[] a
8 simple, scientific context within which to measure and compare his findings” leaving the
9 court “with the impression that Ballard omitted the information to simultaneously
10 maintain, magnify and disguise the import of his allegedly significant findings of
11 EDTA.”³⁰ Pompey, No. S-1594-89, slip op. at 14. The Pompey court accused Dr.
12 Ballard of “selectively adher[ing] to a scientific method” and that he “had an agenda to
13 effectuate outcomes that support the defendant’s tampering theory.” Pompey, No. S-
14 1594-89, Id. slip op. at 21, 19.

15 For example, in Pompey, one of the stains in which Dr. Ballard found an
16 “elevated” EDTA level consisted solely of the victim’s blood, which had never been
17 preserved in a purple-topped tube. Pompey, No. S-1594-89, slip op. at 7. Similarly, Dr.
18 Ballard was criticized for testing two stains together, neither of which had been linked
19 to the alleged perpetrator, and pronouncing the aggregated EDTA number as forensically
20 significant. Pompey, No. S-1594-89, slip op. at 9-10. Dr. Ballard did not normalize the

21
22 ²⁹ That forensic EDTA testing was engendered and cultivated solely within the context of
23 litigation discounts the reliability of the technology under Daubert. The Advisory Notes to Federal Rule
24 of Evidence 702 specify that a court may also consider “whether experts are ‘proposing to testify about
25 matters growing naturally and directly out of their research they have conducted independent of the
26 litigation, or whether they have developed their opinions expressly for the purposes of testifying.’” Fed.
27 R. Evid. 702 advisory committee’s notes (amended 2000) (quoting Daubert v. Merrell Dow Pharm., Inc.,
28 43 F.3d 1311, 1317 (9th Cir. 1995)). In light of this genesis for forensic EDTA testing, the Court
concludes this factor also weighs heavily against Petitioner.

26 ³⁰ The Pompey court was troubled by Dr. Ballard’s failure to explain the units for his various
27 calculations. In this case, Dr. Ballard provided certain standard “concentrations” for EDTA in blood at
28 the tutorial. In the report of his results, an “EDTA concentration” heading appears without any further
explanation. Only after noticing an important disparity in the units presented at the tutorial (ng/μL) and
the units employed in Dr. Ballard’s results (ng/mL) was the Court able to discern that the “EDTA
concentration” referenced in his results denoted the concentration of EDTA in the buffer fluid, not the
concentration of EDTA in blood.

1 aggregated numbers to account for the multiple stains. Pompey, No. S-1594-89, slip op.
2 at 9-10.

3 Calling Dr. Ballard’s analytical methods “haphazard and unreliable,” the
4 Pompey court stated the following conclusions:

5 In sum, he used valid science (gas chromatography/mass spectrometry) to obtain
6 a product, glibly and unscientifically dismissed EDTA from sources other than the
7 purple-topped tubes, and took a gargantuan leap to a conclusion that is
8 unsupported by science, facts in the record or even common sense.

9 ...

10 Ballard skewed the presentation of his data, obscured the significance of his
11 findings and changed his hypotheses to suit defendant’s tampering theory. Ballard
12 did not demonstrate that his conclusions were predicated on a reliable foundation.
13 Rather, his constant equivocations discredited his method of reasoning and thus
14 rendered his ultimate conclusions worthless.

15 Pompey, No. S-1594-89, slip op. at 21, 29.

16 The Pompey court’s sharp disagreement with Dr. Ballard’s methodology and
17 conclusions strengthen this Court’s own doubts about the admissibility of EDTA testing
18 in this case. The Court’s diligent efforts to wade through this alleged “science” of EDTA
19 has elicited many of the same concerns as those expressed by the court in Pompey.

20 A scientific test is not automatically admissible. For example, a polygraph test
21 can reliably measure a person’s heart rate, blood pressure, and breathing. However, a
22 polygraph test is inadmissible to show that person’s veracity. See, e.g., United States
23 v. Ramirez-Robles, 386 F.3d 1234, 1247 (9th Cir. 2004) (affirming district court
24 exclusion of polygraph testimony, citing its “highly influential nature”); United States
25 v. Benavidez-Benavidez, 217 F.3d 720, 725 (9th Cir. 2000) (affirming district court’s
26 decision to exclude potentially exculpatory polygraph results); United States v. Cordoba,
27 104 F.3d 225, 227-28 (9th Cir. 1997) (noting the “inherent problematic nature” of
28 polygraphs).

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1 EDTA testing presents an equally “inherent problematic nature.” Cordoba, 104
2 F.3d at 227-28. Like polygraph testing, the error rate of EDTA testing cannot be
3 determined. The widespread presence of EDTA in the environment can never be ruled
4 out as the source of any EDTA detected in the specimen. In addition, since the history
5 of each specimen’s exposure to environmental EDTA is unknown, there are no
6 established standards against which a test result can be compared. As a result, the
7 factfinder can never reliably conclude from the presence of EDTA in a stain that
8 tampering occurred. There are no industry standards that bind the testing scientist to a
9 certain test protocol. If anything, this problem is more pronounced in the EDTA testing
10 field, where Dr. Ballard appears to be almost the only individual who performs this type
11 of test.³¹

12 The Court concludes that the measurement of EDTA cannot be reliably used to
13 decide the ultimate issue at hand, the probability of tampering. Under the Advisory
14 Committee notes to the Federal Rules of Evidence, a court may weigh this disconnect--
15 “whether the expert has unjustifiably extrapolated from an accepted premise to an
16 unfounded conclusion”--against admissibility. Fed. R. Evid. 702 advisory committee’s
17 notes (amended 2000) (citing General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) for
18 the proposition “that in some cases a trial court ‘may conclude that there is simply too
19 great an analytical gap between the data and the opinion proffered’”).

20 **b. The Application of EDTA Testing to the Forensic Context**
21 **is Not Scientifically Accepted and Has Not Been Subjected to**
22 **Either Peer Review or Publication**

23 Petitioner cites only one article from 1997 that discusses EDTA measurement in
24 the tampering context. This article does not “subject” Dr. Ballard and his methodology
25

26 ³¹ Initially, the Court declined to fund Dr. Ballard as an expert. (04-CV-656, Doc. Nos. 81, 97,
27 Court’s Order filed 6/10/04 and 6/17/04.) In declining to fund Dr. Ballard as an expert, the Court
28 requested that Petitioner provide the Court with “an independent expert and laboratory not affiliated with
Dr. Ballard or law enforcement that is qualified to perform the proposed EDTA testing.” (04-CV-656,
Doc. No. 81, Court Order filed 6/10/04.) In response, the only name provided by Petitioner was Michael
Vickery at NMS where Ballard works, a scientist with a community college degree. (04-CV-656, Doc.
No. 208, Court’s Order filed Aug. 27, 2004 at 4.)

1 to meaningful “peer review.” Publication and peer review are the process by which new
2 scientific methodology is rigorously scrutinized and verified. By referencing peer review
3 as a factor to be considered under Daubert, the Supreme Court indicated that only
4 methods tested and subsequently accepted by the scientific community are methods on
5 which the courts should rely. Indeed, it is illogical that a court would accept a new
6 scientific methodology before it had been adequately reviewed and accepted by the
7 scientific community.

8 Petitioner attempts to explain the dearth of publication and peer review by
9 claiming that this technology is “new,” serves no significant commercial purpose, and
10 is of limited interest to the general population. The Court is not persuaded that these
11 explanations allow the Court to overlook the fact that Dr. Ballard’s methodology has
12 undergone no scientific scrutiny. Dr. Ballard’s use of EDTA testing is not new; EDTA
13 testing was utilized in the O.J. Simpson trial a decade ago. It defies our modern
14 experience to term science from ten years ago as “new.” The Court finds it telling that,
15 since 1997, Petitioner has been unable to identify any publication or peer review of
16 EDTA testing, and only identifies Dr. Ballard’s own abstracts. This void is especially
17 conspicuous given the extreme notoriety of the O.J. Simpson case: if any case were to
18 catapult a new technology to the forefront of forensic science, it would have been one of
19 national recognition like the O.J. Simpson trial.

20 Despite numerous opportunities, Petitioner was unable to find any qualified expert
21 or lab that would perform EDTA testing other than Dr. Ballard. That no lab in the
22 country and no scientist other than Dr. Ballard has ventured into this allegedly “new”
23 science of EDTA testing since that time speaks volumes about its reliability. As this
24 Court previously explained, “[h]aving Dr. Ballard as the only scientist willing to perform
25 the proposed EDTA testing indicates that not only has his methodology not been tested
26 or subject to peer review, it is an indication that his methodology is not generally
27 accepted and not reliable under Daubert.” (04-CV-656, Doc. No. 97, Court Order filed
28 June 17, 2004 at 16.)

1 **c. There are No Standard EDTA Levels Against Which Test**
2 **Results Can Be Compared, Permitting Significant**
3 **Manipulation of the Results and Preventing Definitive**
4 **Conclusions**

5 Even if the amount of EDTA in a forensic sample can be properly measured,³²
6 several variables prevent the reliable interpretation of that number to accurately answer
7 whether tampering with that sample has occurred. EDTA is ubiquitous in the
8 environment. (04-CV-656, Doc. No. 51, Ballard Decl. ¶ 3e.) It is a simple chemical
9 compound with numerous applications. EDTA is used in food products to prevent
10 rancidity; cleaning agents such as laundry and dish detergent, and bathroom and kitchen
11 tile cleaners; and personal care products such as cosmetics, hand lotions, deodorant, and
12 soap in concentrations up to 20% (or 200,000 ng/μL). Pompey, No. S-1594-89, slip op.
13 at 4, 29; (04-CV-656, Doc. No. 23, Ex. 3, Phillips Decl. ¶ 9; Doc. No. 51, Ballard Decl.
14 ¶ 3e; 4/2/04 HRT 54, ll. 10-14.) By comparison, EDTA is used as a blood preservative
15 in the purple-topped tubes in a concentration of .13% (or 1,300 ng/μL). (04-CV-656,
16 Doc. No. 23, Ex. 3, Phillips Decl. ¶ 5.) The court in Pompey likened the abundance of
17 EDTA in our environment “to saying that we are like fish swimming in an ocean of
18 EDTA.” Pompey, No. S-1594-89, slip op. at 4-5.

19 The common presence of EDTA precludes the establishment of known, standard
20 levels of EDTA against which a test measurement could reliably be compared. Since
21 EDTA is commonly found in the environment, there is no scientifically valid method,
22 even through the testing of controls, to ascertain whether the EDTA present in a stain
23 resulted from benign environmental sources. (See 04-CV-656, Doc. No. 23, Ex. 3,
24 Phillips Decl. ¶ 11.) According to Petitioner, EDTA may also have “migrated”³³ from
25 one area of the background material to another, muddling further the interpretation of the

26
27 ³² It is unclear to the Court whether this is even the case, given the inability of Dr. Suizdak, an
accomplished expert in mass spectrometry from Scripps Institute, to arrive at accurate results.

28 ³³ EDTA is readily soluble in water. (4/2/04 HRT 54: ll. 3-4.)

1 EDTA levels. (See 04-CV-656, Doc. No. 51, Ballard Decl. ¶ 4 (“Can EDTA testing tell
2 you how the EDTA got there? Of course not.”).) In short, EDTA does not bear a
3 signature that denotes its source. This is convenient. This uncertainty, however, precludes
4 the reliable and consistent interpretation of EDTA test results, as is required for
5 admission under Daubert.

6 Under the theory Petitioner presented to the Ninth Circuit, the absence of a spiked
7 level of EDTA disproved tampering. Under a theory Petitioner now espouses, a low
8 or constant level of EDTA does not foreclose the possibility of tampering. With a
9 technology where results can be so easily manipulated, there are no definite and reliable
10 conclusions. Moreover, EDTA testing may undermine the ability to perform further
11 DNA testing. Dr. Ballard has previously testified that once EDTA is extracted from a
12 sample, the sample can no longer be used for DNA testing.³⁴ Pompey, No. S-1594-89
13 slip op. at 11; (see also 04-CV-656, Doc. No. 23, Ex. 3, Phillips Decl. at ¶ 8.)

14 The Court concludes that EDTA testing does not satisfy Daubert standards.
15 Because there are so many variables that potentially skew the EDTA test administration
16 and the interpretation of the results, a factfinder is unable to draw any reliable
17 conclusions that assist its resolution of whether tampering occurred. The Advisory
18 Committee notes to the Federal Rules of Evidence instruct the Court to consider
19 “whether the expert has adequately accounted for obvious alternate explanations.” Fed.
20 R. Evid. 702 advisory committee’s notes (amended 2000). This factor is relevant here,
21 where it is simply impossible for an expert to “adequately account” for the myriad
22 “obvious alternate explanations” for the detection of elevated EDTA levels within a
23 forensic sample. Id.

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26 ³⁴ Additional testing will not clarify any interpretation of the EDTA level in the subject stain.
27 Given the presence of EDTA in products like deodorant, hand lotion, and laundry detergent, a constant
28 level of EDTA in the background material cannot be expected. Different areas of a T-shirt could reflect
different levels of EDTA. (4/2/04 HRT 67, ll. 4-13.) According to Petitioner’s theory, those variant
levels of EDTA could also “migrate” to different areas of the T-shirt. Thus, there is no certainty about
which EDTA came from which source, and where that EDTA has since “migrated.” Because of the
widespread presence of EDTA in the environment, EDTA levels cannot be reliably interpreted. There
is simply an unacceptable risk of error.

1 Contrary to how EDTA testing was portrayed to the Ninth Circuit, it is far from
2 “definitive.” Cooper, 358 F.3d at 1125. Instead, its admission here would require the
3 Court to “glibly and unscientifically dismiss EDTA from sources other than the purple-
4 topped tubes, and t[ake] a gargantuan leap to a conclusion that is unsupported by
5 science, facts in the record, or even common sense.” Pompey, No. S-2594-89, slip. op.
6 at 21. The Court declines to do so as Petitioner’s EDTA testing does not meet Daubert
7 standards.

8 **E. The Court’s Conclusions as to the Reliability of EDTA Testing Do Not**
9 **Affect Its Previous Finding That Dr. Ballard’s Results Disprove**
10 **Petitioner’s Theory of Tampering**

11 The Court’s serious concerns about the reliability of EDTA testing do not negate
12 the Court’s conclusion that Dr. Ballard’s test results do not support Petitioner’s theory
13 of tampering. In Petitioner’s case, the level of EDTA found in the subject stain is so
14 low (110 ng) that it cannot be considered significant to show tampering.³⁵

15 Here, where the amount of EDTA detected in the controls, on average, exceeds
16 the amount found in the subject stain, Petitioner’s theory of tampering is without
17 support. As Petitioner represented to the Ninth Circuit, “If the blood was planted, ... it
18 will reflect a high level of EDTA.” Cooper, 358 F.3d at 1125. With only a small amount
19 of EDTA found in the subject stain compared to the control specimens and the “planted”
20 blood on the Control T-shirt, the EDTA test results are not consistent with evidence of
21 tampering.

22 **F. The Court Denies The Request to Subject A-41 to Further Testing**

23 The Court’s grave reservations about the reliability of EDTA testing are more
24 pronounced with Exhibit A-41, blood found on the wall of the victims’ home.³⁶

26 ³⁵ Were the results for the subject stain high relative to the control areas, the Court would have
27 concerns under Daubert due to the widespread presence of background EDTA as a variable that may
28 result in a false positive. In that scenario, the Court could not evaluate whether the elevated level of
EDTA resulted from tampering or some benign factor.

³⁶ Petitioner’s request to test A-41 was not included in its successive petition, filed on April 1,
2004. (04-CV-656, Doc. No. 1.)

1 The Court's Daubert ruling bars Petitioner's request for EDTA testing of A-41, but even
2 were that not the case, the Court concludes that A-41 is not suitable for EDTA testing
3 using the control method or any other method of testing.

4 The totality of the record supports the Court's conclusion that A-41 is not suitable
5 for further scientific testing. Petitioner's expert, Dr. Blake and Steven Myers testified
6 that there is no visible blood remaining on the paint chips comprising A-4.
7 Additionally, the blood used for the nuclear DNA testing performed pursuant the Joint
8 DNA Testing Agreement was found as a dried substance at the bottom of the container
9 holding A-41. Petitioner's expert Dr. Edward Blake testified at the June 3, 2004,
10 evidentiary hearing regarding A-41:

11 Dr. Blake: ...you open up the A-41 tin, and you look at it, and for all intents and
12 purposes, there's no blood there. However, when you look at it with a stereo
13 microscope, a little bit different story (sic). There is a very fine powder of blood
that remains on the inside of the tin. And that's what was collected for PCR³⁷
analysis.

14 (See [04-CV-656, Doc. No. 116 at 7] Petr's Mem. of P & A. in Supp. of the July 12,
15 2004 Mot. for Reconsideration (quoting excerpts from 6/4/04 HRT).)

16 Dr. Blake's credible testimony is corroborated by Mr. Myers' testimony at an
17 evidentiary hearing before Judge William H. Kennedy in the California Superior Court
18 on June 24, 2003, regarding A-41 at the time of the 2001 post-conviction nuclear DNA
19 testing. Mr. Myers testified that when he tested A-41 for nuclear DNA he used the
20 remaining paint chip and some of the blood powder inside the tin containing the paint
21 chip:

22 Mr. Bernstein: With A-41A, you described that as the blood powder, plus
23 inside the tin there was a little open tube with a hole at the
bottom and a paint chip inside it?

24 Mr. Myers: Correct.

26 ³⁷ When testing for DNA, a small sample size can be overcome through polymerase chain
27 reaction ("PCR"). Using PCR, minuscule amounts of DNA can be replicated and the sample size
28 increased so that the amount of available DNA is sufficient for testing. PCR is limited in its application
to DNA and cannot replicate or regenerate from a minute amount of blood powder the amount of EDTA
(if any) present in the original sample. Given this critical limitation, even if any sparse remnants of fine,
blood powder remaining in A-41 could be tested, it would be impossible for the factfinder to extrapolate
from those results to determine whether the original drop was planted.

1 Mr. Bernstein: And you combined the chip with the powder?

2 Mr. Myers: Not all of the powder, because that tube with the hole in it
3 actually - - and I took a stereomicrograph of this - - had some
4 of the powder adhering to the outside of the tube. So I
5 swabbed the inside of the tin and I took the paint chip,
6 combined those into making my DNA extraction sample. But
7 whatever might have been adhering to the outside of that tube
8 when the tube was put back into the tin, it still exists.

6 Mr. Bernstein: So you extracted the chip and the powder together?

7 Mr. Myers: The chip and the powder that I swabbed from the inside of the
8 tin; but, as I said, there's some powder that may still be
9 present.

9 (See 04-CV-656, Doc. No. 28, NOL filed February 4, 2004 at 298-99.) The California
10 Supreme Court has also noted that “[o]nly a minute amount of the blood remained after
11 these tests.” Cooper, 53 Cal.3d at 799. This “minute amount” of blood has already been
12 subjected to extraction for DNA testing, which may alter the sample such that the
13 original EDTA level could not be accurately measured. (4/2/04 HRT 71-72.)

14 In addition, Dr. Blake's and Mr. Myers' credible testimony support the conclusion
15 that A-41 is not able to be tested for EDTA using the control method. Both Dr. Ballard
16 and Mr. LeBeau describe the control method as requiring control areas around the blood
17 sample to determine if there is a significant difference between the amounts of EDTA
18 in the stain compared with areas immediately surrounding the stain. The post-
19 conviction record demonstrates that the state of A-41 does not provide such controls.
20 As a result, the Court concludes that A-41 is not able to be scientifically and reliably
21 tested for the presence of EDTA. Indeed, the totality of the record before this Court
22 supports the conclusion that A-41 is not suitable for further scientific testing. In
23 addition, given the Court's Daubert concerns, the Court concludes that EDTA testing
24 of A-41 is unlikely to be of interpretative value and is unwarranted destructive testing
25 of the evidence.

26 **IV. Actual Innocence**

27 In the first claim of the successive petition, Petitioner alleges that his federal
28 constitutional rights have been denied because he is innocent of all but the escape

1 charge. However, the post-conviction DNA testing confirmed Petitioner's guilt.
2 Petitioner's blood was found at the crime scene and on cigarette butts found inside the
3 Ryen station wagon after the car was recovered in Long Beach.

4 **A. DNA Evidence Establishes Petitioner's Guilt**

5 Subsequent to the passage of California Penal Code section 1405, the California
6 authorities agreed to have certain DNA testing performed in 2001. Petitioner had the
7 assistance of two nationally recognized DNA experts, Dr. Edward Blake and
8 Christopher Plourd. The parties entered into a Joint Forensic DNA Testing Agreement
9 that specified the items of evidence to be tested, how they were to be shipped and the
10 method of DNA testing. (See Joint DNA Agreement dated May 10, 2001.)

11 Pursuant to the Joint DNA Agreement, the evidence to be tested was shipped to
12 the DOJ DNA Laboratory in Berkeley from two locations: the San Diego Superior Court
13 and the San Bernardino County Sheriff's Identification Division. (92-CV-427, Third
14 Supplemental NOL filed Jan. 23, 2004, Ex. No. 33, Judge Kennedy Order dated May
15 10, 2001.) The items shipped from the custody of the San Diego Superior Court,
16 Evidence Clerk, were: a hand-rolled cigarette butt recovered from the Ryen station
17 wagon in Long Beach (Trial Exhibit 584A) (Laboratory item no. V-12); a hatchet (Trial
18 Exhibit 42); the major portion of a T-shirt found near the Canyon Corral Bar (Trial
19 Exhibit 169) (Laboratory Item CC); and a button found in the hideout house bedroom
20 (Trial Exhibit 97). (Id.) The remaining items to be tested were shipped by the San
21 Bernardino County Sheriff's Identification Division. Those items were: a manufactured
22 cigarette butt (Laboratory item no. V-17), found in the Ryen station wagon in Long
23 Beach; the cutout portion from the same T-shirt (Trial Exhibit 169), which remained in
24 the custody of the San Bernardino County Sheriff's Identification Division following
25 Petitioner's trial; hair recovered from the hands of the victims; the remains of bloodstain
26 A-41 (the drop of blood found in the hallway outside the Ryen master bedroom); and
27 the reference hair and blood samples from Petitioner and the victims. (Joint DNA
28 Agreement dated May 10, 2001 at 2-5.)

1 The Agreement provided for STR Profiler Plus DNA testing to be performed by
2 DOJ Berkeley on the specified items of evidence in two stages: “blind” STR Profiler
3 Plus DNA testing was to be performed on specified pieces of crime scene evidence,
4 followed by STR Profiler Plus DNA testing on the known exemplars from Petitioner and
5 the victims. (Id. at 11.) The “blind” test results from the crime scene evidence would
6 then be compared with the results obtained from the known reference samples from
7 Petitioner and the victims. (Id. at 11-12.) STR DNA testing is a forensic DNA testing
8 method that is generally accepted within the relevant scientific community for forensic
9 testing of biological specimens. (Id. at 6.)

10 The results are summarized in the Physical Evidence Examination Report dated
11 July 7, 2002, and in the Supplemental Report dated September 24, 2002. (DOJ Physical
12 Evidence Exam Report dated July 2, 2002; Supplemental DOJ Physical Evidence Exam
13 Report dated Sept. 24, 2002.) The DNA testing that was done provides the most
14 probative evidence of the identity of the murderer. In his July 24, 2001 report,
15 Petitioner’s own DNA expert, Dr. Edward T. Blake, stated that the “most relevant
16 biological evidence in this case is contained within the blood and cigarette butt evidence
17 described above.” (92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Ex. 24,
18 Dr. Blake Letter dated July 24, 2001 at 4.) Dr. Blake had been one of the defense
19 experts on Petitioner’s defense team prior to trial, at trial and during the post-conviction
20 DNA testing procedure.

21 The Supplemental Report concludes that the DNA testing provides strong
22 evidence that Petitioner is the donor of the DNA extracted from: the drop of blood found
23 in the hallway outside the Ryen master bedroom (A-41), saliva from the hand-rolled and
24 manufactured cigarette butts found inside the abandoned Ryen station wagon, and blood
25 smears on the T-shirt found near the Canyon Corral Bar. (Supplemental DOJ Physical
26 Evidence Exam Report dated Sept. 24, 2002.) Petitioner’s DNA profile is consistent
27 with the DNA profiles obtained from each of those items of evidence. (Id.) The DNA

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1 profiles that do not match Petitioner are all consistent with the victims' DNA profiles.
2 The testing did not reveal any unidentified DNA profiles. (Id.)

3 The STR Profiler Plus DNA result obtained from A-41, the bloodstain found on
4 the hallway wall outside the Ryen master bedroom, has been determined to match
5 Petitioner's DNA profile. (Supplemental DOJ Physical Evidence Exam Report dated
6 Sept. 24, 2002 at 1-2.) The probability of a random match is approximately 1 in 310
7 billion for African Americans, 1 in 270 billion for Caucasians, and 1 in 340 billion for
8 Western Hispanics. (Id.) The evidentiary significance of this result is twofold. First, at
9 trial Petitioner testified at length and he denied ever "approaching the Ryen house."
10 Cooper, 53 Cal.3d at 802. Second, the presence of Petitioner's blood inside the Ryen
11 home confirms that Petitioner was inside the Ryen house, in the middle of the crime
12 scene.

13 The STR Profiler Plus DNA also showed that Petitioner's DNA was found on two
14 cigarettes butts found in the Ryen station wagon. The probability estimates for the
15 manufactured cigarette butt, item V-17, was 1 in 19 billion and for the hand rolled
16 cigarette butt, item DOJ-5, was 1 in 110 million. (Id. at 2.) The STR Profiler Plus DNA
17 results from both cigarette butts that were recovered from the Ryen station wagon in
18 Long Beach also has particular significance when considered with the other evidence
19 introduced at trial. The DNA results from the cigarette butts establish that Petitioner
20 took the Ryen station wagon to make his escape after committing the murders. There was
21 a massive manhunt for Petitioner after he escaped from Chino, and there was evidence
22 at trial that shortly prior to committing the murders Petitioner had made telephone calls
23 from the hideout house in an unsuccessful attempt to get help so he could escape from
24 the Chino Hills. Cooper, 53 Cal.3d at 796. The DNA results obtained from the two
25 cigarette butts fortify the conclusion stated by the California Supreme Court that
26 Petitioner "had an obvious motive both for stealing the Ryen car - to get transportation
27 away from the area - and for killing the family - to facilitate the theft and gain time to
28 perfect his escape." Id. at 771, 832.

1 Similarly, the STR Profiler Plus DNA results obtained from the T-shirt found by
2 the roadway leading from the Ryen house to the nearest freeway link Petitioner to the
3 crime. Blood on the cutout portion of the T-shirt (DOJ item CC-1B) matches Doug
4 Ryen's blood. (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002
5 at 3.) In addition, several blood smears/spatters found during the course of the STR
6 Profiler Plus testing match Petitioner's DNA profile. (Supplemental DOJ Physical
7 Evidence Exam Report dated Sept. 24, 2002 at 3.) These blood smears/spatters, from
8 which DNA profiles matching Petitioner were obtained, were found on Trial Exhibit 169
9 (Laboratory Item CC), the portion of the T-shirt which remained in the custody of the
10 San Diego Superior Court Evidence Clerk, since the time of Petitioner's trial in 1984 and
11 1985 prior to the post-conviction DNA testing. (92-CV-427, NOL filed Jan. 20, 2004,
12 Ex. 6, Judge Kennedy's order dated July 2, 2003 at 10.)

13 The state court conducted a post-conviction evidentiary hearing in 2003 to address,
14 among other items, Petitioner's claim of evidence tampering. The Honorable William
15 H. Kennedy concluded that there was no merit to Petitioner's claim of evidence
16 tampering. (92-CV-427, NOL filed Jan. 20, 2004, Ex. 6, Judge Kennedy's order dated
17 July 2, 2003 at 10.)

18 The T-shirt was found by the side of a road which connected the Ryen home with
19 a freeway system that eventually leads to Long Beach, where the Ryen station wagon was
20 found abandoned. The STR Profiler Plus DNA results from this T-shirt establish the
21 presence of Petitioner's and victim Doug Ryen's blood on the same article of clothing.
22 The DNA results provide additional evidence establishing Petitioner's guilt.

23 In sum, this Court concludes that the DNA test results obtained from the evidence
24 presented at trial establish Petitioner's guilt. (See Supplemental DOJ Physical Evidence
25 Exam Report dated Sept. 24, 2002 at 3.)

26 **B. Petitioner's Challenge to the DNA Evidence is Without Merit**

27 Petitioner attempts to undermine the post-conviction DNA testing results by
28 claiming that Criminalist Dan Gregonis might have contaminated or tampered with the

1 evidence. However, his unsupported assertion ignores the consistent DNA test results
2 which were obtained from the hand-rolled cigarette butt found in the Ryen vehicle after
3 its recovery in Long Beach (DOJ-5, crime lab item V-12) and from blood smears/spatters
4 on the T-shirt (DOJ-6) found near the roadway linking the Ryen home to the nearest
5 freeway. The DNA profiles obtained from these items (DOJ-5 and DOJ-6) match the
6 corresponding portion of the full DNA profile obtained from A-41 --- major donor and
7 Petitioner's DNA profile. All these items were in the custody of the San Diego Superior
8 Court Exhibit Clerk from 1984 until 2001, when they were shipped directly to the DOJ
9 Berkeley DNA Laboratory for analysis. Gregonis has had no contact since the time of
10 trial with either the hand-rolled cigarette butt (DOJ-5, crime lab item V-12) or the portion
11 of the T-shirt on which the blood smears matching Petitioner's DNA profile were
12 obtained (Trial Ex. 169). Consistent DNA test results confirming Petitioner's guilt have
13 been obtained from evidence Gregonis had no contact with in 1999, and as to which he
14 has had no contact since the time of Petitioner's trial. The items, which have remained
15 in the custody of the San Diego Superior Court Evidence Clerk, operate as an
16 independent control on the DNA results obtained from the items that were in the custody
17 of the Sheriff's Department.

18 Criminalist Gregonis and others testified at the post-conviction evidentiary hearing
19 held before Judge Kennedy of the California Superior Court on June 23, 2003. (92-CV-
20 427, Third Supplemental NOL filed Jan. 23, 2004, Exs. 20, 23, Decl. and Mot. Test. of
21 Dan Gregonis at 97, 99-107, 110-17, 122-23, 128-29, 131-33.) Judge Kennedy found at
22 the conclusion of the hearing that Petitioner "has not made any showing that law
23 enforcement personnel tampered with or contaminated any evidence in this case." (92-
24 CV-427, NOL filed Jan. 23, 2004, Ex. 6, Judge Kennedy Order dated July 2, 2003 at 10.)

25 After reviewing the transcripts of Judge Kennedy's evidentiary hearing, his
26 findings and conclusions, the parties' submissions and all relevant evidence, the Court
27 finds no merit to Petitioner's challenge of the veracity of the DNA evidence. Moreover,

28 ////

1 EDTA testing ordered by this Court fails to show Petitioner’s blood was planted on the
2 T-shirt.

3 Accordingly, the Court **DENIES** his claim of actual innocence. Petitioner is
4 unable to meet his burden of establishing by clear and convincing evidence that, but for
5 constitutional error, no reasonable factfinder would have found the applicant guilty of the
6 underlying offense. 28 U.S.C. § 2244(b)(2). Even if he met the burden of 28 U.S.C.
7 § 2244(b)(2), Petitioner’s claim is denied on the merits pursuant to 28 U.S.C. § 2254.
8 Alternatively, Petitioner failed to show that in light of all the evidence, including new
9 evidence, it is more likely than not that no reasonable juror would have found Petitioner
10 guilty beyond a reasonable doubt. Schlup, 513 U.S. at 327-28. Further, the Court
11 concludes that Petitioner has not met the stringent burden of Herrera, which requires an
12 “extraordinarily high” showing of “a truly persuasive demonstration of ‘actual
13 innocence.’” As detailed below, Petitioner fails his burden and the Court **DENIES** these
14 claims under 28 U.S.C. § 2244(b)(2), and alternatively, under Schlup and under Herrera,
15 and on the merits pursuant to 28 U.S.C. § 2254(d).

16 As a result, the Court concludes that all claims in this successive petition are
17 properly **DENIED** either under AEDPA, which requires among other things, a “factual
18 claim [] not discoverable through the exercise of due diligence” that establishes by “clear
19 and convincing evidence that, but for constitutional error, no reasonable factfinder would
20 have found the applicant guilty of the underlying offense,” or under Schlup, which
21 requires a showing that it “in light of all the evidence, including new evidence, it is more
22 likely than not that no reasonable juror would have found petitioner guilty beyond a
23 reasonable doubt.”

24 **C. Prior Court Rulings and Findings Document Overwhelming**
25 **Evidence of Guilt**

26 **1. Trial Court Rulings and Findings**

27 The trial judge, Richard Garner, made an independent determination of Petitioner’s
28 guilt at sentencing. (92-CV-427, Third Supplemental NOL filed Jan. 23, 2004, Ex. 7,

1 Transcripts of Judge Garner's rulings at sentencing, May 15, 1985 at 8144-50.) Judge
2 Garner stated on the record:

3 The Court has examined and reviewed all of the evidence that was presented
4 to the jury, the trier of the fact, and in making this determination, the Court
5 has also examined all of the exhibits admitted into evidence and studied the
6 daily transcripts on both phases.

7 The law, from all of the evidence admitted at the guilt phase, the Court is
8 satisfied beyond a reasonable doubt, all reasonable doubt that the defendant,
9 Kevin Cooper, is the one who entered the Ryen home and committed the
10 various murders, and that he is thus guilty beyond a reasonable doubt, of
11 Counts Two through Six (P. Ex. No. 7, p. 8145.)

12 Now, some of the more particular points persuading me of the defendant's
13 guilt are the following: The proof showed, apart from his own statements
14 at trial, that he was in the hideout home next door, in effect to the Ryen
15 home, for several days. He admitted that indeed he could not deny it. He
16 was next door at least until 8:30 p.m. the night of the murder, a fairly short
17 period of time before the crimes occurred.

18 I am convinced that the hatchet in evidence was one of the murder weapons
19 and that it came from the hideout house where the defendant spent a lot of
20 time.

21 I am convinced that the defendant stole the Ryens car; I thought that that
22 was adequately proved by the evidence found therein, particularly the
23 tobacco, the same tobacco that was also found at the home was the same that
24 comes from the state prison.

25 (Id. at 8146.)

26 Judge Garner further discussed the evidence linking the Ryen house to the hideout
27 house where Petitioner had hid, including (1) Petitioner's blood found in the Ryen house,
28 (2) evidence that established after the murders the killer returned to the hideout house
where Petitioner stayed, took a shower and brought blood into that house, and (3)
Petitioner's manner of flight out of the country as additional pieces of evidence that
established Petitioner's guilt. (Id. at 8147-48.)

2. California Supreme Court Rulings and Findings

The California Supreme Court addressed the issue of Petitioner's guilt at length
after his conviction:

[T]he evidence of guilt was extremely strong. Many items of circumstantial
evidence pointed to defendant's guilt. Some alone were quite compelling;

1 others less so. In combination, the evidence established defendant's guilt
2 overwhelmingly.

3 First, there was the fact of defendant's escape and hiding out at the house
4 nearest the crime scene at precisely the time of the crime. Defendant left the
5 house the very night of the murders. The Ryen house could be seen from the
6 Lease house. Since defendant's telephonic appeals for help had proved vain,
7 he desperately needed a means to get out of the area, a means the Ryen
8 station wagon could provide. The hatchet that was one of the murder
9 weapons came from within the Lease house, near the window through which
10 the Ryen house was visible. The sheath for this hatchet was found on the
11 floor of the very room defendant slept in. Items that could have been the
12 remaining murder weapons were missing from the Lease house.

13 In addition to these circumstances, there was the strong shoe print
14 comparison evidence, the cigarette and tobacco comparison evidence, the
15 match between defendant's blood type and the drop of blood in the Ryen
16 house that was not from a victim, the bloodstained prison issue button on the
17 Lease house floor, the bloodstained rope (not defendant's blood, consistent
18 with a victim's blood) found in the closet of the bedroom defendant used, the
19 blood in the Lease house shower and elsewhere, the hair comparisons, and
20 the other evidence summarized earlier in this opinion.

21 It is utterly unreasonable to suppose that by coincidence, some hypothetical
22 real killer chose this night and this locale to kill; that he entered the Lease
23 house just after defendant left to retrieve the murder weapons, leaving the
24 hatchet sheath in the bedroom defendant used; that he returned to the Lease
25 house to shower; that he drove the Ryen station wagon in the same direction
26 defendant used on his way to Mexico; and that he happened to wear prison
27 issue tennis shoes like those of defendant, happened to have defendant's
28 blood type, happened to have hair like defendant's, happened to roll
cigarettes with the same distinctive prison issue tobacco, and so forth.
Defendant sought to discredit or minimize each of these items of evidence,
but the sheer volume and consistency of the evidence is overwhelming.

19 Cooper, 53 Cal.3d at 795-800.

20 An analysis of some of the specific items of evidence the California Supreme Court
21 set forth in their opinion is mentioned below:

22 [1.] After his escape from C.I.M. Cooper hid in the Lease Home, the closest
23 house to the Ryen's residence for several days immediately prior to the
murders.

24 [2.] The Ryen home was clearly visible from the Lease home. Various
25 items of circumstantial evidence connected defendant with the massacre.

26 Defendant had been an inmate at CIM since April 29 under the name of
27 David Trautman. On June 1, he was transferred to a minimum security
28 portion of the prison. The next afternoon, June 2, he escaped on foot.

Undisputed evidence, including fingerprints, showed that after his escape,
defendant took refuge in a nearby house owned by Larry Lease and brothers

1 Roger and Kermit Lang (hereafter the Lease house). He slept in the closet
2 of the bedroom nearest the garage. The Lease house was the closest
neighbor to the Ryen house, about 126 yards away. The window by the
3 Lease house fireplace provided a view of the Ryen house.

4 Kathleen Bilbia, an employee of Lease, had been living in the Lease house
in May, and she had used the bedroom defendant later slept in (hereafter the
5 Bilbia bedroom). She moved out of the house during May. By May 27,
most of her belongings had been removed. On May 30 and June 1, Bilbia
6 vacuumed and cleaned portions of the house, including the bathroom she
had used (hereafter the Bilbia bathroom).

7 [3.] Cooper ended his final telephone call from the Lease house
approximately one hour before the Ryen family and Chris Hughes returned
8 home from a barbeque. Telephone records showed that two telephone calls
were made from the Lease house to the Los Angeles area telephone number
9 of Yolanda Jackson -- one lasting one hundred ten minutes beginning on
June 3 at 12:17 a.m., and one lasting four minutes beginning at 2:26 a.m. the
10 same morning. Two calls were also made from that house to the Pittsburgh,
Pennsylvania telephone number of Diane Williams -- one lasting three
11 minutes beginning on June 3 at 11:46 a.m., and one lasting thirty-four
minutes beginning on June 4 at 7:53 p.m. This final call was only an hour
12 or so before the Ryens and Chris Hughes left the Blade house for their
unsuspected rendezvous with death.

13 Yolanda Jackson testified that she visited defendant on May 30 at CIM.
14 Sometime after midnight on June 3, she received a telephone call from
defendant. She believed the call lasted about 30 to 45 minutes. Defendant
15 said he had "walked out" of the prison. He asked her to help him in what
Jackson believed was a "joking manner." She refused. Defendant asked her
16 where he should go. She said she did not know. At one point in the
conversation, defendant said he was getting a cigarette. Shortly after the first
17 conversation ended, defendant called her again. A brief second conversation
ensued.

18 The parties stipulated that if Diane Williams were called as a witness, she
19 would testify that in June she received two telephone calls from defendant
at her Pittsburgh number. Defendant told her that he had been released from
20 prison because of a new law that had been passed, and that he needed
money. She said she could not get any. He said he would call back.
21 Defendant called Williams again the next day, and asked if she had gotten
any money. She replied that she had not. On June 6, Williams received a
22 collect call from defendant in Tijuana, Mexico.

23 On June 4, around 10 or 11 a.m., Virginia Lang visited the Lease house
briefly to get a sweater. She noticed nothing out of the ordinary.

24 [4.] A bloodstained green button, identical to the buttons found on CIM
25 inmate jackets was found in the Bilbia bedroom where Cooper slept. Blood
from the button could have come from one of the victims or from Cooper.

26 After the murders, a bloodstained khaki green button was found on the rug
27 in the Bilbia bedroom. It was identical in appearance to buttons on field
jackets inmates wore at CIM, including one defendant was seen wearing
28 shortly before his escape. The blood on the button could have come from
defendant or one of the victims.

1 A bloodstained rope was found in the Bilbia bedroom closet. It was similar,
2 but not identical, to a length of bloodstained rope found on the driveway of
the Ryen residence.

3 [5.] Luminol revealed the possible presence of blood in the shower of the
4 Bilbia bedroom and on the rug in the hallway leading to the Bilbia bedroom.
Cooper's footprint was found on the sill on this shower.

5 [6.] Human hair removed from the sink trap in the Bilbia bathroom of the
6 Lease house was consistent with Jessica Ryen's hair. Hair removed from
the shower in that bathroom was consistent with Doug Ryen's hair.

7 A criminalist from the San Bernardino County sheriff's crime laboratory
8 sprayed various areas of the Lease house with luminol, a substance used to
9 detect the presence of blood not visible to the naked eye. A positive
10 reaction consisting of an even "glow" ranging from about two feet to five
11 feet above the floor was obtained on the shower walls in the Bilbia
12 bathroom. Defendant left his footprint on the sill of this shower. There
were also four positive reactions to the luminol on the rug in the hallway
leading to the Bilbia bedroom that appeared to be foot impressions. Other
positive reactions were obtained in the bedroom closet and bathroom sink.
The reactions did not prove the presence of blood, but were "an indication
that it could be blood."

13 Investigators found matted hair in the bathroom sink trap that appeared to
14 have been there a long time. Other hair was not matted. A microscopic
15 examination of one of the latter revealed characteristics similar to Jessica's
head hair. A hair removed from the bathroom shower had characteristics
similar to Doug Ryen's head hair.

16 [7.] The hatchet taken from Lease house where Cooper hid was found on
17 the side of the road leading away from the Ryen home.

18 [8.] Human hairs on the hatchet were consistent with those of Doug and
19 Jessica Ryen. The blood on the hatchet was consistent with that of Josh
Ryen.

20 [9.] The sheath that covered the blade of the hatchet was found in the
"Bilbia" bedroom where Cooper stayed.

21 During the afternoon of June 5, a local citizen discovered a hatchet in some
22 weeds next to a fence on the side of a road that led from the Ryen home out
of the area. The fencepost above the hatchet had a small indentation
23 indicating that something sharp had struck it. The hatchet was covered by
bloodstains; its head was covered by dried blood and human hairs. Some of
24 the hairs were consistent with those of Doug and Jessica Ryen. Some of the
blood on the hatchet head could have come from Josh. Dr. Root, who
25 performed the autopsies, concluded that the hatchet could have inflicted the
chopping wounds.

26 Witnesses identified the hatchet as missing from the Lease house after the
27 killing. It had been kept in a sheath by the Lease house fireplace. Bilbia
recalled seeing it by the fireplace when she was cleaning the house. On
28 June 7, the sheath for the missing hatchet was found on the floor in the
Bilbia bedroom. It had not been there when Bilbia vacated the room.

1 [10.] Buck knives and an ice pick, which could have inflicted some of the
2 injuries on the victims, were missing from the Lease house where Cooper
3 hid. A strap fitting one of the missing knives was found in the bedroom
4 Cooper used.

5 Some buck knives and one or more ice picks were also missing from the
6 Lease house. These could have inflicted the remaining injuries. A strap
7 fitting one of the missing buck knives was found on the floor by the Bilbia
8 bedroom closet.

9 [11.] Three separate ProKed Tennis Shoe impressions, consistent with the
10 size and pattern of the shoes given to Cooper at CIM were found in the
11 following locations:

- 12 1) in the game room at the Lease house,
- 13 2) on the spa cover outside the Ryen master bedroom (which was
14 the scene of the murders);
- 15 3) and in blood on the bed sheet in the Ryen master bedroom.

16 Investigators found three significant shoe print impressions -- a partial sole
17 impression on a spa cover outside the Ryen master bedroom, a partial
18 bloody shoe print on a sheet on the Ryen bedroom waterbed, and a nearly
19 complete shoe print impression in the game room of the Lease house. All
20 three appeared to come from tennis shoes.

21 James Taylor, an inmate at CIM who played on the same prison basketball
22 team as defendant, issued equipment to other inmates. He testified that he
23 issued defendant a pair of P.F. Flyer tennis shoes. Three or four days before
24 defendant was transferred to minimum security (i.e., before June 1)
25 defendant exchanged these shoes for a pair of "Dude" Pro Ked tennis shoes.
26 Taylor did not remember what size shoes were issued to defendant. The
27 Stride Rite Corporation sells Pro Ked tennis shoes to the state for use in
28 institutions such as CIM. All "Dude" tennis shoes contain the same sole
pattern. The general merchandise manager for Stride Rite testified that this
pattern is not found on any other shoe that the company manufactures nor,
to his knowledge (which was extensive), on any other shoe. The shoes are
not sold retail, but only to states and the federal government.

William Baird, the manager of the San Bernardino County sheriff's crime
laboratory, compared the shoe print impressions from the Ryen and Lease
houses to each other, to the type of shoes issued to defendant, and to other
shoes. He concluded that the three shoe prints "all possessed a similar tread
pattern, which would indicate a similar type shoe was used in each case."
They "are consistent with one another, and . . . could have been caused by
the same shoe." The pattern was similar to the "Dude" tennis shoes used at
CIM, probably size 10, but possibly size 9 1/2. Baird searched area stores for
shoes with similar sole patterns, but could find none. The defendant
testified that his shoe size was between nine and ten. Baird believed that the
shoes that made the three impressions were nearly new but not brand new.

[12.] The Ryen family station wagon was taken after the murders.
Bloodstains located inside the station wagon had the same blood type as
some of the victims. The station wagon that was missing from the Ryen
house was found on a church parking lot in Long Beach. One witness

1 testified he put a flyer on the car on Sunday morning, June 5, the morning
2 after the killing of the Ryen family. Another saw the car on June 7. Later,
the vehicle was reported to the police, who examined it for evidence.

3 The car contained various bloodstains, including one which could have
4 come from one or more of the victims, but not defendant. Several hairs were
5 recovered from the vehicle. Two criminalists microscopically compared the
6 hairs with defendant's hair. One believed that one of the hairs probably
7 came from a Black person, and that "there was enough similarity between
8 . . . the hairs from Mr. Cooper and the unknown hair that I felt the unknown
9 hair was consistent with coming from Mr. Cooper." The second criminalist
10 also found it was consistent with defendant's hair. Both believed it was
11 most likely pubic hair. Unlike fingerprint comparison, an absolute match
12 is not possible when comparing hairs.

13 [13.] Loose prison issued "Role-Rite" tobacco was found in both the closet
14 of the Bilbia bedroom in the Lease house where Cooper slept and on the
15 floor board of the Ryen station wagon when it was recovered in Long
16 Beach.

17 James Taylor, the inmate who issued the Pro Ked tennis shoes to defendant
18 at CIM, testified that he saw defendant smoke hand-rolled cigarettes using
19 rolling paper and "Role-Rite" tobacco issued free to inmates. This tobacco
20 is not sold retail, but only to institutions in California such as CIM.

21 Loose tobacco was found inside a white box in the Bilbia closet, and in the
22 Ryen car. In addition, two cigarette butts -- one of a hand-rolled cigarette --
23 were found in the Ryen car. The tobacco in the white box was identified as
24 Role-Rite. Criminalist Craig Ogino examined visually and microscopically
25 the two samples of the loose tobacco and the tobacco from the hand rolled
26 cigarette. Each sample was consistent with each other and with Role-Rite
27 tobacco. Ogino also compared them with various other tobacco samples he
28 obtained from a tobacco store. The other tobacco samples were all different.

Aubrey Evelyn, a manager with the company that manufactures Role-Rite
tobacco, also testified that he had "no doubt" that the tobacco found in the
Ryen car was Role-Rite.

Examination of the saliva on the two cigarette butts from the Ryen car was
inconclusive, but was consistent with the cigarettes having been smoked by
a nonsecretor such as defendant. Some commercial cigarettes were
apparently missing from the Lease house. A Viceroy cigarette butt was
found in the Bilbia bedroom. Bilbia did not smoke.

A six-pack of Olympia Gold beer with one can missing was found in the
refrigerator of the Ryen house. One bloodstained can was hanging over the
edge of a shelf. A nearly empty can of Olympia Gold beer similar in
appearance to those in the Ryen refrigerator was found in a plowed horse
training arena about midway between the Ryen and Lease houses.

[14.] When Cooper was arrested weeks later he was still in possession of
several items taken from the Lease home.

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1 On June 9, defendant met Owen and Angelica Handy in Ensenada, Mexico.
2 Defendant, using the name Angel Jackson, asked for work. Handy offered
3 defendant some food and a place to stay if he would help paint their boat,
4 the Illa Tika. Defendant agreed. After working on the boat for two days,
5 defendant and the Handys set sail for San Francisco. They made several
6 stops, then eventually went to Pelican Bay near Santa Barbara, where they
7 stayed for four or five days. The Coast Guard arrested defendant at that
8 location after he dove off the Illa Tika, swam to a dinghy, and started to row
9 for shore. While he was with the Handys, defendant possessed several items
10 identified as coming from the Lease house.

11 [15.] A drop of blood collected in the hallway at the Ryen home could not
12 have come from any of the victims. When analyzed many of the serum
13 protein and enzyme types of that drop of blood matched Cooper's profile.

14 With one exception, all of the blood samples obtained from the Ryen house
15 could have come from one or more of the victims. The exception is a single
16 drop of blood found on the hallway wall opposite the master bedroom door.

17 Daniel Gregonis, a criminalist with the San Bernardino County sheriff's
18 crime laboratory, examined this drop of blood by a scientific process called
19 electrophoresis. Human blood contains various enzymes and serum
20 proteins. The types of enzymes vary from person to person. Electrophoresis
21 is a technique used to distinguish between enzyme types, so as to exclude
22 or include a person as a possible donor of a blood sample. After
23 electrophoretic testing, Gregonis concluded that the drop could not have
24 come from any of the victims.

25 Based upon results obtained for several enzymes, Gregonis also concluded
26 that the drop was consistent with defendant's blood. Results for certain
27 other enzymes were inconclusive. Because of various characteristics, the
28 blood had to have come from a Black person such as defendant. One of the
enzymes tested is commonly called "EAP." Gregonis initially believed the
EAP of the drop of blood was type B. When he later typed defendant's own
blood, Gregonis also believed it was EAP type B. Gregonis subsequently
learned that defendant's EAP type was RB, a rare type. Gregonis had never
before seen an RB type. He reexamined the photograph of the original
testing of the drop of blood, but it was inconclusive as to whether it was
EAP type B or RB. Gregonis testified, however, that when he tested the
drop of blood, it appeared to have the same EAP type as defendant's blood.
Brian Wraxall, another expert, described the difference between types B and
RB as "fairly subtle."

Before Gregonis learned of his error regarding defendant's EAP type, he and
Dr. Edward Blake, an expert employed by the defense, tested the drop
further. Because of the limited amount of the remaining sample, they
performed tests that they believed had the best chance of excluding
defendant as a possible donor. They did not retest for EAP. The additional
tests tended to include defendant as a possible donor. Only a minute amount
of the blood remained after these tests. Later, after Gregonis learned of his
error regarding defendant's EAP type, he tried to test the remaining sample
for EAP. Dr. Blake was again present. This final test completely consumed
the sample and was inconclusive.

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1 Electrophoretic testing also established the blood on the rope found in the
2 Bilbia bedroom closet could have come from one of the victims but not
defendant.

3 Cooper, 53 Cal.3d at 795-800.

4 In the latest petition, the California Supreme Court denied Petitioner's claims on
5 the merits and as procedurally barred, finding that "[a]s with the previous five petitions
6 for writ of habeas corpus that petitioner has filed in this court challenging the judgment,
7 this petition casts no doubt on petitioner's guilt or the validity of the judgment." In re
8 Cooper, Case No. S122389. This Court agrees.

9 **3. Federal Court Findings and Conclusions Confirmed Petitioner's**
10 **Guilt and Rejected Petitioner's Constitutional Claims**

11 This Court previously reviewed the entire trial court proceedings, the parties
12 extensive briefings, and subsequently conducted an evidentiary hearing. After this
13 thorough review, this Court concluded that (1) Petitioner was represented by an
14 experienced and able trial attorney, (2) Petitioner's trial and appeal were constitutionally
15 conducted, (3) Petitioner was convicted by overwhelming evidence of guilt, and (4) the
16 jury properly weighed the aggravating and mitigating evidence in concluding that four
17 brutal murders justified the death penalty. Cooper I, 92-CV-427, Aug. 25, 1997 Order at
18 1. Thereafter, the Ninth Circuit Court of Appeals affirmed this Court and likewise
19 concluded that Petitioner was convicted by "overwhelming evidence of guilt." Cooper,
20 255 F.3d at 1114-15; Cooper I, 92-CV-427, Aug. 25, 1997 Order at 1-3, 49-50, 104-05.
21 The United States Supreme Court denied Petitioner's petition for writ of certiorari
22 regarding this Court's denial of his first habeas petition and the Ninth Circuit's affirmance
23 of this Court's denial of his first petition. Cooper, 524 U.S. 963 (1998); Cooper, 537 U.S.
24 861 (2002).

25 **4. State Court Post-Conviction Evidentiary Hearing**

26 Significantly, the state court conducted a post-conviction evidentiary hearing on
27 June 23-25, 2003. The state court concluded that Petitioner "has not made any showing
28 that law enforcement personnel tampered with or contaminated any evidence in this

1 case.” (92-CV-427, NOL filed Jan. 23, 2004, Ex. 6, Judge Kennedy Order dated July 2,
2 2003 at 10.)

3 **D. Petitioner’s Allegations Do Not Meet the Burden of Establishing Actual**
4 **Innocence**

5 In this successive petition, the Court heard from forty-two witnesses and reviewed
6 numerous exhibits. After thoroughly considering the evidence and submissions of the
7 parties, the Court denies Petitioner’s claims.

8 **1. Canyon Corral Bar**

9 Petitioner contends his innocence is “corroborated” by the actions of others who
10 “likely were involved” in the Ryen/Hughes murders. (Pet. ¶ 60.) Petitioner focuses on
11 the same persons — three white males at the Canyon Corral Bar the night of the murders
12 — that he tried to direct suspicion toward at trial. (Id.) The Court concludes that the
13 Canyon Corral bar information does not undermine the evidence of Petitioner’s guilt.

14 None of the Canyon Corral bar witnesses are able to refute the physical evidence
15 collected at the crime scene or the post-conviction DNA evidence linking Petitioner to the
16 crime. The blood from the crime scene, A-41, recovered at around 12:25 a.m. on June 6,
17 1983 came from an African American individual, (93 RT 4424), and post-conviction
18 DNA tests confirmed that it was Petitioner’s blood (1 in 310 billion). (See Supplemental
19 DOJ Physical Evidence Exam Report dated Sept. 24, 2002 at 1-2.) None of the bar
20 witnesses describe an inebriated African American individual with blood. As such, the
21 evidence from the bar does not undermine Petitioner’s guilt.

22 Petitioner alleges that on the night of the murders three strangely acting patrons
23 covered in blood were asked to leave the Canyon Corral Bar. (Pet. ¶ 97.) At trial, the
24 defense tried to cast suspicion away from Petitioner by calling bartender Ed Lelko to
25 testify that three men entered the bar that night and later left without incident after being
26 refused service for being too drunk. Lelko did not notice any blood on the men. In fact,
27 none of the people known to be at the Canyon Corral bar on the night of the murders
28 noticed blood. (Answer, Ex. 18, at 1; Answer, Ex. 22, at 1; Answer, Ex. 24, at 2; Answer,

1 Ex. 28, at 1; Answer, Ex. 30.) Petitioner's support for his allegation comes from people
2 who over twenty years after the fact allege to have been patrons in the bar: Lance Stark
3 Mary Mellon-Wolfe, Christine Slonaker, Randy Mansfield and Al Ward.

4 In order to address the issues raised by Petitioner's successive petition, the Court
5 held an evidentiary where several people at the bar that night testified. These people had
6 previously given police interviews the day following the murders and/or testified at trial.
7 These included the bartender Edward Lelko,³⁸ the bar manager Shirley Killian, two
8 waitresses, Virginia Mansfield and Kathleen Royals, and several bar patrons, including
9 Lester Land, Linda Paulk and Pamela Smith. Lelko, Killian, Mansfield, Royals, Land,
10 Paulk and Smith confirm their earlier statements and testimony that there were no men
11 in the bar that night with blood on their clothes or faces and that the police did not come
12 to the bar that night.

13 The Court also heard testimony from Lance Stark, Mary Mellon-Wolfe, and
14 Christine Slonaker. Deputy Rodney Ray Hoops who was on patrol the evening of the
15 murders also testified. At the request of Petitioner, the Court heard from Alfred Eugene
16 Ward, Sr., who testified that he was at the Canyon Corral Bar on the night *before* the
17 murders, Friday, June 3, 1983, one night too soon to be relevant. He specifically recalls
18 seeing three young white males wearing extremely bloody T-shirts. (8/25/04 HRT 37.)
19 If Mr. Ward is credible, his testimony refutes Petitioner's theory and is consistent with
20 Randy Mansfield's testimony that it was not unusual for patrons to come into the bar with
21 blood on their clothes from the slaughterhouses in the area.

22 **a. Evidentiary Hearing Testimony of Bar Employees and**
23 **Patrons Who Were Interviewed After the Murders and/or**
24 **Testified at Trial**

25 Edward Lelko testified he was the bartender at the Canyon Corral Bar on the night
26 of the murders. (6/25/04 HRT 5.) Lelko stated that he saw three men wearing Levi jeans.
27 (6/25/04 HRT 18.) Lelko confirmed that one of the men was wearing a light colored T-

28 ³⁸ The Court held the hearing in Riverside, California as Mr. Lelko was facing major surgery for lung cancer and unable to travel. (See 04-CV-656, Doc. No. 100.)

1 shirt. (6/25/04 HRT 84.) The men were not wearing coveralls. (6/25/04 HRT 18.) Lelko
2 did not call the police and did not see a police officer in the bar that night. (6/25/04 HRT
3 19-21.)

4 Shirley Killian was the manager of the Canyon Corral Bar in June 1983 and
5 recalled the three men at the bar. (6/29/04 HRT 106-09.) She was not working on the
6 night of the murders but was at the bar. (6/29/04 HRT 106.) She did not see any blood
7 on the men's clothing or their persons. (6/29/04 HRT 111.) One of the men was wearing
8 a light colored T-shirt and blue jeans. (6/29/04 HRT 133, 140-41.) She did not call the
9 police. (6/29/04 HRT 109.) Killian went outside when the three men left and she saw
10 one get into a pickup and another one get into a smaller car. (6/29/04 HRT 108.)

11 Kathleen Royals was a waitress at the bar in June 1983. (6/29/04 HRT 148.) She
12 served the three men drinks. (6/29/04 HRT 153.) She described them as clean-cut men
13 and recalled they wore jeans and one or two of them wore a T-shirt. (6/29/04 HRT 153.)
14 She did not notice any blood on their clothing or their persons. (6/29/04 HRT 153.) She
15 did not call the police, was not aware of anyone calling the police and did not see any
16 officers in the bar that evening. (6/29/04 HRT 154.)

17 Linda Paulk was a patron at the bar and testified that three clean-looking men
18 entered the bar on the night of the murders. They looked like they were military
19 personnel. (6/28/04 HRT 183, 187.) They all wore T-shirts and had short haircuts.
20 (6/28/04 HRT 183.) One wore a white T-shirt. (6/28/04 HRT 184.) Ms. Paulk stated she
21 did not notice blood on any of the three men. She did not see anyone with coveralls.
22 (6/28/04 HRT 187.)

23 Pamela Smith was a patron at the bar on the night of the murders. (6/28/04 HRT
24 202.) She noticed three men at the bar. (6/28/04 HRT 203-04.) The three men were in
25 their 20's wearing T-shirt and jeans. (6/28/04 HRT 205.) One man had a T-shirt with a
26 logo making Ms. Smith think he liked heavy metal bands. (6/28/04 HRT 204-05.) Ms.
27 Smith stated that she did not notice any blood or stain on the three men's clothing.
28 (6/28/04 HRT 209.) She did not see a police officer at the bar. (6/28/04 HRT 209.) After

1 hearing about the murders, Ms. Paulk and Ms. Smith, contacted the Sheriff's Department
2 regarding the three men at the bar. (6/28/04 HRT 187-88.)

3 Virginia Mansfield is married to Larry Mansfield and the daughter in law of Shirley
4 Killian, the manager of the bar. (6/29/04 HRT 81.) She was a waitress at the Canyon
5 Corral Bar along with Kathleen Royal. (6/29/04 HRT 82.) On June 5, 1983, she reported
6 to the police that one of the men wore a "white short-sleeved cotton shirt (not an
7 undershirt)." (6/29/04 HRT 91.) She did not see anyone with clothing that had blood on
8 it. (6/29/04 HRT 83.) She does not recall seeing a uniformed officer inside the bar that
9 night and she was not aware of any problems in the bar that evening. (6/29/04 HRT 83.)

10 Lester Land was the maintenance man, bouncer and sometimes bartender at the
11 Canyon Corral Bar and was at the bar the night of the murders. (6/29/04 HRT 2-3.) Mr.
12 Land remembered three men but did not remember what they looked like. (6/29/04 HRT
13 6.) He did not notice anyone with blood on their clothing and did not recall seeing a law
14 enforcement officer inside the bar. (6/29/04 HRT 10.)

15 Land's interview by Detective Wilson on June 5, 1983 was documented in a police
16 report. (Resp't Evid. Hearing, Notebook 11, Ex. AAAA.) He stated that there were three
17 white men that arrived around 9:00 p.m. They were in their 20's. One guy had very short
18 light colored hair and wore a plaid shirt, the second male had short black hair wearing a
19 light colored plaid shirt and the third male had shoulder length dark colored hair. He
20 stated that they left the bar and returned a short time later pretty intoxicated. (Resp't
21 Evid. Hearing, Notebook 11, Ex. AAAA.)

22 The credible version of the three men in the Canyon Corral Bar comes from those
23 who were interviewed at the time of the crimes. The two waitresses and bartender who
24 were working the night of the murders, the manager of the bar who stopped by that night,
25 as well as three patrons at the bar that night, were interviewed by authorities close in time
26 to the murders. (6/05/04 HRT 17; 6/28/04 HRT 187, 196, 226; 6/29/04 HRT 3, 6, 89,
27 126.) Ed Lelko, the bartender was interviewed within three days of the murders. (102

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1 RT 6526-27, 6529.) The bar’s manager, Shirley Killian, was interviewed on June 5, 6,
2 and 8, 1983. (106 RT 7649.)

3 Lelko was called as a witness by the defense to cast suspicion on the three strangers
4 in the Canyon Corral Bar for the Ryen/Hughes murders. At trial, he testified that around
5 9:00 p.m. three Caucasian men entered the bar who were not “regulars.” Each man had
6 a short, military-style haircut, and all were wearing light-colored T-shirts and Levis; none
7 wore coveralls. (102 RT 6530, 6536, 6538.) The men spent about 15 to 20 minutes in
8 the bar before leaving. The three men returned around 11:30 p.m. One was noticeably
9 inebriated. The waitress refused them service and they left the bar without incident. (102
10 RT 6531.) Lelko noticed no blood on their T-shirts. (102 RT 6533, 6544.)

11 At trial, Killian was called as a rebuttal witness by the prosecution. She saw three
12 young men with close-cut, military-style haircuts. They wore light colored T-shirts. She
13 did not see any blood or stains on their clothing. (106 RT 7641, 7645.) The men were
14 “cut-off” from further drinks. They did not seem upset and left the bar around 11:30 p.m.
15 (106 RT 7647.)

16 **b. Evidentiary Hearing Testimony of Lance Stark, Mary**
17 **Mellon-Wolfe, Christine Slonaker, Randy Mansfield, and**
18 **Al Ward**

19 The Court also heard from the descriptions of the men supposedly at the bar that
20 night provided by Petitioner’s witnesses. Lance Stark testified at the evidentiary hearing.
21 (7/23/04 HRT.) He claims he was at the bar the night of the murders and saw three men
22 come into the bar that night who were making inappropriate comments to some women
23 sitting at the bar. (7/23/04 HRT; Pet’r Evid. Hr’g, Ex. 30.) As an initial matter, Stark was
24 known to the defense at trial so that information may not be the basis of an actual
25 innocence claim. See Schlup, 513 U.S. at 324; Thompson, 523 U.S. at 559. At trial,
26 Petitioner was provided information from the San Bernardino Sheriff’s Department
27 (“SBSD”) that Stark claimed to have seen “subjects” in the Canyon Corral Bar on the

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1 night of the murders and that he talked to them and saw their vehicle. (See 04-CV-656,
2 NOL of Blue Slip Re Lance Stark, Doc. No. 202).

3 During his testimony before this Court, Stark claimed to have initially seen two
4 white men on the night of the murders, who were visibly intoxicated. (7/23/04 HRT 28.)
5 Later, Stark stated that he saw three men leave the bar. (7/23/04 HRT 40.) The men
6 appeared dirty looking and not clean cut. (7/23/04 HRT 60.) One of the men had a short
7 military style haircut that was light and unkept, and was wearing a pair of blue jean
8 “Farmer John” bib overalls with the top half down. (7/23/04 HRT 23-24, 85, 97.) Stark
9 testified that the man in the “Farmer John” bib overalls also had a light T-shirt on with
10 what appeared to be some grease or mud stains, and he had a tattoo on his right shoulder.
11 (7/23/04 HRT 23-24.)

12 Stark further testified that after he heard the men talking about how they were in
13 a bar fight he thought that maybe the substance on one man’s shirt he thought was grease
14 or mud may have been blood, but he was not sure about the substance. (7/23/04 HRT 23,
15 64.) At the time, the incident did not stick out in Stark’s mind and he thought it was not
16 significant, even after he learned of the murders in Chino the next day. (7/23/04 HRT
17 95.) In fact, Stark stated that he had not thought about this incident beyond the day it
18 happened until nearly twenty years later when a defense investigator came and visited him
19 in early to mid 2004. (7/23/04 HRT 95.) Because of the twenty year gap between the
20 incident at the Canyon Corral Bar and Stark’s effort to recall, he is not even sure if the
21 incident happened the night of the murders on June 4, 1983. (7/23/04 HRT 95-96.) He
22 states that he knows on some date that these three men came to the Canyon Corral Bar but
23 he cannot personally correlate that date to the night of the murders. (7/23/04 HRT 95-96.)

24 At the evidentiary hearing, Mary Mellon-Wolfe described spots of blood on the
25 front of one of the men’s T-shirt and a small amount of blood on his upper lip. (6/28/04
26 HRT 123-24, 164-65.) Wolfe said his shirt was a “light tan or white, off-white shirt []
27 with jeans” and that he had longer hair than the other two men, who had “really short

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1 hair.” (6/28/04 HRT 121-23.) One of the other men was wearing tan coveralls that were
2 “zipped down and thrown over” down to his waist. (6/28/04 HRT 121-22.) The three
3 were refused service shortly after arriving and they left without incident. (6/28/04 HRT
4 at 125-26.)

5 In contrast, Slonaker’s declaration describes two white men with blond hair in their
6 20's. (6/28/04 HRT 21.) One was wearing a light colored T-shirt and jeans and the other
7 man was wearing coveralls with buckles. (6/28/04 HRT 21-22.) They were “all covered
8 in blood.” (Traverse, Ex. 212 at 2.) During her testimony, she described the man in a
9 white or dirty T-shirt and jeans with blood “[a]ll over him. It was on his arms. It was all
10 over his face. It was on his - - it was all over his shirt. It was on his feet and on his shoes.
11 It was everywhere.” (6/28/04 HRT 25.) She then testified that the men were refused
12 service and left the bar. (6/28/04 HRT 26-27.) Both Mellon-Wolfe and Slonaker describe
13 an incident where the men approached them at the bar and began hitting on their friend,
14 who had on a low cut blouse. (6/28/04 HRT 23-24; 6/28/04 HRT 120-21.)

15 Petitioner also presented the testimony of Randy Lee Mansfield, the son of the bar
16 manager Shirley Killian. (8/25/04 HRT 87.) He said he worked at the bar practically
17 every night back at the time of the murders. (8/25/04 HRT 81, 93.) Mr. Mansfield
18 testified that a couple of men wearing butcher smocks with blood on them came into the
19 bar on some day around the time of the murders, but that he could not place the men in
20 the bar the day of the murders. (8/25/04 HRT 86-87.) Mr. Mansfield testified that these
21 men were Hispanic with dark hair and appeared to work at one of the local
22 slaughterhouses. (8/25/04 HRT 84-85.) The men came into the bar during the day and
23 were wearing butcher smocks, the kind that tie behind the back. Since there were several
24 slaughterhouses in the area, Mr. Mansfield made the logical conclusion that these men
25 were simply coming from work and that is why they had blood on them. (8/25/04 HRT
26 94.) He did not think anything of these men even after he learned of the murders.
27 (8/25/04 HRT 84-85.) Moreover, Mr. Mansfield is not sure when he saw these men, but

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1 he does recall that he was not alarmed when he saw them and did not call law
2 enforcement. (8/25/04 HRT 97-98.)

3 The observations of the employees and patrons at the bar the night of the murders
4 all confirm the trial testimony of Lelko and Killian, and contradict the accounts of Stark,
5 Mellon-Wolfe, and Slonaker. The sworn declarations of a number of employees and
6 patrons who were also at the bar that night contradict the information belatedly recounted
7 by Stark, Mellon-Wolfe, and Slonaker. (See Answer, Exs. 18 (Lelko Decl.); 20 (Killian
8 Decl.); 22 (Mansfield Decl.); 24 (Royals Decl.); 26 (Paulk Decl.); 28 (Smith Decl.); 30
9 (Land Decl.)) The three belated and inconsistent accounts on which Petitioner relies are
10 simply not credible evidence, let alone clear and convincing evidence that would rebut the
11 presumption of correctness attached to the state courts' implied and express factual
12 findings. See 28 U.S.C. § 2254(e).

13 Petitioner requested an evidentiary hearing with Al Ward and learned prior to the
14 testimony that he would not corroborate Petitioner's theory because he would testify that
15 he was there on Friday night, a day too early to be relevant. Petitioner claims that the
16 Court erroneously ordered Al Ward to testify. However, Petitioner's request for
17 evidentiary hearing requests the testimony of Al Ward and Al Warren. (04-CV-656, Doc.
18 No. 121 at 13.) The request specified that Al Warren was not there the night of the
19 murders. (04-CV-656, Doc. No. 121 at 13.) Since Ed Lelko was the bartender on the
20 night of the murders, he confirmed that Al Warren was not bartending the night of the
21 murders. (6/25/04 HRT 5.) Al Warren had a stroke and is deceased. (4/22/05 HRT 45.)

22 Mr. Ward, an African American individual, testified that he was at the Canyon
23 Corral Bar on the night before the murders, Friday, June 3, 1983, and that he specifically
24 recalls seeing three young white males wearing extremely bloody T-shirts. (8/25/04 HRT
25 46.) Mr. Ward testified that this was his only visit to the Canyon Corral Bar. (8/25/04
26 HRT 45.) Mr. Ward worked at the El Toro Marine Corps Air Station and that he would
27 drive by the Canyon Corral Bar every weeknight on his way home. He did not work on

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1 Saturday, so he was not in the bar on the night of the murders. (8/25/04 HRT 42.) As a
2 family man, he never stopped at the bar. (8/25/04 HRT 45.)

3 On Friday night, June 3, 1983, Mr. Ward testified that he was driving home from
4 work just before midnight, as he did every weeknight, when he came across a couple
5 whose car had broken down on Carbon Canyon Road approximately eight miles from the
6 Canyon Corral Bar. (8/25/04 HRT 42-43.) Mr. Ward gave the couple a ride to the bar
7 and they invited him in for a drink to thank him for helping them. (8/25/04 HRT 44.) As
8 he was walking in the bar, Mr. Ward testified that he saw three men coming from around
9 the back of the bar that had unmarked T-shirts covered in blood. (8/25/04 HRT 46.) Mr.
10 Ward testified that he was approximately ten feet from the men and they were covered all
11 over in blood. It was on the front of their shirts and all over their arms and skin. (8/25/04
12 HRT 64.) The men also were all wearing similar khaki pants and similar shoes. (8/25/04
13 HRT 66.) Two of the men had blond hair and the third man had sandy brown hair.
14 (8/25/04 HRT 48.) Two of the men had shorter hair while the third man with blond hair
15 had longer hair tucked into the back of his T-shirt. (8/25/04 HRT 48.) Mr. Ward and the
16 couple he picked up proceeded into the bar and Mr. Ward had one beer and left shortly
17 after midnight. (8/25/04 HRT 45-46.) In total, Mr. Ward testified that he was at the bar
18 twenty minutes. (8/25/04 HRT 45.)

19 Both parties expressed doubt about the credibility of Mr. Ward. (4/22/05 HRT 45.)
20 However, Mr. Ward's testimony may explain why Stark, Mellon-Wolfe, and Slonaker
21 recall seeing men with blood on them at the bar. Yet Mr. Ward specifically recalls seeing
22 the bloody men at the bar on Friday, a day too early for it to be relevant. Given that all
23 of the bar employees and patrons interviewed contemporaneously after the murders and/or
24 testified at trial and before this Court, recall no bloody men at the bar on the night of the
25 murders, the Court concludes that the testimony of the witnesses from the trial have
26 greater weight compared to the additional witnesses whose recollections over twenty
27 years later are not as reliable.

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c. Detective Wilson

Detective Timothy Wilson of the San Bernardino Sheriff’s Department testified that nothing about three men covered in blood had come up in his interviews and investigation into any suspicious men being at the bar the night of the murders, Saturday, June 4, 1983. (8/26/04 HRT 78.) Later, he heard hearsay information. Det. Wilson is not sure where he heard this information, it may have been from any number of hearsay sources such as the newspaper or “word on the streets.” (8/26/04 HRT 76.) The information did not come from his investigation or interviews with witnesses. (8/26/04 HRT 78.)

2. No Brady Violation Regarding Canyon Corral Bar

After reviewing all of the evidence and hearing from the witnesses, the Court concludes that the more credible version of the events at the Canyon Corral Bar the night of the murders comes from the bar employees and patrons interviewed shortly after the murders who also testified at the trial. At the evidentiary hearing, these credible witnesses testified on the night of the murders, there were no bar patrons with blood on them and the police were not at the Canyon Corral Bar.

Petitioner argues that the prosecution withheld evidence that a police officer was called to the Canyon Corral bar the night of the murders. The Court disagrees, and the extensive evidentiary hearings do not support Petitioner’s claim.

For example, Mellon-Wolfe admitted that she had no recollection of seeing a uniformed officer inside the bar, and believed she was confusing the night of the murders with another night at the bar when a uniformed officer came into the bar, and she saw the officer speaking to the woman manager of the bar. (6/28/04 HRT 173, 175.)

Slonaker’s testimony and declaration similarly have changed. In her declaration, she stated a uniformed officer came into the bar. (Traverse, Ex. 212 ¶ 11.) In her testimony, however, she stated that no uniformed police officer came into the bar the night of the murders. She now claims that as she got up to leave the bar by way of the back door, she looked out the open front door of the bar and saw a uniformed officer

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1 outside the bar wearing tan pants and a tan shirt, not the uniform of the Sheriff's officers.
2 (6/28/04 HRT 73-75, 80.)

3 Randy Mansfield testified that he did not call law enforcement. (8/25/04 HRT 97-
4 98.) Since there were slaughterhouses in the local vicinity, Mansfield was not alarmed
5 at seeing a couple of men wearing butcher smocks with blood. (8/25/04 HRT 84-85.)
6 Bartender Edward Lelko, bar manager Shirley Killian, two waitresses, Virginia Mansfield
7 and Kathleen Royals, and several bar patrons, including Lester Land, Linda Paulk and
8 Pamela Smith did not see men with blood on them or see the police at the bar. (6/25/04
9 HRT 17; 6/28/04 HRT 123-24, 187, 189, 209; 6/29/04 HRT 10, 19, 83, 88, 111, 153-54;
10 see also Answer, Ex. 18 at 1; Answer, Ex. 22 at 1; Answer, Ex. 24 at 2; Answer, Ex. 28
11 at 1; Answer, Ex. 30.)

12 The seven witnesses who were at the bar that night all confirmed that there was no
13 reason to call the police to the bar and that none placed an officer in the bar that night.
14 (6/25/04 HRT 19, 21; 6/28/04 HRT 209; 6/29/04 HRT 10, 35, 83, 109, 154.) In addition,
15 Respondent also produced the dispatch log from the Sheriff's Department for the night
16 of the murders, and there was no call for assistance from the bar. (Resp't. Evidentiary
17 Hearing Notebook 12, Ex. MMMM; see also 6/29/04 HRT 47, 53-54 (Dep. Rodney
18 Hoops testimony)).

19 Deputy Rodney Hoops, the deputy sheriff patrolling the area that included the bar
20 from 3:00 p.m. to 11:00 p.m. on June 4, 1983, credibly testified that he did not go to the
21 Canyon Corral Bar that night and that he did not hear any broadcast over the radio
22 relating to the bar or its immediate vicinity. (6/29/04 HRT 45, 47.) No other law
23 enforcement agency would respond to the bar unless a mutual aid request was made, and
24 the request would come from the Sheriff's Department and be reflected on the dispatch
25 log. (6/29/04 HRT 47.)³⁹

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27 ³⁹ The Court also heard testimony from Det. Wilson that when he was a deputy at the west end
28 station, he would regularly check on the Canyon Corral Bar. (8/26/04 HRT.) This is consistent with
Dep. Hoops testimony that he would regularly check on the bar when he was on patrol. (6/29/04 HRT
at 76-77.) But as Dep. Hoops testified, if there was nothing to report from the bar check, then there

(continued...)

1 Paul Beltz, a SBSO officer, testified that he was in the parking lot of the Canyon
2 Corral Bar when he got the call to the Ryan home on June 5th at approximately 12:48.
3 (8/25/04 HRT 8.) He got the call the morning of June 5th when the bodies were
4 discovered. Beltz was not at the Canyon Corral Bar parking lot on the night of the
5 murders.

6 Also, the law enforcement officer in tan pants Slonaker claimed to have seen
7 outside that bar on the night of the murders does not match the uniform of the San
8 Bernardino Sheriff's deputy. Their uniforms consisted of forest green pants. (6/29/04
9 HRT 59; see also Resp. Evidentiary Hr'g Ex. TTTT (picture of uniformed San Bernardino
10 Sheriff's Officer); 8/13/04 HRT (testimony of San Bernardino Sheriff's Dispatch
11 Supervisor Debra Holman that Ex. TTTT is the uniform worn by the San Bernardino
12 Sheriffs with green pants).)

13 After conducting an extensive evidentiary hearing, the Court concludes that there
14 was no Brady violation based on the absence of a report form in response to the Canyon
15 Corral Bar the night of the murders. The evidence, including Petitioner's own witnesses
16 disputes Petitioner's claim that a uniformed officer came to the bar the night of the
17 murders. In addition, the employees on duty and the patrons in the bar were aware of
18 what transpired with the three men in question, and the defense had the benefit of that
19 information before trial and elicited testimony during trial of the events at the bar that
20 night. (Answer, Ex. 35.) Therefore, Petitioner's allegations do not present a viable Brady
21 claim.

22 **3. Daily Logs and Dispatch Information Available at Trial to the**
23 **Defense**

24 On August 8, 1983, and January 16, 1984, Petitioner's defense counsel David
25 Negus filed a subpoena duces tecum for materials that included "the complete daily logs,
26 dispatch records, tape recordings of dispatch or communications made from June 2, 1983

27 _____
28 ³⁹(...continued)
would be nothing noted on the log. (Id.) Thus, even if there were a bar check the night of the murders,
there were no incidents to report, such as bloody men, since nothing is reflected on the logs.

1 to July 31, 1983, by the Sheriffs or any deputy of the SBSO concerning the investigation
2 and search for suspects in the deaths occurring at [the Ryen home] and the escape and
3 attempt to apprehend David Trautman, aka: Kevin Cooper, from CIM on June 2, 1983.”
4 (I CT 75-76.) Negus’ declaration stated in his request: “The logs, dispatch records, and
5 tape recordings include actions of officers which may not be memorialized in reports. The
6 actions are relevant to the integrity of physical evidence, other suspects to the crime, and
7 the issue of flight.” (I CT 90.)

8 On September 2, 1983, after the state’s compliance, defense trial counsel David
9 Negus stated to the court that the daily logs had been received:

10 I can indicate to the court that with respect to the four items in the amended
11 subpoena [see I CT 75-76], that with respect to Item 1 [complete daily logs,
12 dispatch records, tape recordings of dispatch or communications made from
June 2, 1983, to July 31, 1983], all items except the tapes that were requested
have been received.

13 (IV RT 6.)

14 Also, John Kochis, one of the prosecuting attorneys at the Petitioner trial, testified
15 that the San Bernardino Sheriff’s daily logs from June 4-6, 1983 (Resp’t Evidentiary Hr’g
16 Exs. MMMM-PPPP), were subject to a subpoena duces tecum filed by the defense and
17 those documents were released to the defense directly by the San Bernardino Sheriff’s
18 Department. (8/13/04 HRT 183.)

19 Petitioner points to the June 5, 1983 daily logs of the San Bernardino County
20 Sheriff, which lists in the incident detail of the Ryen/Hughes murders a description of the
21 suspect vehicle as a Buick station wagon “occupied by three young males.” (See Resp’t
22 Evidentiary Hr’g, Ex. NNNN at 9; see also Resp’t Evidentiary Hr’g, Ex. RRRR
23 (handwritten page by Holman having information on the suspect vehicle); Resp’t
24 Evidentiary Hr’g, Ex. SSSS (teletype dispatches regarding the suspect vehicle).) The
25 Court held an evidentiary hearing on August 13, 2004, to address the Sheriff’s daily log,
26 where dispatchers Nancy Simendich and Debra Holman testified. (8/13/04 HRT 4, 78.)
27 Both Simendich and Holman were on duty the day the murders were discovered, June 5,
28 1983. (8/13/04 HRT 10-11, 79-80.) Neither Simendich nor Holman had any independent

1 recollection of the suspect vehicle or who may have conveyed the vehicle/occupant
2 information to the dispatch that was entered into the daily logs and broadcast on the
3 teletype. (8/13/04 HRT 101.) This was not new information as Douglas and Paula
4 Leonard, the couple that made the report, testified to this information at trial at the request
5 of the defense. (102 RT 6586-6604.)

6 The Court also heard testimony from Deputy Paul Beltz, who was dispatched to the
7 murder scene when the crimes were discovered and was the Sheriff who advised dispatch
8 about the suspect vehicle and the “three young males.” (8/25/04 HRT.) Deputy Beltz
9 credibly testified that he could not recall the source of the suspect vehicle and the
10 description of the three young males. (8/25/04 HRT 24-25.) He stated that it may have
11 been information that he heard on the Sheriff radio or from Robert Howey, the neighbor
12 of the Ryen family that made the initial call to the Sheriffs to report the murders. (8/25/04
13 HRT 24-25.)

14 Petitioner was aware of the daily logs at trial because they were provided to him
15 during discovery via a subpoena duces tecum. Additionally, the defense elicited the
16 testimony from Douglas and Paula Leonard at trial. (102 RT 6586, 6599.) The daily logs,
17 therefore, cannot be a basis for an actual innocence claim. See Schlup, 513 U.S. at 324;
18 Thompson, 523 U.S. at 559.

19 4. T-shirt (Trial Exhibit 169)

20 Petitioner alleges his innocence is shown by the T-shirt discovered less than one
21 half mile⁴⁰ from the Ryen home near the Canyon Corral Bar. (Pet. at 19.) Moreover, there
22 is nothing inconsistent with Petitioner’s guilt and the T-shirt being left on the side of the
23 road by the bar, inasmuch as Petitioner stole the Ryens’ station wagon and would have
24 driven past the Canyon Corral Bar on his way to Long Beach where he abandoned the
25 station wagon. (Answer, Ex. 15.) Petitioner could have tossed the T-shirt out of the
26 window of the Ryen station wagon, just as he tossed the hatchet out the window. (89 RT
27 3519; 90 RT 3791.) The cigarettes from inside the vehicle contained Petitioner’s DNA.

28 ⁴⁰ In fact, the distance between the Ryen home and the Canyon Corral Bar driving along the only paved road leaving the Ryen home is 1.75 miles. (Answer, Ex. 17; Answer, Ex. 16 (map).)

1 (Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.) Also, since
2 the T-shirt was introduced into evidence at trial by Petitioner in an effort to direct
3 suspicion at the three bar patrons at the Canyon Corral Bar, it does not constitute evidence
4 of actual innocence. See Schlup, 513 U.S. at 324; Thompson, 523 U.S. at 559.

5 Petitioner also attempts to connect the T-shirt on the side of the road by the bar to
6 Lee Furrow, but Petitioner's DNA was on the T-shirt with the blood of the victims, linking
7 Petitioner to the crime. (See Supplemental DOJ Physical Evidence Exam Report dated
8 Sept. 24, 2002.) The stories told by Ms. Roper, now deceased, do not establish that
9 Petitioner is innocent. (Answer, Ex. 51.) Ms. Roper's allegations lack credibility. She
10 was on drugs and hallucinating the night she claims she saw Furrow, and Furrow was at
11 a rock concert on the night of the murders. (Answer, Exs. 45 at 1; 54 at 1.)

12 Petitioner also points out that no one identified the T-shirt as having come from the
13 Ryen home, and the owners of the hideout house did not recognize the T-shirt. (Pet. at
14 20.) Since all of the occupants of the Ryen home except for eight-year-old Josh were
15 dead, the failure to identify the T-shirt as coming from the Ryen home certainly does not
16 exclude the possibility that it did. Also, the owners of the hideout house made it clear that
17 items of clothing were kept at the house for various uses around the ranch. (87 RT 2991,
18 3044, 3065.) Petitioner admitted taking clothing from the hideout house. (97 RT
19 5410-12.) Given the presence of both Petitioner's blood and the victims' blood, and that
20 the T-shirt was on the side of the road leading from the Ryen house to the freeway, it is
21 entirely possible Petitioner used the T-shirt following the murders. In any event, what
22 Petitioner claims was known at trial, and cannot serve as a basis for a claim of actual
23 innocence. See Schlup, 513 U.S. at 324; Thompson, 523 U.S. at 559.

24 To put Petitioner's innocence claim in perspective, the primary newly discovered
25 evidence pertaining to the T-shirt is that it is stained with Petitioner's blood. (Answer, Ex.
26 88.) Petitioner's claim that blood was planted on the T-shirt ignores that the T-shirt was
27 never used as evidence against him. Moreover, the San Diego County Superior Court
28 made express findings in a recent post-conviction evidentiary hearing rejecting

1 Petitioner’s evidence tampering claims, (Answer, Ex. 9 at 10), and Petitioner fails to
2 present clear and convincing evidence to rebut the presumption of correctness that
3 attaches to those findings. 28 U.S.C. § 2254(e). Notwithstanding, EDTA preservative
4 testing ordered by this Court fails to show any evidence tampering relating to Petitioner’s
5 blood found on the T-shirt.

6 **5. Shoe Evidence**

7 Investigators discovered three shoe-print impressions that the prosecution argued
8 linked Petitioner to the murders: a partial sole impression on a spa cover outside the Ryen
9 master bedroom, (88 RT 3363), a bloody shoe print on a bed sheet in the master bedroom,
10 (89 RT 3506-07), and a shoe-print impression in the hideout house. (87 RT 2925.) All
11 three appeared to come from tennis shoes, specifically the Pro-Keds Dude tennis shoes.
12 (88 RT 3364-65; 94 RT 4764; 4778.)

13 Petitioner seeks to undermine the shoe-print evidence presented at trial. Petitioner
14 begins by insinuating there is a problem with the bloody shoe print recovered from the
15 sheet in the Ryen master bedroom because Deputy Duffy testified initially that he did not
16 see any shoe impressions in the master bedroom, but later testified to seeing and
17 photographing such an impression. (Pet. at 21.) Duffy testified to this at trial. (89 RT
18 3457-58, 3497, 3505, 3506.) Petitioner’s insinuation was also rejected by his own expert
19 at trial, Dr. Thornton. (105 RT 7560 (“no particular quarrel concerning the collection and
20 preservation of” the shoe print in blood).) Petitioner may not make a showing of actual
21 innocence based on what was known at the time of trial and presented to the jury. See
22 Schlup, 513 U.S. at 324; Thompson, 523 U.S. at 559.

23 Petitioner claims that the prosecution withheld information concerning criminalist
24 William Baird’s heroin use undermining his conclusion that the tread patterns on the
25 shoeprints matched the tread patterns of the Pro-Keds Dude tennis shoes. Petitioner’s
26 claim concerning criminalist William Baird was previously adjudicated by this Court,
27 Cooper I, 92-CV-427, Aug. 25, 1997 Order at 69-71. Therefore, his claim regarding Baird
28 is barred. See 28 U.S.C. § 2244(b)(1). Additionally, at trial, Dewey Newberry,

1 general merchandise manager of Stride Rite, viewed the photographs of the three shoe
2 impressions from the Ryen home and the hideout house and concluded that the shoe
3 impressions were from the Pro-Keds Dude tennis shoes. (86 RT 2642.)

4 The Court set an evidentiary hearing to address Petitioner's claim that the tennis
5 shoes used at CIM Chino were common tennis shoes available to the general public
6 through any number of retail and department stores such as Sears. (Pet. at 21-22.) The
7 Court heard from Midge Carroll; Lt. Donald Smith, a former investigator at CIM under
8 Midge Carroll; Don P. Luck, a former executive and sales manager for the Stride Rite
9 Corporation, the company that manufactured the Pro-Keds Dude tennis shoes; Sandra
10 Coke, the defense investigator that obtained the declarations from Midge Carroll; James
11 Taylor; and Detective Derek Pacifico of the San Bernardino Sheriff's Department.

12 **a. Testimony of Former Warden Midge Carroll**

13 Petitioner alleges that the prosecution failed to provide information to the defense
14 from the former warden of CIM, Midge Carroll, that the prison-issued Pro-Keds Dude
15 tennis shoes that matched the shoe prints from the crime scene were "common tennis
16 shoes available to the general public through Sears and Roebuck and other such retail
17 stores." Cooper, 358 F.3d at 1121. The Court finds no material Brady violation.

18 Midge Carroll was known to the defense at the time of trial. There are phone messages
19 from her to defense counsel and notes about securing her testimony in the defense file.
20 (Answer, Ex. 81.) Moreover, in December of 2001, Ms. Carroll permitted Petitioner's
21 defense investigator Paul Ingels to spend a week with her going through her papers. This
22 was two-and-a-half years before she submitted her eleventh-hour declaration to the Ninth
23 Circuit. (6/02/04 HRT 125 (Carroll's testimony); 8/13/04 HRT (Ingels' testimony).) Ms.
24 Carroll even gave a telephonic interview to defense investigator Ingels back in November
25 of 2001. (8/13/04 HRT (Ingels' testimony).)

26 Ms. Carroll testified at the evidentiary hearing that after reading a newspaper article
27 stating that shoe prints found at the Ryen/Hughes murder scene were from a prison made
28 tennis shoe, she commenced an informal inquiry into whether CIM manufactured

1 any special tennis shoes. (6/2/04 HRT 102-06.) In a telephonic interview by Detective
2 Pacifico in 2004, Ms. Carroll explained what alerted her to conduct an inquiry was a
3 newspaper article she read describing the tennis shoes as prison made. (Answer, Ex. 64
4 at 11.) Ms. Carroll indicated that she did not personally conduct an investigation but
5 rather she “asked her staff to look into this special shoe and get back to me.” (6/2/04 HRT
6 102.) These people may have included the CIM business manager, Hal Panner, associate
7 warden Bob Bales, or her executive assistant Regina Stevens. (6/2/04 HRT 103.) Robert
8 Bales was the Associate Warden at CIM, in charge of the minimum facility at the time of
9 Petitioner’s escape. Mr. Bales states he was never personally asked to check on any
10 information regarding inmate shoes nor does he recall any conversations with Ms. Carroll
11 about shoes, and no records regarding shoes were exchanged between Mr. Bales and Ms.
12 Carroll. (Answer, Ex. 78 at 1.)

13 Following their investigation, Ms. Carroll’s staff reported to her that the tennis
14 shoes available at CIM were not prison-manufactured or specially manufactured tennis
15 shoes but were commonly available at retail stores such as Sears. They allegedly told her
16 CIM had bought the shoes at Sears, but this was incorrect. (6/2/04 HRT 102-06.) The
17 contracts from Stride Rite for the CIM purchase of 1,390 Pro-Keds Dude shoes were
18 admitted into evidence at trial. (Trial. Exs. 84-88.) At the evidentiary hearing, Ms.
19 Carroll testified that she had no personal knowledge as to the availability of Pro-Keds
20 Dude tennis shoes at CIM:

21 Ms. Wilkens: So you have no personal knowledge whatsoever about the
22 availability of the tennis shoes at CIM. You only know what
 you heard from your staff.

23 Ms. Carroll: That is correct.

24 (6/2/04 HRT 158.)

25 Ms. Carroll failed to request the relevant purchasing records which were readily
26 available or contact the investigators assigned at CIM for any assistance. She did not
27 review the relevant contracts related to the tennis shoes purchases and only informally
28 asked her staff what was going on with the tennis shoes. (6/2/04 HRT 154.)

1 Her investigative staff worked closely and directly with the SBSB in assisting to provide
2 information about Petitioner. (6/2/04 HRT 154.) Ms. Carroll, without conducting her
3 own direct investigation, relied on incorrect information given to her by her staff. Ms.
4 Carroll was relying on her own incorrect assumptions when she allegedly called to inform
5 law enforcement about the CIM tennis shoes.⁴¹ She had erroneously concluded that: (1)
6 CIM did not purchase the Pro-Keds Dude tennis shoes directly from the manufacturer, and
7 (2) the particular brand of shoes was readily available at retailers in southern California
8 such as Sears. Evidence supporting a claim of innocence must be reliable evidence. See
9 Schlup, 513 U.S. at 324; Thompson, 523 U.S. at 559.

10 Following Petitioner's escape from CIM, Ms. Carroll meticulously began keeping
11 detailed records regarding Petitioner. (6/2/04 HRT 141.) She kept everything, including
12 memos. (6/2/04 HRT 142.) Ms. Carroll testified that, after Petitioner's escape and the
13 murders, she contacted the San Bernardino Sheriff's Department and told them that the
14 shoes given to the inmates at CIM were not manufactured or specially made for the
15 prisons but that they were commonly available to the public through major retailers such
16 as Sears. (6/2/04 HRT 104-06.) Despite her detailed record keeping from this time
17 period, Ms. Carroll did not keep a record of having contacted the Sheriff's office. (6/2/04
18 HRT 161.)

19 Ms. Carroll's records from that time period are currently in eight three-ring binder
20 notebooks. (NOL filed 4/15/05, CIM Vault Notebooks.) The Court has reviewed the
21 eight notebooks consisting of 2,484 pages of documents concerning Petitioner's escape,
22 changes to security at CIM, newspaper articles, letters to the warden including a copy of
23 the envelope, memoranda, receipts of mail sent, notes regarding phone calls noting date,
24 time and person contacted, phone messages and many other documents concerning
25 anything related to Petitioner. (NOL filed 4/15/05, CIM Vault Notebooks.) Contrary to

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27 ⁴¹ The Court notes that Petitioner's investigator contacted Ms. Carroll back in November of 2001
28 and received copies of documents from her personal files in December of 2001. (See 6/02/04 HRT 125
(Carroll's testimony); 8/13/04 HRT 132-33 (defense investigator Paul Ingels' testimony).) In 2001, Ms.
Carroll told the investigator her belief that the tennis shoes were not specific to CIM but available at
other locations. (8/13/04 HRT 132.) It is therefore curious that Carroll's declaration submitted to the
Ninth Circuit is dated January 30, 2004.

1 her testimony, records of telephone conversations were made and retained. (See NOL
2 filed 4/15/05, CIM Vault Notebooks.) Yet, a memo or notation that a phone call made to
3 a lead investigator with the SBSB is not documented, but an interview with the defense
4 investigator with a witness called by the defense from CIM about the shoes is well
5 documented. (See NOL filed 4/15/05, CIM Vault, Notebook 6 at 1409-17.) Ms. Carroll
6 thought the information was significant enough to conduct a personal inquiry into the
7 matter, but no documentation is noted despite voluminous notes related to Petitioner. In
8 addition, Detective Pacifico conducted a search of the file for any documents concerning
9 a phone call by Ms. Carroll but nothing was found. (See 6/3/04 RT 46-47.)

10 Carroll's multiple hearsay information contradicts the records maintained by her
11 own institution, and the information known to persons with whom she purports to have
12 spoken. The evidence at trial that contradicts Carroll's multiple hearsay has been
13 confirmed by an Don Luck, former executive of Stride Rite Corporation with forty-two
14 years of experience with the sale of the Pro-Keds shoe brand.

15 **b. Testimony of Stride Rite employees Dewey Newberry and**
16 **Don Luck**

17 At trial, Stride Rite general merchandise manager for the Pro-Keds division, Dewey
18 Newberry, testified that CIM had a contract with Stride Rite, and had shipped the
19 Pro-Keds Dude shoes to CIM in 1982 and 1983. (86 RT 2613, 2619.) He explained that
20 Stride Rite kept records of the orders placed by its clients including the quantity, color,
21 and size of a particular shoe that is sold to a client. (86 RT 2619-20.) To Newberry's
22 knowledge, the Pro-Keds Dude shoe was not sold anywhere in California, or elsewhere
23 in the United States on a retail basis. (86 RT 2621, 2624.) Newberry was specifically
24 asked if Stride Rite shipped any of the Dude model tennis shoes to J.C. Penney,
25 Montgomery Ward, Fedco, or Target, and he indicated they did not. (86 RT at 2621.) He
26 was asked if it would be a fair statement that the only place the shoes would have arrived

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1 in California is at some type of state facility, and he agreed that would be the case.
2 (86 RT 2622.) He authenticated the sales records showing CIM purchased 1,390 pairs
3 of Pro-Keds Dude tennis shoes in 1982. (86 RT 2623; Answer, Ex. 70.)

4 To the best of Newberry's knowledge, the complete list of invoices of all other
5 institutions in and outside of California to which Pro-Keds Dude shoes were shipped from
6 1982 to 1983, were introduced into evidence. (86 RT 2623-24; Trial Exs. 84-88.) Those
7 invoices reflect sales to the Naval Training Center, (Answer, Ex. 71) and numerous
8 juvenile and correctional facilities and state hospitals. (Answer, Exs. 71-74.)

9 The Court heard testimony of Don P. Luck at the evidentiary hearing. Mr. Luck
10 is a former executive with the Stride Rite Corporation with forty-two years of experience
11 selling and managing Pro-Keds and familiar with all sales of the Pro-Keds shoes to major
12 retailers. (6/2/04 HRT 223.) Mr. Luck testified that he knew of all the major sales of
13 Keds during the 1980's and that he was personally responsible for the Sears, J.C. Penney's,
14 and military exchange accounts. (6/2/04 HRT 224, 225, 229-32.) He testified that he is
15 positive that there were no sales of the Pro-Keds Dude tennis shoes to Sears or any other
16 large retail companies or chain stores in the western United States. (6/02/04 HRT 225,
17 231-32, 239-40.) At the hearing, Mr. Luck testified that he has reviewed the trial
18 testimony of Newberry and the records admitted into evidence at trial, and confirms that
19 such testimony and records are consistent with his recollection regarding the sales of
20 Pro-Keds Dude tennis shoes. (6/02/04 HRT 224; Answer, Ex. 66 at 1.) Mr. Luck stated
21 that Mr. Newberry was a thorough person with regards to reviewing and checking files.
22 (6/02/04 HRT 232, 233.)

23 Rather, the Pro-Keds Dude tennis shoe was a "bid" shoe, the low-end shoe of a
24 particular brand, sold to institutions, such as prisons like CIM. (6/2/04 HRT 226-27.) Mr.
25 Luck also stated he knows that the Dude shoe was not available to the public through any
26 major retailer. (6/2/04 HRT 232.)

27 Mr. Luck could not rule out from his own personal knowledge sales to small shoe
28 stores because the Pro-Keds Dude shoe was included in the wholesale shoe catalogue and

1 because such sales would not have crossed his desk or been brought to his attention.
2 (6/2/04 HRT 241.) But as Mr. Luck confirmed in his testimony, Mr. Newberry was the
3 person who reviewed the Stride Rite corporate records and testified at trial based on his
4 search of the records that there were no retail sales of the Pro-Keds Dude tennis shoes.
5 (6/2/04 HRT 230, 233, 242.) Mr. Luck did not comment nor dispute the contents of the
6 corporate records or Mr. Newberry's testimony because he did not review those records
7 at the time Mr. Newberry prepared to testify in Petitioner's state court trial. (6/2/04 HRT
8 230, 233, 242.) So while Mr. Luck cannot rule out sales to small shoe stores from his
9 personal knowledge, nothing in his testimony cast any doubt upon Mr. Newberry's
10 testimony or the corporation records admitted into evidence at Petitioner's trial. (6/2/04
11 HRT 233, 242, 251.) Mr. Luck stated that Stride Rite kept very complete records and there
12 would be records of sales made to smaller retailers. (6/2/04 HRT 232, 242.)

13 The Court notes that at trial, Petitioner was aware that the Dude shoes were in the
14 Pro-Keds wholesale catalogue. (86 RT 2638.) Newberry testified that the Dude shoes
15 were in the catalogues for the past fifteen years before Petitioner escaped from CIM. (86
16 RT 2638.) It is not new information that the Dude tennis shoes were available in the
17 company's wholesale catalogue. In addition, Newberry testified that Don Luck, who
18 worked in the national accounts department for sales would be most knowledgeable about
19 the contracts with the State of California for the Pro-Keds Dude tennis shoes. (86 RT
20 2640-41.) Information regarding the presence of the Pro-Keds Dude tennis shoes in the
21 wholesale catalogue was presented at trial and available to defense counsel to investigate.

22 Mr. Luck also placed into perspective the number of the Pro-Keds Dude tennis
23 shoes manufactured by Stride Rite in 1982 in comparison to other retailers of canvas
24 basketball shoes. (6/2/04 HRT 247, 254-55.) He estimated that Stride Rite sold
25 approximately 80,000 of the Dude tennis shoes, (6/2/04 HRT 247) while its competitor
26 Converse was selling thirty million pairs of the Champion Oxford and eighty million pairs
27 of the loose-lined tennis shoes in 1982. (6/2/04 HRT 253-54.)

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1 Although the former warden erroneously believed the Pro-Keds Dude tennis shoes
2 were locally available to the public through major retailers such as Sears, credible
3 testimony by Stride Rite employees Mr. Newberry, at trial, and Mr. Luck, at the
4 evidentiary hearing, establish that Pro-Keds Dude tennis shoes were not sold to Sears or
5 any comparable retail store in the West coast. Moreover, CIM and Stride Rite Corporation
6 records establish that CIM had a purchase contract with Stride Rite Corporation, the
7 manufacturer of Pro-Keds Dude tennis shoes, for the Dude tennis shoes at the relevant
8 time period. In addition, Stride Rite kept accurate records of all its sales and the contracts
9 provided at trial showed that Pro-Keds Dude tennis shoes were not sold to retailers in
10 California but sold primarily to state institutions including the sale of 1,390 pairs of Pro-
11 Keds Dude tennis shoes to CIM where Petitioner was incarcerated.

12 **c. Testimony of Lieutenant Donald Smith**

13 At the evidentiary hearing, the Court also heard from Lieutenant Donald Smith, the
14 officer in charge of Investigative Services for CIM. (6/2/04 HRT 211.) At the hearing,
15 he verified his statements and testimony from pre-trial motions and the trial, that he
16 obtained copies of the purchase contracts between CIM and the Keds Corporation, and
17 provided those to the prosecution. (6/02/04 HRT 212; see 22 PRT 108-109; 85 RT 2487
18 (Trial Exs. 16, 17); Answer, Ex. 69.) Lt. Smith also testified at the evidentiary hearing that
19 he has no recollection of being asked to investigate the source of the prison tennis shoes.
20 (6/2/04 HRT 212.) Lt. Smith also testified the prisoners frequently played basketball and
21 that they organized their own teams. (6/2/04 HRT 219, 221-22.)

22 **d. Testimony of Detective Pacifico**

23 In order to determine if any records exist at the San Bernardino Sheriff's Department
24 regarding the alleged phone call from Ms. Carroll regarding the CIM tennis shoes,
25 Detective Derrick Pacifico testified at the evidentiary hearing on June 3, 2004. Detective
26 Pacifico testified that he looked through all of the files at the San Bernardino Sheriff's
27 Office and that he could not find any indication of a contact from Ms. Carroll. (6/3/04
28 HRT 46-47.)

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e. Testimony of Inmate James Taylor

Petitioner’s next effort to challenge the shoe-print evidence rests on the alleged recantation of inmate James Taylor’s trial testimony. (Pet. at 21.) Mr. Taylor testified at trial that he gave Petitioner a pair of Pro-Keds that Petitioner never returned. (85 RT 2511, 2546.) Mr. Taylor signed an eleventh-hour declaration penned by a defense investigator, who destroyed her notes of the interview. (6/02/04 HRT 11-12.) The declaration stated the only shoes he ever gave Petitioner were P.F. Flyers, not Pro-Keds. Cooper, 358 F.3d at 1121.

I. Preliminary Hearing Testimony

On November 15, 1983, at the preliminary hearing, Taylor testified for the prosecution that he was housed at Reception Center West at CIM. (4 PRT 3, 4.) Taylor was responsible for checking in and out all inmate recreational activity equipment. (4 PRT 5, 6.) Petitioner came into the gym in the R.C. West facility in May of 1983. (4 PRT 4.) Before Petitioner was transferred from the medium-security facility at CIM to a minimum-security facility, Mr. Taylor issued Petitioner a pair of state-issued tennis shoes. (4 PRT 5.) The shoes were black Pro-Keds. (4 PRT 5.) Mr. Taylor never got the pair of Pro-Keds tennis shoes back from Petitioner. (4 PRT 6.)

ii. Trial Testimony

At trial, Mr. Taylor again testified for the prosecution. (85 RT 2500.) In May of 1983, Mr. Taylor worked as a recreational instructor at the R.C. West facility at CIM. (85 RT 2500-01.) He handed out equipment, including tennis shoes. The shoes they stocked included Pro-Keds, P.F. Flyers, and assorted Converse tennis shoes. (85 RT 2501-02.) Mr. Taylor identified the Pro-Keds tennis shoes (Trial Ex. 38) and the tennis-shoe box (Trial Ex. 51) as the Pro-Keds that were available for checkout to inmates at the gym in May 1983. (85 RT 2503.)

Mr. Taylor knew Petitioner by the name of David Trautman. (85 RT 2504.) At first, Mr. Taylor issued Petitioner a pair of P.F. Flyers. Three or four days before Petitioner left for minimum security, Mr. Taylor gave Petitioner a pair of black Pro-Keds.

1 (85 RT 2510, 2547.) Mr. Taylor gave Petitioner the shoes sometime in the month of May
2 after the tenth of the month. (85 RT 2546.) He gave Petitioner the P.F. Flyers and then
3 the Pro-Keds on the same day. (85 RT 2546.) Mr. Taylor could not recall the size of the
4 shoes. (85 RT 2511, 2552.) He never got the Pro-Keds shoes back from Petitioner. (85
5 RT 2511.)

6 On cross-examination, Mr. Taylor was asked why he did not mention giving
7 Petitioner a pair of P.F. Flyers when he testified at the preliminary hearing. Mr. Taylor
8 explained that “it wasn’t the shoe in question.” (85 RT 2545.) Mr. Taylor testified the
9 gym had four brands of tennis shoes: Nike, Converse, Pro-Keds, and P.F. Flyers. Mr.
10 Taylor did not have a key to the room with the shoes, and always went into the room with
11 a correctional officer present. (85 RT 2551.) The shoes Mr. Taylor gave to Petitioner
12 were not in a box and Mr. Taylor did not know the condition of the shoe. (85 RT 2552.)

13 Mr. Taylor did not recall making a statement to CIM Investigator Hernandez that
14 somehow Petitioner had gotten some Pro-Keds. (85 RT 2555.) A tape recording was
15 played to the jury of Mr. Taylor’s interview with CIM Investigator Hernandez. In the
16 interview, Mr. Taylor said that Petitioner had a pair of brown Brogan prison issue shoes,
17 and no tennis shoes. (85 RT 2569.) The first pair he gave him was a pair of P.F. Flyers,
18 and then somehow Petitioner came up with a pair of Pro-Keds. (85 RT 2570.) Mr. Taylor
19 then said he gave Petitioner two pairs of shoes, and he traded him for Pro-Keds when he
20 got the right size. (85 RT 2570.)

21 **iii. Evidentiary Hearing Testimony**

22 On June 2, 2004, Mr. Taylor testified at an evidentiary hearing. Mr. Taylor began
23 by explaining that in 1983 he could identify the difference between P.F. Flyer basketball
24 shoes and Pro-Keds basketball shoes. (6/02/04 HRT 2, 3.) He also correctly identified
25 pictures of both a Pro-Keds Dude and a P.F. Flyer tennis shoe. (6/02/04 HRT 5, 6; Resp.
26 Evidentiary Hr’g Ex. CC, photo 1 (P.F. Flyer) and photos 2 and 3 (Pro-Keds).) He further
27 identified the Dude tennis shoe as being a black canvas shoe with the words

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1 Pro-Keds on the back of the shoe. (6/02/04 HRT 4; Resp. Evidentiary Hr'g Ex. CC,
2 photo 1 (P.F. Flyer) and photos 2 and 3 (Pro-Keds).

3 He explained that the P.F. Flyer is an everyday tennis shoe and that the Pro-Keds
4 Dude is a better-made shoe that he would give to the basketball players. (6/02/04 HRT
5 3-6.) This is consistent with Lt. Smith's testimony that the prisoners would organize
6 unofficial basketball teams. (6/02/04 HRT 221-22.) He gave Petitioner a pair of Pro-
7 Keds. (6/02/04 HRT 43.) Mr. Taylor could not recall at the hearing whether he had given
8 Petitioner a pair of P.F. Flyers prior to exchanging them for Pro-Keds Dude tennis shoes.
9 (6/02/04 HRT 36, 41, 42.) He did verify his trial testimony as truthful, however, and
10 stated that he was sure he had given Petitioner a pair of Pro-Keds Dude tennis shoes.
11 (6/02/04 HRT 6.)

12 During the interview with investigator Coke, Mr. Taylor stated many times that he
13 gave Petitioner Pro-Keds Dude tennis shoes. (6/02/04 HRT 12.) He told investigator
14 Coke that he had told the truth already at trial and that there was nothing to expound upon.
15 (6/02/04 Id. at 12.) Mr. Taylor explained that he was confused by his conversation with
16 investigator Coke. (6/02/04 HRT 13, 26, 60, 61.) He explained that the Pro-Keds tennis
17 shoes he gave to Petitioner and that he identified in the pictures at the hearing (6/02/04
18 hearing, Resp't's Ex. CC, photos nos. 2 and 3 of the Pro-Keds) were sometimes called
19 "Pro Keds" or "P.F. Flyer Pro Keds." (Id. at 13, 14.) Mr. Taylor explained that the
20 declaration did not reflect what he was attempting to convey, that he gave Petitioner a pair
21 of Pro-Keds that were not returned. (6/02/04 at 67-69.) Taylor was unequivocal at the
22 hearing that he gave Petitioner Pro-Keds:

23 Ms. Wilkens: Mr. Taylor, sitting here today, do you have any doubt whatsoever that
24 the brand of shoes you provided to Kevin Cooper prior to his escape
25 from CIM that were not returned to you were Pro Ked (sic) tennis
26 shoes?

27 Mr. Taylor: I have no doubt that they were Pro-Ked (sic), and these are the models
28 - - middle and bottom on - - whatever page you want to call that.

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1 Ms. Wilkens: So Exhibit CC that's in front of you now.

2 Mr. Taylor. Yes.

3 (6/02/04 at 21, 22.)

4 Mr. Taylor's credible testimony at the evidentiary hearing corroborates his trial
5 testimony that he gave Petitioner a pair of Pro-Keds Dude tennis shoes, which Mr. Taylor
6 correctly identified by sight, and that Petitioner never returned those shoes. Mr. Taylor
7 was simply confused by his interview with investigator Coke, who destroyed her notes of
8 the interview. He believed that his recent declaration reflected that he gave Petitioner the
9 Pro-Keds Dude tennis shoes. He also correctly identified pictures of the Pro-Keds Dude
10 tennis shoes as the type of shoes that he gave to Petitioner. Therefore, the Court
11 concludes therefore that there was no recantation by Mr. Taylor and that Petitioner had
12 a pair of Pro-Keds Dude tennis shoes when he escaped from CIM.

13 **f. Correctional Officer Mason's Testimony at Trial**

14 Correctional Officer Sydney Mason testified at trial that he recalled issuing Pro-
15 Keds Dude shoes in either size 9 or 10 to an inmate who resembled Petitioner.⁴² (104 RT
16 7176-78.) Officer Mason said he did not know whether the shoes were new or used but
17 assumed they were new because they were in a box with a lid. (104 RT 7180-81.)

18 Based on the testimony at the evidentiary hearing and review of the trial and
19 preliminary hearing transcripts, Petitioner has failed to demonstrate a showing of actual
20 innocence. The Ninth Circuit was concerned that the particular type of shoe was not even
21 available at CIM and thus Petitioner could not have been responsible for making the
22 evidence shoe prints in his prison-issued shoes. See Cooper, 358 F.3d at 1122. This is
23 not the case as the contracts showing the CIM purchase of the Pro-Keds Dude shoes were
24 admitted into evidence at the trial. Former Warden Carroll was mistaken about the source
25 of the shoes issued at CIM and their availability in retail stores. The corporate records
26 admitted into evidence at trial confirm the sales of the shoes were to the Naval Training
27 Center, U.S. Forestry Service, and numerous juvenile and correctional facilities and state

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⁴² The defense interviewed another prisoner before trial who also confirmed that Petitioner had a pair of Pro-Keds Dude tennis shoes. (Answer, Ex. 61.)

1 hospitals. (Trial Exs. 84-88; Answer, Exs. 69-75.) At trial, it was known that the Pro-
2 Keds Dude tennis shoes were not limited to prison inmates. It was also know that the Pro-
3 Keds Dude tennis shoes were featured in Pro-Keds' wholesale catalogue. (86 RT 2638.)
4 There is no evidence that retail sales of the Pro-Keds Dude tennis shoes were made in
5 California.

6 In addition, Ms. Carroll was known to the defense at the time of trial. There are
7 phone messages from her to defense counsel and notes about securing her testimony in the
8 defense file. (Answer, Ex. 81.) A note in the CIM vault notebook references a call made
9 to Petitioner's defense investigator on December 17, 1984.⁴³ (NOL filed 4/15/05, CIM
10 Vault, Notebook 6 at 1408.) In fact, Mr. Forbush conducted an interview of Sydney
11 Mason at CIM regarding the tennis shoes on December 15, 1984. (NOL filed 4/15/05,
12 CIM Vault, Notebook 6 at 1409.) Moreover, in November of 2001, defense investigator
13 Paul Ingels contacted Ms. Carroll by telephone and she told him her belief about the tennis
14 shoes. (8/13/04 HRT 132.) In December of 2001, Ms. Carroll permitted investigator
15 Ingels to spend a week with her going through her papers. This was over two-and-a-half
16 years before her eleventh-hour declaration was presented to the Ninth Circuit. (6/2/04
17 HRT 125 (Carroll's testimony); 8/13/04 HRT 133 (Ingels' testimony).) She was available
18 to the defense. In addition, at the time of trial, she was freely available to the defense to
19 freely discuss any issue.

20 According to Stride Rite executives, Pro-Keds Dude tennis shoes were sold
21 primarily to state institutions. The purchasing records show that CIM purchased the Dude
22 tennis shoes from Stride Rite at the relevant time period. The testimony of Mr. Newberry
23 and Mr. Luck demonstrate that Pro-Keds Dude tennis shoes were not sold retail in
24 California. Carroll's unreliable hearsay is not material inculpatory evidence and does not

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27 ⁴³ The only newspaper article in the CIM vault notebooks concerning the prison shoes is an
28 article dated December 12, 1984. (See CIM Vault, Notebook 8 at 1738-A.) A few days later, on
December 15, 1984, defense investigator Forbush was at CIM conducting an interview of Officer
Mason regarding the shoe issue. This shows that the defense had access to CIM to investigate the shoe
issue and had cooperation from CIM officials, including Midge Carroll, who was available to the defense
during the time when she had read about the prison shoes.

1 violate Brady. Under the totality of the evidence, the Court concludes that there was no
2 material Brady violation. (Answer, Ex. 81.)

3 Even if the shoe had been sold retail to a few stores on the East coast, it would not
4 change the inculpatory nature of the shoeprint evidence. Defense counsel argued,
5 consistent with the corporate records in evidence, that the Pro-Keds were not available just
6 to prisoners, but were available to the Navy, the Forestry Department, and all kinds of
7 different people besides prisoners. (Answer, Ex. 71-74.) Accordingly, it was never
8 assumed that the distribution of the shoes was limited to prison inmates; what mattered
9 was that the shoes were linked to Petitioner.

10 Petitioner escaped from CIM, which clearly had the Pro-Keds Dude tennis shoe for
11 its inmates, as established by the purchase contracts. Moreover, Mr. Taylor credibly
12 testified that he gave Petitioner a pair of the Pro-Keds Dude shoes and that Petitioner
13 never returned them prior to his escape from CIM. These facts, combined with the
14 consistency between the shoe print from the hideout house where Petitioner was sleeping
15 with both the shoe print outside the Ryen master bedroom sliding glass door and the one
16 on the sheet from the Ryens' bed, are what made the shoe-print evidence incriminating.

17 Finally, statements by the prosecution in opening and closing argument about the
18 availability of the Pro-Keds Dude tennis shoes were not material or prejudicial. See
19 Donnelly v. DeChristoforo, 415 U.S. 637, 643 (1974). The prosecutor based his
20 comments on the testimony at trial. Based on testimony of Mr. Taylor and Officer Mason,
21 Petitioner was in receipt of the Pro-Keds Dude tennis shoes at CIM and the shoeprints
22 from these shoes were found inside the hideout house and Ryen home. In addition, there
23 was a myriad of evidence connecting Petitioner to the murders. Therefore, even if there
24 were a misstatement, the prosecutor's statement was not material such that the results of
25 the proceeding would have been different. See Brady, 373 U.S. at 83. Additionally, the
26 California Supreme Court denied Petitioner's Brady claim on the merits. (Answer, Ex.
27 13.) Accordingly, the Court concludes Petitioner has failed to show a material Brady
28 violation regarding the Pro-Keds Dude tennis shoes.

1 **6. Petitioner’s Lack of Credibility**

2 Petitioner argues that his innocence is evident because he had no motive to kill the
3 Ryens and Chris Hughes. (Pet. at 22.) Petitioner previously made this argument to the
4 jury at trial, and the jury rejected his testimony. (106 RT 7796-97.) Petitioner’s
5 admission of facts says nothing about his credibility considering the evidence connecting
6 Petitioner to the murders. Before Petitioner admitted his presence at the hideout house,
7 he already knew that his fingerprint was on a jar in the kitchen, his semen was in the
8 closet, and he had made phone calls to old girlfriends from the hideout house shortly
9 before the massacre. Petitioner’s trial testimony cannot serve to support a showing of
10 actual innocence, both because it is not newly discovered, 28 U.S.C. § 2244(b), and
11 because it does not rebut by clear and convincing evidence the express factual findings
12 of the California Supreme Court which are entitled to a presumption of correctness. See
13 28 U.S.C. § 2254(e).

14 **7. Josh Ryen’s statements**

15 Petitioner next contends that Josh Ryen gave a description of the assailants that
16 exonerates him, (Pet. at 23), but this evidence was already admitted at trial. (95 RT 4932-
17 70; 4971-73.) The jury already rejected Petitioner’s claim of innocence based on the
18 speculation of an eight-year-old child, made shortly after he was brutally attacked, that the
19 three Hispanic males who came to his home looking for work before the family left for the
20 barbeque were responsible for the murders in his home later that night. (95 RT 4932-70;
21 4971-73.) The post-conviction testing of the physical evidence at the crime confirms
22 Petitioner’s guilt. Evidence exhibit A-41, the blood from the crime scene discovered
23 shortly after the discovery of the victims, is consistent with blood from an African
24 American and inconsistent with a Hispanic or White individual. (93 RT 4424.)
25 Moreover, the post-conviction DNA testing confirms that A-41 is Petitioner’s blood. (See
26 Supplemental DOJ Physical Evidence Exam Report dated Sept. 24, 2002.) Continued
27 exploitation of the speculation of victim who had been through a horrific experience is

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1 not a reliable basis for a finding of actual innocence. See Schlup, 513 U.S. at 324;
2 Thompson, 523 U.S. at 559.

3 **8. Multiple assailants**

4 Petitioner also revives his argument at trial that the nature and number of the
5 weapons, wounds, and victims confirms his innocence. (Pet. at 23.) The forensic
6 evidence only inculpatates Petitioner. There is nothing inconsistent with the forensic
7 evidence and his guilt. As a result, Petitioner's attempts to revive his multiple-assailant
8 argument from trial, (106 RT 7800-04), do not constitute evidence of actual innocence.
9 See Schlup, 513 U.S. at 324; Thompson, 523 U.S. at 559.

10 **9. Lee Furrow**

11 Petitioner contends the jurors were deprived of a basis for finding reasonable doubt
12 because the prosecution failed to provide the jury with information about the presence of
13 blood on the coveralls, Mr. Furrow's background, and the destruction of the coveralls.
14 (Pet. at 28.) Petitioner is confusing the burden of the prosecution at trial with his burden
15 on habeas in establishing a claim of actual innocence. The jury was aware that the
16 coveralls were destroyed. (102 RT 6545-55.) It is hardly surprising that defense counsel
17 did not present the testimony of Diana Roper. Her credibility issues were readily
18 apparent. (Answer, Ex. 53.) Moreover, the post-conviction DNA testing has confirmed
19 Petitioner's guilt. (See Supplemental DOJ Physical Evidence Exam Report dated Sept.
20 24, 2002.)

21 The stories about Mr. Furrow and coveralls, T-shirts, and hatchet originate with
22 Diana Roper. Diana Roper, now deceased, was abusing drugs and had a motive for
23 disparaging Furrow since he left her the night of the murders, and had begun a sexual
24 relationship with her childhood friend, Debbie Glasgow. (Answer, Ex. 37 (Furrow
25 Decl.)) Significantly, Furrow had an alibi for the night of the murders. He was seen at
26 a concert that night in Glen Helen Park with Debbie Glasgow. It would have been a poor
27 strategy to claim that they traveled from the concert in Glen Helen to Chino Hills,
28 murdered the Ryens and Chris Hughes, and returned home to Mentone. (See Answer,

1 Exs. 36 (map); 37 (Furrow Decl.); 39 (Darnell Decl.); 41 (Schepling Decl.); 47 (Curry
2 Decl.) In any event, Roper’s statements about Furrow do not constitute reliable evidence
3 that could support an actual innocence claim. See Schlup, 513 U.S. at 324; Thompson,
4 523 U.S. at 559.

5 **a. Ineffective Assistance of Counsel with Regard to Lee**
6 **Furrow**

7 The Court also denies Petitioner’s claim of ineffective assistance of counsel
8 concerning whether trial counsel should have tried to link the coveralls to Lee Furrow.
9 (Pet. at 61-64.) This Court defers to the California Supreme Court’s decision denying
10 Petitioner’s claim on the merits pursuant to 28 U.S.C. § 2254(d). Petitioner’s claim also
11 does not satisfy the requirements of 28 U.S.C. § 2244(b).

12 **I. Claim of Ineffective Assistance of Counsel With**
13 **Regard to Lee Furrow is Denied on the Merits**

14 Petitioner does not show that defense trial counsel’s performance fell below the
15 constitutional standard by failing to present evidence allegedly linking Furrow to the
16 coveralls or other evidence at trial. In fact, defense trial counsel presented evidence of the
17 destruction of a pair of coveralls allegedly linked to the Ryens/Hughes murders through
18 law enforcement witnesses, (102 RT 6545-55), thereby allowing counsel to exploit the
19 destruction of the coveralls without encountering the credibility problems that defense
20 counsel knew would arise with presenting testimony from Diana Roper. The testimony
21 of Karee Kellison Curry, Roper’s sister, would encounter similar credibility problems for
22 the defense in attempting to connect the coveralls to the Ryen/Hughes murders through
23 Furrow. (Answer, Ex. 37 at 2.) Moreover, given the overwhelming evidence of
24 Petitioner’s guilt before the jury, Petitioner has not shown any prejudice.

25 As both the California Supreme Court and this Court have already expressly
26 concluded, Petitioner “received an extraordinarily vigorous and able defense.” Cooper
27 I, 92-CV-427, Aug. 25, 1997 Order at 8 (quoting Cooper, 53 Cal.3d at 824). Defense trial
28 counsel’s extensive educational background and prior litigation experience were

1 developed in the evidentiary hearing before this Court in Cooper I. See Cooper I, 92-CV-
2 427, Aug. 25, 1997 Order at 8.

3 Moreover, both this Court and the California Supreme Court found the evidence of
4 Petitioner's guilt to be overwhelming. Cooper I, 92-CV-427, Aug. 25, 1997 Order at 8
5 (quoting Cooper, 53 Cal.3d at 836). Accordingly, the California Supreme Court's
6 decision rejecting the merits of Petitioner's claim is not contrary to federal law, nor an
7 unreasonable determination of the facts, since defense counsel was not deficient, nor was
8 Petitioner prejudiced by his attorney's strategic decisions. This Court therefore **DENIES**
9 this claim pursuant to 28 U.S.C. § 2254(d).

10 **ii. Petitioner Does Not Satisfy the Requirements of**
11 **28 U.S.C. § 2244(b)**

12 If Petitioner has previously adjudicated a claim of ineffective assistance of counsel
13 in this Court, his pending claim of ineffective assistance of counsel must be dismissed.
14 28 U.S.C. § 2244(b). New factual grounds in support of a legal claim that has already
15 been presented are not sufficient to evade the mandatory dismissal requirement of 28
16 U.S.C. § 2244(b). See Babbitt, 177 F.3d at 746.

17 Petitioner already complained about his defense trial counsel's performance in a
18 myriad of claims of ineffective assistance of trial counsel in his first habeas corpus
19 petition, Cooper I, Supp'l Pet. at 63-147, all of which were denied on the merits by this
20 Court. Cooper I, 92-CV-427, Aug. 25, 1997 Order at 7-33. The gravamen of the claim
21 of ineffective assistance of trial counsel is the same, regardless of whether Petitioner
22 presents new and different legal arguments or different factual allegations. See Babbitt,
23 177 F.3d at 746. Petitioner made allegations about trial counsel's failure to utilize a
24 second counsel, failure to conduct an adequate investigation, and to advocate in particular
25 ways with respect to the evidence. See Cooper I, Supp'l Pet. at 121-41. The thrust of
26 Petitioner's attack on his defense counsel's failure to present evidence connecting Mr.
27 Furrow to the coveralls is the same as his other claims of ineffective assistance of counsel

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1 raised in his first petition. Thus, this Court **DENIES** the claim pursuant to 28 U.S.C. §
2 2244(b)(1).

3 Also, Petitioner could have presented the legal and factual basis of his claim
4 previously with due diligence. 28 U.S.C. § 2244(b). The connection between Lee Furrow
5 and Diana Roper has been known since the time of trial. (Answer, Ex. 53.) With due
6 diligence this claim could have been presented in Petitioner’s first federal habeas petition.
7 Beyond the due diligence showing, Petitioner would be required to demonstrate that the
8 facts underlying his claim, if proven and viewed in light of the evidence as a whole, would
9 be sufficient to establish by clear and convincing evidence that, but for the constitutional
10 error, no reasonable juror would have found him guilty of the Ryen/Hughes murders. See
11 28 U.S.C. § 2244(b). Petitioner does not meet this requirement. Petitioner’s guilt was
12 demonstrated by overwhelming evidence at trial, and has been reaffirmed through
13 post-conviction DNA testing. Petitioner does not establish by clear and convincing
14 evidence that no juror would have convicted Petitioner if presented information
15 concerning Lee Furrow at trial.

16 **10. Mental Patient Anthony Wisely’s Alleged Report of the Kenneth**
17 **Koon “Confession”**

18 Petitioner contends that the multiple hearsay statements of a mental patient,
19 Anthony Wisely, demonstrates his innocence and the unreliability of the jury’s verdict.
20 (Pet. at 28.) The statements that Petitioner attributes to Kenneth Koon consist of multiple
21 hearsay related by mental patient Anthony Wisely. Petitioner attempts to tie the
22 information attributed to Mr. Koon by the mental patient to Diana Roper. Koon met
23 Roper after Furrow left her, and Koon later married her. Koon has denied any involvement
24 in the Ryen/Hughes murders. (Answer, Exs. 37 (Furrow Decl.); 48 (Curry Decl.); 54
25 (Koon Decl.).)

26 Considerably more than a mental patient’s secondhand version of a confession by
27 Koon is required to demonstrate actual innocence. See Schlup, 513 U.S. at 324;
28 Thompson, 523 U.S. at 559. The post-conviction DNA testing confirms Petitioner’s guilt

1 and refutes Petitioner's allegations regarding Koon. Item A-41 is from an African
2 American, (93 RT 4424); Koon is white. Petitioner's DNA is found on the cigarette butts
3 in the Ryen station wagon. (See Supplemental DOJ Physical Evidence Exam Report dated
4 Sept. 24, 2002.) Petitioner's blood and Doug Ryen's blood are on the T-shirt found near
5 the crime scene. (See Supplemental DOJ Physical Evidence Exam Report dated Sept. 24,
6 2002.) The mitochondrial DNA testing and EDTA testing have not undermined the post-
7 conviction DNA testing results confirming Petitioner's guilt. The Court previously
8 considered and adjudicated Petitioner's claims regarding mental patient Wisely's account,
9 and the Court affirmed the ruling and denied a successive petition. Cooper I, 92-CV-427,
10 Aug. 25, 1997 Order. This Court has further evaluated the allegations in light of all the
11 evidence, and **DENIES** the claims on the merits.

12 **a. Ineffective Assistance of Counsel Re Kenneth Koon is**
13 **Denied on the Merits**

14 Similarly, the Court denies any claims of ineffective assistance of counsel claim as
15 did the California Supreme Court regarding Mr. Koon. (Pet. at 58-61.) This Court defers
16 to the denial of the claim on the merits by the California Supreme Court pursuant to 28
17 U.S.C. § 2254(d) and also under 28 U.S.C. § 2244(b). (Answer, Ex. 3.) The state court's
18 denial of Petitioner's claim on the merits is not contrary to federal law as enunciated by
19 the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687-88
20 (1984), and does not rest with an unreasonable determination of the facts within the
21 meaning of 28 U.S.C. § 2254(d).

22 At trial, the link between Roper, Furrow, and Koon was noted in an in-chambers
23 conference with counsel when defense counsel was provided with the report about mental
24 patient, Wisely and Koon. (97 RT 5324-25.) Counsel was given time to review the new
25 information to determine how to proceed. (97 RT 5325.) The main connection between
26 Koon and Furrow is Diana Roper. Roper met Koon about a week after Furrow left her
27 which was a week after the murders, and she later married Koon. (Answer, Ex. 54 at 1.)

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1 Defense trial counsel cannot be faulted for a strategic decision not to call Roper at
2 trial. During the time of the murders, Roper was using methamphetamine on a daily basis
3 and in the midst of breaking up with Furrow knowing he was having sexual relations with
4 one of her childhood friends, Debbie Glasgow. (Answer, Ex. 53; Ex. 37.)

5 What Koon knew about Furrow was hearsay from Roper. (Answer, Ex. 54 at 2.)
6 Such strategic decisions at trial to avoid having Roper, her friends, or Furrow’s relatives
7 testify concerning the coveralls, tennis shoes or Roper’s relationship with Koon and
8 Furrow are not grounds for a Strickland claim under these circumstances. See Strickland,
9 466 U.S. at 690. Petitioner has failed to show that his counsel was deficient. See
10 Strickland, 466 U.S. at 687. As both the California Supreme Court and this Court have
11 already expressly found, Petitioner “received an extraordinarily vigorous and able
12 defense.” Cooper I, 92-CV-427, Aug. 25, 1997 Order at 8 (quoting Cooper, 53 Cal.3d
13 at 824). Moreover, both this Court and the California Supreme Court found the
14 combination of evidence of Petitioner’s guilt to be overwhelming. Cooper I, 92-CV-427,
15 Aug. 25, 1997 Order at 8 (quoting Cooper, 53 Cal.3d at 836). Defense counsel was not
16 deficient and Petitioner was not prejudiced as the post-conviction DNA testing has
17 confirmed Petitioner’s guilt. Accordingly, the California Supreme Court’s decision
18 rejecting the merits of Petitioner’s claim is not contrary to federal law, nor an
19 unreasonable determination of the facts. Therefore, the Court **DENIES** this claim
20 pursuant to 28 U.S.C. § 2254(d).

21 **b. Petitioner Does Not Satisfy the Requirement of**
22 **28 U.S.C. § 2244(b)**

23 If Petitioner has previously adjudicated a claim of ineffective assistance of counsel
24 in this Court, his pending claim of ineffective assistance of counsel must be dismissed.
25 28 U.S.C. § 2244(b). New factual grounds in support of the same legal claim which has
26 already been presented are not sufficient to evade the mandatory dismissal requirement
27 of § 2244(b). See Babbitt, 177 F.3d at 746. In prior habeas proceedings, the Ninth Circuit
28 concluded the reference to the Koon confession in the second federal petition was

1 not sufficient to raise a distinct claim of ineffective assistance of counsel on the Koon
2 confession claim in the first federal petition. Cooper, 274 F.3d at 1274.

3 As the Babbitt case illustrates, because the gravamen of Petitioner's ineffective
4 assistance of counsel claim was essentially the same as his earlier claims, new factual
5 grounds such as those presented in the instant claim still pertain to defense counsel's
6 investigation and presentation of Petitioner's defense and, therefore, do not constitute a
7 different claim within the meaning of 28 U.S.C. § 2244(b)(1). In any event, the Ninth
8 Circuit concluded that Petitioner could not meet the due diligence requirement and he was
9 precluded from filing a successive petition because of his inability to meet the
10 requirements of 28 U.S.C. § 2244(b)(2). Cooper, 274 F.3d at 1275. It is axiomatic that
11 Petitioner is not able to meet the due diligence requirement now when he was unable to
12 do so in 2001. Accordingly, Petitioner's claim of ineffective assistance of counsel is
13 **DENIED** under 28 U.S.C. § 2244.

14 **E. Claim of Actual Innocence is Denied on the Merits**

15 Petitioner's claim of actual innocence was heard and denied on the merits by the
16 California Supreme Court. (Sixth State Habeas Pet. at 12-37; Answer, Ex. 13.) In
17 rejecting the merits of Petitioner's sixth eleventh-hour state habeas petition, the California
18 Supreme Court unanimously found the following:

19 As with the previous five petitions for writ of habeas corpus that petitioner
20 has filed in this court challenging the judgment, this petition casts no doubt
on petitioner's guilt or the validity of the judgment.

21 (Answer, Ex. 13.)

22 The same express finding was reiterated with respect to the denial of Petitioner's
23 seventh state habeas petition. (Answer, Ex. 14.) This Court defers to the California
24 Supreme Court's decision because it is not contrary to federal law as enunciated by the
25 United States Supreme Court, nor is it based on an unreasonable determination of the
26 facts. 28 U.S.C. § 2254(d).

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1 **F. Petitioner Does Not Meet the Requirements of 28 U.S.C. § 2244(b),**
2 **Schlup, or Herrera**

3 In sum, Petitioner has had ample opportunity for review in both the state and federal
4 courts, exploring every possible avenue of challenge to his conviction. All of these
5 challenges have come back the same: there is overwhelming evidence that Petitioner is
6 the person guilty of these murders. New evidence of innocence must be reliable evidence
7 that was not presented at trial. See Schlup, 513 U.S. at 324; Thompson, 523 U.S. 559.
8 Most of Petitioner’s allegations relate to evidence that was already presented at trial and
9 previously rejected. In addition, the remainder of his allegations rest on unreliable or
10 incorrect information and sources.

11 After considering all of the evidence presented by Petitioner and the substantial
12 record from the trial court, direct review, and collateral review, the Court concludes that
13 Petitioner has not meet his burden under 28 U.S.C. § 2244(b), which requires among other
14 things, a “factual claim [] not discoverable through the exercise of due diligence” that
15 establishes by “clear and convincing evidence that, but for constitutional error, no
16 reasonable factfinder would have found the applicant guilty of the underlying offense.”
17 Even if Petitioner has met the showing under 28 U.S.C. § 2244(b), the state court’s
18 decision is not contrary to or an unreasonable application of clearly established federal
19 law. 28 U.S.C. § 2254(d). Neither has Petitioner met his burden under Schlup, which
20 requires Petitioner to show that “in light of all the evidence, including new evidence, it
21 is more likely than not that no reasonable juror would have found petitioner guilty beyond
22 a reasonable doubt.” For the same reasons, the Court also concludes that Petitioner has
23 not met the stringent burden of Herrera, which requires an “extraordinarily high” showing
24 of “a truly persuasive demonstration of ‘actual innocence.’” Further, Petitioner also fails
25 to show that there is “no state avenue open to process such a claim.” Herrera, 506 U.S.
26 at 417. The California Supreme Court denied Petitioner’s actual innocence claim on the
27 merits, (see Sixth State Habeas Pet. at 12-37; Answer, Ex. 13), and the Governor of
28 California denied his application for clemency. This Court **DENIES** Petitioner’s claim

1 as not presenting a cognizable federal habeas claim based upon an assertion of actual
2 innocence under Herrera. This Court therefore **DENIES** Petitioner's claims pursuant to
3 28 U.S.C. § 2244(b), and alternatively under Schlup and Herrera and on the merits
4 pursuant to 28 U.S.C. § 2254.

5 **V. Prosecution's Withholding of Evidence and Presenting False Testimony**
6 **Regarding the Coveralls**

7 Petitioner alleges that his constitutional rights were violated by the suppression of
8 material exculpatory evidence and by the presentation of false testimony regarding the
9 destruction of the coveralls by Deputy Frederick Eckley of the San Bernardino Sheriff's
10 Office. (Pet. at 54-58.) Petitioner claims that in December 1998, he discovered a
11 disposition report where a "KS" had signed off on the destruction of the coveralls. From
12 this, Petitioner alleges that Deputy Eckley did not act alone in destroying the coveralls,
13 but did so deliberately in consultation with KS, a superior. (Pet. at 57.) Therefore,
14 Petitioner contends that Deputy Eckley's testimony in pre-trial proceedings and at trial
15 regarding the destruction of the coveralls falsely conveyed that he destroyed the coveralls
16 on his own.

17 The Court conducted an evidentiary hearing and heard from Deputy Eckley and
18 Deputy Ken Schreckengost, "KS" to address this claim. After considering their testimony
19 and evaluating their credibility as witnesses, the Court **DENIES** Petitioner's claims.

20 **A. Pretrial Hearing and Trial Testimony**

21 On June 11, 1984, during the pretrial evidentiary hearing, Deputy Eckley testified
22 he was dispatched to the home of Diane Roper in Mentone, California, which was located
23 approximately forty miles from the Ryen home. Ms. Roper directed him to a closet where
24 he found a pair of coveralls. Deputy Eckley testified that the coveralls were not heavily
25 spotted but had stains below the knees that were dry and reddish in color, as opposed to
26 the usually brownish color of dried bloodstains that he had seen in the past. (32 RT 3183-
27 84, 3205, 3211.) Deputy Eckley also testified that the coveralls had hair, sweat, dirt, and
28 manure on them. (32 RT 3183-84.)

1 Although Ms. Roper did not know who owned the coveralls, her father told Deputy
2 Eckley that Ms. Roper felt that the coveralls had some importance to the Ryen case based
3 on a “vision” she had experienced, as opposed to anything she had actually seen.⁴⁴ (32 RT
4 3204-05.) After Eckley took the coveralls to the Yucaipa substation and tagged them, he
5 called the San Bernardino homicide department and left a message. Although the homicide
6 department never returned his call about the coveralls, Deputy Eckley testified that he
7 spoke with defense investigator Forbush about the coveralls. (32 RT 3205-06.) In
8 December of 1983, after failing to receive a return call from homicide, and believing the
9 coveralls “had no value to the case,” Deputy Eckley destroyed the coveralls. (32 RT
10 3194.) Deputy Eckley similarly testified about the coveralls at trial. (102 RT 6545-55.)

11 **B. Evidentiary Hearing Testimony of KS and Eckley**

12 The Court held an evidentiary hearing on April 1, 2004 where former Deputy
13 Sheriff Ken Schreckengost, and former Deputy Eckley testified. Deputy Schreckengost was
14 Deputy Sheriff at the Yucaipa station during the time of the murders. (4/1/05 HRT 8.) In
15 January 1983, he was promoted to Senior Deputy and assigned as watch commander over
16 the deputies in the field. (4/1/05 HRT 54.) He had no recollection of initialing the
17 disposition report, but recognized his initials on the report. (4/1/04 HRT 31.) As a watch
18 commander, the disposition reports would normally have been in his inbox because “nine
19 out of ten times” the person who filled out report would not be on the same shift. (4/1/05
20 HRT 56.) In reviewing a disposition report, he looked to see if the report was properly
21 filled out. (4/1/05 HRT 56.) Deputy Schreckengost stated he never discussed the
22 coveralls with Deputy Eckley and has never seen the coveralls. (4/1/05 HRT 57.)

23 Deputy Eckley was a former deputy of the San Bernardino Sheriff’s Department and
24 was stationed at Yucaipa from 1980 to 1989. (4/1/05 HRT 73-74.) He had no
25 recollection that Deputy Schreckengost had anything to do with the processing or signing
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28 ⁴⁴ Deputy Eckley stated that Ms. Roper’s knowledge regarding the connection between the
coveralls and the Ryen/Hughes murders was obtained after she and some other “witches” went through
“some kind of trance” which caused her to “just know” that they were worn by someone involved in the
murders. (Resp’t Evid. Hearing Notebook 13, Ex. LLLLL at 6-7.)

1 of the report. (4/1/05 HRT 112.) Deputy Eckley did not have a discussion with Deputy
2 Schreckengost regarding the destruction of the coveralls. He testified that he made the
3 decision to destroy the coveralls on his own without consulting anyone. (4/1/05 HRT
4 115.) The testimony of Deputy Shreckengost and Deputy Eckley do not support
5 Petitioner’s claims of perjury or withholding of evidence.

6 **C. The Claims of Withholding of Evidence and False Presentation of**
7 **Testimony Have No Merit**

8 Petitioner’s claim concerns whether Deputy Eckley consulted someone else before
9 he decided to destroy the coveralls. As the testimony reveals, Deputy Eckley acted on his
10 own in destroying the coveralls. Deputy Eckley and Deputy Schreckengost did not have
11 any discussion about the coveralls. Typically, the disposition report was in Deputy
12 Schreckengost’s inbox and he only made sure that the form was properly filled out.

13 Petitioner comments that Deputy Eckley’s destruction of the coveralls was in
14 violation of the policies of San Bernardino Sheriff’s Department (“SBSD”). However, the
15 defense was aware at the time of trial that Deputy Eckley did not comply with the written
16 policies and practices in the SBSO manual when he destroyed the coveralls. (32 RT 3194-
17 95.) Evidence of the written policies and practices in SBSO manuals at the time the
18 coveralls were destroyed is not newly discovered evidence. The defense was in
19 possession of the manuals at the time of trial. See People v. Cooper, 53 Cal.3d at 817
20 (trial court did not err in not admitting into evidence “sheriff’s policy manuals regarding
21 the collection and preservation of evidence”). Even if Deputy Eckley violated SBSO
22 policy concerning the destruction of evidence, it does not change his consistent testimony
23 that he destroyed the coveralls without consulting anyone. The discovery of the
24 disposition report does not cast doubt upon the testimony of Deputy Eckley, and does not
25 undermine the findings and conclusions by both this Court and the California Supreme
26 Court that the coveralls were not material exculpatory evidence in Petitioner’s case.

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1 Petitioner claims that jurors would not have convicted him had they heard of
2 Petitioner’s new theories. (Pet. at 57.) Any comment by a juror concerning his/her mental
3 process in reaching a verdict in Petitioner’s trial is unsupported, inadmissible, and
4 irrelevant to the claim presented by Petitioner. Fed. R. Evid. 606(b);⁴⁵ Tanner v. United
5 States, 483 U.S. 107, 117 (1987) (in general juror’s statements have traditionally been
6 inadmissible to impeach a verdict); United States v. Elias, 269 F.3d 1003, 1020 (9th Cir.
7 2001) (“[a] court may not, under Rule 606(b), consider testimony “regarding the affected
8 juror’s mental processes in reaching the verdict.”) Petitioner’s reliance on statements
9 from jurors is improper. No statements regarding the deliberative process are admissible.
10 See Fed. R. Evid. 606(b). Moreover, the disposition report hardly constitutes evidence
11 “pointing away” from Petitioner and does not undermine the physical evidence linking
12 Petitioner to the crime by proof beyond a reasonable doubt.

13 This Court accords deference to the California Supreme Court’s decision denying
14 Petitioner’s claim on the merits. 28 U.S.C. § 2254(d). The state court’s denial of
15 Petitioner’s claim on the merits is not contrary to clearly established federal law, and does
16 not rest with an unreasonable determination of the facts within the meaning of 28 U.S.C.
17 § 2254(d). Accordingly, the Court **DENIES** this claim on the merits pursuant to 28
18 U.S.C. § 2254(d).

19 **D. Petitioner Does Not Satisfy the Requirements of 28 U.S.C. § 2244(b)**

20 Further, the Court denies the claim pursuant to 28 U.S.C. § 2244(b). If Petitioner
21 has previously adjudicated a claim relating to the destruction of the coveralls in this Court,
22 his pending claim of withholding evidence and false testimony relating to the destruction
23 of the coveralls must also be dismissed. 28 U.S.C. § 2244(b). The gravamen of the claim
24 of withholding evidence and false testimony is the same, regardless of whether Petitioner
25 presents new and different legal arguments or different factual allegations. See Babbitt,

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28 ⁴⁵ Federal Rule of Evidence 606(b) provides that a “juror may not testify . . . to the effect of anything upon . . . juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes” Fed. R. Evid. 606(b).

1 177 F.3d at 746. Petitioner is revisiting the reasons the coveralls were destroyed, and
2 renewing his attack on the deputy who was responsible for the coveralls' destruction. See
3 Cooper I, 92-CV-427, Amend. Pet. at 310-13. The impact of the destruction of the
4 coveralls on Petitioner's rights at trial has already been adjudicated by this Court,
5 Cooper I, 92-CV-427, Aug. 25, 1997 Order at 51-52, and the current legal arguments and
6 different factual allegations stemming from the discovery of a disposition report with
7 initials signing off on the destruction of the coveralls are not sufficient to evade the
8 mandatory dismissal requirement of 28 U.S.C. § 2244(b)(1). See Babbitt, 177 F.3d at 746.

9 Even if Petitioner's claim were not subject to mandatory dismissal under 28 U.S.C.
10 § 2244(b)(1), his claim is still denied because he could have presented the legal and
11 factual basis of his pending claim previously with due diligence. See 28 U.S.C. § 2244(b).
12 Petitioner already complained about the destruction of the coveralls in his first federal
13 habeas petition. He was aware of Deputy Eckley's role in the destruction of the coveralls,
14 and his testimony at Petitioner's trial regarding his decision and actions regarding the
15 coveralls. Cooper I, 92-CV-427, Amend. Pet. at 310-13.

16 Petitioner's defense investigator reviewed microfiche files in December of 1998,
17 and located a card bearing the initials of the individual who approved the destruction of
18 the coveralls. With due diligence, the card could have been located well before then, and
19 the instant claim could have been presented in Petitioner's first federal habeas petition,
20 that was litigated between 1992 and 1997.

21 Beyond the due diligence showing, Petitioner would be required to demonstrate that
22 the facts underlying his claim, if proven and viewed in light of the evidence as a whole,
23 would be sufficient to establish by clear and convincing evidence that, but for the
24 constitutional error, no reasonable juror would have found him guilty of the Ryen/Hughes
25 murders. See 28 U.S.C. § 2244(b). Petitioner does not meet this requirement. Petitioner's
26 guilt was demonstrated by overwhelming evidence at trial, and has been reaffirmed
27 through post-conviction DNA testing. This Court already determined, as did the California
28 Supreme Court and the trial court, that the coveralls were not material exculpatory

1 evidence and that the law enforcement authorities acted in good faith. Cooper I, 92-CV-
2 427, Aug. 25, 1997 Order at 52; Cooper, 53 Cal.3d at 811. Under these circumstances,
3 Petitioner does not meet the requirements of 28 U.S.C. § 2244(b)(2).

4 **VI. Prosecution’s Withholding of Evidence and Presentation of False Testimony**

5 Petitioner alleges his constitutional rights were violated when the prosecution
6 withheld material exculpatory evidence, knowingly failed to correct false testimony,
7 proffered perjured testimony, and knowingly argued false theories to the jury. (Pet. at
8 43-47.) As detailed below, Petitioner fails his burden and the Court **DENIES** these
9 claims under 28 U.S.C. § 2244(b) and on the merits.

10 **A. Petitioner’s Claims are Denied on the Merits**

11 **1. Criminalist William Baird**

12 Petitioner alleges the prosecution failed to provide material exculpatory evidence
13 concerning criminalist Baird’s misconduct concerning heroin. (Pet. at 44-45.) If
14 Petitioner has adjudicated a claim relating to the withholding of evidence and false
15 testimony previously, then his latest claim alleging the same transgression must be
16 dismissed. 28 U.S.C. § 2244(b). The gravamen of the claim of withholding evidence and
17 false testimony is the same, regardless of whether Petitioner presents new and different
18 legal arguments or different factual allegations. See Babbitt, 177 F.3d at 746. Petitioner
19 already adjudicated a claim relating to Mr. Baird’s connection with heroin. Cooper I,
20 Amend. Pet. at 387; Cooper I, 92-CV-427, Aug. 25, 1997 Order at 69-71.

21 Even if Petitioner’s claim were not subject to mandatory dismissal based on 28
22 U.S.C. § 2244(b)(1), his claim must still be dismissed because he could have presented
23 the legal and factual basis of his pending claim previously with due diligence. 28 U.S.C.
24 § 2244(b). Petitioner could have discovered, with due diligence, the additional
25 information about Mr. Baird’s alleged use of heroin, particularly since Petitioner had
26 already focused on Mr. Baird’s dismissal from his employment for allegedly stealing
27 heroin.

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1 Moreover, to support his Brady claim, Petitioner must show that the prosecution
2 had knowledge of material exculpatory evidence that was unknown to the defense. See
3 Agurs, 427 U.S. at 103. This Court has already determined in adjudicating Petitioner’s
4 first federal habeas petition that the prosecution did not have knowledge of Mr. Baird’s
5 alleged dismissal or misconduct while the trial was in progress. Cooper I, 92-CV-427,
6 Aug. 25, 1997 Order at 70. Petitioner is not entitled to a second opportunity to litigate this
7 factual question in this Court. 28 U.S.C. § 2244(b).

8 Petitioner’s Brady claim also fails to state a prima facie case because he has not
9 established that Mr. Baird’s alleged drug abuse constitutes material exculpatory evidence
10 in the context of the entire record. See Agurs, 427 U.S. at 112. Accordingly, the Court
11 denies the habeas claim regarding Mr. Baird.

12 **2. A-Troop Allegations**

13 **i. CIM Correctional Officer Donnie Eddings**

14 Petitioner alleges the prosecution withheld material exculpatory evidence provided
15 by a former inmate at CIM that a Hispanic gang called A-Troop committed the
16 Ryen/Hughes murders. (Pet. at 45.) In order to address this allegation, the Court held an
17 evidentiary hearing on August 6, 2004, where former CIM Correctional Officer Donnie
18 Eddings testified. (8/6/04 HRT 3.) Officer Eddings was a correctional counselor in the
19 Reception Center who conducted intake interviews to determine what level of custody was
20 appropriate for an inmate. She was unaware of the outstanding warrant in the CIM files
21 for Petitioner’s rape, aggravated assault, kidnaping, mayhem, and making a terrorist threat
22 arising out of Petitioner’s rape and threat to kill victim Lori S. in Pennsylvania. (8/6/04
23 HRT 4.) The warrant for the rape charges was in the CIM files with the name, David
24 Trautman aka Kevin Cooper, clearly listed, but CIM egregiously erred by not linking its
25 own records of Petitioner’s rape to the false name of David Trautman. (See NOL filed
26 4/15/05 CIM Vault, Notebook 9 at 2385-2417.) The Court concludes that Officer Eddings
27 had a substantial motive to deflect guilt from Petitioner due to CIM’s institutional error
28 in placing a known rapist in minimum security.

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1 Officer Eddings testified that in 1983, inmate Luparello told her that Doug Ryens's
2 chiropractic office in Santa Ana had been burglarized by a gang called A-Troop. (8/6/04
3 HRT 8-9.) Officer Eddings was told by this inmate that he thought that Mr. Ryen either
4 pressed charges or testified against the members of the gang following the burglary.
5 (8/6/04 HRT 8-9.) Officer Eddings prepared a written report and submitted it to her
6 supervisor. (8/6/04 HRT 7.)

7 The prosecution provided defense trial counsel with a memorandum written by
8 Officer Eddings detailing the information from inmate Luparello, as well as handwritten
9 notes regarding Luparello. (See 04-CV-656, NOL filed 7/27/04.) Moreover, the Santa
10 Ana Police Department reports regarding the burglary of the Ryen chiropractic office and
11 other businesses in the same commercial complex were also provided to defense trial
12 counsel by the prosecution. (See 04-CV-656, NOL filed 07/27/04.) The burglary of the
13 Ryen chiropractic office was being reported in newspaper articles discussing the
14 Ryen/Hughes murders. A copy of a Los Angeles Times article dated June 7, 1983, which
15 includes information on the burglary, was included in the defense trial file turned over on
16 discovery in 1997 in connection with Petitioner's first federal habeas petition. (See
17 Answer, Ex. 56 (copy LA Times article re burglary, from defense trial file).) Given the
18 discovery provided by the prosecution, there was no Brady violation.⁴⁶ Additionally,
19 defense investigator Ingels testified that in 2002 he checked out the information regarding
20 Eddings' allegation and found no merit to the claim. (8/13/04 HRT 141-143.) Therefore,
21 the Court concludes there was no Brady violation regarding the Luparello or A-Troop
22 information.

23 **ii. CIM Correctional Officer Richard Krupp**

24 Petitioner further alleges that the prosecution withheld material exculpatory
25 evidence from an unidentified inmate at CIM who allegedly told a correctional counsel
26 named Richard C. Krupp that he had overheard a conversation about the murders. (Pet.

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28 ⁴⁶ The Court also notes that Petitioner's attorneys were aware of the information contained in
the Eddings memo back in December of 2001 when defense investigator Ingels interviewed Officer
Eddings and had her sign a declaration. (See 8/13/04 RT (Ingels' testimony).)

1 at 46.) In order to address this allegation, the Court held an evidentiary hearing on August
2 6, 24 and 26, 2004, where Officer Krupp, correctional counselor Ted Fahey, and
3 Lieutenant Watch Commander Cornelius Shepherd testified. (8/6/04 HRT 51; 8/24/04
4 HRT 42-55; 8/26/04 HRT 19-30.) After hearing the testimony of the witnesses and
5 evaluating their credibility, the Court concludes that there was no Brady violation.

6 In 1984, Officer Krupp was a correctional counselor. He conducted intake interviews
7 at CIM Chino. (8/6/04 HRT 51-52.) An inmate relayed to him that three Mexicans in the
8 San Bernardino County jail had claimed to have committed the Ryen/Hughes murders.
9 (8/6/04 HRT 51-52.) Because the incident occurred so long ago, Officer Krupp could not
10 remember the inmate's name. (8/6/04 HRT 68.)

11 Officer Krupp testified that he placed this information regarding the Hispanic males
12 in the inmate's evaluation form and then passed it on to his supervisor, Officer Fahey, and
13 the gang coordinator supervisor, Officer Shepherd. (8/6/04 HRT 53.) Officer Krupp
14 further testified that he discussed a phone call that was placed to the San Bernardino
15 Sheriff's Office by either Officer Fahey or Officer Shepherd with them. (8/6/04 HRT 54-
16 57.)⁴⁷

17 In contrast to Officer Krupp's recollection, Officer Shepherd credibly testified
18 before this Court that he did not speak to Officer Krupp regarding information of an
19 inmate claiming to have committed the Ryen/Hughes murders and that he had not passed
20 information along to the San Bernardino Sheriff's Office:

21 I was employed at California Institution for Men as a correctional lieutenant
22 at the time of Kevin Cooper's escape. I testified at Cooper's trial regarding
23 his escape from CIM. I have never spoken with Richard Krupp regarding
24 information he obtained from an inmate about the Ryen murders. I did not
25 provide any information to San Bernardino County Sheriff's Department
26 from an inmate at CIM regarding the Ryen murders.

25 (04-CV-656, Resp't Ex Parte Request filed Aug. 18, 2004, Shepherd Decl.; see also
26 8/24/04 HRT 42.)

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28 ⁴⁷The Court notes that Petitioner's attorneys were aware of the information from Officer Krupp
back in August of 2001 when defense investigator Paul Ingels interviewed Officer Krupp and had him
sign a declaration. (See 8/6/04 HRT 59-61; 8/13/04 HRT (Ingels' testimony).)

1 Mr. Shepherd further testified that he was a lieutenant watch commander for the
2 east facility at CIM Chino from 1983-84 and that although he may have spoken to Mr.
3 Krupp on occasions, it was not within his duties to discuss the substance of prisoner
4 interviews with correctional counselors such as Mr. Krupp. (8/24/04 HRT 42, 44, 51-52,
5 55.) Mr. Shepherd then testified that he does not recall any meetings with Mr. Krupp or
6 Mr. Fahey regarding the murders. (8/24/04 HRT 50, 64.) He also stated unequivocally
7 that he did not place any phone calls to the San Bernardino Sheriff's Office because such
8 a phone call would be against procedure. (8/24/04 HRT 59.) The normal procedure
9 would be to contact the institutional investigators at CIM Chino, who would then contact
10 the Sheriff's Office if warranted. (8/24/04 HRT 62-63.)

11 Consistent with Officer Shepherd's testimony, Officer Fahey, correctional counselor
12 at CIM, also credibly testified before this Court that he does not recall any conversations
13 or information received from any of the correctional counselors, including Officer Krupp,
14 or with Officer Shepherd regarding the Ryen/Hughes murders. (8/26/04 HRT 19, 29-30.)
15 Officer Fahey also testified, consistent with Officer Shepherd's testimony, that as a watch
16 commander in the east facility, Officer Shepherd would have had no job related interaction
17 with correctional counselors in the central facility such as Officer Krupp and Officer
18 Fahey. (8/26/04 HRT 29-30.) He also verified that institutional procedure did not permit
19 correctional counselors to call the Sheriff's Office. (8/26/04 HRT 22-23.) Mr. Fahey
20 testified that in the sixteen years he was at CIM Chino, he did not once call the Sheriff's
21 Office. (8/26/04 HRT 22-23.) The procedure would be to inform the institutional
22 investigators of the information and then they would contact the Sheriff's, if necessary.
23 (8/26/04 HRT 22-24.)

24 The Court concludes that Mr. Krupp's recollection is contradicted by the credible
25 testimony of Officers Fahey and Shepherd. As Officer Fahey and Officer Shepherd
26 testified, they do not recall receiving any information from Mr. Krupp regarding the
27 Ryen/Hughes murders. Officer Shepherd, as a watch commander in a separate facility
28 would not have been in a professional position to have such information passed on to him

1 from Officer Krupp. Moreover, the alleged phone call placed to the Sheriff's office is not
2 credible given that both Officer Fahey and Officer Shepherd testified that the phone call
3 would never have occurred because it was against procedure for such a phone call to take
4 place, and they did not make the phone call.

5 Officer Shepherd and Officer Fahey credibly testified that Officer Krupp did not
6 speak to him regarding the hearsay statements of the three Hispanics. Officers Shepherd,
7 Fahey and Krupp did not speak to the San Bernardino Sheriff's Office regarding those
8 hearsay statements. As with any prominent murder investigation, there were numerous
9 rumors and false claims made in connection with the Ryen/Hughes murders, and a belated
10 report of a multiple hearsay account by an unknown inmate does not constitute a Brady
11 violation.

12 3. Anthony Ruiz

13 Petitioner also claims that a Brady violation occurred when the prosecution failed
14 to disclose material exculpatory evidence from Anthony Ruiz that law enforcement was
15 ordered to plant evidence inculcating Petitioner. On the eve of the execution, an
16 acquaintance of Mr. Ruiz appeared at a press conference with information that Mr. Ruiz
17 worked for the San Bernardino County Sheriff's Department and allegedly admitted that
18 the San Bernardino's Sheriff's Department had planted evidence to frame Petitioner.

19 This allegation was not supported by Mr. Ruiz's testimony at the evidentiary
20 hearing on August 6, 2004. Mr. Ruiz testified that he was never employed or associated
21 with the San Bernardino County Sheriff's Department, that he never worked as an
22 informant for them, that he never had access to the crime scene, and that he never had
23 first-hand knowledge of anything regarding the Ryen/Hughes murders. (8/06/04 HRT 76.)
24 He never received any information from any member of the San Bernardino Sheriff's
25 Department regarding the Ryen/Hughes murders. (8/6/04 HRT 79.) All of the
26 information Mr. Ruiz had regarding the murders was hearsay and speculation, and he

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1 testified that he never received any information or had any contact with anyone in the San
2 Bernardino Sheriff's Office.⁴⁸ (8/6/04 HRT 79.)

3 The only conversations Mr. Ruiz claimed to have had with law enforcement
4 regarding the Ryen/Hughes murders were with Jim Parsons of the Riverside County
5 Sheriff's Department, whom Mr. Ruiz would go with on "ride-a-longs." (8/6/04 HRT
6 103-04; 132) As admitted by Mr. Ruiz at the evidentiary hearing, these conversations with
7 Mr. Parsons were based upon speculation and things heard on the media and on the street.
8 (8/6/04 HRT 115) This is confirmed by Mr. Parsons, now a lieutenant with the Riverside
9 Sheriff's Department:

10 I had no knowledge regarding the Ryen/Hughes murders in the Chino Hills
11 beyond what I read in the newspapers or saw on television. I had no
12 participation in the investigation of the murders, because the crimes did not
13 occur in Riverside County. I have no specific recollection of speaking to
Ruiz about the Ryen/Hughes murders. Any conversation I would have had
with Ruiz would have been based on information available in the media at
that time, because I had no other source of information regarding the crimes.

14 (04-CV-656, NOL filed Aug. 24, 2004, Parsons Decl., Doc. No. 205.) Mr. Ruiz's
15 speculation and hearsay do not constitute material information under Brady.

16 Petitioner's claim of evidence tampering and withholding evidence was raised in
17 Petitioner's sixth and seventh state habeas petitions and denied on the merits by the
18 California Supreme Court. (Sixth State Hab. Pet. at 37-54; Answer, Ex. 13.) Exhibits
19 concerning Ruiz were filed in support of Petitioner's seventh state petition for writ of
20 habeas corpus, and denied on procedural grounds and on the merits. (Answer, Ex. 14.)
21 Accordingly, this Court accords deference to the California Supreme Court decision
22 denying Petitioner's claims on the merits. See 28 U.S.C. § 2254(d). The state court's
23 denial of Petitioner's claim on the merits is not contrary to clearly established federal law,
24 and does not rest on an unreasonable determination of the facts within the meaning of 28
25 U.S.C. § 2254(d).

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⁴⁸ The Court sustained objections under Federal Rule of Evidence 403 to non-San Bernardino's Sheriff's office informant activity.

1 **4. The “Blue” Shirt**

2 Petitioner alleges a Brady violation occurred when the prosecution failed to disclose
3 to the defense that Laurel Epler reported finding a “blue” shirt possibly with blood on it
4 on Peyton Drive on the afternoon of June 6, 1983. Petitioner is incorrect. The dispatch
5 log referencing the report of a “blue shirt” was disclosed to the defense before trial. (See
6 IV RT 6.) If Petitioner’s counsel at trial was on notice as to the possible existence of
7 material evidence and did not raise that at trial, there is a lack of diligence in raising a
8 Brady violation. See Williams, 529 U.S. at 435. In this instance, defense counsel was on
9 notice of the possible existence of the “blue” shirt. The state court trial record documents
10 that defense trial counsel received the daily logs from the San Bernardino Sheriff’s
11 Department, which contains the reference to a “blue” shirt with possible blood being
12 reported on June 6, 1983, on Peyton Drive, by Laurel Epler at 2:41 p.m., in August of
13 1983. (See I CT 75-75; III (8/12/83) RT 14-15, 19; IV (9/2/83) RT 6.) Petitioner’s
14 counsel represented to the Court that he received the daily logs; the record confirms his
15 statement. (IV RT 6.)

16 On January 16, 1984, an amended⁴⁹ attachment to the subpoena duces tecum for
17 materials including the “complete daily logs, dispatch records, tape recordings of dispatch
18 or communications made from June 2, 1983, to July 31, 1983, by the Sheriffs or any
19 deputy of the SBSO concerning the investigation and search for suspects in the deaths
20 occurring at 2943 English Road, Chino, on June 4 or 5, 1983, DR 1211029-02, and the
21 escape and attempt to apprehend David Trautman, aka: Kevin Cooper, from CIM on June
22 2, 1983.” (I CT 75-76.) Defense trial counsel Negus’ declaration regarding items of
23 discovery stated: “The logs, dispatch records, and tape recordings include actions of
24 officers which may not be memorialized in reports. The actions are relevant to the integrity
25 of physical evidence, other suspects to the crime, and the issue of flight.” (I CT 90.)

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28 ⁴⁹ On August 8, 1983, Petitioner’s defense counsel filed with the San Bernardino County
Municipal Court a declaration in support of a subpoena duces tecum. (I CT 61-62.)

1 On September 2, 1983, defense trial counsel Negus stated:

2 I can indicate to the court that with respect to the four items in the amended
3 subpoena [see I CT 75-76], that with respect to Item 1 [complete daily logs,
4 dispatch records, tape recordings of dispatch or communications made from
5 June 2, 1983, to July 31, 1983], all items except the tapes that were requested
6 have been received. Mr. Kochis and I have agreed that the tapes will be held
by the sheriff's office until such time as we can agree on what part of those
tapes will be needed to be recorded for trial. If we cannot agree, then we will
be coming back to the court at some future time, but mainly the tapes will be
preserved until we can work that out.

7 (IV RT 6.)

8 The trial prosecutor confirmed the accuracy of Mr. Negus' representations to the
9 trial court. (IV RT 6.) Moreover, it is clear that defense trial counsel appreciated the
10 relevance of the information as it related to the integrity of physical evidence and other
11 suspects to the crime at the time he sought the daily logs and dispatch information. (See
12 I CT 75-76.)

13 John Kochis, one of the prosecuting attorneys in the Petitioner trial, testified at the
14 evidentiary hearing that discovery and documents related to the dispatch records were
15 provided to Petitioner's defense at trial by way of a subpoena duces tecum. (8/13/04 HRT
16 183-84.) Mr. Kochis testified that the San Bernardino Sheriff's daily logs from June 4-6,
17 1983 (Resp't Evidentiary Hr'g Ex. MMMM-PPPP), as well as the documents pertaining
18 to the burglary of the Ryen chiropractic business in 1983 (Resp't Evidentiary Hr'g Ex.
19 UUUU), were turned over to Petitioner's defense team at trial. (8/13/04 HRT 182-84.)
20 Petitioner represented to the trial court that he had a copy of the daily log prior to trial.
21 (See I CT 75-75; III (8/12/83) RT 14-15, 19; IV (9/2/83) RT 6.) Because Petitioner
22 represented to the trial judge that he had the daily logs, the Court relies on his
23 representation made on the record to the court at that time. As an attorney, trial counsel
24 has a professional obligation to be truthful to the Court. Rule of Professional Conduct
25 of the State Bar of California 5-200. Petitioner had the daily logs referencing the report

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1 of a “blue” shirt and the collection of that evidence was disclosed to the defense before
2 trial.⁵⁰

3 Petitioner has not presented a viable Brady claim, or any other constitutional
4 violation warranting habeas relief. The fact that Petitioner claims that trial counsel has
5 no recollection of a blue shirt twenty-two years later is not surprising. Laurel Epler had
6 no recollection of a blue shirt when she was interviewed about the shirt. (See 04-CV-656,
7 NOL filed Aug. 18, 2004, Doc. No. 187 at 5, 12-13 and 20.)

8 Ms. Epler was contacted on August 3, 2004 about the shirt. In the recorded
9 statement, Ms. Epler stated that she does not remember calling law enforcement regarding
10 the shirt, she does not recall the color of the shirt, and she does not remember where the
11 shirt was found. (04-CV-656, NOL filed August 18, 2004, Doc. No. 187 at 5, 12-13, and
12 20.) Ms. Epler testified before this Court that her statements at that interview were true
13 and correct and were to the best of her best recollection. (8/26/04 HRT 124.)

14 At the evidentiary hearing, Ms. Epler testified that she vaguely remembers finding
15 the “blue shirt” when she was driving home. (8/26/04 HRT 133-34.) She testified that
16 she could not recall exactly where the shirt was found and that she could not recall
17 driving and seeing the shirt on the side of the road, although she believes that it must have
18 been close to Peyton and Glenridge because that is where she regularly drove her car.
19 (8/26/04 HRT 133-34.) She also testified that her memory of the shirt was very vague
20 and it was only after referencing the log that mentioned the “blue shirt” and speaking to
21 Petitioner’s defense investigators that she recalled anything about the shirt. (8/26/04
22 HRT 123-24, 149.)

23 Finally, Ms. Epler testified that she had been influenced by letters shown to her by
24 Petitioner’s attorneys regarding alleged suppression of evidence and law enforcement
25 cover-ups in this case. (8/26/04 HRT 179-80.) She stated that she did not think
26 Petitioner committed the murders after reading the materials sent to her by Petitioner’s

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28 ⁵⁰ Petitioner strategically may not have wanted to focus on a blue shirt since Petitioner testified
at trial that he had a blue prison shirt in a bag he was carrying when he left the hideout house the night
of the murders. (99 RT 5852.)

1 attorneys. (8/26/04 HRT 179-80.) Due to Ms. Epler's previous statements where she did
2 not recall the T-shirt, its color, or the location or time it was found and given the passage
3 of many years and failure of recollection, the Court questions whether Ms. Epler actually
4 recalls a blue shirt. Notwithstanding, the daily logs referencing the call placed to the
5 Sheriff's Office regarding the shirt were turned over to the defense counsel at trial and
6 therefore are not a proper basis for a habeas claim.

7 Respondent contends that the report of a "blue shirt" found on Peyton Drive listed
8 on the Sheriff's daily log of June 6, 1983, is actually the tan T-shirt at issue in this case
9 (Trial Ex. 169). According to Mr. Kochis, none of the documents logging the evidence
10 at the San Bernardino Crime Lab show a "blue shirt." (8/13/04 RT 198-201.) Rather,
11 those documents only reflect the receipt of the T-shirt introduced at trial by the defense
12 (Trial Ex. 169). (8/13/04 RT 198-201.) Moreover, Deputy Fields, now deceased, is the
13 officer listed on the daily logs as picking up the "blue shirt" on Peyton Drive after Laurel
14 Epler reported the shirt to the San Bernardino Sheriff's Office on June 6, 1983. (Resp't
15 Evidentiary Hr'g, Ex. OOOO, at 9; 04-CV-656, Doc. No. 143.) Mr. Kochis testified that
16 the only shirt Deputy Fields turned over to the crime lab was the T-shirt in this case (Trial
17 Ex. 169). (8/13/04 RT 199-200.) The existence of the tan shirt is not in dispute. In fact,
18 photographs of the tan T-shirt were taken at the time it was picked near the side of the
19 road on Peyton Drive. (Resp't Evidentiary Hr'g, Ex. CCCCC-1 through CCCCC-5.)

20 Petitioner argues that the "tan shirt" was picked up by Detective Fields on June 7,
21 1983, the day after the "blue shirt" was picked. The daily log of June 7, 1983 has no
22 entry regarding a "tan shirt." (See NOL filed May 5, 2005 of Daily Log of June 7, 1983
23 for In Camera Review.) Although Detective Fields' report, dated June 10, 1983, states
24 he picked up the "tan shirt" on June 7, 1983, he may have meant June 6, 1983. In any
25 event, the "tan shirt" that was picked up by Detective Fields and photographed was
26 collected and tagged with Property Tag No. A-58046 and stored in the Sheriff's evidence
27 locker. (Traverse, Ex. 160.) At trial, Detective Fields identified the "tan shirt" (Trial
28 Exhibit 169) as the T-shirt he recovered on the side of the road. (101 RT 6511.)

1 Therefore, the “blue shirt” reported on June 6, 1983 is most likely the tan T-shirt (Tr.
2 Exhibit 169) at issue in this case as testified by Mr. Kochis. (8/13/04 HRT 198-201.)

3 Even if there were a blue shirt, there is no showing of a material Brady violation.
4 Petitioner’s blood and the victims’ blood were on the tan shirt. Detective Fields, the
5 officer who was dispatched to pick up the blue shirt, is now deceased, (04-CV-656, Doc.
6 No. 143), and Sergeant Billy Arthur, his supervisor in homicide is also deceased.
7 (4/22/05 HRT 22.) Any further investigation would be of limited value as the two main
8 individuals that would have any significant knowledge regarding the blue shirt are
9 deceased, and there has been no showing of bad faith in light of the fact that defense
10 counsel represented to the Court that he had received the daily logs.

11 In evaluating the merits of Petitioner’s claim, this Court accords deference to the
12 California Supreme Court decision denying Petitioner’s claim on the merits. See 28
13 U.S.C. § 2254(d). The state court’s denial of Petitioner’s claim on the merits is not
14 contrary to clearly established federal law, and does not rest on an unreasonable
15 determination of the facts within the meaning of 28 U.S.C. § 2254(d). This Court also
16 denies this claim pursuant to 28 U.S.C. § 2244(b) because Petitioner has failed to
17 demonstrate that the facts underlying his claim, if proven and viewed in light of the
18 evidence as a whole, would be sufficient to establish by clear and convincing evidence
19 that, but for the constitutional error, no reasonable juror would have found him guilty of
20 the Ryen/Hughes murders. See 28 U.S.C. § 2244(b). Petitioner’s guilt was demonstrated
21 by overwhelming evidence at trial, and has been reaffirmed through post-conviction DNA
22 testing.

23 **VII. Evidence Tampering and Withholding of Evidence**

24 Petitioner contends his constitutional rights were violated when law enforcement
25 tampered with key pieces of evidence, presented misleading and false testimony, and
26 withheld material exculpatory evidence. (Pet. at 29, 31-43.) Petitioner fails to meet his
27 burden and the Court **DENIES** these claims on the merits and pursuant to 28 U.S.C.
28 § 2244(b).

1 **A. The Court Denies the Claims of Evidence Tampering and Withholding**
2 **Evidence**

3 Petitioner alleges planting of or tampering with items of evidence. Petitioner’s
4 claims of evidence tampering were rejected after a post-conviction evidentiary hearing
5 in 2003. In a post-conviction evidentiary hearing, the Honorable William Kennedy of the
6 San Diego Superior Court concluded that there was no merit to Petitioner’s claim of
7 evidence tampering. (92-CV-427 NOL filed Jan. 23, 2004, Ex. 6, Judge Kennedy Order
8 dated July 2, 2003 at 10.)

9 Petitioner’s complaints about the handling of A-41 is repetitive of his complaints
10 that were litigated during trial, on direct appeal, in post-conviction motions and in
11 previous habeas petitions. (Pet. at 33-34.) Petitioner’s expert at trial, Dr. Edward T.
12 Blake, had no complaint about the results presented at trial by the prosecution regarding
13 A-41. (105 RT 7559-60.) Defense trial counsel stated in a declaration that in hindsight
14 he would have presented another expert at trial because Dr. Blake confirmed the validity
15 of the prosecution’s evidence regarding A-41. Cooper I, 92-CV-427, Amended Pet., Ex.
16 T at 560 (“The district attorney was able to bring out the fact that [Dr. Blake] believed
17 that A-41 had been tested in a proper manner and the results were accurate.”) Moreover,
18 Petitioner ignores the fact that the post-conviction testing on A-41 was done with the
19 assistance of Petitioner’s own nationally recognized DNA experts, Dr. Blake and
20 Christopher Plourd. Petitioner offers no clear and convincing evidence to rebut the
21 presumption of correctness that attaches to the state court’s express factual findings that
22 there was no tampering with A-41 at the post-conviction evidentiary hearing. See 28
23 U.S.C. § 2254(e).

24 Additionally, at trial, the defense knew about the testing of the UU series. Brian
25 Wraxall testified that he reviewed the evidence series from UU-1 through UU-16 and
26 explained his results. (94 RT 4726.) The defense knew about Mr. Wraxall’s testing and
27 results of the UU series since the trial and after trial. (94 RT 4726.) Since Petitioner was

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1 on notice as to the existence of material evidence, there is a lack of diligence in raising
2 a Brady violation. See Williams, 529 U.S. at 435-38.

3 As to the T-shirt, found on Peyton Road, it was never used as evidence against
4 Petitioner and cannot be considered as affecting the result in Petitioner's trial. The
5 T-shirt was introduced by the defense and never used to inculcate Petitioner. The San
6 Diego County Superior Court took evidence on Petitioner's tampering claim with respect
7 to the T-shirt, and expressly found that the testimony proffered by the prosecution that
8 no tampering had occurred was credible and unrebutted by a complete absence of
9 evidence by Petitioner. (92-CV-427 NOL filed Jan. 23, 2004, Ex. 6, Judge Kennedy
10 Order dated July 2, 2003 at 10.) The state court's findings are entitled to a presumption
11 of correctness. See 28 U.S.C. § 2254(e). The California Supreme Court's denial of
12 Petitioner's writ of mandate relating to the denial of his post-conviction DNA motion
13 does not rest on an unreasonable determination of the facts, and is consistent with federal
14 law within the meaning of 28 U.S.C. § 2254(d). In this petition, Petitioner has not
15 presented any clear and convincing evidence that would overcome the presumption that
16 attached to the state court's factual findings.

17 Petitioner's allegations about the cigarette butts, the rope, and the hatchet sheath
18 are also without merit. Petitioner was represented by an experienced and capable
19 attorney. Cooper I, 92-CV-427, Aug. 25, 1997 Order at 8. The cigarette butts, the rope,
20 and the hatchet sheath were all used as evidence against Petitioner, and defense counsel
21 was focused on that evidence. (See, e.g., 106 RT 7788, 7790, 7794 (defense closing
22 argument).) The state court rejected Petitioner's claims of evidence tampering after an
23 evidentiary hearing in 2003. Finally, EDTA preservative testing of the T-shirt has not
24 undermined the post-conviction DNA testing results confirming Petitioner's guilt.

25 In addition Petitioner's claims are undermined because he had a very able and
26 skilled defense attorney representing him. Indeed, this Court and the California Supreme
27 Court both made express findings that Petitioner received "an extraordinarily vigorous
28 and able defense." Cooper, 53 Cal.3d at 824; Cooper I, 92-CV-427, Aug. 25, 1997

1 Order at 8. Defense trial counsel David Negus' extensive educational and prior litigation
2 experience were developed at the evidentiary hearing conducted by this Court regarding
3 Petitioner's first federal habeas petition, Cooper I, 92-CV-427, Aug. 25, 1997 Order at
4 8, and he had the benefit of able post-conviction counsel. This weighs against
5 Petitioner's vague suggestions that the evidence introduced against him at trial suffered
6 from any deficiencies beyond those thoroughly litigated and developed in the trial court
7 and in post-conviction evidentiary proceedings. Accordingly, the Court concludes there
8 is no merit to Petitioner's tampering allegation and the state court's rejection of
9 Petitioner's vague and unsubstantiated accusations over two decades after the crimes that
10 evidence was planted is not contrary to federal law, nor based on an unreasonable
11 determination of the facts. See 28 U.S.C. § 2254(d).

12 **B. Petitioner Does Not Satisfy the Requirements of 28 U.S.C. § 2244(b)**

13 If Petitioner has previously adjudicated a claim relating to the withholding of
14 evidence, planting of evidence, failure to collect evidence, and false testimony, then his
15 pending claims must be dismissed. 28 U.S.C. § 2244(b). The gravamen of claims of
16 withholding evidence, failure to preserve evidence, and false testimony is the same,
17 regardless of whether Petitioner presents new and different legal arguments or different
18 factual allegations. See Babbitt, 177 F.3d at 746.

19 Even if Petitioner's claim were not subject to mandatory dismissal based upon
20 § 2244(b)(1), his claim is still denied because he could have presented the legal and
21 factual basis of his pending claim previously with due diligence. 28 U.S.C. § 2244(b).
22 As to the cigarette butts, the defense knew about the testing of the cigarette butts by Mr.
23 Wraxall prior to trial and at the time of trial. Mr. Wraxall testified at trial about his
24 testing of V-12 and V-17. (94 RT 4702-43.) He testified he and Dr. Blake, Petitioner's
25 expert, shared the same facility. (94 RT 4730.) Mr. Wraxall stated he conducted testing
26 of the cigarette butts in consultation with Dr. Blake and Dr. Blake had full access to
27 Wraxall's notes and results. (94 RT 4732.) As a result, Petitioner does not satisfy the
28 requirements of 28 U.S.C. § 2244(b).

1 Petitioner is simply making unsubstantiated allegations of tampering as to evidence
2 that was used against him at trial, or that subsequently confirmed his guilt from
3 post-conviction DNA testing. The defense presented a comprehensive pretrial motion in
4 an effort to exclude evidence based on allegations the crime scene had not been properly
5 managed, and that evidence was not collected or mishandled. Petitioner was represented
6 by an experienced and capable attorney at trial. Cooper I, 92-CV-427, Aug. 25, 1997
7 Order at 8. Petitioner's allegations have already been addressed at trial, on appeal, and
8 in his first federal habeas petition. Petitioner could have discovered any of the alleged
9 deficiencies with respect to the chain of custody of evidence, mishandling of evidence,
10 or tampering with evidence previously with due diligence. The same is true as to the
11 purported false testimony and withholding of evidence. Petitioner had excellent post-
12 conviction counsel, and Petitioner could have raised the same allegations he chose to
13 present in the eleventh hour of this case previously with due diligence.

14 Beyond the due diligence showing, Petitioner would be required to demonstrate
15 that the facts underlying his claim, if proven and viewed in light of the evidence as a
16 whole, would be sufficient to establish by clear and convincing evidence that, but for the
17 constitutional error, no reasonable juror would have found him guilty of the Ryen/Hughes
18 murders. 28 U.S.C. § 2244(b). Petitioner does not meet this requirement. Petitioner's
19 guilt was demonstrated by overwhelming evidence at trial, and has been reaffirmed
20 through post-conviction DNA testing. Therefore, the Court **DENIES** these claims.

21 **VIII. Josh Ryen's Videotape/Audiotape Testimony**

22 **A. Claim Re Josh Ryen's Videotape/Audiotape Testimony is DENIED on**
23 **the Merits**

24 Petitioner alleges that his federal constitutional rights were violated because of the
25 admission of videotape and audiotape evidence. (Pet. at 47-52.) The Court disagrees.
26 The jury heard two taped statements of Joshua Ryen pursuant to a stipulation. The first
27 was a videotape of a December 9, 1984 interview in which Josh, then age ten, was
28 questioned under oath by the prosecutor and defense counsel. The second was an

1 audiotape of a December 1, 1983 interview with Dr. Lorna Forbes, his treating
2 psychiatrist and a specialist in treating children who survived the murder of a family
3 member. Josh did not identify anyone as the assailant. (95 RT 4932-70; 4971-73; Trial
4 Exs. 641, 642.)

5 The defense received a benefit from the stipulation, as Josh Ryen did not identify
6 his assailant and the jury heard of his earlier statement concerning three Hispanic workers
7 coming to the ranch. The defense also avoided the drama and sympathy that would have
8 undoubtedly occurred had the defense called victim Josh Ryen to the stand in the trial and
9 heard his firsthand recollection about a man with bushy hair. (4/22/05 HRT 133.)
10 Petitioner's claim was also denied by the state court on independent and adequate state
11 grounds. This Court defers to the denial of Petitioner's claim on the merits by the
12 California Supreme Court pursuant to 28 U.S.C. § 2254(d). Accordingly, Petitioner's
13 claim is **DENIED** on the merits.

14 **B. Petitioner Does Not Satisfy the Requirements of 28 U.S.C. § 2244(b)**

15 Petitioner does not satisfy the requirements of 28 U.S.C. § 2244(b)(2). Petitioner
16 must demonstrate that he could not have presented his claim previously with due
17 diligence. 28 U.S.C. § 2244(2)(b)(I). The facts and circumstances surrounding Joshua's
18 statements and the manner in which his testimony was presented to the jury have been
19 matters of record since trial. Cooper, 53 Cal.3d at 800-801.

20 Assuming *arguendo* that Petitioner could demonstrate that the factual and legal
21 basis of his claim could not have been discovered previously with due diligence, he
22 would still be required to demonstrate that the facts underlying his claim, if proven and
23 viewed in light of the evidence as a whole, would be sufficient to establish by clear and
24 convincing evidence that, but for the constitutional error, no reasonable juror would have
25 found him guilty of the Ryen/Hughes murders. See 28 U.S.C. § 2244(b). Petitioner does
26 not meet this standard. The guilt of Petitioner was demonstrated by overwhelming
27 evidence at trial, and has been reaffirmed through post-conviction DNA testing.
28 Petitioner has not established by clear and convincing evidence that no juror would have

1 convicted Petitioner if Josh Ryen was subjected to testifying in person before the jury.
2 Accordingly, this Court **DENIES** this claim pursuant to 28 U.S.C. § 2244(b).

3 **IX. Denial of Access to the Judicial Process**

4 Petitioner claims that his rights under the Fifth, Sixth, Eighth, and Fourteenth
5 Amendments were violated when the San Diego County Superior Court directed him to
6 file his petition for writ of habeas corpus and related motions directly in the California
7 Supreme Court. (Pet. at 53-54.) Petitioner’s claim is properly **DENIED** as failing to
8 present a cognizable federal question for this Court’s consideration. Even if the claims
9 were a cognizable federal question, he does not satisfy the requirements of 28 U.S.C. §
10 2244(b). Even assuming arguendo that Petitioner met the requirements of 28 U.S.C. §
11 2244(b), this Court also **DENIES** Petitioner’s claim on the merits with deference to the
12 California Supreme Court’s denial of Petitioner’s claim because that decision is not
13 contrary to clearly established federal law nor based on an unreasonable determination
14 of the facts within the meaning of 28 U.S.C. § 2254(d).

15 **A. Petitioner Fails to Present a Cognizable Federal Question**

16 Petitioner’s complaint involves the application of and interpretation of state law
17 and does not implicate the federal Constitution. In Estelle v. McGuire, 502 U.S. 62,
18 67-68 (1991), the United States Supreme Court reiterated the well-established rule that
19 federal habeas corpus relief does not lie for errors of state law, and that it is not the policy
20 of the federal courts to re-examine state court determinations of state law questions. In
21 conducting a federal habeas review, a federal court is limited to deciding whether a
22 conviction violated the Constitution, laws or treaties of the United States. Id. at 68
23 (citations omitted). Petitioner’s claim fails to present a federal question cognizable on
24 federal habeas review and is properly **DENIED**. See id. 67-68.

25 **B. Claim of Denial of Access to the Judicial Process is DENIED on the**
26 **Merits**

27 This Court also defers to the state court’s denial of the claim on the merits. (Sixth
28 State Habeas Pet., (Claim VII) at 88–91; Answer, Ex. 13.) The California Supreme

1 Court's denial of Petitioner's claim is not contrary to clearly established federal law, nor
2 does it rest on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). This
3 Court therefore **DENIES** this claim pursuant to 28 U.S.C. § 2254(d).

4 **C. Petitioner Does Not Satisfy the Requirements of 28 U.S.C. § 2244(b)**

5 In order to be heard in a successive petition, Petitioner must demonstrate that the
6 claim could not have been previously presented with the exercise of due diligence, and
7 that the facts underlying his claim, if proven and viewed in light of the evidence as a
8 whole, would be sufficient to establish by clear and convincing evidence that, but for the
9 constitutional error, no reasonable juror would have found him guilty of the Ryan/Hughes
10 murders. See 28 U.S.C. § 2244(b)(2). Petitioner does not satisfy the second prong of 28
11 U.S.C. § 2244(b)(2), because his complaint about being directed to file in the California
12 Supreme Court is of no import to a juror's determination of his guilt.

13 **X. Petitioner's Claims are Procedurally Barred**

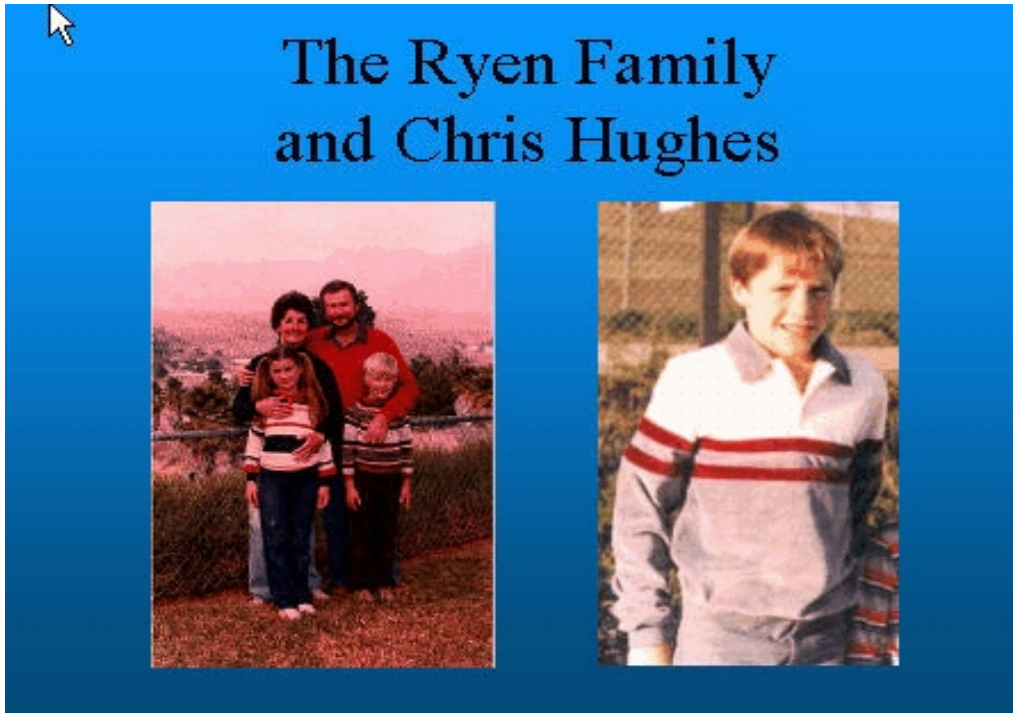
14 Even if Petitioner were to satisfy the requirements of 28 U.S.C. § 2244(b), the
15 Court denies his claims from this successive petition as procedurally barred. The
16 California Supreme Court denied Petitioner's claims on February 5, 2004, as untimely
17 and successive citing to In re Clark, 5 Cal. 4th 750 (1993) and In re Robbins, 18 Cal. 4th
18 770 (1998). (Sixth State Habeas Pet. at 37-54 (claim IV); Answer, Ex. 13.) Respondent
19 argues that Petitioner's claims are procedurally barred. In response, Petitioner fails to
20 raise "specific factual allegations that demonstrate the inadequacy of the state procedure,
21 including citation to authority demonstrating inconsistent application of the rule."
22 Bennett, 322 F.3d at 584, 586. Accordingly, this Court also **DENIES** these claims in the
23 successive petition as procedurally barred.

24 **XI. Lingering Doubt**

25 The Court recognizes that any case involving the death penalty is a serious matter.
26 The capital penalty for this case will continue to be highly debated in society. However,
27 a trial court is bound by the law and cannot be influenced by the positions of either side
28 of the death-penalty issue. As an alternative to the death penalty, Petitioner argues there

1 is sufficient evidence to reduce his sentence to life without parole under the doctrine of
2 lingering doubt. Respondent argues that Petitioner is foreclosed from raising a claim
3 relating to the penalty phase of his trial, as successive habeas petitions are limited to guilt
4 phase issues, and the penalty-phase claim was previously decided by the court against
5 Petitioner, and affirmed by the Ninth Circuit. See Greenawalt v. Stewart, 105 F.3d 1268
6 (9th Cir. 1997) (ineffective assistance of counsel at sentencing). The Court continues to
7 believe, in light of the totality of the record, that Petitioner received an extraordinarily
8 able defense at trial, and his claims of ineffective assistance of counsel and Brady
9 violations are without merit. In addition, Petitioner has not shown any legal authority to
10 reduce his penalty to life without parole in this successive habeas petition. At this time,
11 the Court concludes that it is not appropriate for this Court to alter the valid judgment of
12 the state court that has determined on multiple occasions that Petitioner deserves the
13 death penalty. As an aggravating factor, these brutal murders have forever adversely
14 impacted the lives of the victims. (4/22/05 HRT 124 (Mr. Hughes), 125 (Mrs. Hughes),
15 128 (Josh Ryen).) Accordingly, the Court **DENIES** Petitioner's claim of lingering doubt.

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CONCLUSION

In this case, Petitioner has had multiple habeas corpus petitions in state and federal court. In addition to the direct review affirming Petitioner’s conviction by the California Supreme Court, he has filed seven state petitions in the California Supreme Court, eight petitions for writ of certiorari in the United States Supreme Court, two habeas petitions in the United States District Court, two habeas petitions in the United States Supreme Court, a habeas petition in the San Diego County Superior Court and two applications for authorization to file a successive petition in the Ninth Circuit Court of Appeal. Post-conviction DNA testing confirms that Petitioner committed the murders of the Ryen/Hughes victims. This Court has conducted mitochondrial DNA testing and EDTA testing, has heard testimony from forty-two witnesses, independently reviewed the evidence, including the trial and evidentiary hearing transcripts and all of the parties’ submissions and arguments. Based on this careful review, the Court agrees with the post-conviction DNA results and all of the courts that came before it in this case: Petitioner is the one responsible for these brutal murders. Accordingly, the Court **DENIES** the successive petition for writ of habeas corpus.

IT IS SO ORDERED.

Dated: _____

MARILYN L. HUFF, JUDGE
UNITED STATES DISTRICT COURT

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