10-56118

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL LARSEN,

Petitioner-Appellee,

**v.**

BRENDA CASH, Acting Warden,

Respondent-Appellant.

On Appeal from the United States District Court
for the Central District of California
Case No. CV 08-4610-CAS
The Honorable Christina A. Snyder, Judge

# APPELLANT'S OPENING BRIEF

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## STATEMENT OF JURISDICTION

This appeal is from the final judgment of the United States District Court for the Central District of California (Clerk's Record ("CR") 81; 1 Excerpts of Record ("ER") 1),[1] granting the First Amended Petition for Writ of Habeas Corpus (the "FAP") filed by Petitioner-Appellee Daniel Larsen ("Petitioner"), a state prisoner, in case number CV 08-04610-CAS(SS). (CR 12; 3 ER 445-520.) Petitioner has been imprisoned in the custody of the California Department of Corrections as a result of his conviction by a jury, in Los Angeles County Superior Court case number PA032308. (6 ER 1144-46.) Since the FAP challenged the constitutionality of that conviction and the resulting sentence of imprisonment, the district court had subject-matter jurisdiction under 28 U.S.C. § 2254. Its final judgment, entered on June 14, 2010, is appealable under 28 U.S.C. §§ 1291 & 2253(a). Respondent filed a timely notice of appeal of that judgment, and of the order adopting the magistrate judge's two reports and recommendations (CR 80; 1

[1] "CR" refers to the Clerk's Record and the numbers refer to the items listed in the civil docket sheet, a copy of which is included at the end of the Volume I of the Excerpts of Record ("ER") filed concurrently by Respondent-Appellant ("Respondent").

ER 2-6), on July 13, 2010. (CR 82; 2 ER 129-30.) This Court consequently has jurisdiction over the instant appeal.

## QUESTIONS PRESENTED

1. Is there an implied "actual innocence" exception to the federal habeas corpus statute of limitations (28 U.S.C. § 2244(d))?

2. If such an exception exists, does it require proof that the prisoner pursued his rights with due diligence, and if so, did Petitioner exercise due diligence here?

3. Assuming that an "actual innocence" exception exists, did the district court err in its conclusion that Petitioner had carried his burden of proving, by a preponderance of the evidence, that no reasonable juror would have voted to convict him after hearing the testimony presented in federal court?

## STANDARD OF REVIEW

Where, as here, a district court has granted habeas corpus relief, its overall decision is reviewed de novo. *E.g.*, *Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003). Whether a claim is barred by a statute of limitations is likewise reviewed de novo. *Rouse v. United States Dep't of*

*State*, 567 F.3d 408, 414 (9th Cir. 2009); *Oja v. U.S. Army Corps of Engineers*, 440 F.3d 1122, 1127 (9th Cir. 2006). More generally, a district court's determinations on issues of law, and on mixed questions of fact and law, are reviewed de novo. *Frierson v. Woodford*, 463 F.3d 982, 988 (9th Cir. 2006). "To the extent it is necessary to review findings of fact made in the district court, the clearly erroneous standard applies." *Chaker v. Crogan*, 428 F.3d 1215, 1221 (9th Cir. 2005).

"In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Although a district court's decision on whether "to grant or deny an evidentiary hearing" is reviewed for abuse of discretion (*Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008)), its "interpretation of AEDPA standards governing the grant or denial of an evidentiary hearing" is reviewed de novo. *Earp v. Ornoski*, 431 F.3d 1158, 1066 (9th Cir. 2005). An error of law, by definition, is an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996). "Because the determination as to whether no reasonable juror would find a petitioner guilty beyond a reasonable doubt is a mixed question of law and fact," a "district court's ultimate finding of

actual innocence" is reviewed de novo. *Doe v. Menefee*, 391 F.3d 147, 163 (2d Cir. 2004) (opinion of Sotomayor, J.); *accord Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003); *Weaver v. Attorney General of Montana*, 370 Fed.Appx. 869, 869 (9th Cir. 2010).

## STATEMENT OF THE CASE

Following a jury trial in Los Angeles County Superior Court case number PA032308, Petitioner was found guilty of possession of a deadly weapon, a felony under California Penal Code section 12020(a)). After admitting that he had three prior felony convictions within the meaning of California's Three Strikes Law (Cal. Penal Code §§ 667(b)-(i), 1170.12(a)-(d)) and that he had served prior prison terms (Cal. Penal Code § 667.5(b)), Petitioner was sentenced to state prison for a total term of twenty-eight years to life. (CR 19, Lodged Document ("LD") #1; 6 ER 1135, 1141-42.)[2]

Petitioner appealed his conviction to the California Court of Appeal for the Second Appellate District (6 ER 1134), which affirmed the judgment on

[2] This Court may take judicial notice of the records and files in the underlying federal habeas proceedings. Fed. R. Evid. 201; *see United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) ("[A] court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases.")

June 1, 2000. (CR 19, LD #2; 1 ER 120-28.) Petitioner filed a petition for review in the California Supreme Court. The state Supreme Court denied review on August 9, 2000. (CR 19, LD #3; 1 ER 119.)

Petitioner waited close to five years, until May 13, 2005, before filing his first state petition for writ of habeas corpus in the Los Angeles County Superior Court. (*See* LD #4; CR 12-6; 6 ER 1094, 1105-06.) That petition was denied the next day. (CR 12-4; 1 ER 117-18.)

On February 27, 2006, Petitioner filed a second state petition for writ of habeas corpus, this one in the California Court of Appeal. (LD #5; 5 ER 765-1063; 6 ER 1064-84.) The petition was denied on March 28, 2006. (CR 12-4; 1 ER 115-16.)

Petitioner filed his third state habeas petition in the California Supreme Court on May 31, 2006. (LD #6; 4 ER 592-764.) In accordance with the court's instructions, Respondent filed an informal response (LD #7), and Petitioner filed an informal reply. (LD #8.) On July 25, 2007, the petition was summarily denied. (CR 12-6; 1 ER 112-14.)

Petitioner did not file his first federal Petition for Writ of Habeas Corpus ("Petition") until July 15, 2008. (CR 1; 3 ER 521-87.) On August 7, 2008, the district court dismissed the Petition with leave to amend. (CR 5.) Petitioner filed a First Amended Petition ("FAP") on October 27, 2008. (CR

12; 3 ER 445-520.) The FAP raised a single broad claim – that his trial counsel rendered ineffective assistance – with several subparts. (3 ER 450.) Specifically, Petitioner alleged that his trial counsel: (1) failed to investigate and present a number of witnesses, including James McNutt, Elinore McNutt, and Jorji Owen; (2) failed to raise a claim of third-party culpability; and (3) failed to move for a new trial after Petitioner had informed him of other percipient witnesses. (3 ER 487-96.)

Respondent filed a motion to dismiss the FAP as untimely (CR 18; 3 ER 417-44), which Petitioner opposed (CR 22). Following a federal evidentiary hearing (*see* CR 24, 25, 36), the magistrate judge filed a Report and Recommendation on July 13, 2009, recommending that Respondent's motion to dismiss be denied. Acknowledging that the FAP was untimely under the federal habeas statute of limitations (CR 37; 1 ER 76-77), the magistrate judge nevertheless opined that Petitioner was entitled to have his claim considered on the merits by virtue of an actual innocence exception to the statute (1 ER 77-83). On August 7, 2009, after Respondent had filed objections (CR 39), the district court adopted the magistrate judge's findings, conclusions, and recommendations (CR 42; 1 ER 67-68), and directed Respondent to file an Answer addressing the merits of Petitioner's ineffective-assistance claim (CR 44).

Respondent thereafter filed an Answer (CR 48; 2 ER 264-89), and Petitioner filed a Traverse (CR 52). A second federal evidentiary hearing was held to determine whether Petitioner was entitled to relief on the merits of his ineffective-assistance-of-counsel claim. (*See* CR 57, 61, 62, 66.) On April 27, 2010, the magistrate judge filed a second Report and Recommendation and recommended that the FAP be conditionally granted. (CR 71; 1 ER 7-66.) Respondent once again filed objections. (CR 77.) On June 14, 2010, the district court adopted the second Report and Recommendation (CR 80; 1 ER 2-6) and issued a published decision granting conditional relief on Petitioner's FAP. *Larsen v. Adams*, 718 F. Supp. 2d 1201 (C.D. Cal. Jun. 14, 2010). It ordered that Petitioner be released from custody if, within ninety days of the judgment becoming final, the State had not elected to retry him. (CR 80-81; 1 ER 1-6.) Respondent filed a timely notice of appeal on July 13, 2010. (CR 82; 2 ER 129-30.)[3]

[3] Pursuant to this Court's Orders of May 3, 2011, and December 9, 2011, the district court's judgment is currently stayed pending the outcome of this appeal.

## STATEMENT OF FACTS

### A. Trial Evidence[4]

Evidence adduced by the prosecution at trial established that during the early-morning hours of June 6, 1998, Los Angeles police officers Thomas Townsend and Michael Rex were on patrol when they received a radio call about a reported assault with a deadly weapon, with shots fired, in progress at an establishment known as the Gold Apple bar. The suspect was described as having a ponytail, and as wearing a green flannel shirt. According to the dispatch, he was also reportedly carrying a gun. (7 ER 1219-21, 1351-52, 1383; 1400-01.) As the officers approached the Gold Apple, located in a mall at the intersection of Balboa Boulevard and Parthenia Street, they turned off their lights and sirens so they would not be seen or heard. The officers pulled up next to the bar, turned on their lights, and parked next to a fence. (7 ER 1221, 1223-24, 1353-54.) The officers saw Petitioner, who was wearing a green buttoned-up flannel shirt that was

[4] This portion of the Statement of Facts is based on the evidence presented at Petitioner's trial in the Los Angeles County Superior Court. The two-volume Reporter's Transcript of the trial was lodged in the district court on January 16, 2009 (CR 19, LD #10), concurrently with Respondent's Motion to Dismiss. The United States magistrate judge also summarized the evidence presented at trial in both the first and second Report and Recommendations. (CR 37, 71; 1 ER 12-19, 83-90.)

untucked and covering the waistband of his pants. (7 ER 1225-27, 1230, 1354-55.) Petitioner crouched down and reached his right hand under his flannel shirt into the waistband of his pants. He pulled out a shiny metal object, approximately six inches in length, and threw it underneath a car parked to his left. (7 ER 1232-35, 1359-61.)

The officers got out of their car and yelled for everyone to put their hands up. (7 ER 1242.) After the officers placed everyone, including Petitioner, in handcuffs (7 ER 1245-46), Officer Townsend looked underneath the parked car where Petitioner had thrown the object and found a knife with a double-edged blade and a weighted handle with a finger guard. (7 ER 1247.) Officer Rex asked Petitioner his name and Petitioner replied, "Anthony Vant." (7 ER 1374-75.) When asked for identification, Petitioner produced a temporary driver's license in the name of Anthony Vant. (7 ER 1375.) Petitioner was booked under the name Anthony Vant, but it was later discovered that his true name was Daniel Larsen. (7 ER 1376-77; 8 ER 1420-21.)

### B. First Federal Evidentiary Hearing

On May 19, 2009, the magistrate judge held the first of two federal evidentiary hearings in the case, to give Petitioner an opportunity to show

that he is "actually innocent" within the meaning of *Schlup v. Delo*, 513 U.S. 298 (1995). The following summary of evidence presented at the hearing is taken nearly verbatim from the second report and recommendation, with bracketed citations to the excerpts of record replacing the magistrate judge's citations to volume and page numbers of the transcript, and to some of the exhibits introduced therein:[5]

**1. James McNutt's Testimony**

> James McNutt is currently a correctional officer in Tennessee. [2 ER 305-06.] He previously spent twenty-two years in the military, serving in combat in Vietnam and Grenada. [2 ER 303.] After leaving the military, Mr. McNutt spent eight years as a police officer in North Carolina, including time as a chief of police. [2 ER 304-05.]
>
> On June 6, 1998, Mr. McNutt went to the Gold Apple bar with his wife to celebrate a birthday. [2 ER 306.] Mr. McNutt intended to meet his stepson, Daniel Harrison, at the bar. [2 ER 307.] Mr. McNutt estimated that he arrived at the bar around 7:30 p.m., but stated that he was unsure of the time. [2 ER 307.] Mr. McNutt parked facing the bar. (*Id.*). Harrison was parked behind him and to the right. (*Id.*).
>
> When Mr. McNutt exited his car, he heard a loud argument coming from near Harrison's car. [2 ER 308.] Mr. McNutt walked over to Harrison's car and stood by the front driver's side. ([2 ER 308-09]; see also 1EH, Exh. 21). Two other people were

[5] Although the quoted portions of the report and recommendation contain several footnotes, most are omitted in the interest of brevity.

standing near Harrison's car: Petitioner and William Hewitt.[6] [2 ER 309-10.] Mr. McNutt was standing approximately two feet away from Hewitt. [2 ER 310.] Hewitt was standing next to the driver's door of Harrison's car. (See 1EH, Exh. 21). Petitioner stood behind Hewitt, closer to Harrison's taillights. (*Id.*). Mr. McNutt, Hewitt, and Petitioner were in these same positions when Mr. McNutt became aware of the police. [2 ER 311.]

After Mr. McNutt walked to Harrison's car, he argued with Hewitt for approximately two minutes. (*Id.*). Petitioner did not say anything while Mr. McNutt was there. [2 ER 313.] Petitioner stood with his hands at his sides, listening to Mr. McNutt and Hewitt argue. (*Id.*). After arguing with Hewitt for two minutes, Mr. McNutt heard someone yell "5-0." [2 ER 311.] Mr. McNutt took this to mean "police." [2 ER 311-12.] Mr. McNutt then saw twenty to twenty-five police officers arrive from all directions. [2 ER 312.]

Mr. McNutt was paying attention to Hewitt because Hewitt was hostile. (*Id.*). When the police arrived, "[Hewitt] turned around, took a few steps . . . [and] threw an item near the vehicle parked next to [Harrison's] vehicle." (*Id.*). Mr. McNutt did not see the object when it was in Hewitt's hand, but heard it hit the ground. (*Id.*). The object sounded metallic, and Mr. McNutt believes that it was "probably" a knife. (*Id.*). Based on his professional experience, Mr. McNutt testified that the object was not a handgun. (*Id.*). Mr. McNutt also testified that a copper weight would not have made the noise he heard. [2 ER 321.] After Hewitt threw the object, Mr. McNutt saw it go under the vehicle. [2 ER 312.] It appeared to be ten or twelve inches long. [2 ER 321.]

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[6] As the district court noted, "Hewitt went by the name 'Bunker' [*see* 6 ER 1133], which was the name that Mr. McNutt primarily used when referring to him. For consistency, the Court refers to him only as Hewitt." (CR 71; 1 ER 20 n.9.)

When the police arrived, Mr. McNutt, Petitioner, and Hewitt walked away from Harrison's car, toward the bar. ([2 ER 313]; see also 1EH, Exh. 21). Mr. McNutt, who was wearing a Pittsburgh Steelers jacket because the night was cool, heard: "You in the fucking Pittsburgh Steelers jacket. . . . Freeze." [2 ER 314.] Two police officers handcuffed Mr. McNutt. (*Id.*). One of the police officers frisked Mr. McNutt, and in the process "massaged" Mr. McNutt's penis "for about five, six seconds." (*Id.*). An officer then searched Mr. McNutt's wallet, finding cards identifying Mr. McNutt as a former police officer and chief of police. (*Id.*). The officers then opened Mr. McNutt's handcuffs and told him to leave. (*Id.*). Mr. McNutt asked the officers what they were looking for and was told: "a black man with a gun." (*Id.*). The officers never interviewed Mr. McNutt about what he had seen. [2 ER 314-15.] Mr. McNutt never went into the Gold Apple bar that night. [2 ER 319.]

Mr. McNutt was not contacted by an attorney about the events of June 6, 1998 until approximately two years later. [2 ER 315.] However, had Petitioner's counsel asked, Mr. McNutt would have agreed to testify at Petitioner's trial as to what he saw in the parking lot. [2 ER 316.]

On cross-examination, Mr. McNutt testified that although he remembers lights in the parking lot and red and blue flashing lights on the police cars, he did not remember whether the police cars had their spotlights or headlights on. [2 ER 317.] Mr. McNutt neither saw nor heard a police helicopter. [2 ER 317-18.] Mr. McNutt testified that he was "a nervous wreck" after the incident. [2 ER 323.] He felt that the officers he encountered were extremely rude and rough. (*Id.*). However, he thought that the police officers treated his wife appropriately. [2 ER 325.] Mr. McNutt never complained to either the Los Angeles Police Department watch commander or the United States Attorney about the officers' conduct. [2 ER 324, 326.]

Although Mr. McNutt saw police arrest Petitioner, Mr. McNutt did not tell any of the police officers that he had been a witness. [2 ER 333.] The police ordered Mr. McNutt to leave and

did not give him a chance to make a statement. (*Id.*). Mr. McNutt did not make a statement concerning his recollection of Petitioner's arrest until two years after the incident. [2 ER 330.]

Mr. McNutt made an initial statement with Mrs. McNutt on September 21, 2001, and a declaration of his own on July 21, 2005. [*See* 6 ER 1085-89.] The testimony in the statement and the declaration was virtually identical to Mr. McNutt's testimony at the evidentiary hearing. Mr. McNutt did not review any of these documents to prepare for his testimony, although he may have talked about the events with his wife. (2 ER 330-31.)

**2. Elinore McNutt's Testimony**

Elinore McNutt is married to James McNutt. [2 ER 336.] She has had multiple back surgeries and suffers from fibromyalgia. (*Id.*). As a result, Mrs. McNutt has difficulty sitting for extended periods of time. (*Id.*). Mrs. McNutt did not suffer from her current back problems at the time of Petitioner's arrest. [2 ER 362.] Her medication does not affect her ability to recall events. (*Id.*). She chose not to take any pain medication before the hearing so that she could speak clearly. (*Id.*).

Mrs. McNutt testified that she went with Mr. McNutt to the Gold Apple to meet her son on June 6, 1998. [2 ER 336-37.] She does not recall the time that they arrived, but remembers that it was dark. [2 ER 337.] Mrs. McNutt's car was parked facing the bar. ([2 ER 337-38]; see also 1EH, Exh. 4). Harrison's car was parked facing the other direction, across "a little parking lot." [2 ER 337-38.] As Mrs. McNutt walked toward the bar, she saw two men walk up to Harrison's car. [2 ER 338.] One of these men was Hewitt. (*Id.*). Hewitt had come to Mrs. McNutt's house a week before and stayed for approximately five minutes. (*Id.*). At the time, Hewitt was skinny and had medium length dark hair. (*Id.*). The other man approaching Harrison's car was Petitioner, who was "chubby" and had short hair. [2 ER 338-39.]

Mrs. McNutt's attention was on Hewitt because the way he walked directly up to Harrison's car door concerned her. [2 ER 339.] She pointed out Hewitt's actions to Mr. McNutt. (*Id.*).

While Mr. McNutt walked over to Harrison's car, Mrs. McNutt waited by the tailgate of her car. [2 ER 339-40.] She could see Petitioner, Hewitt, and Mr. McNutt from where she was standing. [2 ER 340.] Petitioner was standing by Harrison's car's taillights, not by the side of the car. (*Id.*; see also 1EH, Exh. 4). Hewitt stood by the driver's side of the car and Mr. McNutt stood in front of the driver's door. ([2 ER 343]; see also 1EH, Exh. 4.) Hewitt and Harrison argued, but Petitioner was not involved. [2 ER 340.]

When the police arrived, Hewitt turned toward Mrs. McNutt. [2 ER 344.] She saw Hewitt reach into his clothing and throw an object under a car. (*Id.*). Mrs. McNutt testified that she did not know what the object was, but that it was metal and she heard a clank and a "skidding . . . noise" when Hewitt threw it. (*Id.*). At this time, Petitioner "just stood there" with his hands at his sides, then turned and walked away. [2 ER 344-45, 353-54.] Petitioner had nothing in his hands. [2 ER 345.] Mrs. McNutt saw police officers put Petitioner in a car, but did not know that they had arrested Petitioner. [2 ER 346.]

Mrs. McNutt did not remember Petitioner's counsel contacting her. [2 ER 347.] She stated that she would have been willing to testify at Petitioner's trial if Petitioner's counsel had contacted her. [2 ER 348.]

On cross-examination, Mrs. McNutt testified that although she remembered seeing overhead lighting in the parking lot, she does not remember lights on either the police cars or a helicopter. [2 ER 351-52.] She did not hear any sirens before the police arrived. [2 ER 352.] As the police arrived, Mrs. McNutt scanned the parking lot, so her eyes were not on Hewitt and Petitioner the entire time. [2 ER 361-62.] Mrs. McNutt saw Mr. McNutt "being fondled by a police officer," and an officer grabbed her by the hair. [2 ER 359-60.] She never called the Los Angeles Police Department, the United States Attorney's office, or the F.B.I. to complain about her treatment by the police. [2 ER 360.] Mrs. McNutt testified that she believes "it doesn't do a lot of good to call LAPD." (*Id.*). After the police left, Mrs. McNutt and her husband went into the bar, but only for a short time because Mr.

McNutt was so upset. [2 ER 348-49.] Mrs. McNutt talked to Harrison either later that evening or the next day about what had happened. [2 ER 349-51.] Before making her July 21, 2005 declaration [*see* CR 12-2; 6 ER 1090-93], Mrs. McNutt discussed what had happened with Mr. McNutt. [2 ER 354-55.] She did not discuss anything with Harrison, with whom she did not have much contact. [2 ER 355.]

Mrs. McNutt admitted that Harrison had been in prison, but she thinks that the police always treated him fairly. [2 ER 360-61.] She said that it seemed like Petitioner, Hewitt, and Harrison knew each other at the time of the incident, but she does not know how they were acquainted. [2 ER 360.] She does not think that Harrison and Petitioner were friends. [2 ER 353.]

### 3. Brian McCracken's Testimony and Declaration

Brian McCracken admitted that he had been convicted of conspiracy to commit a crime in 1990 and of being a felon in possession of a firearm in 1998. [2 ER 364.] The Court took judicial notice of his record of convictions.[7] [2 ER 378.] McCracken began supervised release in 2001. [2 ER 365.] He has held a job making aircraft components since 2001. (*Id.*). He has not been arrested during his supervised release. (*Id.*).

On June 6, 1998, McCracken was in the Gold Apple bar. [2 ER 365.] He testified that he does not remember exactly what

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[7] As set forth in the first Report and Recommendation,

> McCracken pled no contest to conspiracy to commit a crime (Cal. Penal Code § 182), specifically, shooting at an inhabited dwelling (Cal. Penal Code § 246), in Los Angeles Superior Court on June 28, 1990. On August 16, 1999, McCracken pled guilty to felon in possession of a firearm (18 U.S.C. § 922(g)(1)) in U.S. District Court for the Central District of California.

(CR 37; 1 ER 98 n.15.)

time he arrived there, but thinks it was around dusk. [2 ER 386.] McCracken went to the bar alone. [2 ER 365.] McCracken knew Petitioner at the time, but they were not close friends. [2 ER 384.] McCracken saw Petitioner in the bar, and was sitting fifteen to twenty feet away from him. [2 ER 366.]

After McCracken was in the bar for fifteen or twenty minutes, a man approached him and said "you know, I could kill you right now." [2 ER 366-67, 386-87.] This man was not Petitioner. [2 ER 367.] The man "flashed" a knife at McCracken. [2 ER 366.] The knife was double-edged, with a four to five inch long blade and a finger guard. [2 ER 370.] Petitioner's counsel introduced a photograph of a knife found in Petitioner's trial counsel's file. ([2 ER 370-71]; see 1EH, Exh. 22). McCracken testified that the knife depicted in the photo found in Petitioner's trial counsel's file looks like the knife he saw in the Gold Apple bar. [2 ER 371.] McCracken never saw Petitioner with a knife. (*Id.*).

After the man threatened McCracken, McCracken diffused [*sic*] the situation and ordered beer for the two of them. [2 ER 371-72.] When McCracken was ordering, the bartender told him that she had called the police. [2 ER 372.] McCracken saw police lights outside the bar, but never went out into the parking lot. (*Id.*).

In his declaration filed December 4, 2009, McCracken stated that he was never contacted by Petitioner's trial counsel to testify at Petitioner's 1999 trial. (McCracken Decl. ¶¶ 3-4). Had he been asked to testify, McCracken would have been available and would have provided the same testimony as in the First Evidentiary Hearing. (*Id.* ¶ 5).

On cross-examination, McCracken described the man in the bar with the knife as having a medium build and short brown hair. [2 ER 380-81.] The man was neither skinny nor "chunky." [2 ER 381.] Although McCracken had difficulty remembering the man with the knife, he was certain of his description of the knife itself. [2 ER 382.] He focused on the knife because the man threatened to kill him with it. (*Id.*). McCracken drank two beers on the night

of the incident. [2 ER 386.] He had one beer before he saw the knife. (*Id.*).

**4. Jorji Owen's Declaration**

Jorji Owen did not testify at the First Evidentiary Hearing, but submitted a declaration.[8] [*See* CR 12-2; 6 ER 1126-28.] Owen identified Hewitt as her boyfriend. [6 ER 1127.] According to Owen, on June 6, 1998, Hewitt, Petitioner, and two other men went to a bar. (*Id.*). When Hewitt returned from the bar, he told Owen that Petitioner "had been arrested for possession of his (Hewitt's) knife, and that he (Hewitt) has [*sic*] tossed the knife under a truck when the police arrived at the bar." (*Id.*). Hewitt sold his motorcycle to bail Petitioner out of jail, because he felt responsible for Petitioner being in jail. [6 ER 1127-28.] Owen stated that Hewitt felt responsible because the knife belonged to him and he had thrown it under a truck when the police arrived. (*Id.*).

**5. William Hewitt's Declaration**

William Hewitt did not testify at the First Evidentiary Hearing. He executed a declaration on January 15, 2001. [6 ER 1132-33.] Hewitt stated that he was with Petitioner when Petitioner was arrested. (*Id.*). He further stated: "I know that the knife was not [Petitioner's], because it was mine." (*Id.*).

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[8] Footnote 11 of the second Report and Recommendation, reproduced in full herein, recites as follows:

> On February 24, 1997, Owen pled guilty to forgery of access cards to defraud, Cal. Penal Code § 484f(a), in Los Angeles County Superior Court. (Respondent's Apr. 8, 2009 Pre-Evidentiary Hearing Memorandum at 2). The Court takes judicial notice of this conviction.

(CR 71; 1 ER 27 n.11.)

(CR 71, 1 ER 19-29 (underlining in original).)

### C. Second Federal Evidentiary Hearing

The district court, as previously noted, held a second evidentiary hearing to address the merits of Petitioner's ineffective assistance claim. Since Respondent is only challenging the correctness of the district court ruling that Petitioner's action is not time-barred, and is not separately seeking appellate review of its merits determination in this appeal, Respondent has not undertaken to summarize the evidence presented at the second hearing.

## SUMMARY OF ARGUMENT

1. The original and First Amended Petitions in the instant case were facially untimely under the statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 28 U.S.C. § 2244(d)(1). Petitioner did not file his original Petition until July 15, 2008, almost seven years after the statute of limitations expired. Statutory tolling (*see* 28 U.S.C. § 2244(d)(2)) is unavailable because Petitioner did not file his first state habeas petition until May 18, 2005, by

which time the federal statute had already run. For the reasons stated by the district court, Petitioner does not qualify for equitable tolling.

2. Contrary to what the district court ruled, the "actual innocence" gateway discussed in *Schlup v. Delo*, 513 U.S. 298 (1995), is not available to state prisoners whose petitions are untimely under the AEDPA statute of limitations. As a result, the action should have been dismissed as untimely.

3. Even if the district court was correct in ruling that there is an "actual innocence" exception to the statute of limitations, such an exception would be equitable in nature and would require a petitioner to demonstrate that he at least exercised due diligence in pursuing his legal remedies. *Holland v. Florida*, 130 S. Ct. 2549, 2562-63 (2010). Since Petitioner has not done so in this case, he does not qualify.

4. The *Schlup* gateway, where it applies, "requires the habeas petitioner to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup*, 513 U.S. at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 326. Since Petitioner failed to make the required showing in the district court, he does not fit within the exception.

# ARGUMENT

## I. THE DISTRICT COURT ERRED BY REFUSING TO DISMISS THIS ACTION AS UNTIMELY

### A. The Original and First Amended Petitions Were Facially Untimely

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs all federal habeas actions that, like this one, were first filed on or after April 24, 1996. *Woodford v. Garceau*, 538 U.S. 202, 206-07, 210 (2003); *Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997); *Brown v. Roe*, 279 F.3d 742, 743 (9th Cir. 2002). Since Petitioner did not file his federal habeas action until July 2008 (CR 1; 3 ER 521), AEDPA applies herein.

Under AEDPA, a state prisoner who seeks to file a federal habeas action challenging his conviction or sentence must do so within one year after the date on which the judgment became final. 28 U.S.C. § 2244(d)(1)(A). The prisoner's conviction becomes final when his direct appeal has been completed and/or all deadlines for seeking direct review by higher courts have passed. *See Smith v. Duncan*, 297 F.3d 809, 813 (9th Cir.

2002); *Wixom v. Washington*, 264 F.3d 894, 897 (9th Cir. 2001).[9] Since a defendant has the right to petition the United States Supreme Court for a writ of certiorari as part of the direct review process, "a state court criminal judgment is 'final' (for purposes of collateral attack) at the conclusion of review in the United States Supreme Court or when the time for seeking certiorari review expires." *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999) (quoting *Kapral v. United States*, 166 F.3d 565, 575 (3d Cir. 1999), and citing *Ross v. Artuz*, 150 F.3d 97, 98 (2d Cir. 1998)). This Court has upheld the constitutionality of the statute of limitations provision. *Green v. White*, 223 F.3d 1001, 1003-04 (9th Cir. 2000).

Under Rule 6(a) of the Federal Rules of Civil Procedure, the statute of limitations expires on the first anniversary of the date the prisoner's conviction became final, or of the date the AEDPA was enacted, whichever occurred later. *See, e.g.*, *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002) (where time for filing petition for certiorari expired on October 13, 1999, petitioner had until October 13, 2000 to file federal habeas petition); *Patterson v. Stewart*, 251 F.3d 1243, 1245-46 (9th Cir. 2001) (when

[9] In rare cases, the one-year limitation period may run from a date later than the date on which the judgment became final. *See* 28 U.S.C. § 2244(d)(1)(B)-(D). The district court did not suggest, however, that any of these alternative start-date provisions are applicable here.

petitioner's conviction became final prior to April 24, 1996, when the AEDPA was enacted, period of limitation began running on April 25, 1996 and in the absence of statutory tolling, expired on April 24, 1997). A federal habeas petition filed even one day late is untimely and must be dismissed. *E.g.*, *Lattimore v. Dubois*, 311 F.3d 46, 53-54 (1st Cir. 2002); *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000).

The AEDPA also provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). Conversely, time elapsed between the finality of the state court judgment and the filing of the first state habeas petition counts toward the one year. The pendency of state collateral proceedings only tolls the one-year period, but does not delay its start. *See Green v. White*, 223 F.3d at 1002-03. Once the one-year period has expired, the filing of a subsequent state petition for collateral review will not revive or toll the statute because there is nothing left to toll. *See, e.g.*, *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003); *Green v. White*, 223 F.3d at 1002.

The United States Supreme Court has held that the doctrine of equitable tolling may apply in some cases to the one-year period of limitations set

forth in 28 U.S.C. § 2244(d) for a state prisoner to file a federal habeas petition under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). However, the criteria for obtaining equitable tolling are stringent. A petitioner may be entitled to equitable tolling, "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id*. at 2562 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *see also Lawrence v. Florida*, 549 U.S. 327, 336 (2007); *Randle v. Crawford*, 604 F.3d 1047, 1057 (9th Cir. 2010) ("Equitable tolling is only appropriate if '*extraordinary* circumstances beyond a prisoner's control make it impossible to file a petition on time.'"); *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011, 1013 (9th Cir. 2009) (petitioner must show that the extraordinary circumstance "caused him to file his petition almost a year late"); *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006); *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). "When external forces, *rather than a petitioner's lack of diligence*, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (emphasis added).

A petitioner's burden of proof for equitable tolling is a "heavy" one (*Chaffer v. Prosper*, 592 F.3d 1046, 1048 (9th Cir. 2010)), and "'the threshold necessary to trigger equitable tolling . . . is very high, lest the exceptions swallow the rule.'" *Waldron-Ramsey v. Pacholke*, 556 F.3d at 1011. "This high bar is necessary to effectuate the 'AEDPA's statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.'" *Mendoza v. Carey*, 449 F.3d 1065, 1068 (9th Cir. 2006) (quoting *Guillory v. Roe*, 329 F.3d 1015, 1018 (9th Cir. 2003)). Thus, equitable tolling "will not be available in most cases," because district courts are expected to "take seriously Congress's desire to accelerate the federal habeas process" and to allow equitable tolling only when the above-noted "high hurdle is surmounted." *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1288-89 (9th Cir. 1997); [10] *see also Lakey v. Hickman*, 633 F.3d 782, 786 (9th Cir. 2011) (noting the "high threshold" for application of the equitable tolling doctrine); *Spitsyn v. Moore*, 345 F.3d at 799 ("[e]quitable tolling is justified in few cases").

[10] The *Beeler* decision was overruled on other grounds in *Calderon v. United States Dist. Court* (*Kelly)*, 163 F.3d 530 (9th Cir. 1998), which was in turn overruled on other grounds in *Woodford v. Garceau*, 538 U.S. 202 (2003).

Petitioner has the burden of establishing that he is entitled to equitable tolling. *Pace v. DiGuglielmo*, 544 U.S. at 418; *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002). Although the statute of limitation provision in the AEDPA is theoretically subject to equitable tolling, this Court has "made clear that equitable tolling is 'unavailable in most cases.'" *Miranda v. Castro*, 292 F.3d at 1066 (quoting *Miles v. Prunty*, 187 F.3d at 1107). Equitable tolling is unavailable unless the petitioner shows that he has pursued his legal remedies diligently and that extraordinary circumstances beyond his control nevertheless prevented him from filing a federal habeas petition in a timely manner. *Rasberry v. Garcia*, 448 F.3d at 1153; *see also Pace v. DiGuglielmo*, 544 U.S. at 418 (assuming without without deciding that equitable tolling of the AEDPA statute of limitations was potentially available but finding that under "long-established principles, petitioner's lack of diligence precludes equity's operation").

Accordingly, neither a prisoner's pro se status, nor his ignorance of the legal requirements for instituting a habeas action, justifies equitable tolling. *E.g.*, *Delaney v. Matesanz*, 264 F.3d 7, 15 (1st Cir. 2001); *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000); *United States v. Cicero*, 214 F.3d 199, 203 (D.C. Cir. 2000); *Smith v. McGinnis*, 208 F.3d 13, 18 (2d Cir. 2000); *Jones v. Morton*, 195 F.3d 153, 159-60 (3d Cir. 1999); *Fisher v.*

*Johnson*, 174 F.3d 710, 714 (5th Cir. 1999). The same is true of a prisoner's illiteracy. *See Hughes v. Idaho State Bd. Of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986) (illiteracy did not provide "cause" sufficient to excuse a procedural default in state court). A prisoner's lack of legal knowledge or expertise is not an "extraordinary circumstance." *Rasberry*, 448 F.3d at 1154.

Here, as the district court properly recognized, the California Supreme Court denied his petition for review in the California Supreme Court on August 9, 2000. (CR 19, LD #3; 1 ER 72, 119.) Petitioner thereafter had ninety days to file a petition for certiorari in the United States Supreme Court (*see* Sup. Ct. R. 13.1), but never did so. Since the ninetieth day was a Sunday, Petitioner's conviction and sentence became final for statute of limitations purposes on the next business day, which was November 8, 2000. *See* Fed. R. Civ. P. 6(a)(1)(C). As a result, Petitioner had until November 8, 2001, to file a petition for federal habeas relief. *See, e.g.*, *Miranda v. Castro*, 292 F.3d at 1065; *Patterson v. Stewart*, 251 F.3d at 1245-46.

Yet Petitioner never got around to filing his federal habeas Petition until July 15, 2008 (CR 1, 37-71; 1 ER 7, 69; 3 ER 521), over seven years after the limitations period had expired. Petitioner did not even file his first state habeas petition until May 2005 (CR 12-6, 37; 1 ER 72-73; 6 ER 1094,

1105), over four years after his conviction became final. Since AEDPA's statutory tolling provisions cannot stop or re-start the limitations clock once it has run out, both the original and First Amended Petitions were untimely. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003); *Green v. White*, 223 F.3d at 1002. In addition, as the district court correctly observed, Petitioner's assertion that he initially had trouble finding a lawyer who would take his case, and that "he did not want to file a habeas petition without assistance because he was not familiar with the law," did not afford grounds for equitable tolling. (CR 37; 1 ER 76-77.) "Absent any other tolling or excuse from AEDPA's statute of limitations," as the district court further noted, "the Petition was untimely by 2,441 days" (1 ER 77), which equates to six years and four months. Accordingly, unless the district court was correct in concluding that there is an "actual innocence" exception to the statute of limitations, and that Petitioner carried the heavy burden of proving that he is "actually innocent," the court's decision to grant habeas relief in this case must be reversed.

### B. The District Court Erred in Finding That Petitioner Made the Requisite Showing of Actual Innocence

While recognizing that the Petition in this case was facially untimely, the district court nevertheless considered his ineffective-assistance-of-counsel claim on the merits and ultimately granted relief on that claim. It did so on the theory that there is an exception to the federal habeas statute of limitations for prisoners who affirmatively demonstrate that they are actually innocent of the charges on which they were convicted. (1 ER 77 (citing *Schlup v. Delo*, 513 U.S. at 301, 315).)

In *Schlup*, the Supreme Court held that a federal court could consider a state prisoner's habeas petition that was second or successive, amounted to an abuse of the writ, or was procedurally barred if the rejection of the claims contained therein on such procedural grounds would result in a "fundamental miscarriage of justice." *Id*. at 318-21. Such a miscarriage of justice occurs when "constitutional error has resulted in the conviction of one who is actually innocent of the crime." *Id*. at 324. Under *Schlup*, a showing to this effect "functions as a 'gateway,' permitting a habeas petitioner to have considered on the merits claims of constitutional error that would otherwise be procedurally barred." *Carriger v. Stewart*, 132 F.3d 463, 477 (9th Cir. 1997) (citing *Schlup*, 513 U.S. at 315-16). "[I]f a

petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claim." *Schlup*, 513 U.S. at 316. But *Schlup* did not address the applicability of the doctrine to the statute of limitations and indeed could not have done so, since AEDPA had not yet been enacted when that case was decided.

Partly for that reason, as explained more fully in Argument section I(C), *infra*, it is not clear that the "miscarriage of justice" doctrine extends to the AEDPA statute of limitations. Although this Court's latest decision on the issue has expressed the view that the exception does apply in the statute of limitations context (*see Lee v. Lampert*, 653 F.3d 929, 931-32, 937 (9th Cir. 2011)), its reasoning to that effect was not necessary to the final outcome and was thus at least arguably non-binding dicta. However, even if the Court views *Lee* as fully dispositive with respect to the applicability of *Schlup*, the district court still erred in concluding that Petitioner made a satisfactory showing that he is innocent. In fact, as explained more fully below, Petitioner came nowhere close.

### 1. To Qualify for the "Actual Innocence" Exception, a Petitioner Must Produce Newly Discovered Evidence of Innocence So Strong that No Reasonable Juror Would Vote to Convict Him

The "miscarriage of justice" exception, where it applies, "requires the habeas petitioner to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup v. Delo*, 513 U.S. at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). "Actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998); *King v. Trujillo*, 638 F.3d 726, 733 & n. 34 (9th Cir. 2011) (quoting *Bousley*). It is worth noting that a state prisoner like Petitioner, who has been convicted by a jury, is no longer entitled to the presumption of innocence. "To the contrary," as the *Schlup* Court emphasized, such an individual "comes before the habeas court with a strong – and in the vast majority of the cases conclusive – presumption of guilt." *Schlup*, 513 U.S. at 326 n.42.

For that reason, "[i]n order to present otherwise procedurally barred claims to a federal habeas court, a petitioner must come forward with sufficient proof of his actual innocence to bring him 'within "the narrow class of cases . . . implicating a fundamental miscarriage of justice."'" *Sistrunk v. Armenakis*, 292 F.3d 669, 672-73 (9th Cir. 2002) (quoting

*Schlup*, 513 U.S. at 314-15; and *McCleskey v. Zant*, 499 U.S. 467, 494 (1991)). "To establish the requisite probability, the petitioner must show that it is more likely than not that *no reasonable juror would have convicted him in the light of the new evidence*." *Schlup*, 513 U.S. at 326 (emphasis added). What this means, as Chief Judge Kozinski and others have recognized, is that a petitioner who seeks "to pass through the *Schlup* gateway . . . must persuade [the habeas court] that *every juror would have voted to acquit him*." *Lee v. Lampert*, 653 F.3d at 946 (Kozinski, C. J., concurring) (emphasis added); *accord Smith v. Baldwin*, 510 F.3d 1127, 1142 (9th Cir. 2007) (en banc). If a reasonable juror, after hearing the new evidence presented by the petitioner, would still have sufficient evidence to conclude that he more likely than not committed the crime, the gateway standard is not met. *Smith*, 510 F.3d at 1142. As long as a reasonable juror could still credit the evidence originally presented at trial, the standard is not satisfied. *Id.* at 1143-45.

"To be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Schlup v. Delo*, 513 U.S. at 324. "Because such evidence is obviously

unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Id.* Evidence that the defendant may not have committed the crime, or that merely casts doubt on whether he did so, is not enough to prove "actual innocence" in the *Schlup* sense. *See Griffin v. Johnson*, 350 F.3d 956, 963-65 (9th Cir. 2003). By the same token, new evidence that merely sets up a conflict or a "swearing match" with the prosecution's trial evidence or witnesses, does not suffice. *See, e.g.*, *McCray v. Vasbinder*, 499 F.3d 568, 571 (6th Cir. 2007); *Albrecht v. Horn*, 485 F.3d 103, 125 (3d Cir. 2007); *Moore-El v. Luebbers*, 446 F.3d 890, 902-03 (8th Cir. 2006); *Bosley v. Cain*, 409 F.3d 657, 665 (5th Cir. 2005).

More generally, evidence that does not thoroughly and unequivocally discredit the case presented by the prosecution at trial, and does not purport to make an affirmative showing that the petitioner never committed the crime, does not open the gateway. *See Sistrunk v. Armenakis*, 292 F.3d at 675-77. It is not enough simply to establish that the underlying constitutional error prejudiced the petitioner. *Schlup*, 513 U.S. at 326 & n.45 (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984); and *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Nor is it enough to create a reasonable doubt as to guilt. *Schlup*, 513 U.S. at 329; *Downs v. Hoyt*, 232 F.3d 1031, 1040 (9th Cir. 2000). Instead, to reiterate, the petitioner must

affirmatively show he is "actually innocent." *Schlup*, 513 U.S. at 326-27. "To satisfy the *Carrier* gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327; *accord Bousley*, 523 U.S. at 623. Although it is theoretically possible for a petitioner to carry his burden of proof with evidence that impeaches or casts doubt on the credibility of prosecution witnesses at trial, impeachment alone will not get him through the gateway unless it is so compelling as to make it "more likely than not that no reasonable juror would have found petitioner guilty . . . ." *Gandarela v. Johnson*, 286 F.3d 1080, 1086 (9th Cir. 2002) (quoting *Schlup*, 513 U.S. at 327). Speculative and collateral impeachment, for example, falls short of showing actual innocence. *Gandarela*, 286 F.3d at 1086.

Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record." *House v. Bell*, 547 U.S. 518, 539 (2006). "It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do."

*Schlup*, 513 U.S. at 329; *accord House*, 547 U.S. at 538 (quoting above language from *Schlup*, and adding that the reviewing court must make the determination "[b]ased on [the] total record"). "The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538 (citing *Schlup*, 513 U.S. at 329). The standard is objective as to the likely impact of the evidence on reasonable jurors, but the reviewing court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of the evidence. *House*, 547 U.S. at 537-39; *Schlup*, 513 U.S. at 332.

Needless to say, the above standards are demanding and permit review of the claims only in the extraordinary case. *House*, 547 U.S. at 538; *Schlup*, 513 U.S. at 327; *Lee v. Lampert*, 653 F.3d at 937 (recognizing that the exception applies only in "extraordinary cases," thereby minimizing the "danger of it swallowing the rule"). "[A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." *Schlup*, 513 U.S. at 324. The *Schlup* exception "seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Lee*, 653 F.3d at 935-36 (quoting *Schlup*, 513 U.S. at

324).[11] Indeed, given the narrow scope of this stringent standard and the extreme rarity of the type of evidence required by *Schlup*, allegations of actual innocence have been summarily rejected in the vast majority of cases in which they have been made. *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 559-66 (1998); *Griffin v. Johnson*, 350 F.3d at 963-66; *Sistrunk v. Armenakis*, 292 F.3d at 672-77; *Shumway v. Payne*, 223 F.3d 982, 990 (9th Cir. 2000). In deciding whether the standard is met, it is worth considering the extraordinary nature and quality of evidence presented by the petitioners in the rare cases where they did manage to carry their burden under *Schlup*. *E.g.*, *House v. Bell*, 547 U.S. at 540-41 (DNA evidence that showed semen on murder victim's clothes came from her husband, not from the defendant as the evidence at trial had indicated); *id.* at 541-48 (testimony that bloodstains and other items of forensic evidence presented at trial were contaminated); *id*. at 548-53 (evidence that there was long history of domestic violence between the victim and her husband); *Carriger v. Stewart*,

[11] As Justice O'Connor, who cast the tie-breaking vote in *Schlup*, observed in her concurring opinion, the standard embraced by the majority "properly balances the dictates of justice with the need to ensure that the actual innocence exception remains only a '"safety valve" for the "extraordinary case."'" *Schlup*, 513 U.S. at 333 (O'Connor, J., concurring) (quoting her earlier concurring opinion in *Harris v. Reed*, 489 U.S. 255, 271 (1989)).

132 F.3d at 478-79 (relying on confession by key prosecution trial witness that he, rather than the petitioner, committed the crime).

### 2. The District Court's Ruling re "Actual Innocence"

At the first evidentiary hearing, held on May 19, 2009, Petitioner presented live testimony by three witnesses, James McNutt, Elinore McNutt, and Brian McCracken. The magistrate judge thereafter issued a preliminary Report and Recommendation opining that Petitioner had carried his burden under *Schlup*, and was therefore entitled to have his claims considered on the merits notwithstanding their untimeliness. Based primarily on the testimony of McCracken and the McNutts,[12] the magistrate judge concluded that Petitioner had "presented enough evidence to cause the Court to lack confidence in the outcome of Petitioner's trial." (CR 37; 1 ER 103.)

Finding that the McNutts were "credible and persuasive witnesses," the magistrate judge reasoned that:

> The McNutts have no apparent reason to perjure themselves for Petitioner's benefit. Mr. McNutt is a correctional officer and was a police officer for many years. Both Mr. and Mrs. McNutt

[12] The Report and Recommendation also cited declarations by McCracken, Jorji Owen, and William Hewitt, that had been attached by Petitioner as exhibits to the FAP, but devoted little space to discussing the contents thereof.

> were standing at least as close, if not closer, to Petitioner as were Townsend and Rex, and it appears that Mr. McNutt was standing between Petitioner and the police officers. (See Hearing Exh. 4, 105). Both Mr. and Mrs. McNutt had unobstructed views of both Bunker and Petitioner, unlike Townsend and Rex, who were looking through a chain link fence. Mr. McNutt was standing only two feet away from Bunker. Both Mr. and Mrs. McNutt testified unequivocally that it was Bunker, not Petitioner, who threw something metallic sounding under a nearby car. Mr. McNutt was certain that this metallic object was not a copper bar.

(1 ER 102.)

Despite McCracken's previous convictions on state and federal charges of conspiracy to shoot at an inhabited dwelling,[13] and possession of a firearm by a convicted felon,[14] respectively (*see* 1 ER 98 & n.15; 6 ER 1136-40; 8 ER 1560-72; Mot. for Judicial Notice, Ex. A), the district court uncritically accepted his testimony as well:

> Although he was not a percipient witness to the events in the parking lot, McCracken did provide circumstantial evidence that Petitioner was not the individual who possessed the knife. McCracken's care to limit his testimony speaks to his credibility. He was forthright about not seeing the events outside the bar. He admitted that he did not know the person who threatened him with the knife. However, McCracken was certain that the person with the knife in the bar was not Petitioner. McCracken knew Petitioner at the time of the incident, though they were not close friends, and McCracken saw Petitioner elsewhere in the bar when an unknown man threatened McCracken. Additionally,

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[13] Cal. Penal Code §§ 182 & 246.

[14] 18 U.S.C. § 922(g)(1).

> McCracken's description of the knife used to threaten him matched the knife found in Petitioner's trial counsel's files.

(CR 37; 1 ER 102-03.)

Ultimately, after repeatedly stating that the evidence undermined her confidence in the jury's verdict (1 ER 79, 102-03, 105, 107, 110), the magistrate judge simply asserted, in conclusory fashion, that any reasonable juror would have viewed the evidence the same way she did:

> After weighing the trial evidence with that presented at the Hearing as well as the evidence lodged with the current Petition, *this Court lacks confidence in the outcome of Petitioner's trial*. The Court concludes that, *had the jury been able to consider this same evidence, "no reasonable juror would [have found Petitioner] guilty beyond a reasonable doubt*." House, 547 U.S. at 538. Petitioner therefore passes through the Schlup gateway. The Court may proceed to consider the merits of his ineffective assistance of counsel claim.

(1 ER 110 (underlining in original and italics added).) As explained more fully in the next section, this is not the proper methodology.

### 3. In Assessing Petitioner's Gateway Claim of "Actual Innocence," The District Court Misapplied the Applicable Standards

A review of the preliminary Report and Recommendation (CR 37; 1 ER 69-111), which the district court adopted in its entirety (CR 42 & 80; 1 ER 2-6, 67-68), shows clearly that the district court misapplied the *Schlup* standard. As discussed above, a subjective lack of confidence in the

conviction is a necessary but not a sufficient condition for a petitioner to qualify under the *Schlup* exception. "To satisfy the actual innocence gateway standard, a petitioner must show that "in light of all the evidence [including the evidence of guilt presented at trial], it is more likely than not that no reasonable juror would have convicted him." *Schlup*, 513 U.S. at 329 (internal quotation marks omitted). Indeed, if undermining confidence in a conviction were enough by itself to pass through the gateway, any petitioner who could satisfy the prejudice prong of *Strickland*[15] or the materiality element of *Brady* error[16] could qualify. Since the High Court has made clear that evidence establishing prejudice is not enough to carry a petitioner's burden of demonstrating that his conviction was a miscarriage of justice (*Schlup v. Delo*, 513 U.S. at 326 n.45), a district court's subjective

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[15] *See, e.g.*, *Strickland v. Washington*, 466 U.S. at 694 (holding that prejudice prong of an ineffective-assistance claim requires proof of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and defining a "[r]easonable probability" as one "sufficient to undermine confidence in the outcome").

[16] *United States v. Bagley*, 473 U.S. at 682 (reciting that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" and reiterating that "[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome").

lack of confidence in the jury's verdict cannot be viewed as synonymous with a valid finding of "actual innocence."

Although the legal boilerplate in the report and recommendation notes that "[t]o pass through the Schlup gateway, Petitioner must "demonstrate that more likely than not, in light of [new evidence presented to the Court], no reasonable juror would find him guilty beyond a reasonable doubt" (CR 37; 1 ER 78 (quoting *House v. Bell*, 547 U.S. at 538) (underlining in original); *see also* 1 ER 101 (quoting same excerpt)), its analysis contains little, if any, meaningful explanation as to how the evidence actually satisfies the latter standard. All the district court really said in this regard was that "[t]he jury may not have concluded that Townsend and Rex were lying on the stand, but had the jury heard the McNutts and McCracken testify, a reasonable juror would have had serious doubts about Townsend and Rex's version of the events." (1 ER 108.) Despite the numerous aspects of the McNutts' testimony that cast doubt upon the accuracy of *their* accounts (*see* Argument I(C)(4), *infra*), the report and recommendation did not discuss the impact those sources of doubt might have or would have had on reasonable jurors.

Similarly, although the McNutts' story left open the distinct possibility that Petitioner could have thrown the knife without them noticing (*see id.*),

the report and recommendation never even addressed the possibility that a reasonable juror might have actually realized that their testimony did not necessarily contradict that of the officers. And while the district court cursorily acknowledged that Brian McCracken had two prior felony convictions, it never evaluated the likelihood that a reasonable juror might have been troubled by that fact.

Instead, apart from the single thinly-supported assertion that the testimony of Petitioner's new witnesses would have caused jurors to doubt the officers' testimony, the district court essentially catalogued the evidence presented at the hearing and in Petitioner's hearsay declarations (1 ER 91-100), pronounced his witnesses credible (1 ER 102-03, 109-10), and dismissed some of the discrepancies and contradictions in their testimony as "minor" (1 ER 105-06). It also rejected Respondent's contentions to the contrary as "flippant[]" (1 ER 107), and otherwise unpersuasive (*see* 1 ER 104-08). At one point, the district court even criticized one of Respondent's arguments – about why a reasonable juror could have and would have credited the testimony of Officers Townsend and Rex – on the ground that this "does not prove Petitioner's guilt." (1 ER 108.) In so doing, the court

essentially shifted the burden of proof,[17] even though the prosecution had already proven Petitioner's guilt at trial and had no obligation to do so again.[18] After reiterating its subjective lack of "confidence in the outcome of Petitioner's trial," the district court concluded without further elaboration that if only the new evidence had been available to Petitioner's jury, "no reasonable juror would [have found Petitioner] guilty beyond a reasonable doubt." (1 ER 110 (quoting *House*, 547 U.S. at 538).)

As the Supreme Court has repeatedly made clear, however, such an approach is not permissible when evaluating a petitioner's bid to pass through the *Schlup* gateway:

> It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do.

*Schlup v. Delo*, 513 U.S. at 329. "The court's function is not to make an independent factual determination about what likely occurred, but rather to

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[17] *See Schlup*, 513 U.S. at 326 (placing burden on petitioner to "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence").

[18] *Schlup*, 513 U.S. at 326 n.42 (holding that defendant convicted in state court is no longer entitled to a presumption of innocence and in fact, is presumed to be guilty).

assess the likely impact of the evidence on reasonable jurors." *House v. Bell*, 547 U.S. at 538 (citing *Schlup*, 513 U.S. at 329). Yet despite those admonitions, the district court never made the required "probablistic determination" in any meaningful sense. It simply reached its own "independent judgment" that reasonable doubt existed and then assumed that any reasonable juror would necessarily adopt the same view.

#### 4. Even If One Assumes That the District Court Applied the Correct Standard, It Erred in Concluding That Petitioner Carried His Burden of Proof

A careful examination of the trial and evidentiary hearing transcripts reveals that Petitioner's showing falls well short of proving that no reasonable juror would have voted to convict him. In fact, as explained more fully below, the district court's analysis, and its conclusion that Petitioner carried his burden of proof, is fatally flawed in numerous respects.

First, although the district court relied heavily on the accounts of James and Elinore McNutt as evidence of Petitioner's innocence, it is far from clear that the McNutts were even talking about the same events as the police officers whose testimony formed the centerpiece of the prosecution's case at trial. Both McNutts testified that the events they described occurred early in

the evening of June 6, 1988, at approximately 7:30 p.m. (2 ER 307, 319), 8:00 p.m. (2 ER 348) or at "dusk" (2 ER 322). Yet according to the trial testimony of Officers Townsend and Rex, they were dispatched to and arrived at the the parking lot outside the Gold Apple bar some time between 12:10 a.m. and 1:00 a.m. on that date. (6 ER 1220, 1352, 1383; 8 ER 1400-01.) Similarly, although the officers testified that an LAPD helicopter arrived at the scene and illuminated the entire area with a "Night Sun" spotlight (6 ER 1243-44), neither of the McNutts saw or heard the helicopter. (2 ER 317-18, 351-52.) Though the report and recommendation dismisses these discrepancies as "minor" (CR 37; 1 ER 105-06), a reasonable juror plainly could have reached precisely the opposite conclusion. While it is certainly plausible that a witness might not recall the exact time of events he describes, and might even be off by an hour or two in his estimates, the difference between 8:00 p.m. and 12:10 a.m., or between "approximately dusk" and post-midnight, is an entirely different story.

In fact, further comparison of the McNutts' testimony with that of the officers reveals that is highly unlikely that this discrepancy was attributable to a simple mistake in time-keeping. Both of the McNutts testified that they went to the Gold Apple to meet Ms. McNutt's son, Danny Harrison, for drinks and to celebrate a birthday. (2 ER 306-07, 319, 336-37.) Mr. McNutt

added that he and his wife had not had any drinks earlier that evening. (2 ER 319.)[19] Both said that the encounter between Harrison and Hewitt in the parking lot occurred just after they arrived and parked their own car (2 ER 307-10, 337-40), and that the police got there a few minutes after that. (2 ER 311-12, 340-41.) Though it is perfectly plausible that a middle-aged couple might meet their adult son for a birthday celebration at 7:30 or 8:00 p.m., the idea that they would schedule such a rendez-vous for after midnight, especially when it was evidently their first stop of the evening, strains credulity.[20] It is even more unlikely that both McNutts would have failed to recall doing so, and would have both provided roughly the same incorrect time estimate, if the meeting was really scheduled for so late.

Officer Rex, on the other hand, consulted his report during trial, and determined that the initial radio call came in at 12:11 a.m.; that he and Officer Townsend arrived at the Gold Apple bar seven minutes later; that

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[19] Mr. McNutt said that he and his wife never actually made it inside the bar, but went straight home after being told to leave by the LAPD officers who frisked him. (2 ER 319.) His wife said the opposite. (2 ER 349.)

[20] Indeed, simple common sense suggests that most people of any age going to a bar for a birthday celebration would not just be joining the festivities at midnight, especially if they did not have some other social engagement first.

Petitioner was arrested at 12:30 a.m.; and that the booking recommendation was written at 1:00 a.m. (8 ER 1400-01.) It is hard to imagine why Officer Rex would have falsified the times of these events, especially since the correct information would have presumably been verifiable through other sources. And since the McNutts likewise had no memory of something as dramatic as a police helicopter hovering over the scene and lighting up the parking lot and the entire surrounding area with a spotlight, a reasonable juror could have easily figured that the McNutts were lying, were describing a completely different incident, or were hopelessly confused about virtually everything that went on that evening.

Second, even if one accepts the notion that the McNutts and the officers did witness the same incident, there is also considerable reason to doubt the couple's impartiality. Both Mr. and Mrs. McNutt testified that the former was mistreated by other LAPD officers at the scene. Mr. McNutt said that an unidentified officer accosted him and said, "You in the fucking Pittsburgh Steelers jacket, on [*sic*]. Freeze." (2 ER 314.) He went on to testify, in graphic detail, about the "rude and rough" treatment (2 ER 323, 333) he received at the hands of the LAPD:

> When [an unidentified officer] put my hands behind me like this, they handcuff me, two officers, they were – one white officer, one started frisking me. The one that did the frisking went ahead

> and was holding my penis, was messaging it for about five, six seconds, and I said F'in feels good to you? And he said: We got a wise ass here. He said F you.

(2 ER 314.) Ms. McNutt testified that she saw her husband "being fondled by a police officer," and that another officer grabbed her by the hair. (2 ER 2 ER 359-60.)

Though the district court, in finding the McNutts credible, made much of the fact that Mr. McNutt was a correctional officer, a retired police chief, and a military veteran (CR 37; 1 ER 91, 102, 106, 108), a reasonable juror hearing their testimony could have concluded that this actually cut the other way. At a minimum, a juror could have easily wondered whether the McNutts might have borne a grudge against the LAPD for failing to accord Mr. McNutt the respect he deserved as a veteran and fellow member of law enforcement. (*See* 2 ER 323 (testimony by Mr. McNutt calling himself a "nervous wreck" after the incident), 333 (complaining that he was "searched rudely [and] told to get out of there"), 360 (testimony by Ms. McNutt, in response to question about why she did not register a complaint with the LAPD, that "it doesn't do a lot of good to call LAPD"). And since Ms. McNutt's son, Daniel Harrison, himself had a history of run-ins with the LAPD and had even served time in prison (2 ER 327, 360-61), a reasonable juror could have also harbored suspicions that the McNutts might not be as

reflexively pro-law enforcement as some might otherwise suspect from her husband's resumé.

Third, despite the district court's assumption to the contrary (CR 37; 1 ER 106), jurors could have quite easily concluded that the McNutts had more than ample motive to favor Petitioner in their testimony. Ms. McNutt described how Hewitt had approached her son in an intimidating manner. (2 ER 339-40.) Both McNutts testified that Hewitt had been involved in a verbal altercation with Harrison. (2 ER 340.) Mr. McNutt added that Hewitt had insulted him, and displayed a "hostile attitude" toward him and his son-in-law. (2 ER 311-12.) Under these circumstances, a reasonable juror could have logically inferred that the McNutts viewed Hewitt as a threat to their son's safety and would have preferred to see Hewitt go to prison, rather than Petitioner, who did not threaten or display hostility toward anyone. This is especially true in light of the fact that the incident would have still been relatively fresh in 1999, when Petitioner says he first became aware of what the McNutts had to say (CR 12-2; 3 ER 588-91), and even in 2001, when they first reduced their story to writing. (6 ER 1085-93.) And although the district court found it "unbelievable" that the McNutts, with his experience in law enforcement and her medical problems, "would travel long distances to give perjurious testimony on Petitioner's behalf"

(CR 37; 1 ER 106), it is at least as hard to believe that Officers Townsend and Rex, who did not know any of the players and had no reason to favor anyone, would have endangered their own careers by giving perjurious testimony against him.

Fourth, even if jurors had been able to put aside any doubts about the McNutts' reliability and veracity as witnesses, their account still did not preclude the possibility that Petitioner threw the knife at issue when the couple was not watching. As Ms. McNutt admitted on cross-examination, her eyes were not on Petitioner and Bunker the entire time, and she was busy looking in "every direction" just as the police were arriving. (2 ER 361-62.) Reasonable jurors could have likewise inferred that Mr. McNutt was probably not paying much attention to Petitioner when he heard various people suddenly yelling "5-0," and when he saw "20 or 25 LAPD [officers] coming from all different directions." (2 ER 311, 318.) The same would probably also be true of those intervals when Mr. McNutt was walking toward his wife's pickup truck, when he was being handcuffed and frisked, when his penis was being "massaged," and when he was accused of being a "wise guy" by LAPD officers at the scene. (*See* 2 ER 314, 323-24.) Nor, for that matter, does it seem likely that Mr. McNutt had his eye on Petitioner at the time he was watching Hewitt throw what he assumed was a knife

underneath a nearby vehicle. (2 ER 312.) While both McNutts said they saw Hewitt throw a rectangular-shaped object under a parked car, neither was sure that the object was in fact a knife. (2 ER 312, 332, 344, 346-47.) Reasonable jurors thus could have easily concluded that even if the McNutts told the unvarnished truth about what they saw, the officers were telling the truth as well. They could have decided that Officers Townsend and Rex, focusing on Petitioner because his clothes matched those of the suspect described in the radio call (7 ER 1221, 1227-28, 1230, 1350), saw him throw a knife, which they later recovered. They could have also simultaneously determined that the McNutts, who would have been focused primarily on Hewitt because he was the one who had been hostile toward Ms. McNutt's son (2 ER 312, 339-40), saw him throw a different object that may or may not have been a knife. In particular, a reasonable juror could have logically calculated that Hewitt threw the copper bar that Officer Townsend subsequently found in a patch of weeds close to, but in the opposite direction from, where he saw Petitioner throw the knife. (7 ER 1248-49, 1254, 1258-60.)

Fifth, although the district court explicitly addressed and dismissed Respondent's argument to this effect (*see* CR 37; 1 ER 105-06), its analysis is a non-sequitur. According to the district court,

> If the fact that a witness's eyes left Petitioner and Bunker for a moment is enough to cast doubt on that witness's credibility, then Respondent's argument applies equally to Officer Townsend, who testified that he tried to eliminate his tunnel vision on Petitioner by forcing himself to look around the parking lot.

(1 ER 105.) The fact that Officer Townsend was not watching Petitioner every second would hardly have prevented him from seeing Petitioner throw an object while he was watching. The converse, however, is simply not true. In order to prevail on his gateway claim of actual innocence, it is simply not enough for Petitioner to prove that *Hewitt* threw a knife – or more to the point, something that the McNutts only assumed was a knife. He must prove, with evidence strong enough to compel any reasonable juror to vote for acquittal, that *Petitioner did not throw the knife the police found under a nearby car*. *Schlup*, 513 U.S. at 326-27. Any significant interval in which the McNutts were not looking in Petitioner's direction, or when they were distracted by the general tumult at the scene, is a time when he could have thrown the knife without them seeing him do so.

Sixth, although the district court found Brian McCracken credible and viewed his testimony as evidence of "actual innocence," a reasonable juror plainly could have concluded otherwise. Since McCracken admitted that he had suffered two previous felony convictions, jurors could have easily found his testimony less credible than that of two sworn police officers. The

district court discounts the probable impact of these convictions, pointing out that the last one occurred in 1998 and that "[a]fter beginning supervised release *in 2001*, [McCracken] has held a steady job and has remained crime free." (CR 37; 1 ER 106 (emphasis added).)

What the court neglected to mention, however, is that McCracken's January 1999 federal felon-in-possession conviction was not "more than a decade old" at the time of Petitioner's trial in June 1999.[21] (6 ER 1144-45; 8 ER 1540.) Not only would the jury have never heard about McCracken's job or his crime-free decade, but he more than likely would have had to appear before the jurors in an orange jumpsuit or other prison attire, since he had not yet even begun his supervised release from federal custody. And even if Petitioner's jurors had nevertheless viewed McCracken's testimony as credible, McCracken did not claim to have seen the incident at issue.

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[21] According to the docket sheet from McCracken's federal criminal case, he pled guilty to this charge on January 26, 1999 (*see* Motion for Judicial Notice, Ex. A), a little over four months before Petitioner's trial commenced. (8 ER 1540.) Respondent respectfully requests that this Court take judicial notice of the docket in McCracken's case, which is attached as Exhibit A to the accompanying motion for judicial notice. *See* Fed. R. Evid. 201(b)(2) & (c)(2); *Porter v. Ollison*, 620 F.3d 952, 954-55 (9th Cir. 2010); *Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (federal appeals court may take judicial notice of state court documents if they "have a direct relationship" to the appeal).

Even assuming that another unidentified man did threaten McCracken with a knife that resembled the one thrown underneath a car, the latter's testimony to that effect does not even prove that this was actually the same knife, much less that the mystery man or someone other than Petitioner threw it.

Seventh, to the extent the district court may have relied on the declarations of William Hewitt (CR 12-2; 6 ER 1132-33) and Jorji Owen (6 ER 1126-28),[22] neither of those declarations qualifies as reliable or even

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[22] In its order adopting the second Report and Recommendation, the district court largely disclaimed any such reliance:

> [I]t is clear that both the April 27 R&R and the July 13 R&R rely on the testimony of the live witnesses, not the Owen and Hewitt declarations. The April 27 R&R merely recite[s] the contents of the Owen and Hewitt declarations. (April 27 R&R at 21-22). It does not rely on the declarations in any material way. The April 27 R&R relies on the July 13 R&R to the extent that the July 13 R&R finds that Petitioner met the "actual innocence" standard announced in Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), and therefore had established the prejudice prong of the ineffective assistance of counsel analysis under Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). (See April 27 R&R at 43-44). In the section of the July 13 R&R referred to in the April 27 R&R, it is clear that the Magistrate Judge relied on the testimony of the live witnesses. (See July 13 R&R at 34-42). The July 13 R&R mentions the contents of the Owen and Hewitt declarations in only two sentences in the eight-page section (see id. at 36, 40), and those two sentences are merely peripheral to the Magistrate Judge's findings.

(continued…)

credible evidence of actual innocence. *See Schlup*, 513 U.S. at 324. Since Hewitt and Owen never testified in federal court, their declarations were never authenticated (*see* Fed. R. Evid. 901(a); *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 924-25 (9th Cir. 1987)) and were also inadmissible hearsay (s*ee* Fed. R. Evid. 801(c)(1) & 802; *United States v. Buckles*, 647 F.3d 883, 892 (9th Cir. 2011)). Had they been called as witnesses, it is entirely speculative whether they would have testified as advertised in the declarations. For all these reasons, neither of these two hearsay declarations should have been considered for any purpose.

But even if the two declarations had been available to Petitioner's jury, reasonable jurors could have viewed their contents with considerable skepticism, if not downright suspicion, in light of Owen's forgery conviction[23] (*see, e.g.*, Cal. Evid. Code § 788; *People v. Wheeler*, 4 Cal. 4th 284, 291, 295-97, 841 P.2d 938 (1992)) and Petitioner's evident unwillingness to make either available for cross-examination. Hewitt's declaration said only that he owned the knife Petitioner was convicted of

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(…continued)
(CR 80; 1 ER 3-4 (underlining in original).)

[23] Owen pled guilty to forgery of an access card, a felony, in the Los Angeles County Superior Court on February 24, 1997. (8 ER 1547-59.)

possessing; it did not purport to say that Hewitt was actually carrying the knife during the encounter in the parking lot, or that he was the one who threw it when police arrived. (*See* 6 ER 1132-33.) And since neither came to court and testified that Petitioner did not throw a knife under a car, neither actually refutes the testimony of Officers Townsend and Rex.

Eighth, none of the evidence presented at the federal evidentiary hearing adequately accounts for the fact that Petitioner, when arrested at the scene, gave the police a false name. (7 ER 1374-75; 8 ER 1420-22.) A reasonable juror could have rejected Petitioner's new evidence simply on the theory that a truly innocent man would have had no reason to lie to police about his identity. *See, e.g.*, *United States v. Newman*, 6 F.3d 623, 628 (9th Cir. 1993) (defendant's false exculpatory statements were evidence of his consciousness of guilt); Cal. Comm. on Criminal Jury Instructions, CALJIC Nos. 2.03 (Consciousness of Guilt – Falsehood) & 2.06 (Efforts to Suppress Evidence); 6 ER 1155 (specially tailored version of CALJIC No. 2.06 that was used in Petitioner's case).)

Finally, it bears mentioning that none of the testimony and none of the declarations even mentioned Officers Townsend and Rex, let alone impeached their testimony. Both testified unquivocally at trial that they saw Petitioner throw a long linear object under a car. Officer Townsend

described how he recovered that object, and that the object turned out to be a knife. Officer Townsend also testified that he searched the parking lot for other weapons, and located a copper bar between ten and thirty feet away from where Petitioner was standing, in the opposite direction from where the latter had thrown the knife. (7 ER 1248-49, 1254, 1258-60.) A reasonable juror could have easily inferred that even if the McNutts were telling the truth, this was the object they saw Hewitt throw. Although the district court speculated that the officers' view of the parking lot may have been "obstructed" by a chain link fence (CR 37; 2 ER 102), the evidence remains uncontroverted that the officers were only a few feet away from Petitioner and that the parking lot was well lit. (7 ER 1266-67, 1362.) Even with the fence,[24] both officers still had ample opportunity to observe Petitioner's actions (7 ER 1224-25, 1232, 1236, 1238, 1242, 1362), and neither had any plausible motive to lie.[25] In fact, as the district court itself recognized,

[24] In fact, Officer Townsend was specifically asked whether the fence affected his ability to observe what was going on, and he responded in the negative. (7 ER 1238.)

[25] Neither the state or federal record contains any evidence suggesting that either Officer Townsend or Rex had any part in the rough treatment the McNutts claimed they received from other LAPD officers.

"Because Townsend and Rex were police officers, jurors may have given their testimony significant weight." (2 ER 101.)

In short, whatever exculpatory value the testimony of McCracken and the McNutts may have had pales in comparison with the recantation and confession by the star prosecution witness in *Carriger v. Stewart*, 132 F.3d at 478-79, and the newly discovered DNA samples and history of domestic violence unambiguously implicating the victim's husband in *House v. Bell*, 547 U.S. at 540-41, 548-53. The most that can be said about the testimony by McCracken and the McNutts is that it *might* have set up a conflict in the evidence, and *might* have raised some basis for doubt about his guilt, that did not exist at trial. Creating such conflicts or doubts, however, falls well short of proof that a defendant is actually innocent of the crime. *See Griffin v. Johnson*, 350 F.3d at 963-65; *McCray v. Vasbinder*, 499 F.3d at 571; *Albrecht v. Horn*, 485 F.3d at 125; *Bosley v. Cain*, 409 F.3d at 665. And notwithstanding the district court's characterization of Petitioner's witnesses as credible, the Report and Recommendation does not identify any objective and persuasive reason why a reasonable juror would have necessarily resolved a credibility contest between the officers and the McNutts in favor of the latter.

To the contrary, any one of the above-described holes in Petitioner's evidence could have easily led a reasonable juror to reject that evidence and vote to find him guilty on the basis of the police officers' testimony at the original trial. *See Smith v. Baldwin*, 510 F.3d at 1142-45. Taken together, those holes all but ensure that at least one reasonable juror would have done just that. The district court's announcement that it lacked confidence in the verdict thus reflected little more than its *subjective* view that the evidence presented at the first evidentiary hearing created a reasonable doubt about his guilt and thus established prejudice within the meaning of *Strickland* and its progeny. *See, e.g.*, *Strickland v. Washington*, 466 U.S. at 694 (defining a "[r]easonable probability" as one "sufficient to undermine confidence in the outcome"). Such a determination, as previously noted, is simply not enough to open the *Schlup* gateway. *Schlup*, 513 U.S. at 326, 329 & n.45; *Downs v. Hoyt*, 232 F.3d at 1040.

Proper application of the extraordinarily stringent *objective* standard prescribed by *Schlup* – i.e., the requirement that a prisoner prove that *no reasonable juror could have voted to convict him* – therefore compels the conclusion that Petitioner did not even come close to carrying his burden of proof. *See Schlup*, 513 U.S. at 326. Absent such a showing, the district

court was required to dismiss Petitioner's habeas action as untimely. 28 U.S.C. § 2244(d)(1). The district court erred by refusing to do so here.

### C. Even If There Is an "Actual Innocence" Exception to the Federal Habeas Statute of Limitations, the District Court Erred by Failing to Consider Whether Petitioner Exercised Due Diligence in Pursuing His Claims

As a threshold matter, it is still unclear whether an "actual innocence" exception to the AEDPA statute of limitations truly exists. As the Chief Judge of this Circuit recently observed in *Lee*:

> Once again, we're asked to consider whether a petitioner may file an untimely writ of habeas corpus by making a showing of actual innocence. Some day we may have to take up this issue, but not today.

*Lee v. Lampert*, 653 F.3d at 945 (Kozinski, C. J., concurring). If this Court concludes that Petitioner has made the extraordinary showing contemplated by *Schlup* – i.e., that no reasonable juror would have found him guilty – "some day" will then be at hand.

To date, as this Court has recognized, the United States Supreme Court has not yet passed on whether the "actual innocence" gateway discussed in *Schlup* is available to prisoners whose claims would otherwise be barred by the AEDPA statute of limitations. *See, e.g.*, *Majoy v. Roe*, 296 F.3d 770, 776 (9th Cir. 2002). The Courts of Appeal in other circuits are divided on

this question, with the Sixth, Tenth, and Eleventh saying that such an exception exists,[26] while four others – the First, Fifth, Seventh, and Eighth – have held the opposite.[27] Still another, the Second, has expressly reserved the issue.[28] This Court has weighed in only recently, with a three-judge panel initially holding that an "actual innocence" exception would be inconsistent with the plain language of the statute,[29] but a subsequent en banc opinion later in the same case repudiated that result. *Lee v. Lampert*, 653 F.3d at 931-32, 937.

As the en banc opinion went on to hold, however, the petitioner in that case did not make a showing of "actual innocence" sufficient to satisfy the requirements of *Schlup*, and was therefore not entitled to federal habeas relief. *Lee*, 653 F.3d at 945. Thus, as Chief Judge Kozinski pointed out in

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[26] *See Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005); *Lopez v. Trani*, 628 F.3d 1228, 1230-31 (10th Cir. 2010); *San Martin v. McNeil*, 633 F.3d 1257, 1267-68 (11th Cir. 2011).

[27] *See David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003); *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002); *Escamilla v. Jungwirth*, 426 F.3d 868, 871-72 (7th Cir. 2005); *Flanders v. Graves*, 299 F.3d 974, 976-78 (8th Cir. 2002).

[28] *Doe v. Menefee*, 391 F.3d at 161.

[29] *Lee v. Lampert*, 610 F.3d 1125, 1134-36 (9th Cir. 2010) (majority opinion of O'Scannlain, J.), *aff'd on other grounds*, 653 F.3d 929 (9th Cir. 2011).

his concurring opinion, "we . . . have no occasion to consider whether [the petitioner's] late filing can be equitably tolled under AEDPA because "[b]y no stretch of the imagination does [he] present a colorable claim of actual innocence." *Id*. (opinion of Kozinski, C. J., concurring in the result). Since the en banc court's conclusion that a petitioner may obtain relief on an otherwise time-barred claim if he can make a persuasive showing of actual innocence, was utterly unnecessary to its bottom-line decision – that the petitioner was *not* entitled to federal habeas relief – its analysis of that issue is arguably dictum and does not carry the force of law. *Best Life Assur. Co. of California v. Comm'r*, 281 F.3d 828, 834 (9th Cir. 2002) (observing that "Black's Law Dictionary defines 'obiter dictum' as a statement 'made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)'" (citing Black's Law Dictionary 1100 (7th ed.1999)); *accord NLRB v. Int'l Bhd. of Elec. Workers, Local 340*, 481 U.S. 573, 591 n.15 (1987) (declaring that a statement in a previous decision was dictum because it "was unnecessary to the disposition").

Thus, in the absence of binding Supreme Court or circuit precedent extending *Schlup* to untimely filed petitions, the issue remains open in this circuit. While recognizing that this Court will inevitably be guided in part

by its own dicta in *Lee*, Respondent respectfully submits that the original panel decision in that case actually had the better of the argument. As the panel persuasively noted,

> This provision [28 U.S.C. § 2244(b)(2)] expressly creates an actual innocence exception to the bar against second or successive habeas petitions. [Footnote omitted.] It is thus especially significant that section 2244(d)(1) does not include an actual innocence exception, because "Congress clearly knew how to provide such an escape hatch." *David* [*v. Hall*], 318 F.3d at 347; *see Flanders* [*v. Graves*], 299 F.3d at 977(emphasizing that "other parts of AEDPA, enacted at the same time, do refer to this doctrine" of actual innocence (citing 28 U.S.C. § 2244(b)(2)(B)(ii))). We interpret differences in statutory text to be meaningful, as has the Court when interpreting AEDPA's statute of limitations. *Lawrence v. Florida*, 549 U.S. 327, 333, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) (interpreting § 2244(d)(2) differently than § 2244(d)(1)(A) because "§ 2244(d)(1)(A) uses much different language from § 2244(d)(2)"). [Footnote omitted]. In light of the absence of a presumption in favor of an actual innocence gateway, we believe the best reading of the statute is that it does not include an unenumerated actual innocence gateway.

*Lee*, 610 F.3d at 1130-31.

Perhaps more importantly, even if one does take the en banc decision in *Lee* as controlling authority on this point, the district court still erred by failing to consider whether Petitioner exercised diligence in pursuing his ineffective-assistance claims. An "actual innocence" exception to the statute of limitations, as this Court recognized, would necessarily be based on equitable principles similar to those underlying the doctrine of equitable

tolling. *See Lee v. Lampert*, 653 F.3d at 933-35. Yet as the Supreme Court and this Court have consistently held, equitable tolling is not available to a petitioner who fails to exercise diligence to press his claims as expeditiously as possible despite the impediment. *Holland v. Florida*, 130 S. Ct. 2549, 2562-63 (2010); *Guillory v. Roe*, 329 F.3d at 1018; *accord Spitsyn v. Moore*, 345 F.3d at 802 (quoting *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000)). By parity of reasoning, the same should be true of a prisoner seeking to invoke what the en banc court in *Lee* called an "equitable exception" (*see Lee*, 653 F.3d at 933) to the statute of limitations for persons raising a credible claim of actual innocence. Though the *Lee* court did not decide "what diligence, if any, a prisoner must demonstrate in order to qualify for the actual innocence exception," its logic plainly suggests that he should be required to make a showing at least as strong as that required for equitable tolling. *Id.* at 934 n.9 (noting that at least one other circuit has said that "a petitioner seeking equitable tolling on actual innocence grounds [would have to] show either that a state-created barrier prevented his timely discovery of relevant facts or that a 'reasonably diligent petitioner' could not have discovered such facts in time to file within the limitations period").

In the instant case, Petitioner, by his own admission, "discovered the names of James and Elinore McNutt and learned that they witnessed the

incident after my conviction but before I was sentenced." (CR 12-2; 3 ER 589.) With the help of his girlfriend, Bridgette Timcho, Petitioner managed to procure a jointly signed letter from the McNutts setting forth the highlights of their story as early as September 2001. (6 ER 1085-93, 1129-31.)[30] At that point, the federal statute of limitations had not yet expired. Petitioner could have obtained statutory tolling by filing a state court petition shortly thereafter (*see* 28 U.S.C. § 2244(d)(2)), and presumably could have obtained declarations from the McNutts suitable for attaching as exhibits. But Petitioner instead waited over three years, until March 2005, before obtaining such declarations (*see* 5 ER 970, 974), and waited another two months before filing his state habeas petition in the Los Angeles County Superior Court, with the declarations attached. (CR 12-6; 6 ER 1106.) Petitioner's failure to act as expeditiously as possible to vindicate his rights once he knew what the McNutts had to say should foreclose any claim based on an equitable exception to the statute of limitations just as surely as it would a claim of equitable tolling.

[30] To the extent Petitioner purports to rely on the declarations of William Hewitt and Jorji Owen, he evidently had those documents as early as January 15, 2001; and April 14, 2005, respectively. (CR 12-2; 6 ER 1126-28, 1132-33.)

Furthermore, even if the Court accepts the excuse, proffered by Petitioner in the past, that he was unable or unwilling to take action in state court without first obtaining assistance of a lawyer, he still cannot demonstrate due diligence. Even though the California Innocence Project took Petitioner's case in April 2002 (CR 12-2; 3 ER 591), it did not file a first state petition on his behalf until May 2005. (CR 12-6; 6 ER 1106.) When the Superior Court denied that petition (CR 12-4; 1 ER 117-18), Petitioner waited nine months to file a second such petition in the California Court of Appeal. (LD #5; 5 ER 782, 816.) Even after his third state petition (4 ER 592-764) was denied by the California Supreme Court in July 2007 (CR 12-6; 1 ER 112-14), Petitioner waited almost a full year before filing his first federal Petition. (CR 1, 46; 3 ER 521; 8 ER 1577.) It is difficult to see how such a leisurely stroll through the legal system, well after the federal clock has already run, could possibly amount to due diligence. *See Guillory v. Roe*, 329 F.3d at 1018; c*f. Chaffer v. Prosper*, 592 F.3d at 1048 (although a prisoner may be entitled to statutory tolling for gaps between the denial of a habeas petition in one court and the filing of another in a higher court, such gap tolling is not available when the petitioner waits too long before proceeding to the next level).

## II. THE SUPREME COURT'S DECISION IN *CULLEN V. PINHOLSTER*, 131 S. CT. 1388 (2011), DOES NOT APPEAR TO BE RELEVANT TO ANY ISSUE RESPONDENT IS RAISING IN THIS APPEAL

In its order of December 9, 2011, this Court also directed the parties to "address with specificity any impact *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) may have on this appeal." In *Pinholster*, the High Court held that when reviewing a petitioner's claims under the AEDPA deference standard (*see* 28 U.S.C. § 2254(d)),[31] a federal habeas court is strictly "limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 131 S. Ct. at 1398; *see also* § 2254(d)(2).

Although the district court apparently did consider evidence that was not before the state court (*see* CR 71; 1 ER 51-53 & n.20; 1 ER 56, 60-62), and may not have applied the deference standard at all (*see* 1 ER 48 & n.15; *id*. at 57-65) when it granted relief on Petitioner's ineffective-assistance claim, Respondent has opted not to challenge those aspects of the lower court's ruling in this appeal. For reasons already stated in Argument section

[31] Under § 2254(d), a petitioner cannot obtain relief on the merits unless he can show that the state court's previous adjudication of the claim was either (1) "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,'" or (2) "'based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding.'" *Harrington v. Richter*, 562 U.S. __, 131 S. Ct. 770, 783-84 (2011) (quoting 28 U.S.C. § 2254(d)).

I of this brief, Respondent respectfully submits that Petitioner's gross non-compliance with the AEDPA statute of limitations, along with his failure to exercise due diligence and the absence of proof establishing his innocence under *Schlup*, is fully dispositive of this case. Consequently, in Respondent's view, the district court erred in reaching the merits of Petitioner's ineffective-assistance claim, and this Court should refrain from doing so as well.[32] The *Pinholster* decision is therefore irrelevant to any of the issues Respondent is raising in this appeal.

[32] It is is perhaps worth noting that in his opposition to Petitioner's motion to vacate the stay, Respondent had previously advised this Court that he anticipated challenging the grant of habeas relief based in part on the ground that that district court erred by considering and relying upon evidence adduced for the first time in federal court, rather than limiting its analysis to to evidence in the state-court record, as required by *Pinholster*, 131 S. Ct. at 1398-99. On further reflection, however, Respondent has determined that in light of the patent facial untimeliness of the Petition, and Petitioner's failure to even come close to carrying the heavy burden of proving his "actual innocence" under *Schlup v. Delo*, 513 U.S. 298, such an argument would be superfluous. Respondent has therefore decided not to pursue the *Pinholster* issue in this appeal.

## CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that the district court erred in granting relief on Petitioner's ineffective-assistance-of-counsel claim. The judgment should be reversed with instructions to deny relief and dismiss the action as untimely.

Dated: March 16, 2012.

Respectfully submitted,

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10-56118

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL LARSEN,

Petitioner-Appellee,

**v.**

BRENDA CASH, Acting Warden,

Respondent-Appellant.

**STATEMENT OF RELATED CASES**

To the best of our knowledge, there are no related cases.

Dated: March 16, 2012

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**
**PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1**
**FOR 10-56118**

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 16, 465 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

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☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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March 16, 2012
Dated

***s/ Richard S. Moskowitz***
Richard S. Moskowitz
Deputy Attorney General

# CERTIFICATE OF SERVICE

Case Name: ***Daniel Larsen v. Brenda Cash, Acting Warden*** No. **10-56118**

I hereby certify that on March 16, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**APPELLANT'S OPENING BRIEF**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 16, 2012, at Los Angeles, California.

| J.R. Familo | *s/J.R. Familo* |
|---|---|
| Declarant | Signature |

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