SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

IN RE MAURICE CALDWELL,	Case No. 5917 (WHT)
Petitioner,	Related Actions: San Francisco County Superior Court No. 138408
On Habeas Corpus.	

PETITION FOR WRIT OF HABEAS CORPUS

Linda Starr, #118789
Paige Kaneb, #251184
NORTHERN CALIFORNIA
INNOCENCE PROJECT
500 El Camino Real
Santa Clara, CA 95053-0422
Telephone: (408) 554-1945
Facsimile: (409) 554-5440

With assistance of law student, Courtney Smith

PETITION FOR WRIT OF HABEAS CORPUS

TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO:

Petitioner, Maurice Caldwell, by and through attorney, Linda Starr, Legal Director of the Northern California Innocence Project (NCIP), petitions for a writ of habeas corpus and by this verified petition states as follows:

I.

Mr. Caldwell is unlawfully incarcerated and restrained at Folsom State Prison, Folsom, California, by Secretary Mathew Cate, Director of the California Department of Corrections and Rehabilitation, pursuant to a judgment pronounced by the San Francisco County Superior Court, in San Francisco County Superior Court Case No. 138408.

II.

NCIP is a non-profit, clinical legal education program developed by faculty of the Santa Clara University School of Law. Law students and faculty carefully screen thousands of inmate applications and choose to represent only those with strong evidence of actual innocence. NCIP is a member of the Innocence Network. (Exhibit A.)

III.

This petition is being filed in this court pursuant to its original habeas corpus jurisdiction. (Cal. Const., art. VI, §10.)

IV.

On December 14, 1990, by San Francisco County Information No. 138408, Maurice A. Caldwell was charged with one count of murder (Pen. Code, § 187),[1] one count of attempted murder (§§ 664, 187), and one count of felony discharge of a firearm at an occupied motor vehicle (§ 246). (CT 1-3.)[2] It was further alleged that during the commission of all three crimes,

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

2 Cites from the Record on Appeal include those from the Clerk's Transcript (CT), Reporter's Transcript (RT), and the Preliminary Hearing Transcript (PT).

Mr. Caldwell discharged a firearm at an occupied motor vehicle which caused great bodily injury or death to another (§ 12022.5, subd.(b)).

V.

The facts supporting the conviction are briefly summarized as follows:

On Friday, June 30, 1990, sometime after 2 am, Eric Aguirre, Judy Acosta, Domingo Bobila and Dominador Viray drove to the Alemany Projects in San Francisco to purchase crack cocaine. (RT 45, 46, 64-66, 119-121.) After driving into the Projects, Acosta told Bobila to pull over to the right curb near the midpoint of Ellsworth Street, approximately 35 feet from where five to seven people were standing by a streetlight. (RT 48-49, 70, 123-125.) All four men exited the car and Acosta handed Bobila some money. (RT 47, 70, 95, 127, 160-161.) The men by the streetlight walked over to the car and Acosta spoke to them. (RT 49, 72, 125, 128, 160.) After some discussion, one of the men handed Bobila two pieces of crack cocaine. (RT 72, 125-128, 160.) Bobila handed him the money, but the man said that it was not enough. (RT 127-128.) Bobila turned toward to the others to ask for more money and when he turned back around, one of the men punched him in the face. (RT 50, 127-128, 161-162.) Immediately thereafter, he heard a shot fired. (RT 130.) Bobila got into the car to leave, and while he was trying to start the car, the window on his door shattered. (RT 130-133.) After starting the car, Bobila saw Acosta clutching his chest and trying to get into the car. (RT 133-134.) He stopped and pulled Acosta into the car, pushed the seat forward and put Acosta into the back seat. (RT 133-136, 192.) Bobila heard two or three more shots as he drove away. (RT 137-138, 196.) Viray and Aguirre ran from the scene, escaping unharmed on foot. (RT 52-53, 77-78.)

After driving for about ten minutes, at around 2:50 am, Bobila pulled into a gas station, asked the attendant to call 911 and attempted to administer CPR to Acosta until paramedics arrived and found Judy Acosta deceased. (RT 137-138, 170, 340, 414.) According to the medical examiner, Acosta died of shock and loss of blood from gunshot wounds caused by shotgun pellets and by a bullet. (RT 331-333, 343, 348.) The examiner determined the bullet wound to be the primary cause of death because the bullet had traveled through Acosta's heart, liver, and spleen. (*Id.*) The police arrived and questioned Bobila, who was scared and thought

he might be in trouble and so did not tell them that they had gone to the Projects to buy narcotics. (RT 139.)

In response to 911 calls of shots fired, a police lieutenant went to Ellsworth Street at 2:48 am to investigate. (RT 521.) At 2:51, he called to say that it looked like a real shooting, but he could not find a victim. (RT 523.) At 2:53 he left, reporting the run completed because a security guard told him the noises were possibly from M-80s (fireworks) and not gunshots. (RT 523.)

In the meantime, Viray ran back to Acosta's house. (RT 52-53.) Aguirre ran until he reached the corner of Silver Avenue and Mission Street, where he called his cousin to pick him up. (RT 77-78.) They drove to Acosta's house, where they met Viray. (*Id.*) Viray later returned to the Alemany Projects to see what had happened, but continued to drive past because the police were there. (RT 53-54.) Neither Viray nor Aguirre called the police that night. (RT 53-54, 77.)

Bobila spoke to the police again later that night in the emergency room and described the man who punched him as tall, at least 5'10" African-American, with a dark complexion and "short, nappy" hair, wearing a light-colored jogging suit. (PT 32; RT 139, 176-177, 187-188.) He related that the other three suspects wore "London Fog" type overcoats. (*Id.*) He did not view any photos at this time.

Viray and Aguirre spoke to the police for the first time four days after the incident. (RT 54, 60, 111-112.) Viray viewed hundreds of photographs from which he chose someone other than Mr. Caldwell as having resembled the person who punched Bobila. (RT 54, 60.) Aguirre provided various descriptions of people in trench coats and overcoats, but did not view any photographs. (RT 111-112.) At trial, he agreed that Mr. Caldwell did not match any of those descriptions, nor could he say Mr. Caldwell was the person he described as five-four. (RT 111.)

On July 12, 1990, an anonymous caller provided the first lead in the case, advising police to look into Maurice Caldwell. (RT 380; Exhibit B, Police Report.)

On July 13, in an effort to find witnesses and anyone with information about the murder of Judy Acosta, Inspector Gerrans canvassed the Alemany Projects with two officers from the

narcotics detail, including Officer Kit Crenshaw, who knew some of the Projects' residents, including Mr. Caldwell. (RT 375, 378.) Inspector Gerrans knocked on Mary Cobbs' door at 947 Ellsworth Street as part of that effort. (RT 377.) Cobbs related that she had seen "the whole thing," they spoke briefly about what she saw, and then Inspector Gerrans turned on the tape and recorded the interview. (RT 377.) Cobbs related that on June 30 she woke up to gunshots and breaking glass. (RT 208.) She went to her window and saw two men, one with a handgun and one with a shotgun, standing under a streetlight. (RT 208-210, 377.) She told Inspector Gerrans that the shooters "don't live around here," but she recognized them because they come through to sell drugs, and although she did not know their names or nicknames, she would recognize them if she saw them again. (RT 252-253, 305.)

While Inspector Gerrans was speaking with Cobbs, uniformed narcotics Officer Kit Crenshaw brought Mr. Caldwell to Cobbs' door, saying that he needed to obtain car keys to place Mr. Caldwell in the police car. (RT 25-26, 389.) Both Cobbs and Inspector Gerrans went to the door, opened it and had unobstructed views (PT 64-65; RT 379-380), yet both claimed to have seen only Officer Crenshaw. (RT 222, 379-380.) While Inspector Gerrans initially mistakenly testified that Mr. Caldwell had already been placed in the car, he later acknowledged that Officer Crenshaw had come to the door with Caldwell and said he needed the keys in order to put Mr. Caldwell in the car. (RT 379-380, 389.) Inspector Gerrans acknowledged, and the tape recording confirms, that Officer Crenshaw referred to Mr. Caldwell by name while he and Cobbs were at the door. (RT 380-381.)

Thirteen days later, on July 26, 1990, Mary Cobbs chose Mr. Caldwell's picture from a six-pack and stated, "that's him, that's Twan." (RT 227-228, 382-383.) She testified that although she had recognized him as Twan when she first looked out the window during the shooting, she did not tell Inspector Gerrans that "Twan" was a participant during the July 13 interview because she was not sure whether that was his nickname, and instead told Inspector Gerrans that she did not know the shooters' nicknames.[3] (RT 214-216.) Although Cobbs told

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[3] Cobbs first testified at the preliminary hearing that she recognized the man with the shotgun as "Twan" and gave that name to Inspector Gerrans on July 13, 1990, but later in the

Inspector Gerrans on July 13 that the shooters "don't live around here," she admitted at trial that Maurice Caldwell was someone she knew because he had lived in the apartment next door to hers just a few months prior to the shooting, and that she knew him as "Twan" while he was her neighbor. (RT 214-215, 217, 230, 252-254, 260-261.) Cobbs attempted to explain these discrepancies by stating that when she told Inspector Gerrans that "they don't live around here," on July 13, she merely meant that Mr. Caldwell "didn't live in the area no more after he had moved out." (RT 314-315.)

Prior to the shooting, Cobbs feared for her safety in the Projects and wanted to move out. (PT 61-62.) During her initial taped interview, Inspector Gerrans told her that if she was threatened and if she agreed to help them, they would move her out of the Projects. (RT 301.) After she identified Mr. Caldwell, they did in fact move her out of the Alemany Projects. (RT 229.)

Mary Cobbs was the sole person who identified Mr. Caldwell as the shotgun shooter and, as the prosecution admitted in opening statements, she only did so after Officer Crenshaw brought him to her front door – not immediately, but thirteen days later when his picture was included in a six-pack. (RT 25-26, 382-383, 389.) No physical evidence connected Mr. Caldwell to this crime.[4]

None of the surviving victims positively identified Maurice Caldwell as one of the shooters, or even as one of the other participants. (RT 142.) Viray and Aguirre did not identify Mr. Caldwell from a photographic lineup they viewed on July 27, 1990. (RT 54, 79, 82-83.) On July 27, 1990, Bobila tentatively identified Mr. Caldwell from the six-pack as the person who punched him, stating he was not 100% sure of that identification. (RT 143, 180.) At trial,

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preliminary hearing retracted that testimony after hearing her tape-recorded interview, which indicates that she told Inspector Gerrans that she did not know the shooters' nicknames. (RT 243.) Moreover, Cobbs initially testified at trial that she did not know Mr. Caldwell's nickname at the time of the shooting. (RT 215-216.) Moments later in the preceding, Cobbs said that at the time of the shooting she had heard the name "Twan" associated with Mr. Caldwell but was not certain whether it was him or not, then stated she had heard it was his nickname prior to the shooting and finally claimed she had known him as "Twan" long before the shooting. (RT 221, 233, 242, 260-261.)

[4] Mary Cobbs is now deceased. (Exhibit B, Death Record.)

Bobila admitted that he chose Mr. Caldwell merely because he looked familiar. (RT 143.) He also admitted at trial that he and Inspector Gerrans went through a "dry run" with the six-pack, meaning that they spoke about the photos and Bobila allegedly chose Mr. Caldwell's photo, before he tentatively identified Mr. Caldwell on tape. (RT 189.) Finally, Bobila also testified that while the man who punched him was taller than him, Mr. Caldwell was about his height, and that Mr. Caldwell's hair was "longer and thicker" than the hair of the person who punched him. (RT 188, 199-200.)

At a live lineup on October 23, 1990, Viray tentatively identified a filler as someone who resembled the pistol shooter. (RT 56, 60, 100.) Aguirre identified Mr. Caldwell with a question mark and wrote "maybe" to indicate he was unsure of his identification, admitting at trial that he chose Mr. Caldwell because of the way he stood, but that his facial features did not look familiar. (RT 82-84, 101-102, 108.) Bobila again tentatively identified Mr. Caldwell by placing an X, a question mark and writing "possibly" on the form, explaining that he only chose Mr. Caldwell because he had selected him in the photo lineup, even though he remained unsure of that first identification. (RT 142-143, 146, 180-182.)

When asked to make in-court identifications, Viray, Aguirre and Bobila all admitted that they could not identify Mr. Caldwell as one of the people on the street that night and certainly could not identify him as a shooter. (RT 54, 83-84, 182.) As the prosecution stated in closing, "if those were the witnesses I had to identify the defendant, I don't know if we'd be here and I stand by that." (RT 730.)

The defense presented three witnesses. Betty Jean Tyler testified that Mr. Caldwell lived with her at 949 Ellsworth Street from January of 1988 until his arrest. (RT 425.) She said that at the time of the shooting a lady named Mary lived next door to them, and had been living there for approximately six to seven months. (*Id.*) The prosecution challenged Tyler's characterization of their living situation, implying that Ms. Tyler had mischaracterized it as "peaceful" when in fact she was afraid of Mr. Caldwell and did not want him living with her. (RT 426-430.) Nonetheless, regardless of the nature of his living arrangement, Mr. Caldwell lived next door to Mary Cobbs for months, rendering her identification of him as the shooter

suspect given her initial statement that the shooters did not live in the area. (RT 425.)

Deborah Rodriguez testified that Mr. Caldwell was upstairs in her apartment, along with Tina McCullum, when they heard shots and that he ran downstairs and outside after the shooting to see what happened. (RT 449-452.) She also testified that Marritte Funches, whom she knew from the Projects, told her that he had shot someone when she and Mr. Caldwell went outside to see what happened. (RT 455, 460.) Although Ms. Rodriguez testified that she and Mr. Caldwell ran out together and Jacqueline Williams testified that Ms. Rodriguez went outside after Mr. Caldwell, both agree that Mr. Caldwell was inside at the time of the shooting, and that they heard no further shots after he went outside. (RT 449-450, 452-453, 462-465, 678-679, 688-689, 694.)

Finally, Alice Caruthers testified that on the night of the shooting at approximately 2 a.m., she was walking down the street and saw Marritte Funches arguing with a few people who were trying to buy "rocks" from him. (RT 484.) She saw Marritte pull out a gun and shoot one of them, and she turned and ran home. (RT 487.) She did not see Mr. Caldwell, who she knew was living with Betty Jean Tyler, on the street at that time. (RT 488.)

VI.

On March 19, 1991, following a full day of deliberations, the jury announced that it had found Mr. Caldwell not guilty of first degree murder, but found him guilty of second degree murder, attempted murder, felony discharge of a firearm into an occupied vehicle and the related enhancements. (CT 30-A, 30-B.) When polled however, the foreman stated he had in fact voted Not Guilty on second degree murder. (RT 831-836.) The court questioned why, if he had voted Not Guilty, he had filled out the form indicating a Guilty verdict. (RT 836.) The foreman explained that he thought he was obligated to do so based on the court's response to jury questions. (*Id.*)

In an effort to explain that that was not the case, the court reviewed with the foreman and jury what had happened. When the foreman told the judge that he was not comfortable being the foreperson, the court directed that another of the jurors be selected as foreperson to lead deliberations that would continue the following day. (RT 840-841.) The next day, March 20,

1991, the jury found Mr. Caldwell guilty of second degree murder and found all the allegations true. (CT 31-A, 31-B.)

VII.

Mr. Caldwell filed a motion for a new trial arguing that the evidence did not support the guilty verdict. (Judgment & Sentence, April 29, 1991, RT 1-6.) The court denied this motion on April 29, 1991, and sentenced Mr. Caldwell to a total term of imprisonment of 27 years to life. (CT 223-A, 223-225.)

VIII.

On August 27, 1992, the California Court of Appeal, First Appellate District, affirmed Mr. Caldwell's conviction in Court of Appeal Case No. A053626.

IX.

Mr. Caldwell is currently unlawfully incarcerated and confined by the California Department of Corrections and Rehabilitation at Folsom State Prison pursuant to a judgment pronounced by the San Francisco County Superior Court. Such imprisonment is in violation of his federal and state constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, by Article I, sections 1, 7, 15, and 17 of the California Constitution, and by Penal Code section 1473. Mr. Caldwell's imprisonment is unlawful because:

1. Newly discovered evidence undermines the entire prosecution case and points unerringly to innocence;

2. Mr. Caldwell was convicted by false testimony;

3. Mr. Caldwell was deprived of his right under the Sixth Amendment to the Constitution of the United States and under Article I, section 15 of the California Constitution to the effective assistance of counsel before and during trial, and was thereby prejudiced;

4. These errors cumulatively deprived Mr. Caldwell of his right to due process and effective assistance of counsel compelling reversal; and

5. Maurice Caldwell is actually innocent.

X.

First, this petition is based on the ground that newly discovered has surfaced that undermines the entire prosecution case and points unerringly to his innocence, and which was never presented to the jury that decided Mr. Caldwell's guilt. The following facts now known to Mr. Caldwell support this claim:

Marritte Funches has signed a sworn declaration confessing that he in fact committed the murder of Judy Acosta and that Maurice Caldwell was neither present during, nor involved in, the commission of the crime. (Exhibit D, Declaration of Marritte Funches.) Although he strongly dislikes Mr. Caldwell and knows that he may be prosecuted for murder as a result of his confession, he has come forward with this information because Mr. Caldwell is truly innocent. (*Id.*) His diagram of the scene and events comports with the victims' descriptions of what happened that night, and, in stark contrast to the diagram drawn by Mary Cobbs, also mirrors the diagrams drawn by the victims. (Exhibit E, Supplemental Declaration of Marritte Funches & accompanying diagram; Exhibit F, diagrams of Mary Cobbs, Eric Aguirre and Dominador Viray.)

In addition, Marcus Mendez has sworn under penalty of perjury that he was in the Alemany Projects on the night of the shooting, heard the shots, looked out the door after they were fired and saw a group of people gathered by the shooting. (Exhibit G, Declaration of Marcus Mendez.) He states that he saw Maurice Caldwell running toward the shooting empty-handed, after it had already happened. (*Id.*) He did not hear any more shots after Mr. Caldwell ran towards the commotion. (*Id.*) When he learned Mr. Caldwell was on trial for this shooting, he went to court to testify on Mr. Caldwell's behalf because, based on what he had seen, he believed Mr. Caldwell could not have been responsible, but Mr. Mendez was never called to testify. (*Id.*)

This new evidence, which this court must take as true in deciding whether to issue an order to show cause, entitles Mr. Caldwell to relief because it undermines the prosecution's entire case and points unerringly to innocence. (Cal. Rules of Court, rule 4.551(c); *In re Hardy*

(2007) 41 Cal.4th 977, 1016; *In re Clark* (1993) 5 Cal.4th 750, 766; *In re Hall* (1981) 30 Cal.3d 408, 417.)

XI.

Second, this petition is based upon the ground that the newly discovered evidence demonstrates that Mr. Caldwell's conviction was the product of the false testimony of Mary Cobbs, who claimed that she saw Mr. Caldwell standing under a streetlight holding a shotgun. (RT 209-212.) Her testimony was the sole evidence implicating Mr. Caldwell as a participant in the offense. Yet Marritte Funches, who was never prosecuted for this offense, has confessed to the murder of Judy Acosta and swears that Mr. Caldwell was in no way involved and was not the man with the shotgun. (Exhibits D & E.) Further, Marcus Mendez saw Mr. Caldwell running empty-handed toward the shooting after it had occurred. (Exhibit G.)

Cobbs also testified that the man with the handgun stood under the streetlight, but Funches, the man with the handgun, explains that he never stood under the streetlight during the shooting. (RT 210; Exhibits E & F.) Finally, Cobbs testified that the man with the handgun was closer to her than the man with the shotgun, and that she did not recognize him. (RT 210, 220.) However, Funches, who also lived in the Alemany Projects, knew Mary Cobbs well and explains that she would have recognized him if she were truly identifying the shooters she claimed to have seen through her window that night. (Exhibit D.) Thus, the declarations of Mssrs. Funches and Mendez demonstrate that Maurice Caldwell was convicted on the basis of false testimony. (Pen. Code, § 1473, subd. (b)(1).)

XII.

Further, this petition is based upon the ground that Craig Martin, Mr. Caldwell's trial attorney, rendered ineffective assistance of counsel in violation of Mr. Caldwell's federal and state constitutional rights. Despite having been told by two witnesses and his client that Marritte Funches was one of the true perpetrators, Martin never attempted to contact, investigate or interview Funches. (Exhibit D at p. 2; Exhibit H, Declaration of Craig Martin.) In fact, Craig Martin never hired an investigator to work on this case at all. (Exhibit H.) He also failed to object to the admission of Mary Cobbs' unreliable identification of his client and further failed to

even argue the suggestiveness of the identification procedure to the jury. Finally, these deficiencies, combined with Martin's failures to object to testimony regarding Mr. Caldwell's unrelated "bad acts," identified by petitioner on appeal, constitute ineffective assistance of counsel requiring relief. Such deficient performance deprived Mr. Caldwell of his state and federal constitutional rights to the effective assistance of counsel.

XIII.

Moreover, the combination of these errors and the errors identified by petitioner on direct appeal, require relief. Mr. Caldwell hereby reincorporates the facts and claims set forth above. In addition to those claims, and for purposes of a cumulative error argument, petitioner re-alleges the following claim raised on direct appeal: that the trial court erred in admitting a wide range of "bad acts" unrelated to the crime, and that counsel was ineffective in failing to object to much of that testimony.

XIV.

Finally, this petition requests relief on the ground that Maurice Caldwell is actually innocent. His innocence is demonstrated by Marritte Funches' sworn confession of his own guilt and statement Mr. Caldwell was no way involved, and by Marcus Mendez's sworn statement that he saw Mr. Caldwell run empty-handed toward the shooting after the shots were fired. (Exhibits D & F.) The new evidence, which this court must take as true in deciding whether to issue an order to show cause, shows that Mr. Caldwell is innocent and therefore entitled to relief. (Cal. Rules of Court, rule 4.551(c).)

XV.

Mr. Caldwell has not previously challenged this conviction in any petition for writ of habeas corpus to this or any other court, state or federal, in any petition, motion or application. Mr. Caldwell previously filed a petition for writ of habeas corpus in the First District Court of Appeal requesting his trial transcripts, which the court denied without prejudice because Mr. Caldwell did not first file in San Francisco County Superior Court.

XVI.

Mr. Caldwell has no other plain, speedy, or adequate remedy at law. The issues presented in this habeas corpus petition are only fully reviewable by a consideration of the facts presented in the petition, and cannot be considered in any other forum.

XVII.

Mr. Caldwell's claims in this petition will be based on the petition, the accompanying memorandum, the attached exhibits, and all records, documents, and pleadings on file with this court and any further material to be developed through discovery and at any future hearing that may be ordered.

XVIII.

NCIP has spent the last nine months investigating Maurice Caldwell's claim of innocence, and has located and interviewed various possible witnesses; interviewed Marritte Funches numerous times; obtained the signed declarations from Marritte Funches, Craig Martin and Marcus Mendez; requested, paid for and copied the Appellate and Superior Court files; corresponded with, interviewed and visited Mr. Caldwell; and after obtaining evidence of Mr. Caldwell's innocence, drafted and filed this petition for writ of habeas corpus on his behalf. (Exhibit A.)

XIX.

Mr. Caldwell has remained in constant communication with NCIP during this time. He trusts NCIP, knows how much time and energy have been expended by NCIP on his case, and therefore requests that this court appoint NCIP to represent him in further proceedings related to this matter. (Exhibit I.)

XX.

WHEREFORE, Mr. Caldwell respectfully requests that this Court:

1. Take judicial notice of the transcripts, briefs and court records in *People v. Caldwell*, San Francisco County Superior Court number 138408 and *People v. Caldwell*, First District Court of Appeal number A053626; (Evid. Code, § 452, subds. (c) and (d));

2. Issue an order to show cause directing respondent to show cause why Mr. Caldwell is not entitled to the relief sought;

3. Appoint the Northern California Innocence Project to represent Mr. Caldwell in further proceedings;

4. Conduct an evidentiary hearing to resolve any factual disputes;

5. After full consideration of the issues raised by this petition, grant the petition, vacate the April 28, 1991 judgment of conviction of the San Francisco County Superior Court in Case No. 138408; and,

6. Grant Maurice Caldwell such other and further relief as may seem just under the circumstances.

Date: February 17, 2009

Respectfully submitted,

Linda Starr,
Legal Director
Northern California Innocence Project,
For Petitioner
Maurice Caldwell

VERIFICATION

Linda Starr declares as follows:

I am an attorney admitted to practice law in the State of California.

I make this verification because petitioner is incarcerated at the Folsom State Prison in Folsom, California, which is outside the county in which my office is located, and because the matters stated in the petition for writ of habeas corpus are more within my knowledge than his.

I have read the foregoing petition for writ of habeas corpus, and declare that the contents of the petition are true.

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

Executed this 17th day of February at Santa Clara, California.

Respectfully submitted,

Linda Starr
Legal Director
Northern California Innocence Project,
For Petitioner
Maurice Caldwell

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

IN RE MAURICE CALDWELL, Petitioner, On Habeas Corpus.	) Case No.)) Related Actions: San Francisco County) Superior Court No. 138408)

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Linda Starr, #118789
Paige Kaneb, #251184
NORTHERN CALIFORNIA
INNOCENCE PROJECT
500 El Camino Real
Santa Clara, CA 95053-0422
Telephone: (408) 554-1945
Facsimile: (409) 554-5440

With assistance of law student, Courtney Smith

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INTRODUCTION

On June 30, 1990, Judy Acosta was shot and killed in the Alemany Projects in San Francisco. Police apparently had no suspects in the killing. When initially interviewed by Inspector Gerrans on July 13, 1990, Mary Cobbs, a resident of the Projects, claimed that she had seen the shooting. She related that the shooters did not live in the neighborhood and that she did not know their names or nicknames, but could identify them if she saw them again. (RT 252-253.) She told police that she was afraid in the Projects and wanted to move. They told her that if she cooperated and felt threatened they would move her. (RT 301.) During that July 13 interview, a uniformed police officer brought petitioner, Maurice Caldwell, to Cobbs' door and identified him by name, allegedly to obtain car keys to place Mr. Caldwell in the police car. (RT 25, 389.) Thirteen days later, only after having seen Mr. Caldwell at her door in the custody of a police officer who identified him as "Twan," and promised help for her cooperation, did Cobbs identify Mr. Caldwell as one of the shooters from a six-pack and identified him by his nickname, "Twan." (RT 382-383.) She testified that on the night of the shooting, when she looked out her window, she had recognized Mr. Caldwell as "Twan" and knew him from living in the apartment next door to hers prior to the shooting. (RT 214, 261.) She attempted to explain her contradictory statements from her initial interview by claiming that she did not tell Inspector Gerrans on July 13 that she knew one of the shooters as "Twan" because she was unsure of his nickname at the time, and also that when she told Inspector Gerrans the shooters "don't live around here," she meant that Mr. Caldwell "didn't live in the area no more after he had moved out." (RT 214-216, 314-315.)

The surviving victims never positively identified Mr. Caldwell as one of the shooters or as a participant in any way, and no other evidence connected him to this crime. (RT 54, 83-84, 102, 143-146.) Mr. Caldwell was ultimately convicted of murder in the second degree based solely on Mary Cobbs' testimony identifying him as a

participant, and was sentenced to a total term of imprisonment of 27 years to life. (CT 223-225.)

Since that time, knowing he could be subject to full prosecution, Marritte Funches has provided a sworn declaration confessing that he, in fact, was the pistol shooter that night and stated that Maurice Caldwell was neither present during nor involved in the commission of the crime in any way. (Exhibit D.) His confession and exoneration of Mr. Caldwell are corroborated by the sworn statement of Marcus Mendez, who looked out his kitchen door and saw Mr. Caldwell running empty-handed toward the group of people who had gathered by the shooting only after the shots had been fired. (Exhibit G.)

These facts establish a prima facie case for relief on five grounds:

(1) Mr. Caldwell is entitled to relief on the ground of newly discovered evidence;

(2) Mr. Caldwell's conviction was the product of material false testimony;

(3) Mr. Caldwell is entitled to relief because he was deprived of his constitutional right to the effective assistance of counsel;

(4) These errors cumulatively deprived Mr. Caldwell of his right to due process and the effective assistance of counsel, and;

(5) Maurice Caldwell is actually innocent.

We address actual innocence last, but not because it is the least important or persuasive claim. To the contrary, it is the strongest claim, because proof of actual innocence overcomes all procedural barriers and technical impediments. Innocence is the essence of petitioner's argument, the summation of all that has gone before.

ARGUMENT

I. NEWLY DISCOVERED EVIDENCE ENTITLES MR. CALDWELL TO HABEAS CORPUS RELIEF UNDER CALIFORNIA LAW.

"A criminal judgment may be collaterally attacked on the basis of 'newly discovered' evidence only if the 'new' evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must

undermine the entire prosecution case and point unerringly to innocence or reduced culpability." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246; see also *In re Clark* (1993) 5 Cal.4th 750, 766; *In re Branch* (1969) 70 Cal.2d 200, 213.) The California Supreme Court has further clarified this standard, explaining that,

> we did not intend to impose either the hypertechnical requirement that each bit of prosecutorial evidence be specifically refuted, or the virtually impossible burden of proving there is no conceivable basis on which the prosecution might have succeeded. It would be unconscionable to deny relief if a petitioner conclusively established his innocence without directly refuting every minute item of the prosecution's proof...

(*In re Hall* (1981) 30 Cal.3d 408, 423.)

In Mr. Caldwell's case, there are two pieces of newly discovered evidence that undermine the prosecution's entire case and point unerringly to innocence.

First, Marritte Funches has signed a declaration confessing to the murder and exonerating Mr. Caldwell. (Exhibit D.) Funches has confessed to murder under penalty of perjury, knowing he can be fully prosecuted for the crime. (*Id.*) He has made clear that he strongly dislikes Mr. Caldwell, and is only coming forward with his own admission of wrongdoing because Maurice Caldwell is truly innocent. (*Id.*) Although Funches admits to being the pistol shooter and refuses to identify the shotgun shooter for fear that his family will suffer repercussions, he swears that Mr. Caldwell was not involved in any way, and is subjecting himself to the possibility of being prosecuted for murder to declare Maurice Caldwell's innocence. (*Id.*)

Further, Marcus Mendez swears under penalty of perjury that when he was fourteen or fifteen, he lived with his mother in the Alemany Projects and heard shots fired sometime after midnight, while he was watching *Showtime at the Apollo*. (Exhibit G.) After the shots were fired, he looked out his kitchen door, and saw a group of people gathered in one area where the shooting seemed to have occurred. (*Id.*) At that time, he saw Maurice Caldwell running toward the group empty-handed. (*Id.*) He closed the door and heard no further shots. (*Id.*) When he learned that Mr. Caldwell was on trial for the shooting, he went to court to testify because he knew that Mr. Caldwell could not have

been responsible for this crime because he saw him running toward the shooting empty-handed after the shots were fired. (*Id.*) However, Mr. Mendez was never called to testify. (*Id.*) Mr. Mendez is not close to Mr. Caldwell, they have only spoken once briefly on the phone in the 18 years Mr. Caldwell has been incarcerated and he has no other reason than telling the truth to come forward with this information. (*Id.*)

In determining whether to issue an order to show cause, this court must take the factual allegations as true and determine whether if accepted as true they would entitle the petitioner to relief. (Cal Rules of Court, rule 4.551(c)(1); *People v. Romero* (1994) 8 Cal.4th 728, 737, 739-740; *In re Lawler* (1979) 23 Cal.3d 190, 194, citing *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4.) "Obviously a confession by another party exonerating the petitioner does point unerringly to petitioner's innocence and, if credited, undermines the entire case of the prosecution." (*In re Branch, supra*, 70 Cal.2d at p. 215; see also *In re Weber* (1974) 11 Cal.3d 703, 724.)

The court in *In re Branch* ultimately found that the third-party's confession did not merit relief because substantial evidence of guilt, including physical evidence and two confessions made by Branch, was not undermined by the third-party's confession. (*In re Branch, supra,* 70 Cal.2d 200.) Yet the court reached this conclusion *only after* issuing an order to show cause and holding an evidentiary hearing, thus showing that the California Supreme Court considered the third-party's confession sufficient to require relief if true. (*Id.*) Moreover, unlike Branch, Mr. Caldwell has never confessed to anyone and no physical evidence tied him to the crime.

In *In re Hardy* (2007) 41 Cal.4th 977, a third-party, Boyd, confessed to multiple people that he was the actual killer. The court found declarations from those people sufficient to require an order to show cause and an evidentiary hearing. While Hardy's conviction was not overturned because other evidence that was not undermined established that he was guilty of first degree murder as a coconspirator and aider and abettor, a theory the prosecution had also argued, the court noted that had petitioner been

convicted solely on the theory that he was the actual killer, it would have had to overturn the conviction.[5] (*In re Hardy, supra*, 41 Cal.4th at p. 1025.)

Further, in *Luna v. Cambra* (9th Cir. 2002) 306 F.3d 954, amended by *Luna v. Cambra* (2002) 311 F.3d 928, the Ninth Circuit reversed the district court's decision to uphold Luna's state court convictions for attempted murder, assault with deadly weapon, and robbery based a third-party's sworn confession, and testimony from two alibi witnesses whom trial counsel failed to interview. While the confessor, Richard Lopez, pleaded the Fifth Amendment and refused to testify at the evidentiary hearing, the Ninth Circuit found that the written confession bore "indicia of trustworthiness because [Lopez] memorialized it on paper, under oath, and presented it as truth to a court of law." (*Luna v. Cambra, supra,* 306 F.3d at p. 963-964.) The Ninth Circuit said,

> There is no evidence in the record to suggest that Lopez made the statement in an attempt to 'shift blame or curry favor.' [Citations.] Nor is there evidence that Lopez filed the declaration just 'to aid his friend.' [Citations.] Finally, no record evidence suggests that Lopez made the statement unwittingly or without understanding the ramifications of his statement. To the contrary, Lopez had been involved in the criminal justice system and knew or should have known that his sworn declaration could be used against him in a subsequent criminal trial. Nevertheless, he confessed to the crime in a court document under the threat of perjury.

(*Id.*)

Similarly, Marritte Funches' confession bears great indicia of trustworthiness. He memorialized his confession on paper, under oath, knowing that it would be presented to a court of law. (Exhibit C.) As in *Luna*, there is no evidence that Funches confessed to murder in an attempt to curry favor or shift blame, nor is there any evidence that he did so to aid a friend, especially given his strong dislike of Mr. Caldwell. (*Luna v. Cambra, supra*, 306 F.3d at p. 963-964.) Moreover, like Richard Lopez in the *Luna* case, Marritte Funches is quite familiar with the criminal justice system and is well aware that he could

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[5] The court did vacate the sentence and order a new penalty phase, finding Hardy's counsel was ineffective for failing to discover and present evidence of Boyd's involvement in the murder. (*In re Hardy, supra,* 41 Cal.4th at p. 1035.)

be prosecuted for this murder and that his sworn declaration could be used against him in a trial.[6] Yet he has confessed to murder in a court document under penalty of perjury. (Exhibit D.) Funches has also presented a diagram of the scene and events, which, unlike Cobbs' diagram, is very detailed and comports with the victims' descriptions and diagrams of the events in that they all place the perpetrator with the handgun in the same location. (Exhibits E & F.) Mary Cobbs diagram, in contrast, places the pistol shooter in a completely different location. (*Id.*)

Further, the trial record also corroborates Funches' confession. None of the three surviving victims positively identified Mr. Caldwell at any point prior to or during the trial. (RT 54, 56, 82-84, 180-182.) Two witnesses, Deborah Rodriguez and Alice Caruthers, identified Marritte Funches as the pistol shooter at trial. Caruthers testified that she saw Funches arguing with some people and then pull out a pistol and shoot, at which point she turned and ran home. (RT 487-489.) Rodriguez testified that someone else had confessed to her that he had shot Judy Acosta. (RT 455.) When asked "who?" by the prosecution, Rodriguez responded "Marritte." (RT 460.) The District Attorney then asked, "Marritte Funches?" and Rodriguez responded affirmatively. The prosecutor asked whether she had heard that Funches was the pistol shooter and she again responded affirmatively. (*Id.*)

Deborah Rodriguez and Jacqueline Williams testified that Mr. Caldwell was upstairs in Rodriguez' apartment when they heard the shots. (RT 449-450, 687-688.) Although the testimony of Rodriguez, called by the defense, and Williams, called as a rebuttal witness by the prosecution, differed as to whether Rodriguez went outside with or after Mr. Caldwell, both agreed that Mr. Caldwell was upstairs when the shots were fired and that they heard no further shots after he went outside. (RT 449-450, 454-455,

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[6] Mr. Funches was prosecuted for and convicted of an unrelated murder in Nevada in 2004 and remains incarcerated in that state. (Exhibit D.)

687-689, 694.) Alice Caruthers, who saw the shooting and identified Marritte Funches as the shooter, did not see Mr. Caldwell on the street during the shooting. (RT 488.)

This testimony supports Funches' sworn statement that he fired the pistol that killed Judy Acosta and that Mr. Caldwell was not a participant. (Exhibit D.)

Moreover, as discussed more fully below in section III.B, the case against Mr. Caldwell was weak at best. The surviving victims never positively identified Mr. Caldwell as one of the shooters or even as one of the other participants in the crime. (RT 54, 83-84, 182.) Mary Cobbs only identified him after the police promised her help moving from the Projects and brought him to her door, identified him and then placed him in a six-pack. (RT 25, 379-389.) Moreover, although she initially told the investigating officer that the shooters were not from the neighborhood and that she did not know their nicknames, she later admitted that she knew Mr. Caldwell lived next door to her just a few months prior to the shooting, and also that she knew from that time onward that his nickname was Twan. (RT 252-253, 242, 254, 260-261.) Finally, Cobbs' testimony was extremely suspect, filled with inconsistencies and illogical descriptions of what she allegedly saw, and often contradicted by the facts, as explained fully in section III.B.

Although a competent and effective attorney could possibly have discovered some of this evidence at the time of trial (see section III below) the California Supreme Court has made clear that in actual innocence cases, any evidence that was not presented at trial constitutes new evidence.

> In [*In re Imbler* (1964) 60 Cal.2d 554, 569,] the court stated that evidence undermining the prosecution's case so as to warrant habeas corpus relief must be "new" evidence. However, it is so fundamentally unfair for an innocent person to be incarcerated that he should not be denied relief simply because of his failure at trial to present exculpatory evidence. Thus, the term "new evidence" as used in *Imbler* should be held to include any evidence not presented to the trial court and which is not merely cumulative in relation to evidence which *was* presented at trial.

(*In re Branch*, *supra*, 70 Cal.2d at p. 214, original italics.)

The jury never heard Marritte Funches confess to murder and exonerate Mr. Caldwell, nor did they see a sworn document with indicia of trustworthiness in which Funches confessed to the murder of Judy Acosta and explained that Mr. Caldwell was in no way involved. This powerful newly discovered evidence, taken as true as it must be, undermines the entire prosecution case and points unerringly to innocence and therefore entitles Mr. Caldwell to an order to show cause and an evidentiary hearing to prove any disputed facts. (Cal. Rules of Court, rule 4.551(c); *In re Clark*, *supra*, 5 Cal.4th at p. 766; *In re Branch*, *supra*, 70 Cal.2d at p. 215.)

II. MR. CALDWELL'S CONVICTION WAS THE PRODUCT OF MATERIAL FALSE TESTIMONY IN VIOLATION OF HIS STATE AND FEDERAL RIGHTS TO DUE PROCESS.

Penal Code section 1473, subdivision (b)(1), provides that a writ of habeas corpus may be pursued when, "false evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration." "There is no longer any obligation to show that the testimony was perjured or that the prosecutor or his agents were aware of the impropriety." (*In re Hall, supra*, 30 Cal.3d 408, 424, citing *In re Wright* (1978) 78 Cal.App.3d 788, 807-808; Pen. Code, § 1473, subd. (c).) Evidence is "material and probative" if there is a "reasonable probability" that, had it not been introduced, the result of the proceeding would have been different. (*In re Malone* (1974) 12 Cal.4th 935, 965, citing *In re Wright*, *supra*, 78 Cal.App.3d at p. 814.) "The requisite 'reasonable probability,' ... is such as undermines the reviewing court's confidence in the outcome." (*In re Malone*, *supra*, 12 Cal.4th at p. 965.)

Moreover, a conviction based in part on false evidence, even false evidence that is presented in good faith, hardly comports with due process and fundamental fairness. Thus, under the federal Constitution, even if the government unwittingly presents false evidence, a defendant is entitled to a new trial if there is a reasonable probability that without the false testimony the result of the proceeding would have been different.

(*United States v. Young* (9th Cir. 1994) 17 F.3d 1201, citing *United States v. Bagley* (1985) 473 U.S. 667, 682.) Therefore, it is not necessary for Mr. Caldwell to prove that the prosecution knew Mary Cobbs' testimony was false or perjured. To obtain relief, Mr. Caldwell need only show that Cobbs' testimony was false, and that a showing of its falseness undermines the reviewing court's confidence in the outcome of the trial. (*In re Malone*, *supra*, 12 Cal.4th at p. 965; *In re Hall*, *supra*, 30 Cal.3d at 424; *United States v. Young*, *supra*, 17 F.3d 1201.)

Cobbs' testimony was vital to the prosecution's case. She was the sole person to identify Mr. Caldwell as the shotgun shooter, and her testimony was the sole evidence conclusively linking Mr. Caldwell to this crime. Cobbs testified that when she woke up to gunfire, she went to her bedroom window and saw two men standing under a streetlight. (RT 210). She testified that one man had a handgun and the other, whom she claimed to recognize as the defendant, Mr. Caldwell, had a shotgun. (RT 210-211.)

Yet Marritte Funches, who was never prosecuted for this crime but has recently signed a sworn confession to his participation, insists that Mr. Caldwell was not the man with the shotgun. (Exhibit D.) He further swears that had Cobbs looked out her window that night, she could not have seen the real shotgun shooter because he was standing around the corner of her building. (*Id.*; Exhibit E and accompanying diagram.) Moreover, while Cobbs claimed that she saw both of the shooters standing under the streetlight, Funches admits to being the man with a handgun and swears that he never stood under the streetlight during the shooting. (RT 210; Exhibits D & E.) This statement is corroborated by the victim's testimony, and also by their diagrams, which place the pistol shooter directly across the street from Mary Cobbs' apartment, rather than under the streetlight on the same side of the street as her apartment. (RT 50-51, 75; Exhibit D.) It is further corroborated by the sworn declaration of Marcus Mendez who states that he saw Mr. Caldwell running toward the scene of the shooting empty-handed after the shots were fired. (Exhibit G.)

Also, Cobbs told investigating officers that neither of the shooters was from the neighborhood, and that she did not know the man with the handgun but would be able to identify him if she saw him again. (RT 210, 220, 252-253, 259, 315.) Yet Funches lived in the Alemany Projects, knew Mary Cobbs well and as he points out, had Cobbs actually seen him through her window that night during the shooting, she would have seen him with a pistol and recognized him. (Exhibit D at p. 2.)

Finally, Mary Cobbs had reason to claim falsely that she saw the perpetrators and to identify Mr. Caldwell as one of them. First, she admitted that she desperately wanted a way out of the Projects and the investigating officers told her that if she cooperated and felt threatened, they would move her out of the Alemany Projects, which they later did. (PT 61-62; RT 26, 228-229, 301.) Second, she had good reason to believe that the police wanted her to identify Mr. Caldwell as a participant after they brought him to her door while questioning her about the murder, identified him by name, indicated that they were placing him in the police car and then later asked her to identify the shooter out of a six-pack photo array that contained Mr. Caldwell's photo after promising her help if she cooperated. (RT 25, 301, 382, 389.)

The District Attorney admitted in opening statements that without Cobbs' testimony and identification of Mr. Caldwell, "I would have a hard time standing in front of you and arguing that I could prove this defendant had the shotgun beyond a reasonable doubt." (RT 21.) Cobbs' testimony was clearly material to this case and there is more than a reasonable probability that the outcome of the case would have been different without it. The newly discovered evidence demonstrating that Cobbs' testimony was false should therefore undermine any court's confidence in the outcome of the trial. (*In re Malone*, *supra*, 12 Cal.4th at p. 965.)

This new evidence, taken as true as it must be, therefore entitles Mr. Caldwell to relief on the ground that he was convicted on the basis of false testimony in violation of his state and federal right to due process. (Cal. Rules of Court, rule 4.551(c).)

III. MR. CALDWELL WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A criminal defendant is guaranteed the right to the effective assistance of counsel by both the state and federal constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 684-692; *In re Hardy*, *supra*, Cal.4th at p. 1018; *People v. Ledesma* (1987) 43 Cal.3d 171, 215; *People v. Pope* (1979) 23 Cal.3d 412, 423-424.) "The constitutional right to counsel contemplates 'effective aid in the preparation and trial of the case.'" (*In re Branch*, *supra*, 70 Cal.2d at p. 210, quoting *Powell v. Alabama* (1932) 287 U.S. 45, 71.) Where such aid is denied, the question may be raised in a habeas petition. (*In re Hardy, supra,* 41 Cal.4th 977; *In re Branch*, *supra*, 70 Cal.2d at p. 210, citing *In re Beaty* (1966) 64 Cal.2d 760, 761.)

To obtain relief for a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's deficient performance prejudiced the defense. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687-688, 691-692; *In re Thomas* (2006) 37 Cal.4th 1249, 1256; *People v. Ledesma*, *supra*, 43 Cal.3d at p. 216-217; *People v. Pope*, *supra*, 23 Cal.3d at p. 423-425.) Prejudice exists where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra,* 466 U.S. at p. 694.) "A 'reasonable probability' is not a showing that 'counsel's conduct more likely than not altered the outcome in the case,' but simply 'a probability sufficient to undermine confidence in the outcome.'" (*In re Cordero* (1988) 46 Cal.3d 161, 180, quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 693-694; see also *In re Thomas*, *supra*, 37 Cal.4th at p. 1256.)

Defense counsel has a "duty to make a reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 695.) This includes a duty to investigate carefully crucial defenses of fact that may be available. (*People v. Ibarra* (1963) 60 Cal.2d 460,

464; *In re Smiley* (1967) 66 Cal.2d 606, 626.) The inexcusable failure to do so constitutes a denial of effective assistance of counsel. (*People v. Ibarra*, *supra*, 60 Cal.2d at 464; see *In re Smiley*, *supra*, 66 Cal.2d at 626). Where the record contains no explanation for the challenged behavior, effective assistance may have been denied where "there simply could be no satisfactory explanation." (See *People v. Pope*, *supra*, 23 Cal.3d at 426.)

Craig Martin's representation of Mr. Caldwell fell far below an objective standard of reasonableness and prejudiced Mr. Caldwell's case. Martin offers no explanation for his failures, and in fact there can be no satisfactory explanation for them. There is more than a reasonable probability, sufficient to undermine confidence in the outcome, that the result of this case would have been different, had Martin conducted a proper investigation and uncovered and presented evidence to impeach the sole testimony incriminating his client and identify the true perpetrators.

A. Craig Martin's Deficient Representation Fell Below an Objective Standard of Reasonableness and Deprived Mr. Caldwell of his Right to Effective Assistance of Counsel.

Craig Martin's deficient performance, which manifested itself in three main areas, fell far below an objective standard of reasonableness and could not be considered sound trial strategy because it was not founded on any adequate investigation or preparation. (See *In re Thomas*, *supra*, 37 Cal.4th 1249.) There can be no satisfactory explanation for his failures to investigate and interview the perpetrators and alibi witnesses, or his deficiencies at trial and Martin offers none.

(1) Martin did not hire an investigator to assist him investigate the murder charges against. (Exhibit H.) Martin did not adequately investigate or present a defense of third-party culpability, failing even to attempt to interview Marritte Funches, despite the fact that two defense witnesses and his own client had informed him that Funches was the pistol shooter and that Mr. Caldwell was not involved. (RT 460, 478-479; Exhibit D at p. 3; Exhibit I.) Further, he failed to interview any of the witnesses identified in the police

reports as potential witnesses, and failed to interview any of the witnesses his client told him could potentially have information regarding the shooting.

(2) Martin failed to explore the suggestive procedure leading to Mary Cobbs' unreliable identification, and also failed to object to the admission of such damaging and unreliable evidence at trial. (RT 228.)

(3) Martin both elicited and failed to object to testimony regarding Mr. Caldwell's "bad acts" completely unrelated to this crime.

Considering these deficiencies in light of the available facts, Craig Martin's performance was manifestly unreasonable, falling far below an objective standard, and deprived Mr. Caldwell of his right to the effective assistance of counsel.

1) **Trial counsel failed to hire an investigator, failed to interview numerous eyewitnesses and inexplicably failed to even attempt to interview Marritte Funches, whom two defense witnesses identified as the pistol shooter.**

"Representation of an accused murderer is a mammoth responsibility." (*In re Hall*, *supra*, 30 Cal.3d at p. 434.) This was not a case in which an attorney could reasonably decide that no investigation was necessary. The prosecution charged Mr. Caldwell with first-degree murder; he faced a life sentence and in fact received a sentence of 27 years to life. Mr. Caldwell provided Craig Martin with the names of the people whom he believed to be the true perpetrators, alibi witnesses and numerous people who had a vantage point from which they might have seen the crime and thus been able to exonerate Mr. Caldwell. (Exhibits H & I.) Yet Craig Martin never interviewed the majority of these people, including Marritte Funches, whom Mr. Caldwell and two defense witnesses identified as being one of the true perpetrators and who has since confessed to the murder. (RT 460, 479-480, 484; Exhibits C, H & I.) Craig Martin admits that he did not hire an investigator, did not interview Funches, and does not recall even attempting to interview him. (Exhibit H.) He offers no explanation for these failures and there can be no reasonable explanation for failing to investigate, failing to

interview alibi witnesses identified to him, and failing interview a perpetrator who could have provided exculpatory information about his client.

Such an inexcusable failure to conduct a "reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary," where there can be no "satisfactory explanation" for it, constitutes a denial of effective assistance of counsel. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 695; *People v. Ibarra*, *supra*, 60 Cal.2d at 464; *In re Smiley*, *supra*, 66 Cal.2d at 626; *People v. Pope*, *supra*, 23 Cal.3d at 426.) Although Mr. Caldwell's girlfriend retained him, California case law clearly provides that retained counsel can still obtain funds for ancillary services like investigators when their client is indigent, as Mr. Caldwell was and continues to be. (*Tran v. Superior Court* (2001) 92 Cal.App.4th 1149, 1154-1158; *Anderson v. Justice Court* (1979) 99 Cal.App.3d 398, 401-402; Exhibit I.)

Here, there can be no satisfactory explanation and indeed Martin offers none for his failure to interview Funches. There is a reasonable possibility that had Craig Martin interviewed him, Funches would have made some sort of incriminatory statement as he recently has, said that Mr. Caldwell was not a participant in the shooting, revealed the identity of one or more of the witnesses who were on the street that night, or even disclosed the identity of the actual perpetrator who fired the shotgun. (See *Luna v. Cambra, supra,* 306 F.3d 954 [court found the sworn declaration, corroborated by out-of-court confessions to Luna's attorney and investigator, "provided substantial evidence that trial counsel would have obtained inculpatory statements from Lopez, similar to those made to habeas counsel during the pre-evidentiary hearing interview"]; *Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1457 [finding prejudice from counsel's failure to attempt to obtain a statement from the defendant's brother because, had counsel done so, "he might very well have obtained a confession similar to the written declaration that accompanied the habeas petition," which "would have provided powerful evidence of [petitioner's] innocence"]; *Avila v. Galaza* (9th Cir. 2002) 297 F.3d 911, 921 [holding that defendant's case was prejudiced by trial counsel's failure to investigate and present evidence that the

defendant's brother, who later confessed, committed the crime because there was a reasonable probability that the brother "would have made an inculpatory statement or testified at trial had [counsel] adequately investigated this case"]; *In re Hardy*, *supra*, 41 Cal.4th at p. 1035 [finding counsel ineffective for failing to discover and present evidence of a third-party's involvement in the murder when counsel was aware that more investigation into the third-party was warranted].) Martin might also have obtained Funches' description of the scene, which was markedly different than Cobbs', and used it along with the victims' testimony and diagrams to impeach Cobbs and challenge her ability to identify Mr. Caldwell as one of the shooters. (Exhibits E & F.)

Finally, although Mr. Martin asked Bobila whether he knew "a guy named Merritt [sic]," he did not show a picture of Marritte Funches to any of the surviving victims, even after Mr. Caldwell requested he do so. (RT 195; Exhibit I.) Had they been able to identify Funches, their lack of ability to identify Mr. Caldwell would have been much stronger and more compelling evidence of his innocence.

The failure to investigate a third-party whom counsel had reason to believe was likely the guilty party, and who also had exculpatory information about, and might actually exonerate, his client constitutes ineffective assistance of counsel and grounds for overturning Mr. Caldwell's conviction. (*Luna v. Cambra*, *supra*, 306 F.3d 954; *Sanders v. Ratelle*, *supra*, 21 F.3d 1446; *Avila v. Galaza*, *supra*, 297 F.3d 911; *In re Hardy*, *supra*, 41 Cal.4th at p. 1035.)

2) Trial counsel failed to explore and object to admission of Mary Cobbs' unreliable identification of Mr. Caldwell.

This was purely an eyewitness identification case. No physical evidence linked Mr. Caldwell to this crime. Moreover, as the California Supreme Court has noted, "penetrating concern as to the propriety of a pretrial identification should be a commonplace consideration to any attorney engaged in criminal trials." (*People v. Nation* (1980) 26 Cal.3d 169, 179.) Yet, Craig Martin failed to interview Mary Cobbs about her identification of Mr. Caldwell, failed to object to the introduction of her

suspicious and unreliable identification, and did not even argue to the jury just how curious it was that she only identified Mr. Caldwell from a six-pack shortly after Officer Crenshaw brought him to her door. (RT 238; Exhibit F.)

The United States Supreme Court, the California Supreme Court and lower courts have repeatedly stressed their disapproval of identifications following police procedures that are impermissibly suggestive and unnecessary, as these situations raise due process concerns. (*Manson v. Braithwaite* (1977) 432 U.S. 98; *Neil v. Biggers* (1972) 409 U.S. 188; *Foster v. California* (1969) 394 U.S. 440; *People v. Yeoman* (2003) 31 Cal.4th 93; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1051.) "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." (*Neil v. Biggers*, *supra*, 409 U.S. at p. 198.)

The admission of identification evidence where there is such a likelihood of misidentification violates a defendant's right to due process. (*Id.*) The admissibility of identification testimony is therefore to be determined by whether the identification is reliable under the totality of circumstances. (*Watkins v. Sowders* (1981) 449 U.S. 341, 347; *Manson v. Brathwaite*, *supra*, 432 U.S. at 114; *Foster v. California*, *supra*, 394 U.S. 440; *People v. Gordon* (1990) 50 Cal.3d 1223, 1242, disapproved on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 834-835.)

> Constitutional reliability ... depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation] and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

(*People v. Johnson* (1992) 3 Cal.4th 1183, 1216, citing *People v. Gordon*, *supra*, 50 Cal.3d at p. 1242, citing factors enumerated in *Neil v. Biggers*, *supra*, 409 U.S. at p. 199.)

In this case, the identification procedure was both unduly suggestive and

unnecessary. To determine whether a procedure is unduly suggestive, the court should consider "whether anything caused defendant to 'stand out' from the others in a way that would suggest the witness should select him." (*People v. Yeoman* (2003) 31 Cal.4th 93, 124, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 367 and *People v. Johnson* (1992) 3 Cal.4th 1183, 1217.) As discussed in *People v. Martin* (1970) 2 Cal.3d 822, 829-830, the danger of misidentification is already high in a one-on-one show-up, and is increased significantly when the witness only sees one suspect "in the company of a uniformed officer."

On July 13, while Inspector Gerrans interviewed Mary Cobbs in regards to the murder, she said that she was fearful living in the Projects and would like to move. He told her that if she felt threatened, they would move her if she cooperated. (RT 301.) Also during that interview, uniformed narcotics Officer Kit Crenshaw knocked on Cobbs' door, allegedly to obtain car keys to place Mr. Caldwell in the police car.[7] (RT 25-26, 222, 378-379.) Both Cobbs and Inspector Gerrans went to the door and had unobstructed views (PT 64-65; RT 379-380), although both claimed to have seen only Officer Crenshaw. (RT 222, 379-380.) Mr. Caldwell swears Officer Crenshaw took him directly to Mary Cobbs' front door, that Cobbs answered and he saw her, and the prosecution admitted that another police officer brought Mr. Caldwell "up to the front door" while Inspector Gerrans and Mary Cobbs were talking. (Exhibit I; RT 25.) Inspector Gerrans acknowledged that Officer Crenshaw referred to Mr. Caldwell by name while he and Cobbs were at the door. (RT 380-381.) Although Mr. Caldwell's name had come up the previous day "as a possible person out there," Inspector Gerrans claimed that Officer Crenshaw brought Mr. Caldwell to Cobbs' residence merely by coincidence. (RT 380-381.) Yet even then, Cobbs did not identify Mr. Caldwell to the police. Only when

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[7] While Inspector Gerrans initially mistakenly testified that Mr. Caldwell had already been placed in the car, he later acknowledged that Officer Crenshaw had come to the door because he needed the keys in order to put Mr. Caldwell in the car. (RT 379-380, 389.)

Inspector Gerrans presented her with a photo lineup including Mr. Caldwell's photograph thirteen days later did she tell the police that she saw "Twan" firing the shotgun. (RT 382-383.)

In *Foster v. California*, *supra*, 394 U.S. 440, the Supreme Court reversed Foster's conviction after finding all the identifications unreliable and inadmissible where the witness first failed to identify Foster from a suggestive lineup, then tentatively identified him in a one-on-one show up and finally positively identified Foster at a subsequent lineup. As the court said in *Foster*, an identification of Foster following this suggestive procedure was "all but inevitable." (*Foster v. California*, *supra*, 394 U.S. at p. 443.) Similarly, here, police promised Cobbs help if she cooperated, brought the only suspect to her door, and although she claimed not have seen him, named him and discussed placing him in the police car in front of her and she failed to identify him. (RT 25, 301, 380.) Thirteen days later, police placed his photograph in a six-pack and only then did Cobbs identified him. Maurice Caldwell was the only person whom officers brought to her door and then placed in a six-pack. Like the identification in *Foster*, Cobbs' identification of Mr. Caldwell was all but inevitable following the unduly suggestive procedure. "A procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police." (*People v. Hunt* (1977) 19 Cal.3d 888, 894, quoting *People v. Slutts* (1968) 259 Cal.App.2d 886, 891.) Moreover, this procedure was unnecessary because no exigent circumstances demanded that officers bring Mr. Caldwell to Cobbs' door; certainly Officer Crenshaw could have waited for the car keys until Inspector Gerrans finished interviewing Cobbs.

Further, Cobbs' identification of Mr. Caldwell was completely unreliable under a totality of the circumstances test applying the factors suggested in *Neil v. Biggers*, *supra*, 409 U.S. at p. 199, including the witness' opportunity to view the suspect, accuracy of the prior description and level of certainty demonstrated at the confrontation. First, Mary Cobbs did not even tentatively identify Mr. Caldwell in the first confrontation or show-up in which Officer Crenshaw brought Mr. Caldwell to her door and named him. Second,

Cobbs did not have much opportunity to clearly view the perpetrators during the crime. The light post under which Cobbs' claimed to have seen Mr. Caldwell is approximately 60 feet from her bedroom window. (RT 361.)

Nor was Cobbs' description of the shotgun shooter at all accurate. During the initial interview on July 13, 1990, Cobbs described the shotgun shooter as having "short hair, jheri curl," but upon viewing pictures of Mr. Caldwell from the time of the shooting and at the live lineup that demonstrated that he had a large afro, admitted his hair at the time was substantially "longer" than what she described. (RT 245-246.) In the initial interview, she also related that the shooters did not live in the area, but she was well aware of the fact that Mr. Caldwell lived next door to her a few months prior to the shooting. (RT 214, 252, 260-261.) She told Inspector Gerrans on July 13 that she did not know the shooters' names or nicknames, yet later claimed she knew Mr. Caldwell as "Twan" when he was her neighbor, and even testified that she knew his nickname was "Little Twan" to distinguish him from the other larger man known in the neighborhood as "Big Twan." (RT 225, 242-243, 252, 260.) At the preliminary hearing, Cobbs testified that when she looked out her window during the shooting, she saw a group of people and recognized one of them, "Twan," whom she knew "because of being from the area of where I lived." (PT 44.)

Furthermore, on July 25 Mary Cobbs attempted to cancel her July 26 appointment to view a six-pack, saying that she had been threatened by "the fellows in the area." (RT 255, 390-391.) She said nothing about "Twan," nor did she mention that one of the shooters had threatened her. (*Id.*) Only when Inspector Gerrans presented her with his photograph on July 26, did she say that it was "Twan" that had threatened her the week before. (RT 255, 258, 391.)

The California Supreme Court has also indicated that courts may consider the adequacy of cross-examination and argument to the jury in determining whether the admission of a suggestive identification violated due process. (*People v. Gordon, supra*, 50 Cal.3d at p. 1243-1244.)

Here, defense counsel did not cross-examine Mary Cobbs at all regarding the suggestive identification procedure. Craig Martin did not ask Cobbs a single question about Officer Crenshaw bringing Mr. Caldwell to her door. Nor, while questioning Cobbs about her identification of Mr. Caldwell, did Martin play the portion of the investigation tape recording so the jury could hear Cobbs answering the door, or Officer Crenshaw identifying Mr. Caldwell and asking for the keys to place him in the police car.

Martin asked Inspector Gerrans exactly one question about the appearance of Mr. Caldwell at Cobbs' front door: "[d]oes it refresh your memory that the reason Officer Crenshaw came to the door and knocked was because he needed the keys to put Maurice Caldwell in the car?" Inspector Gerrans answered, "[i]t's possible." (RT 389.) Martin again did not play the relevant portion of the tape that clearly indicated that was in fact what happened.

That was the extent of Craig Martin's cross-examination and argument regarding the suggestive identification. Martin did not call Officer Crenshaw to testify as to why he brought Mr. Caldwell to Cobbs' door and in closing arguments, made no mention of Cobbs only identifying Maurice Caldwell after police officers took him to her door and then placed his photo in a six-pack.

Furthermore, rather than try to elicit information about why the officers brought Mr. Caldwell to Cobbs' door and whether they did so knowing he might be identified as a perpetrator, Martin actually objected to the admission of such evidence, and continued to object even after the court suggested the information might help the defense. After Inspector Gerrans denied directing Officer Crenshaw to bring Mr. Caldwell to Cobbs' residence, the district attorney questioned whether he knew Mr. Caldwell was going to be identified as involved in the shooting. (RT 393-394.) Gerrans responded that he did not, and added that "[t]he day before, his name came up as a possible person out there." (*Id.*) Martin objected to the statement that Mr. Caldwell's name had come up the previous day, and continued to object while the court pointed out for him that the answer was not "a straight no," that in fact Inspector Gerrans had "some knowledge" about Mr. Caldwell,

some indication that he might be identified. (*Id.*) Clearly, Martin did not understand the importance of demonstrating that Officer Crenshaw brought Mr. Caldwell to Mary Cobbs' door because he was a suspect whom they wanted Cobbs to identify.

Finally, Craig Martin completely failed to object to the admission of Mary Cobbs' suspicious identification of his client, and failed to request that the court at least conduct a hearing on reliability of the identification outside the jury's presence. (See *United States v. Wade* (1967) 388 U.S. 218; *Wray v. Johnson* (2d Cir. 2000) 202 F.3d 515.) The California Supreme Court has twice overturned convictions after finding an attorney ineffective for failing to challenge suggestive identification procedures used by the police. (*People v. Nation*, *supra*, 26 Cal.3d 169; *In re Hall*, *supra*, 30 Cal.3d at p. 430-435.)

"Since an objection to the identification evidence would have been adjudicated outside the presence of the jury, there could be no satisfactory tactical reason for not making a potentially meritorious objection." (*People v. Nation*, *supra*, 26 Cal.3d at p. 179, citing *People v. Pope*, *supra*, 23 Cal.3d at p. 426.) Like this case, *Nation* was an eyewitness identification case in which no physical evidence connected Nation to the crime. The Court determined that the facts and circumstances of the identifications were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (*People v. Nation*, *supra*, 26 Cal.3d at p. 179, citing *Simmons v. United States* (1968) 390 U.S. 377, 384 and *People v. Blair* (1979) 25 Cal.3d 640, 659.) Three of the witnesses together chose the defendant from a photographic lineup, and then took the photograph with them to show another witness, who agreed the photograph depicted the perpetrator. (*People v. Nation*, *supra*, 26 Cal.3d at p. 180.) The court stated that the "mere showing of suspects singly to a witness for identification has been widely condemned," and that the "danger of error in identification is at its greatest when the police display only the picture of a single individual and it is heightened when the witness has indications that there is other evidence that the person in the photograph committed the crime." (*Id.*) Based solely on "trial counsel's failure to obtain an

adjudication of the admissibility of the critical identification evidence against his client," the court reversed the conviction finding the failure deprived Nation of his right to constitutionally adequate assistance of counsel. (*Id.*)

Similarly, here Cobbs not only potentially saw Mr. Caldwell singly, but also had "indications that there is other evidence that the person in the photograph committed the crime." (*Id.*) As in *Nation*, "trial counsel's failure to obtain an adjudication of the admissibility of the critical identification evidence against his client deprived the defendant of constitutionally adequate assistance." (*Id.* at p. 181.)

Moreover, in *Hall*, where the court found trial counsel incompetent for multiple failures, the court held it unnecessary to decide "whether the allegations of suggestiveness are true or whether, if true, they constitute a denial of due process," finding it "sufficient for the present purpose to observe that the defense was potentially meritorious, and that petitioner was denied an adjudication on the matter because of his counsel's inadequate factual and legal preparation." (*In re Hall*, *supra*, 30 Cal.3d at p. 434.) Similarly, here, the court need only find, and should find, that such a defense was "potentially meritorious" and that Mr. Caldwell "was denied an adjudication on the matter because of his counsel's inadequate factual and legal preparation." (*Id.*)

The likelihood that Mr. Caldwell was convicted solely on the basis of unreliable evidence raises grave concerns about Martin's effectiveness. A reasonably competent attorney would have argued the suggestiveness of the identification procedure, and moved to exclude the identification. Martin's failures to do deprived Mr. Caldwell of effective assistance of counsel. (See *Neil v. Biggers*, *supra*, 409 U.S. at p. 198; *Foster v. California*, *supra*, 394 U.S. at p. 443; *People v. Nations*, *supra*, 26 Cal.3d 169; *In re Hall*, *supra*, 30 Cal.3d at p. 430-435.)

3) Craig Martin's deficient performance allowed for the introduction of irrelevant "bad acts," as argued on appeal.

The sole issues argued on appeal were whether the court erred in admitting a wide range of bad acts irrelevant to the question of whether Maurice Caldwell participated in

the murder of Judy Acosta and whether Craig Martin's performance was deficient in so far as he failed to object to much of the irrelevant and prejudicial evidence. In fact, Martin himself elicited some of the "bad acts" testimony, while the court admitted other "bad acts" testimony when Martin either failed to articulate a proper objection or completely failed to object.

Martin called Betty Jean Tyler to establish that she was Mary Cobbs' neighbor at the time of the shooting and that Mr. Caldwell lived with her at that time. On cross, the prosecution asked Tyler whether she had called the police on May 24, 1989, after being beat up and told them Mr. Caldwell was part of "the crack gang" that had been living in and out of her house and that she could not get rid of, whether she often called the police on Mr. Caldwell, whether she told the police Mr. Caldwell kept guns and cocaine under his bed, and whether she remembered telling the police she was afraid Mr. Caldwell would kill her if she called the police on him. (RT 426-429.) In each instance, Mr. Martin failed to object. (*Id.*) It was not until the prosecution asked about a Leron Priestly that Mr. Martin managed to state an objection. (RT 429.)

The Court of Appeal, in affirming the conviction, found the lack of objections was "a tactical decision to downplay the importance of testimony damaging to the defense." (Ct of Appeal Opinion at p. 14.) Referring to a discussion that ensued once Martin did finally object, the court went on to state that "counsel recognized the admissibility of the bulk of the questions on the basis that they impeached Tyler's direct testimony." (*Id.*) However, a competent attorney would have argued that the sole import of Tyler's testimony was that Mr. Caldwell lived next door to Cobbs at the time of the shooting, which is relevant to Cobbs' identification of Mr. Caldwell given that her initial statement was that the shooters "don't live around here," and that whether their living situation was peaceful or not was completely irrelevant, rather than "recognize" the admissibility of such testimony as Martin did.

Martin further demonstrated his incompetence when he elicited testimony alleging that Mr. Caldwell was a drug dealer, then attempted to object when the

prosecution followed up on the line of questioning moments later saying, "there's been no foundation, no evidence that my client is a dope dealer." (RT 310.) The Court responded, "[y]ou just went through that with her," to which Martin replied, "[t]here's been no proof of that other than her word." (*Id.*) The Court then patiently explained to Martin that, of course, Mary Cobbs' testimony is evidence. (*Id.*)

For the purposes of establishing cumulative error and to demonstrate the extent of his ineffective representation, Mr. Caldwell reasserts that Craig Martin's repeated failure to object to "bad acts" testimony constitute ineffective assistance of counsel, as did Martin's elicitation of such testimony.

B. Trial Counsel's Deficient Performance Prejudiced Petitioner's Defense in What Was Already a Close Case.

There is a reasonable probability that had Craig Martin adequately represented Mr. Caldwell and investigated the scene, witnesses, and probable perpetrators, and presented their testimony, the jury would have found Mr. Caldwell not guilty – not only of first degree murder, but also second degree and attempted murder. This, after all, was a close case. The jury spent over one full day deliberating and, encountering a "serious division," asked the court two questions regarding what to do if it remained deadlocked. (RT 836.) Multiple circumstances of the jury deliberation – duration longer than seven hours, questions asked of the court, and the indication of hopeless deadlock – demonstrate the jury's doubt regarding Mr. Caldwell's guilt and the closeness of this case. (See, e.g., *People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Thompkins* (1987) 195 Cal.App.3d 244; *People v. Williams* (1971) 22 Cal.App.3d 34, 40-41.)

Furthermore, as evidenced by the difficulty the jury had in reaching a guilty verdict, there was very little evidence against Mr. Caldwell and what evidence there was is extremely suspect. As discussed above, Cobbs' identification of Mr. Caldwell, the sole evidence against him, was unreliable. In fact, all of Mary Cobbs' testimony was inconsistent, illogical, contradicted by the facts and casts doubt on whether she actually saw any part of the crime.

Cobbs initially testified that she heard three shots before she got out of bed and heard three more at the window, for a total of six shots. (RT 209, 239, 241.) After a tape of her July 13 conversation with Inspector Inspector Gerrans was played in court, Cobbs testified that she heard six shots while in bed and at least four more while at the window, for a total of ten shots. (RT 287.) The following day, she insisted that she heard four shots while in bed, and saw two at the window. (RT 300.) Cobbs alternately claimed that she saw Mr. Caldwell fire two and four shots, and recalled having stated at the preliminary that she saw him fire four or five shots. (RT 232, 274, 287, 300.) She also testified to having heard zero, two, and three shots while en route from the bed to the window. (RT 239-241.) At one point, she testified to hearing three shots before getting out of bed, three more after getting out of bed and before arriving at the window, and then two more after looking out the window. (RT 239.) When asked immediately thereafter if she heard a total of eight shots, she responded "No. I heard six, three before I got up out of bed, three as I was in the window." (*Id.*) Seconds later she reiterated that she heard two shots on her way to the window. (RT 240.)

Further inconsistencies arose as Cobbs described what she saw during the shooting. She initially testified that the glass on the passenger side window of the car was already broken when she looked outside, yet seconds later denied having made that statement. (RT 273.) She first testified that the car had already turned around by the time she saw Mr. Caldwell shoot, then testified that she saw him fire a shot and hit the car before the car had turned around. (RT 232, 267-268, 322.) At the preliminary hearing she claimed that Mr. Caldwell shot the car from six feet behind it, yet there was no damage to the rear of the car. (RT 270, 323.) Cobbs also testified that the passenger was lying in the front passenger seat with the seat pushed back, but Acosta, the passenger, was actually lying in the back seat and the passenger seat had been pushed all the way forward. (RT 135, 263-264.) At the preliminary hearing, she testified that she saw one person whom she knew, Twan, and a group of others whom she did not know, but at trial testified that she could only see the two people with guns. (PT 45; RT 250.)

Cobbs also stated that Mr. Caldwell was not wearing a shirt and that she did not see any people in trench coats. (RT 216, 249.) Yet the surviving victims, Aguirre, Viray, and Bobila, asserted that the people they saw on the street that night wore trench coats and jogging suits and did not describe anyone as shirtless. (RT 102-103, 111, 162-163, 177, 188.) Bobila tentatively identified Mr. Caldwell as someone in a white jogging suit. (RT 188.) Further, Aguirre, who did not see anyone without a shirt on, saw the man with the pistol wearing a trench coat, and told investigating officers that Bobila had told him that the man with the shotgun wore a trench coat as well, although Bobila denied having made that statement. (RT 102-103, 106, 184.)

Finally, Cobbs' testimony as to the locations of the shooter, the car and the resulting damage was not possible, as testified to by the criminalist, Robert Fitzer, and the medical examiner, Stephen Boyd. (RT 351, 353, 369-370.) Cobbs testified that the man firing the shotgun stood immobile on the sidewalk under a lamppost on the same side of the street as her apartment building, that the car was parked on her side of the street with the passenger side facing her building and the doors closed, and yet that the first shot hit the driver's side glass. (RT 250, 268-29.) She also claimed that the next shot struck the passenger's side after the car had turned around, at which point the driver's side would have been facing the shooter. (RT 268, 314.) Both Fitzer and Boyd stated it would be impossible to obtain the damage described by Cobbs if the shooters and car were located where Cobbs claimed they were. (RT 351, 353, 369-370.)

The prosecution's case – resting entirely on Mary Cobbs' testimony – was extremely tenuous. Martin's deficiencies fell below an objective standard of reasonableness, and there is a reasonable probability that had Craig Martin effectively represented Mr. Caldwell, the outcome of the trial would have been different. Mr. Caldwell is therefore entitled to relief on the ground that he was deprived of his right to the effective assistance of counsel.

IV. CUMULATIVELY, THE ERRORS IN THIS CASE PREJUDICED PETITIONER'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND EFFECTIVE ASSISTANCE OF COUNSEL SUCH THAT REVERSAL OF HIS CONVICTION IS COMPELLED.

"[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 847-848. See also, *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) Thus, even in cases with strong government evidence, reversal may be compelled when "the sheer number of ... legal errors raises the strong possibility that aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (*People v. Hill*, *supra*, 17 Cal.4th at p. 845; see also *Gerlaugh v. Stewart* (9th Cir. 1997) 129 F.3d 1027, 1043; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.) In close cases, such as this case, the cumulative effect of multiple errors can lead to a miscarriage of justice even though the prejudicial impact of any one error may be relatively slight. (*People v. Cruz* (1978) 83 Cal.App.3d 308, 334.) While not conceding any of these errors were separately harmless, Mr. Caldwell asserts their combined effect contributed to the adverse result. Consequently, a miscarriage of justice has occurred, requiring reversal. (*People v. Watson* (1956) 46 Cal.2d 818, 836; Cal. Const., art. VI, § 13.)

Mr. Caldwell contends each of the errors mentioned above is so fundamental that reversal is required unless demonstrably harmless beyond a reasonable doubt. Should this court find that one or more of these errors is subject to the less strict *Watson* standard, the rule would apply that when a number of trial errors occur, some of which are of constitutional dimension, the correct standard is whether or not their cumulative effect was harmless beyond a reasonable doubt. (*People v. Williams*, *supra*, 22 Cal.App.3d at p. 58-59; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470; *Chapman v. California* (1967) 386 U.S. 18, 24.)

As discussed above, the lack of evidence against Mr. Caldwell and the objective record of jury deliberations demonstrate that this was a close case. Mr. Caldwell reasserts all the facts and legal arguments above, states that these errors affected the trial and that their cumulative effect was not harmless beyond a reasonable doubt.

V. MR. CALDWELL IS ENTITLED TO RELIEF BECAUSE HE IS ACTUALLY INNOCENT UNDER STATE AND FEDERAL LAW.

Marritte Funches has confessed under penalty of perjury to the murder of which Mr. Caldwell was convicted, and has also sworn that Mr. Caldwell was in no way involved or even present during the commission of the crime. (Exhibit D at p. 2.) His exoneration of Mr. Caldwell is corroborated by Marcus Mendez's sworn statement that it was only after the shots were fired that he saw Mr. Caldwell running empty-handed toward the shooting. (Exhibit F.) Such evidence supports an actual innocence claim because it undermines the prosecution's entire case and points unerringly to innocence. (*In re Hardy*, *supra*, 41 Cal.4th at p. 1016, citing *In re Weber*, *supra*, 11 Cal.3d 703, 724; *In re Branch*, *supra*, 70 Cal.2d at p. 215.)

A. Federal Law.

In *Herrera v. Collins* (1993) 506 U.S. 390, the U.S. Supreme Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." (*House v. Bell* (2005) 547 U.S. 518, 554, quoting *Herrera v. Collins*, *supra*, 506 U.S. at p. 417.) "'[T]he threshold showing for such an assumed right would necessarily be extraordinarily high,' the Court explained, and petitioner's evidence there fell 'far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo,* to exist.'" (*Id.*)

Justice Blackmun, with whom Justice Stevens and Justice Souter joined in dissenting, would have explicitly held that the execution of an innocent person violates the Fourteenth Amendment's substantive Due Process Clause and the Eighth

Amendment's prohibition against cruel and unusual punishment and that a petitioner should be entitled to relief when he shows that he is "probably innocent, in light of all the evidence." (*Herrera v. Collins*, *supra*, 506 U.S. at pp. 437, 444.)

Although Herrera was a capital case, the controlling opinion in *Herrera* recognized that where a fundamental error resulted in an erroneous finding of guilt, "[i]t would be rather strange jurisprudence... which held that under our Constitution [a petitioner] could not be executed, but that he could spend the rest of his life in prison." (*Id.* at p. 405.) The dissenters also noted that "[i]t also may violate the Eighth Amendment to imprison someone who is actually innocent," and quoted *Robinson v. California* (1962) 370 U.S. 660, 667 in noting that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold," but did not rule on the question because the court was not asked to do so. (*Herrera v. Collins*, *supra,* 506 U.S. at p. 432, fn 2.)

Interpreting *Herrera*, the Ninth Circuit stated that, "[w]ith respect to a freestanding actual innocence claim, a majority of the Supreme Court assumed, without deciding, that execution of an innocent person would violate the Constitution. A different majority of the Justices would have explicitly so held." (*Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463, 476.) In *Carriger*, the Ninth Circuit, agreeing with Justice Blackmun's dissent in *Herrera,* held that "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." (*Carriger v. Stewart*, *supra*, 132 F.3d at p. 476, citing *Herrera v. Collins*, *supra*, 506 U.S. at p. 442-44, (Blackmun, J., dissenting); see also *Osborne v. Dist. Attorney's Office* (2008) 521 F.3d 1118, 1130, cert. granted Nov. 3, 2008, 129 S.Ct. 488, ["In this circuit we not only have assumed that freestanding innocence claims are possible but also have articulated a minimum standard: "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent."].)

The requisite standard of proof to obtain relief on a freestanding actual innocence, or "*Herrera*" claim, has not been decided by the Supreme Court. In *House v. Bell*, *supra*, 547 U.S. 518, 537, 555, the U.S. Supreme Court declined to rule on what it might take to establish a *Herrera* claim and held that House had met the requirements for overcoming procedural default based on actual innocence but had not met the requirements for a *Herrera* claim. The *House* court enigmatically stated that the test for a *Herrera* claim is something more than the test for overcoming procedural default based on a miscarriage of justice –"no reasonable juror would find him guilty beyond a reasonable doubt – or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt" – set out in *Schlup v. Delo* (1995) 513 U.S. 298, but did not explain how much more is required. (*House v. Bell*, *supra*, 547 U.S. at p. 538, 555.)

Unlike the petitioners in *Herrera* and *Schlup*, Mr. Caldwell would meet any federal standard of actual innocence because, as discussed below in section B, he has made a "truly persuasive" showing that he is actually innocent and has more than affirmatively proved that he is probably innocent. (*Herrera v. Collins*, *supra*, 506 U.S. at p. 417; *Carriger v. Stewart*, *supra*, 132 F.3d at p. 476.)

B. <u>California Law.</u>

The California Supreme Court has repeatedly held that when evidence exists which proves a defendant's actual innocence, the court must grant relief. (*In re Hardy*, *supra*, 41 Cal.4th at p. 1015; *In re Clark*, *supra*, 5 Cal.4th 750; *People v. Martinez* (1984) 36 Cal.3d 816, 825-826.) "Habeas corpus will lie to vindicate a claim that newly discovered evidence demonstrates a prisoner is actually innocent." (*In re Hardy*, *supra*, 41 Cal.4th at p. 1015.) Stressing the underlying goal of determining guilt and innocence, the California Supreme Court in *People v. Martinez*, *supra*, 36 Cal.3d 816, said that if evidence exists which proves a defendant's actual innocence, then the court must grant relief. "Fundamental principles of due process require a remedy by which a defendant can bring newly discovered evidence before a court to urge correction of an erroneous judgment." (*Id.* at p. 826.)

In *Clark*, the California Supreme Court held that a petitioner is entitled to relief if he "allege[s] facts which, if proven, would establish that a *fundamental* miscarriage of justice occurred as a result of the proceedings leading to conviction and/or sentence." (*In re Clark*, *supra*, 5 Cal.4th at p. 797, original italics.) The "fundamental miscarriage" requirement may be met by showing that the petitioner is actually innocent of the crime of which he was convicted. (*Id.* at p. 797-798.) The court in *Clark* further concluded:

> ...[T]he petitioner would bear a heavy burden of satisfying the court that the evidence of innocence could not have been and presently cannot be, refuted. The requirement that a petitioner demonstrate his or her innocence requires more than a showing that the evidence might have raised a reasonable doubt as to the guilt of the petitioner. The petitioner must establish actual innocence, a standard that cannot be met with evidence that a reasonable jury could have rejected.

(*Id.* at p. 798, fn. 33.)

To support a claim of actual innocence, new evidence "must undermine the entire prosecution case and point unerringly to innocence or reduced culpability." (*In re Hardy*, *supra*, 41 Cal.4th 977, 1016; *In re Hall*, *supra*, 30 Cal.3d at p. 417; *In re Weber* (1974) 11 Cal.3d 703, 724.) An example of such evidence is a confession of guilt by a third party. (*In re Hardy*, *supra*, 41 Cal.4th at p. 1016, citing *In re Weber*, *supra*, 11 Cal.3d at p. 724.) "Obviously a confession by another party exonerating the petitioner does point unerringly to petitioner's innocence and, if credited, undermines the entire case of the prosecution." (*In re Branch*, *supra*, 70 Cal.2d at p. 215.)

As discussed above in section I, Marritte Funches has confessed to the shooting and signed a sworn declaration under penalty of perjury admitting to the murder and stating that Maurice Caldwell was neither present during, nor involved in, the commission of the crime. (Exhibit D.) Although Funches strongly dislikes Mr. Caldwell, he has admitted to the murder and subjected himself to prosecution because he knows Mr. Caldwell is innocent and should not spend his life in prison for a crime he did not commit. (*Id.* at p. 2-3.) Funches' confession to the crime and exoneration of Mr. Caldwell, which this court must take as true in deciding whether to issue an order to show

cause, "obviously" undermines the entire case of the prosecution and points unerringly to innocence, therefore entitling Mr. Caldwell to relief. (Cal. Rules of Court, rule 4.551(c); *In re Branch*, *supra*, 70 Cal.2d at p. 215.) Further, Mr. Caldwell's innocence is also corroborated by Marcus Mendez's sworn statement that after the shots were fired, he saw Mr. Caldwell run empty-handed toward the shooting. (Exhibit G.)

Moreover, the trial record corroborates Marritte Funches' confession and exoneration of Mr. Caldwell. On the night of the shooting, Funches confessed to Deborah Rodriguez that he had fired the pistol. (RT 460.) Alice Caruthers saw Funches fire the pistol and did not see Mr. Caldwell on the street at that time. (RT 487-488.) Jacqueline Williams and Deborah Rodriguez were in Rodriguez's apartment when the shots were fired, and Mr. Caldwell was upstairs. Williams and Rodriguez saw Mr. Caldwell run downstairs and outside to see what happened, and neither woman heard shots after he went outside. (RT 449-450, 452-453, 462-465, 678-679, 688-689, 694.) Finally, none of the surviving victims positively identified Mr. Caldwell at any point as having been involved in the shooting. (RT 22, 54, 79, 102, 112, 143, 180-182.)

Mr. Caldwell has pleaded a prima facie and truly persuasive case that he is actually innocent. No reasonable trier of fact today, knowing that Marritte Funches both confessed to murder himself and uncategorically says that Mr. Caldwell was not a participant, with the understanding that he could be prosecuted for the crime, and hearing all the facts corroborating Funches' confession, would reject the evidence of innocence and find petitioner guilty. The evidence set forth in this petition – the truth of which must be assumed in deciding whether to issue an order to show cause – establishes that Mr. Caldwell is actually innocent and has been unlawfully imprisoned for 18 years. (Cal. Rules of Court, rule 4.551(c)(1).) This court should therefore issue an order to show cause and order an evidentiary hearing to resolve any disputed facts. (*Id.*)

VI. MR. CALDWELL'S PETITION IS TIMELY AND, IN ANY EVENT, IS NOT SUBJECT TO THE PROCEDURAL BAR OF UNTIMELINESS BECAUSE HE IS ACTUALLY INNOCENT.

California law on procedural defaults in habeas corpus is set out in four Supreme Court cases: *In re Clark*, *supra*, 5 Cal.4th 750, *In re Gallego* (1998) 18 Cal.4th 825, *In re Robbins* (1998) 18 Cal.4th 770, and *In re Sanders* (1999) 21 Cal.4th 697. All of these are capital cases. The opinions do not make clear how the rules they set out apply in noncapital cases.[8]

Under the California Supreme Court's capital case standards, "to avoid the bar of untimeliness, [a] petitioner has the burden of establishing either (i) 'absence of substantial delay'", (ii) 'good cause for the delay' or (iii) that his claims fall within an exception to the bar of untimeliness." (*In re Robbins*, *supra*, 18 Cal.4th at p. 783; *In re Gallego*, *supra*, 18 Cal.4th at p. 780, 831.) One of the exceptions to the bar of untimeliness, that "the petitioner is actually innocent of the crime or crimes of which he or she was convicted," clearly applies here. (*In re Clark*, *supra*, 5 Cal.4th at p. 759; *In re Robbins*, *supra*, 18 Cal.4th at p. 780.) "These claims will be considered on their merits even though presented for the first time in a successive petition or one in which the delay has not been justified." (*In re Clark*, *supra*, 5 Cal.4th at p. 797-798.)

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[8] The standards for noncapital cases should be considerably more lenient, more willing to excuse failures by prisoners without counsel and without the same incentive to delay. In a capital case, the Supreme Court appoints counsel to research and file a petition for habeas corpus while the appeal is still pending. Funds are available to investigate and research issues. As a result, extensive petitions, often with over 400 pages and more than 100 claims, are filed in virtually every capital case, generally before the appeal is argued and decided. Thus when the Supreme Court talks of delay in filing a petition for habeas corpus, this is often in the context of fault by an appointed attorney charged with the duty of filing a timely petition. And when the Court speaks of the limitations on the filing of successive petitions, it is generally in a case in which there was an exhaustive prior petition drafted by counsel appointed for his or her expertise in capital habeas matters.

The noncapital case is very different. In the case at bar, as in most noncapital cases, no attorney has ever been appointed or paid to investigate and draft a petition for writ of habeas corpus.

Further, Mr. Caldwell has presented his petition without substantial delay. While Mr. Caldwell has long known of Marritte Funches' guilt, he could not establish a prima facie case for relief until he obtained evidence of Funches' guilt, such as a declaration from Funches confessing to the crime. "When ... a petitioner or counsel only knows of triggering facts – i.e., facts sufficient to warrant further investigation, but insufficient to state a prima facie case for relief – the potential claim should be the subject of further investigation either to confirm or to discount the potential claim." (*In re Gallego*, *supra*, 18 Cal.4th at p. 833.)

In August of 2005, Paul Myslin of the San Francisco Public Defender's Office Innocence Project interviewed Funches in Nevada State Prison while investigating Mr. Caldwell's claim of innocence with investigator Beverly Myres. Funches told them that Maurice Caldwell is innocent but would not confess to his own involvement, nor identify the other true perpetrators and Mr. Caldwell remained unable to plead a prima facie case for relief. However, Funches subsequently wrote investigator Myres confessing to the crime, around the same time that the San Francisco Public Defender's Office closed its Innocence Project. Paul Myslin referred Mr. Caldwell's case to NCIP, who then began to investigate Mr. Caldwell's claim of innocence and, upon obtaining the confession letter from Ms. Myres, sent a declaration to Marritte Funches based on the letter. After receiving his signed and edited declaration on August 13, 2008, and while continuing to investigate the case and Funches' involvement, NCIP drafted a petition for writ of habeas corpus on behalf of Mr. Caldwell, which has been filed without substantial delay. (Exhibit A.)

Moreover, while drafting the petition for writ of habeas corpus, NCIP continued to investigate Mr. Caldwell's claim of innocence, examining the scene, locating and interviewing potential eyewitnesses and perpetrators, and obtained declarations from Marcus Mendez and Craig Martin corroborating Mr. Caldwell's claims. (Exhibits A, D, E, G & H.) "Good cause for substantial delay may be established if, for example, the petitioner can demonstrate that because he or she was conducting an *ongoing*

3. Appoint the Northern California Innocence Project to represent Mr. Caldwell in these proceedings;

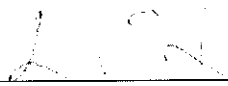
4. Conduct an evidentiary hearing to answer the factual questions necessary to determine the merits of Mr. Caldwell's claim;

5. After full consideration of the issues raised by this petition, grant the petition, vacate the April 28, 1991 judgment of conviction of the San Francisco County Superior Court in Case No. 138408; and,

6. Grant Maurice Caldwell such other and further relief as may seem just under the circumstances.

Date: February 17, 2009

Respectfully submitted,



Linda Starr,
Legal Director
Northern California Innocence Project,
For Petitioner
Maurice Caldwell

investigation into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other known claims in order to avoid the piecemeal presentation of claims..." (*In re Robbins*, *supra*, 18 Cal. 4th at p. 780, original italics.) NCIP has conducted an ongoing investigation into Mr. Caldwell's innocence, and since obtaining Mr. Funches' declaration has investigated other potential claims to avoid the piecemeal presentation of claims. (Exhibit A.) Finally timeliness is a procedural bar overcome by actual innocence under state law and thus a bar to which Mr. Caldwell is not subject. (*In re Clark*, *supra*, 5 Cal.4th at p. 759; *In re Robbins*, *supra*, 18 Cal.4th at p. 780.)

Mr. Caldwell's claim of innocence also satisfies the federal requirements for overcoming procedural default based on actual innocence. While it is a demanding standard, "the *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to demonstrate that ... more likely than not any reasonable juror would have reasonable doubt." (*House v. Bell*, *supra*, 547 U.S. 518, 538.) Any reasonable jury would have reasonable doubt given that someone else has confessed and exonerated Mr. Caldwell, and that confession and exoneration have been corroborated by multiple witnesses. (Exhibits D, E, G & M.)

Finally, because Mr. Caldwell's prior petition for writ of habeas corpus was denied without prejudice, and because actual innocence is an exception the procedural bar of successive petitions, this court should reach the merits of this petition. (*In re Clark*, *supra*, 5 Cal.4th at p. 797.)

CONCLUSION

For the above reasons, Mr. Caldwell respectfully requests that this court:

1. Take judicial notice of the transcripts, briefs and court records in *People v. Caldwell* 138408 and *People v. Caldwell* A053626; (Evid. Code, § 452, subds. (c) & (d));

2. Issue an order to show cause directing respondent to demonstrate why Mr. Caldwell is not entitled to the relief sought;

EXHIBITS

A) Declaration of Linda Starr

B) Police Report

C) Death Report of Mary Cobbs

D) Declaration of Marritte Funches

E) Supplementary Declaration of Marritte Funches and accompanying diagram

F) Crime scene diagrams drawn by Mary Cobbs, Eric Aguirre and Dominador Viray

G) Declaration of Marcus Mendez

H) Declaration of Craig Martin

I) Declaration of Maurice Caldwell

DECLARATION OF LINDA STARR

I, LINDA STARR, hereby declare as follows:

1. I am the Legal Director at the Northern California Innocence Project.
2. I make the following statements based on personal knowledge, the pleadings, files, and records in People v. Maurice Caldwell, San Francisco County Superior Court No. 138408, contact with the defendant, Maurice Caldwell, and communications with attorneys Paige Kaneb and Paul Myslin, private investigator Beverly Myres and law student Courtney Smith.
3. Maurice Caldwell has requested the assistance of the Northern California Innocence Project to investigate his claim of innocence, and file a petition for writ of habeas corpus on his behalf.
4. Mr. Caldwell was convicted of second degree murder, attempted murder and felony discharge of a firearm at an occupied motor vehicle under.
5. He has always maintained his innocent of these crimes.
6. With the informed consent and authorization of Maurice Caldwell, the Northern California Innocence Project has conducted an investigation into his case.
7. NCIP has remained in contact with Mr. Caldwell during the investigation of his claim of innocence and drafting this petition for writ of habeas corpus. Mr. Caldwell has shared all the documents he has retained relating to this case with NCIP, along with everything he knows about the crime and the actual perpetrators. NCIP also ordered, paid for and copied the reporter's transcript, the clerk's transcript, and all other documents in the appellate file, including the

appellant's opening brief, the appellee's brief and the appellant's reply brief, along with the First Appellate District Court of Appeal opinion.

8. On Mr. Caldwell's behalf, NCIP located and interviewed numerous people who witnessed or participated in the crime, along with the trial attorney, Craig Martin, who corroborated Mr. Caldwell's claims. NCIP obtained the signed declarations from Marritte Funches, Marcus Mendez and Crag Martin. Further, NCIP is familiar with the habeas corpus process, the facts of Mr. Caldwell's case and the legal issues involved.

9. Since obtaining the declaration of Marritte Funches, NCIP has conducted an ongoing investigation while drafting this petition for writ of habeas corpus so as to avoid the piecemeal presentation of claims.

10. NCIP is prepared and willing to be appointed to represent Maurice Caldwell in the petition for writ of habeas corpus.

I, Linda Starr, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Santa Clara, California, on February 17, 2009.

Respectfully Submitted,

Linda Starr
Legal Director
Northern California Innocence Project

7/12/90

Spoke on the phone with Captain Philpott of Ingleside Station. Gave him description of suspects. Captain Philpott states he received a phone call from a female caller who was afraid to give her name or be involved as a witness. This caller told the Captain to check out a Marvin Caldwell. She said that Caldwell has been shooting off guns in the projects at Alemany & Ellsworth for years.

JC

California Deaths

Search Date: Monday, February 16, 2009
Query Submitted: Last Name = Cobbs
First Name = Mary
Middle Name = L
Birth Month = 07
Birth Day = 22
Birth Year = 1961

Client Reference: 114

Record # 1 of 1

Database: CALIFORNIA DEATH INDEX

Name: COBBS MARY LOUISE
Sex: FEMALE
SSN: 563-19-XXXX
Father's Last Name: COBBS
Mother's Maiden Name: WILLIAMS
Birth Date: 07/1961
Birth Place: ARIZONA
Death Date: 01/08/1998
Death County: ALAMEDA

High Desert State Prison
P.O. Box 650
Indian Springs, NV. 89070-0650

I, Marritte Funches, declare as follows:

1. I make all of the following statements based on personal knowledge.
2. I was born February 28, 1971.
3. I am currently incarcerated in Ely State Prison in Nevada. I am serving a life sentence for first degree murder for which I was convicted in 1991.
4. Until shortly after June 30, 1990, I lived in the Alemany Projects in San Francisco, CA. Maurice Caldwell also lived there and I knew him for at least ten years prior to the events described below.
5. On or about June 30, 1990, around 1:30 a.m., I was selling drugs on Ellsworth Street in the Alemany projects with four other men. Maurice Caldwell was not one of them. A car pulled up with four or five Asian men who said they wanted to buy dope. Most of them got out, which I thought was unusual, and then they began stalling like they were up to something. A fight broke out and one of the Asian men pulled out a butterfly knife and took two steps towards me. I raised my gun (it was my .38 or .357) and shot him in the chest. He immediately fell to the ground. I then randomly fired shots in the direction of the other men as they began to run, before they could use their weapons. I picked up his butterfly knife and kept it.
6. As I was shooting, I saw another one of the Asian men fall and I guess he dropped his gun because after everything died down, my friend found a gun in the street and brought it to me. It was a chrome .45.
7. My homeboy, who I cannot name because it would put the lives of my daughter and her family in jeopardy, had a shotgun and was standing across the street from

I believe we were both residents of the area for some years, but I only knew Mr. Caldwell personally for approx 3 yrs. prior to the shooting.

me, behind the corner of the building in which Mary Cobbs lived. As the driver was attempting to pull the man I shot into the car and drive away, my homeboy fired a few shotgun shots at them. My homeboy with the shotgun was not Maurice Caldwell.

8. I know that Maurice Caldwell was convicted for this shooting.

9. Because I was the shooter, I know that Maurice Caldwell was not present at any time during this incident.

10. Maurice Caldwell did not kill Judy Acosta. I killed him.

11. Mary Cobbs was a single mother with children who lived at 947 Ellsworth Street, in the Alemany Project at the time of this incident. She lived in one of the center units with an upstairs window and the events described above took place in front of and beside her building. I knew Mary Cobbs and her children well. Had she looked out her window that night, she would have seen me. Moreover, because the man with the shotgun was around the corner of her apartment building, she could not have seen him from her front window. In fact, upon hearing gunshots and breaking glass, she would have hit the floor and made sure her family was okay, as everyone in the projects was trained to do. Like most of us, Mary Cobbs was desperate for a way out of the projects and her way out was by "cooperating" with the police, even if she never looked out her window that night.

12. I have not had any contact with Mr. Caldwell since 1990. I do not like him and I am not doing this to help him, but rather to correct an injustice and make sure an innocent man does not sit in prison for something that I did. I was angry at him for many years because he tried to rat me out, which is why I had to run to

She lived in the corner house, at the end of the building. The shooting took place right in front of her apt. MJ

I don't like him for a # of good reasons. We had just fought each other shortly prior to the shooting. And most of all he ratted me out to the police. But I left the city before they could catch me. MJ

I am 100% innocent of the murder for which I've been convicted of here in Nevada. M. F.

Nevada and ended up killing another person. I am coming forward now because I have decided to look past the face that betrayed me to the face of an innocent man in prison for a crime he did not commit.

13. Mr. Caldwell's attorney never spoke to me about these events, nor did I ever receive any information from anybody that he was trying to contact me.

14. While this case was characterized as a drug deal gone bad, I have always believed that this incident was actually an attempted retaliation for an incident that occurred 3-4 weeks earlier in which myself and another homeboy (not Maurice Caldwell) robbed an Asian family in the hills across the freeway from the Alemany Projects. In the process of the robbery, we pistol-whipped several of the family members and an Asian man who drove up during the robbery and tried to stop it.

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

Executed on July 22nd, 2008

Marritte Funches

SUPPLEMENTAL DECLARATION OF MARRITTE FUNCHES

I, MARRITTE FUNCHES, hereby declare as follows:

1. I make the following statements based on personal knowledge.
2. I have previously signed a declaration dated July 22, 2008, in this case, and affirm the statements made therein.
3. I have drawn a diagram of the events on June 30, 1990, which I have signed and attached as an Exhibit to this Supplemental Declaration. As this diagram shows, the man who fired the shotgun was located at the corner of the apartment building in which Mary Cobbs lived, and she could not have seen him by looking out her front window when he was firing the shotgun.
4. As stated in my previous declaration, on June 30, 1990, I shot and killed Judy Acosta. I was standing directly across the street from Mary Cobbs' apartment. Had she looked out her window, she may have been able to see me. At no point during the shooting did I stand under the streetlight next to her building.

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

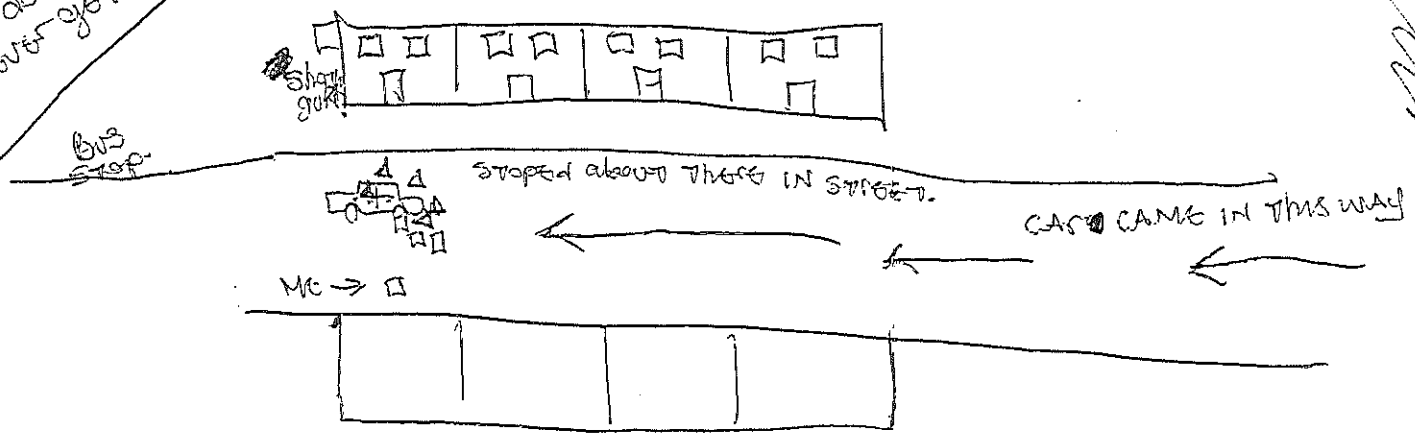
Executed on Jan, 26TH, 2009

Marritte Funches

Notes

It should be noted several weapons were recovered from the Asians. And it is my strong belief they had come now for drugs but to retaliate for the robbery of an Asian family across the freeway. I say this because despite friends don't bring guns, generally. And they almost never get out of the car; especially in force.

Five people in car = Δ
There were 4 of us. = □
One of us = *



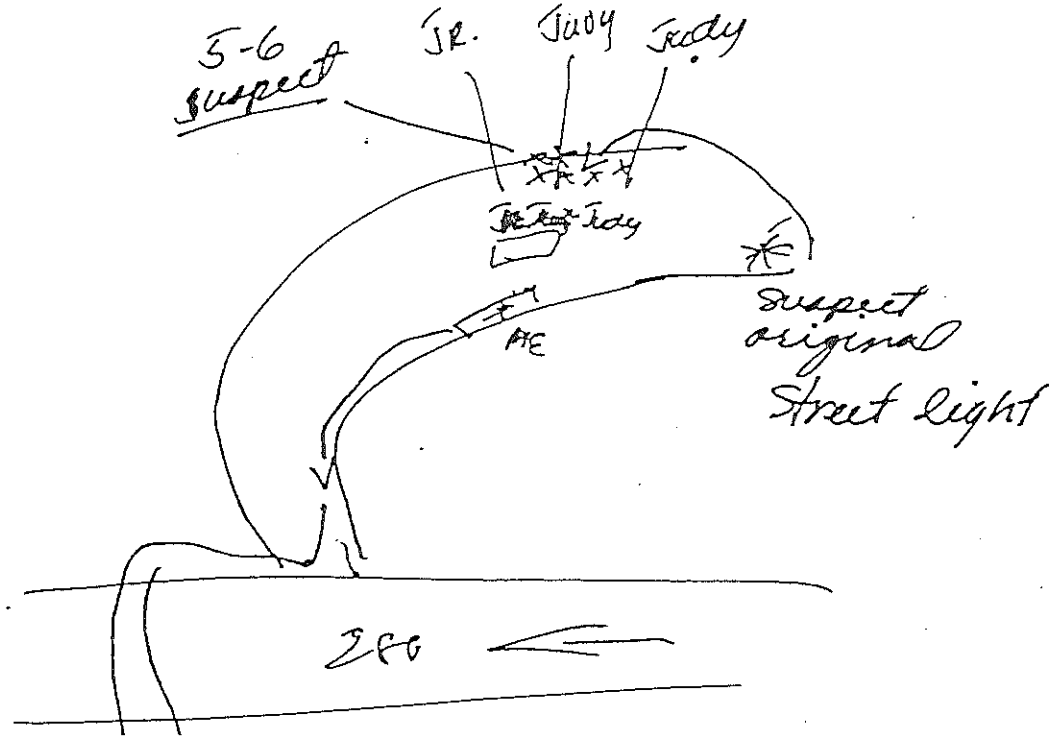
By Dave Ellis Main Person

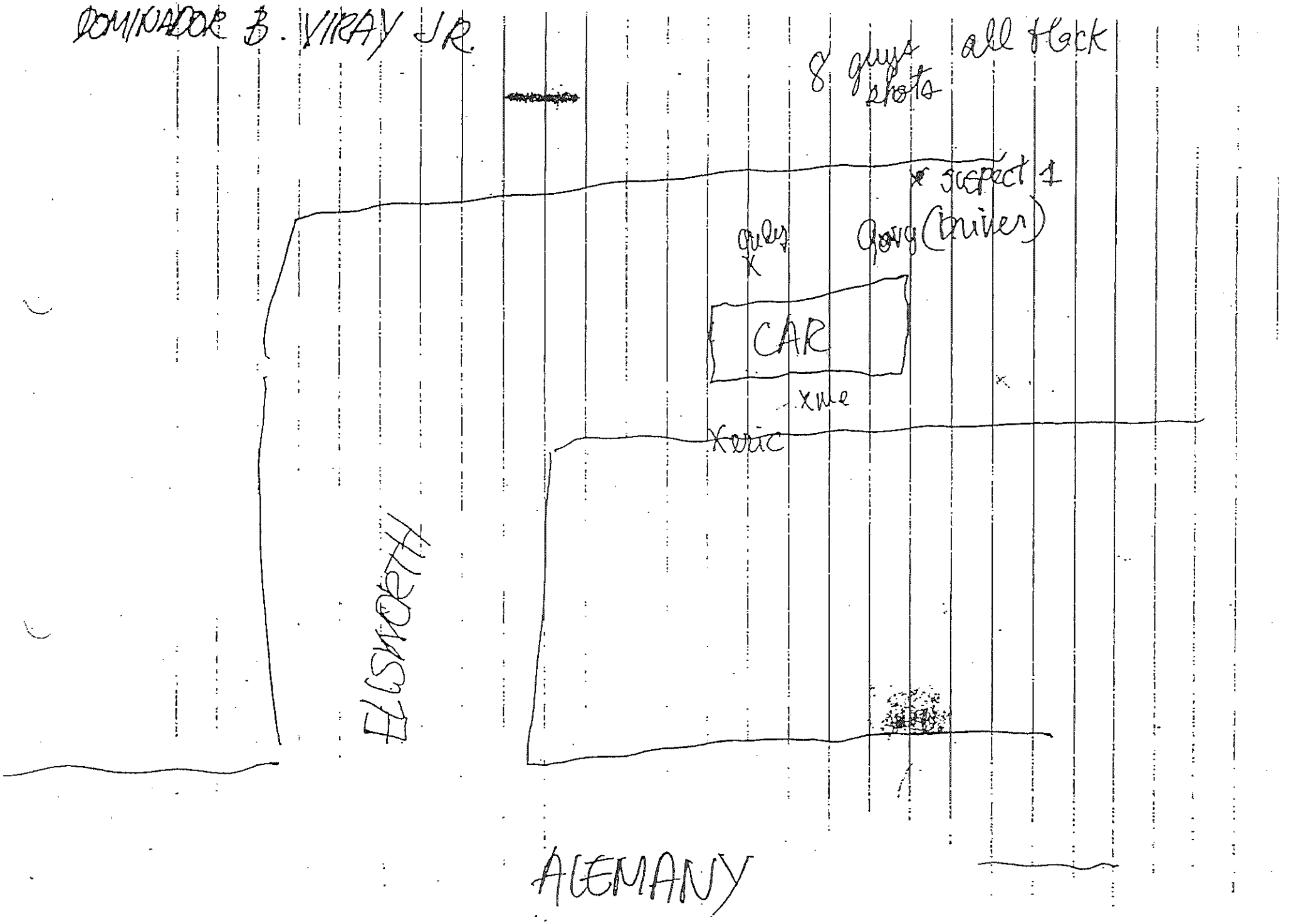
Look, my memory says the light was over the bus stop. I could be off, I've not seen alleyway an over 18 years! Better live. Myself and 3 other men were directly across from the ladys house on the steps in relative darkness but with a light near by you could see. The other men (me and myself were like security was across the street on the side of the ladys house, under (theres a over hang) the window, in complete darkness. The car pulls up. 4 dudes got out, driver stays in with car running. The 4 dudes pulled out various weapons. Not sure if fight started before or after weapons pulled. One of the Asian men had a knife and came on me. I raised my gun and fired, (I'm pretty sure I had a 38 or 357 that night) one shot at the dude coming on me. He fell and I began shooting randomly at the others. The men I shot was near middle of the street. As I was (everyone ran) walking away I watched the driver as he pulled his shot friend over and into the car. Once I was out of the way, my boy with the shot gun let loose. I didn't see all the shots, but just knowing how things were I know the police reports are on how the scene was are wrong. Regardless. caldwell was not present

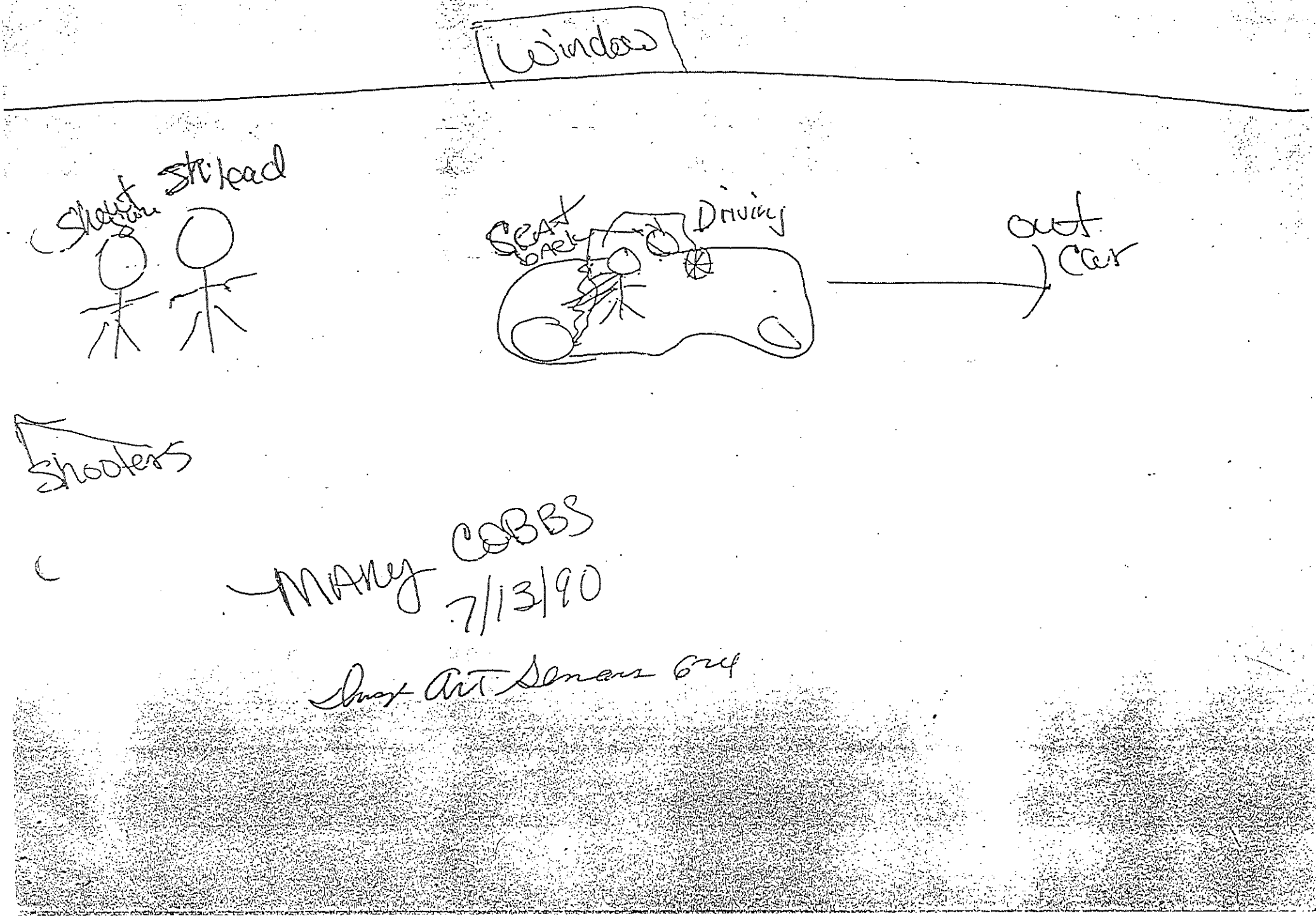
Eric

2/3/90

12:30




DOMINADOR B. VIRAY JR.
8 guys shots all black
suspect 1
guy
guy (driver)
CAR
ELSWORTH
ALEMANY


Windows
Shoulder
Strikead
Seat Belt
Driving
out
Car
Shooters
Mary Cobbs
7/13/90
Dept Art Seniors 6x4

I, MARCUS MENDEZ, hereby declare as follows:

1. I make all of the following statements based on personal knowledge.

2. I was born on May 18, 1976.

3. I grew up in the Alemany Projects in San Francisco, CA. Maurice "Twan" Caldwell also lived there and I knew him when we were younger. I have always been on good terms with him, but we have never been close friends. I have spoken to Maurice Caldwell once since he has been imprisoned for the shooting I heard when I was 14 or 15.

4. One night, when I was approximately 14 or 15, I heard a number of shots being fired. It was late Saturday night/early Sunday morning and I was watching Showtime at the Apollo. At the time, I lived at 558 Alemany Blvd. with my mother, and our kitchen door overlooked Ellsworth Street. After the shots were fired, I went to the kitchen door, opened it and looked out. I saw a group of people gathered together, whom I could not identify, and saw Maurice Caldwell run towards the group. He did not have anything in his hands and was not holding a gun. I closed the door and went to look out my bedroom window. I heard no further shots.

5. When I learned that Maurice Caldwell was on trial for the shooting that I heard, I did not believe he could have been responsible because I had seen him empty-handed running toward the shooting after I had heard shots so I went to court to testify to what I have said in this declaration, but I was never called to testify.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed on January 12, 2009, in San Francisco, California.

Marcus Mendez

I, Craig K. Martin, hereby declare as follows:

1. I make all the following statements based on personal knowledge.

2. I am an attorney licensed to practice law in the State of California.

3. In late 1990 through May of 1991, I represented Maurice Antwone Caldwell on murder and related charges in San Francisco Superior Court, Case No. 138408. Maurice Caldwell retained me to represent him. I no longer have a file because I sent it to Mr. Caldwell's appellate attorney.

4. I did not hire an investigator to work on this case.

5. Before trial, Mr. Caldwell told me that he ran out after the shooting had occurred and saw Henry Martin with a shotgun. Mr. Caldwell further related that he then spoke to Marritte Funches and Eric Brown, who were standing nearby. They told him that some people had come through to buy drugs and that after some argument about the drugs, Eric punched one of the buyers in the face and then Marritte shot and killed one of the other buyers with a handgun.

6. Both before and during trial, only one witness, Mary Cobbs, identified Maurice as a perpetrator in the charged crime. Before trial I did not investigate whether from her vantage point she could actually see the area where she claimed she saw Mr. Caldwell standing with a shotgun. Before trial, I did not interview her about what she saw, or about her identification of my client.

7. I have no recollection of interviewing, or attempting to interview Marritte Funches, whom two defense witnesses identified as the pistol shooter.

8. Mr. Caldwell always maintained that he did not participate in the crime, but ran out of a nearby building after the shots were fired. He insisted that I present that as his defense to the jury. I believe that the better strategy would have been to agree that Ms. Cobbs saw Mr. Caldwell shooting at the car as it drove away and argue that his shotgun blasts at the car could not have killed the victim, given that the primary cause of death was a pistol wound.

9. Mr. Caldwell also did not listen to my advice about improving his appearance for the jury by cutting his hair and his nails and not frowning.

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

Executed on: January 6, 2009, in San Francisco, California.

Craig Kenneth Martin

I, Maurice Antwone Caldwell, hereby declare as follows.

1. I was born on August 17, 1967.

2. In 1991, under San Francisco Superior Court No. 138408, I was convicted of the murder of Mr. Judy Acosta and related offenses that occurred on Ellsworth Street in the Alemany Projects in San Francisco on June 30, 1990. I received a sentence of 27 years to life, which I am currently serving in Folsom State Prison.

3. I swear that I am innocent of this crime and I have always maintained my innocence of this crime.

4. I was born in San Francisco and grew up in the Alemany Projects, and except when incarcerated, always lived in or near the neighborhood. From August of 1988 until September of 1990, I lived in the Alemany Projects with my friend Betty Jean Tyler. For at least ten months of that time, Betty Jean Tyler and I lived next door to Mary Cobbs. I saw Mary Cobbs often and knew her by name, although we never spoke.

5. On July 30, 1990, I was upstairs with Tina McCullum in my aunt Deborah Rodriguez' home in the Alemany Projects. I heard some shots fired, pulled on a pair of pants and tank top and ran out to see what happened. I learned that Marritte Funches had killed someone who had come through the neighborhood to buy drugs.

6. On July 13, 1990, San Francisco Police Officer Kit Crenshaw stopped me and ordered me to get up against the wall. When I asked what this was about, he told me that he would ask the questions and that I had better answer them. He

took my arm and led me to Mary Cobbs' front door, which was immediately next door to mine. He knocked on the door and Mary Cobbs answered. While I was standing next to him, Crenshaw asked Ms. Cobbs to get the homicide inspector who was interviewing her. When the homicide inspector came to the door, Officer Crenshaw told him that I was Maurice Caldwell, a.k.a. Twone. Officer Crenshaw then asked the homicide inspector for the car keys. All of this conversation was recorded and could be heard on the original tape of Mary Cobbs' interview, which was played in court during the trial.

7. Officer Crenshaw then took me from the apartment complex, placed me in the back seat of the police car, and questioned me about the shooting that had occurred on June 30, 1990. I told him that I was not involved and that I was in my aunt and uncle's house on that night. Officer Crenshaw and I knew each other because he frequently worked in the Alemany Projects. We agreed that shooting a drug purchaser was not my modus operandi and after we spoke, he released me. He did not question me about any other incidents or crimes.

8. On September 9, 1990, I was arrested and charged with the murder of Judy Acosta.

9. Before trial, Andrena Gray, who was my girlfriend at the time, and her mother Mary Gray hired and paid attorney Craig Martin to represent me in all proceedings, including trial. I told him everything I knew and saw about the shooting, which is the following:

On the night of the shooting, I was at Deborah Rodriguez' apartment on Alemany Street in the Alemany Projects in San Francisco, upstairs in bed with Tina McCullum. I heard gunshots, quickly put on a white tank top and a pair of sweatpants, and ran downstairs and outside to see what had happened. I ran on the path between the apartments and Alemany Street toward the area of Ellsworth Street from where it sounded as if the shots had come. I saw Henry Martin standing at the corner of the 947 Ellsworth Street building in which Mary Cobbs lived, firing a shotgun. I could not see what he was shooting at. I saw him fire one shot and then take off running down Ellsworth Street. I saw Marritte Funches and Eric Brown standing at the back corner of the same building so I stopped to ask them what happened. I knew both of them, and Henry Martin, from the neighborhood. Eric and Marritte told me that some people had come from outside of the neighborhood to buy drugs from them and that they got into a fight with them over the cost of the crack cocaine. They told me that Eric punched one of the buyers and Marritte shot and killed one of them. I then returned to Ms. Rodriguez' home, and walked Tina McCullum back to her house up the hill with my friend Mark Darden.

10. I have drawn a diagram of where I ran and what I saw, which I have signed and attached as an exhibit to this declaration.

11. Despite the fact that I told Craig Martin this information and asked him about it before trial, Mr. Martin never told me that he interviewed Marritte Funches, Eric Brown or Henry Martin, nor did I see any investigation reports indicating that he interviewed these people.

12. I also informed Mr. Martin of everyone I knew who may have had a vantage point and might have seen the crime occur, and so might be able to identify the participants and exonerate me, including Marcus Mendez, Vivian Irving, James Green, Shawn Johnson, Maurice Tolliver, James Lucas and Anthony Moore. Again, Mr. Martin never informed me that he interviewed any of these people, nor did I see or receive investigation reports indicating that he had interviewed any of these possible eyewitnesses.

13. When I asked Mr. Martin if he had interviewed all the witnesses, he told me that he did not need to interview all the people I had told him about because he knew I was innocent. He convinced me that he did not need a lot of witnesses to testify to the same thing, especially given the weakness of the prosecution's case.

14. Craig Martin never told me that he had hired an investigator to work on my case. I have never met or spoken to any investigator hired by Mr. Martin to work on my case, and have never seen a single investigation report from my case.

15. I wanted to testify on my own behalf to tell the jury that I was not involved in this crime in any way. I told this to Mr. Martin but he insisted that I not do so. He convinced me that we were winning and stated that he would walk out on my case if I took the stand because it would mess up his winning case.

16. I also asked Mr. Martin to get identification photographs of the real perpetrators and suggested that he and the District Attorney show the photos

to the victims and witnesses to help prove my innocence and demonstrate who the real killers were, but he never did so.

17. Mr. Martin also failed to object to testimony about my drug dealing, fighting and other bad acts that were not related to the murder.

18. I knew Marritte Funches well because we were both from the Alemany Projects and we spent a lot of time together during the year prior to my arrest for this crime. However, after he shot his step-father in 1989, I started to distance myself from him. Although we were both well-aware of the fact that he was responsible for killing Judy Acosta, I never expected him to come forward and admit his own responsibility for that offense. I have not had any contact with Marritte since I was convicted of the murder of Mr. Judy Acosta. On November 17, 2008, when Paige Kaneb and Courtney Smith from the Northern California Innocence Project visited me in Folsom State Prison, I learned for the first time that Marritte had confessed to killing Mr. Judy Acosta, admitted I was not involved, and signed a declaration stating these facts.

19. At my request, and with my informed consent and authorization, the Northern California Innocence Project (NCIP) has conducted extensive investigation of my case and assisted me in the preparation of this petition for writ of habeas corpus. NCIP obtained the evidence necessary to file this petition for writ of habeas corpus and prove my innocence. Since agreeing to investigate my claim of innocence, NCIP's attorneys and representatives have remained in regular contact with me, kept me informed of the investigation and its results,

and have visited me in Folsom State Prison in Folsom, California. I trust NCIP, have informed its attorneys and representatives of everything I know about the murder of Mr. Judy Acosta and shared with them all the documents I have retained. I am indigent, have no independent source of income, own no real property, and have been incarcerated for the past 18 years. I was indigent when I was arrested and charged with this crime. My ex-girlfriend and her mother paid for my trial attorney, Craig Martin because I could not afford to. After my conviction, I remained indigent and was represented by court appointed counsel Donald Bergerson on appeal. Because of the extensive commitment of time and effort NCIP has devoted to becoming familiar with the facts and legal issues involved in my case, their familiarity with the habeas corpus process, their detailed knowledge of my case, and my full trust and confidence in their abilities, I request that NCIP be appointed to represent me in any and all further proceedings regarding this matter.

I swear under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed on February 1, 2009, at Folsom, California.

Mr. Maurice Antwone Caldwell

Maurice Antwone Caldwell

PROOF OF SERVICE

I declare that I am over the age of eighteen years, not a party to this action, and my business address is 500 El Camino Real, Santa Clara, California, 95053-0422.

On the date shown below I served the enclosed PETITION FOR WRIT OF HABEAS CORPUS by United States mail, postage pre-paid, on the following:

San Francisco District Attorney's Office
Hall of Justice
850 Bryant Street, Room 322
San Francisco, CA 94103

Office of the Attorney General
1300 "I" Street
P.O. Box 944255
Sacramento, CA 94244-2550

Sacramento County District Attorney's Office
901 G Street,
Sacramento, CA, 95814

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

Executed on February 17, 2009, at Santa Clara, California.

Sandy Lichau