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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

RAFAEL MADRIGAL, JR.,	)	Case No. CV 07-7251-GAF (MLG)
	)	
Petitioner,	)	REPORT AND RECOMMENDATION OF
	)	UNITED STATES MAGISTRATE JUDGE
v.	)	
	)	
JAMES YATES, Warden	)	
	)	
Respondent.	)	
	)	
	)	

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This is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. On January 18, 2002, a Los Angeles County Superior Court jury convicted Petitioner Rafael Madrigal, Jr. of the attempted murder of Ricardo Aguilera (Cal. Penal Code §§ 664, 187(a)). The jury also found true that Petitioner personally used a handgun (Cal. Penal Code § 12022.53), and that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang. (Cal. Penal Code § 186.22(b)(1)). (Clerk's Transcript ("CT") 54-55.) Petitioner was sentenced to a term of 25-years-to-life with the possibility of parole on the attempted murder charge, plus an additional 28 years on the gang enhancement. (CT 134.)

1           Petitioner raises four grounds for relief in this petition: (1)  
2 ineffective assistance of counsel ("IAC") for failure to identify and  
3 present exculpatory evidence; (2) IAC for failure to put Petitioner  
4 on the witness stand after informing the jury that Petitioner would  
5 testify; (3) IAC for failure to investigate and present corroborating  
6 witness testimony to support Petitioner's alibi that he was at work  
7 at the time of the Aguilera shooting; and (4) a *Brady*<sup>1</sup> claim based on  
8 the prosecution's failure to disclose exculpatory evidence.

9  
10 **I. Facts and Procedural History**

11 **A. Facts<sup>2</sup>**

12           During the summer of 2000, members of the rival Marianna  
13 Maravilla ("Marianna") and Ford Maravilla ("Ford") gangs of East Los  
14 Angeles engaged in a series of retaliatory attacks, leading to the  
15 Aguilera shooting. The attacks began on May 27, 2000, when Marianna  
16 gang member Steve "Pollo" Romero was shot and killed. (Reporter's  
17 Transcript ("RT") 991.) Marianna retaliated, resulting in the  
18 shooting death of Ford gang member Marcos "Fat Boy" Torres on June  
19 29, 2000. (RT 991-92.) The Aguilera shooting followed six days  
20 later.

21           On the afternoon of July 5, 2000, Ricardo Aguilera was visiting  
22 Michael and Carlos Moreno in East Los Angeles. Michael Moreno had  
23 previously been a Marianna gang member. (RT 409.) Sometime between  
24 3:15 and 3:20 p.m., Michael Moreno and Aguilera were outside when a

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25           <sup>1</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

26           <sup>2</sup> These facts are drawn both from the California Court of Appeal  
27 decision in Petitioner's case and the trial transcript. *People v.*  
28 *Rafael Madrigal, Jr.*, Case No. B170431 (unpublished opinion). (Lodgment  
11.)

1 truck and a car slowed in front of the Morenos' apartment. Michael  
2 and Aguilera ran inside and Michael told his mother that Ford gang  
3 members were outside planning to do something. Michael indicated  
4 that "Go-Go," later identified as Petitioner's co-defendant,  
5 Francisco Olivares, was one of the individuals in the truck.

6 Michael, Carlos and Aguilera went outside to bring in the  
7 family's other children. While they were outside, the truck stopped  
8 at the apartment's driveway and the passenger repeatedly asked  
9 Aguilera, "Where are you from[?]" Aguilera understood that the  
10 passenger was asking for his gang affiliation and replied three times  
11 that he was from "nowhere." Aguilera turned and ran towards the  
12 apartment. (RT 257.) The passenger then fired several shots from the  
13 car, one of which hit Aguilera in the back of the head. (RT 257.)  
14 Aguilera survived the shooting.

15 Aguilera could not identify the shooter, but told a Los Angeles  
16 County Sheriff's detective that he had previously seen the shooter at  
17 Baby's Liquors, a Ford gang hangout on Olympic Boulevard. (RT 624.)  
18 On July 11, 2000, Carlos Moreno identified a photograph of  
19 Petitioner, taken from the Los Angeles County Sheriff's gang  
20 identification book, as the passenger and shooter.<sup>3</sup>

21 Based on this identification, Petitioner was arrested on July  
22 20, 2000. (RT 556.) At the time of his arrest, Petitioner was  
23 married with three children, had been working steadily since 1994,  
24 had moved away from East Los Angeles to Riverside County, and owned  
25 a home. He had no prior record except for a misdemeanor conviction  
26 for possession of an item worth less than \$400 with the serial number

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27  
28 <sup>3</sup> At trial, Carlos testified that he never actually saw the  
passenger holding a gun. (RT 436.)

1 removed (Cal. Penal Code § 537(e)(1)).

2 **B. Petitioner's Trial**

3 On January 5, 2001, the state filed a one-count information  
4 charging Petitioner with the attempted murder of Aguilera. The  
5 information also alleged firearm use and gang enhancements. (CT 54-  
6 55.) The state filed an amended information adding Olivares as a co-  
7 defendant on the same charges, and also charging Olivares with  
8 assault with a deadly weapon (Cal. Penal Code § 245(a)(2)). (CT 60-A-  
9 C.) The trial of Petitioner and Olivares began on January 4, 2002.

10 **1. The Prosecution's Case**

11 Three eyewitnesses linked Petitioner and/or his co-defendant  
12 Olivares to the shooting: Carlos Moreno, and Jessica and Salvador  
13 Huezo, teenage neighbors of the Morenos. As noted above, on July 11,  
14 2000, Carlos Moreno identified Petitioner from a series of  
15 photographs as the passenger of the truck and the shooter.<sup>4</sup> (RT 394-  
16 96.) However, Carlos failed to identify Petitioner as the passenger  
17 during a corporeal lineup held in July 2001. (RT 404, 455.) Carlos  
18 testified at trial that he had been reluctant to participate in the  
19 lineup due to concern for his family's safety.<sup>5</sup> (RT 397.) Although  
20 Carlos' fear for his family's safety was "in [his] mind at the time"  
21 of the lineup, he stated that the reason he did not identify  
22 Petitioner at the lineup was that, "at the time [he] really didn't

23  
24 <sup>4</sup> The photo used to identify Petitioner apparently depicted him at  
25 about 17 years of age (RT 748), whereas he was 25 years old in July  
26 2000.

27 <sup>5</sup> The basis for Carlos' concern was a police report that was  
28 circulating on the "streets" with his name and the names of other  
witnesses, that someone had shot his brother Michael (the bullet  
apparently grazed Michael's face, causing no serious injury), and that  
he believed that he and his family were being followed. (RT 398, 401-  
402.)

1 recognize him." Carlos "did [his] best and couldn't pick anybody out  
2 that day." (RT 452.)

3 Carlos nevertheless identified Petitioner at trial as the  
4 truck's passenger. (RT 393.) He said that when he walked into the  
5 courtroom, he expected to see the shooter. (RT 452.) Carlos  
6 testified that when the shooting occurred, he was standing about  
7 eighteen feet in front of the truck. (RT 432.) He initially  
8 testified that he saw the passenger for "a good five minutes," but  
9 later testified that he saw the passenger for only a few seconds. (RT  
10 432-33.) Carlos described the passenger as a "little gang banger" in  
11 his early twenties - certainly no older than twenty-five years of age  
12 - who had a mustache and dark goatee, wore a white baseball cap with  
13 an orange brim, and appeared to have a cleanly-shaved head. (RT 419,  
14 421-22.) Carlos testified that he did not see a gun at the time of  
15 the shooting (RT 417) and never saw the passenger holding or firing  
16 a gun. (RT 391, 437.)

17 Jessica and Salvador Huevo also testified. Jessica Huevo stated  
18 that she was across the street from the Morenos' apartment when the  
19 shooting occurred and only saw the truck's driver. (RT 299.) At a  
20 live lineup in July 2001, Jessica picked out both Petitioner and  
21 another individual as possibly being the driver of the truck, but she  
22 did not identify Petitioner as the passenger. (RT 306.) In court,  
23 Jessica stated that the only reason she selected Petitioner as the  
24 driver was because he was the only one who had a goatee in the "six-  
25 pack" photographs she had been shown, and the driver of the truck had  
26 a goatee. (RT 317.) In court, she stated that she never saw the  
27 passenger of the truck. (RT 300, 316, 324.) She further testified  
28 that she did not remember seeing Petitioner in the truck on July 5,

1 2000. (RT 307.) Jessica did, however, positively identify Francisco  
2 Olivares as the driver. (RT 300.) Therefore, Jessica did not  
3 identify Petitioner at trial as being involved in the Aguilera  
4 shooting.

5 Salvador Huevo, Jessica's younger brother, testified that he was  
6 about twenty or twenty-five feet to the rear and on the passenger  
7 side of the truck when he saw the passenger lean out with a gun. (RT  
8 341, 342.) He ducked and then ran away when he saw the gun, so he  
9 did not see the passenger fire the gun. (RT 342.) Salvador testified  
10 that he saw the passenger's face and identified Petitioner in court  
11 as the passenger. (RT 345.) Salvador also testified that he had  
12 identified Petitioner in a photo "six-pack," but in fact he had never  
13 participated in a photographic lineup which included Petitioner's  
14 photo.<sup>6</sup> (RT 346-47, 587-88.) Salvador also testified that the  
15 passenger had a "goatee," although according to Salvador's  
16 description of the passenger's facial hair, the passenger did not  
17 actually have a goatee, but rather a long mustache, often referred to  
18 as a "Fu Manchu" mustache. (RT 358-59.) Salvador further described  
19 the passenger as having a shaved head, but did not recall the  
20 passenger or anyone else wearing a white baseball cap with an orange  
21 brim. (RT 359.) Finally, Salvador stated that when he walked into  
22 the courtroom that day, he expected the shooter to be there. (RT  
23 364.)

24 The final prosecution witness was Los Angeles County Sheriff's

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26 <sup>6</sup> During a sidebar between the court, the district attorney, and  
27 Petitioner's trial counsel, Andrew Stein, the district attorney stated  
28 that Salvador had never been shown a "six pack" of photos of  
Petitioner, but rather had been shown one which included Olivares, and  
therefore, Salvador was "mistaken" that he had photographically  
identified Petitioner. (RT 347.)

1 Detective Michael Delmuro, an expert on East Los Angeles gangs, who  
2 had investigated the Aguilera shooting. Detective Delmuro testified  
3 that, as of July 5, 2000, Petitioner was a Ford gang member with the  
4 nickname "Mugsy." (RT 551-52.)

5 Delmuro's testimony that Petitioner was a Ford gang member and  
6 the eyewitness identification testimony provided by Carlos Moreno and  
7 Salvador Huezo was the only evidence connecting Petitioner to the  
8 Aguilera shooting. There was no physical evidence linking Petitioner  
9 to the crime. (RT 586-87, 605.)

10 **2. Petitioner's Defense**

11 In his opening statement, Petitioner's counsel, Andrew Stein,  
12 laid out the contours of an alibi defense and a third-party  
13 culpability defense. (RT 197-200.) Stein stated that the evidence  
14 would show that Petitioner was at work at Proactive Packaging &  
15 Display in Rancho Cucamonga until 3:30 p.m. on the day of the  
16 shooting. (RT 197-99.) Stein told the jury that Robert Howards, the  
17 plant manager of Proactive Packaging, would testify that he was  
18 certain that Petitioner was at work at the time of the shooting, and  
19 that Steve Finley, Petitioner's supervisor, would also testify that  
20 Petitioner was at work in Rancho Cucamonga at the time of the  
21 shooting. (RT 199.) Stein also told the jury that Petitioner would  
22 testify about who he believed actually shot Aguilera. (RT 200.)  
23 Stein finally stated that the state's own gang expert would testify  
24 that a gang member who testifies against another member of his gang  
25 is signing his own death warrant. (*Id.*)

26 Stein first called Steve Finley as a witness. Finley testified  
27 that Petitioner ran a lamination machine and that if Petitioner had  
28 left before 3:00 p.m. on July 5, 2000, production would have stopped.

1 (RT 689, 707.) However, production documents from July 5, 2000  
2 showed ongoing production on Petitioner's machine only until 1:40  
3 p.m., after which time Petitioner's absence would not have stopped  
4 production. (RT 730, 732.) Finley also testified that Petitioner and  
5 his brother, Victor Madrigal, carpooled to work every day, clocked in  
6 and clocked out at the same time, and that Victor had clocked out at  
7 3:30 p.m. on July 5, 2000. (RT 711, 722, 728.) Finley further  
8 testified that Petitioner had not clocked out on July 5, 2000.  
9 Finley signed a time card, most likely on July 6, 2000, indicating  
10 Petitioner had been at work on July 5, 2000, until 3:32 p.m., but  
11 that he had probably done so after Victor Madrigal brought to his  
12 attention that Petitioner had not clocked out that day.<sup>7</sup> (RT 705, 721,  
13 723.) However, Finley did not specifically remember whether  
14 Petitioner and his brother left together on July 5, 2000. (RT 734.)  
15 Finley conceded that an employee could leave 30 minutes to an hour  
16 early without him noticing. (RT 728.) While Finley had told  
17 investigators in September and December 2000 that he was sure  
18 Petitioner worked his entire shift on July 5, 2000, Finley admitted  
19 that he could not be absolutely certain that Petitioner had in fact  
20 worked his entire shift that day. (RT 735, 739.)

21 Petitioner's cousin, Ricardo Pimienta, testified that Petitioner  
22 did not have a goatee when he attended Ricardo's wedding on July 1,  
23 2000, four days before the Aguilera shooting. (RT 742.) Ricardo  
24 authenticated several pictures of Petitioner taken at the wedding,  
25 which Ricardo described as depicting Petitioner without a goatee. (RT  
26

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27 <sup>7</sup> Finley had regularly handwritten in times on Petitioner's time  
28 cards that year. Thus, it was not unusual for him to have done so on  
July 5, 2000. (RT 695-704.)

1 742-43.)

2 Petitioner's wife, Veronica Madrigal, testified that she  
3 believed that the picture of Petitioner in the "six-pack" lineup  
4 photos shown to the witnesses in the Aguilera shooting depicted the  
5 way Petitioner looked when he was about sixteen years old, which was  
6 when they first began dating. (RT 748.) Veronica also testified that  
7 Petitioner drove her to work on the morning of July 5, 2000, and that  
8 because they only had one car, he drove her to work each morning  
9 before driving to his own job. (RT 750.) Veronica also testified  
10 that, although he had been a Ford gang member in high school,  
11 Petitioner was no longer a gang member. (RT 756.) On cross-  
12 examination, she conceded that, at a birthday party at his sister's  
13 house in May 2000, Petitioner had spoken with Ford gang members who  
14 were congregated in front of a house near his sister's home. (*Id.*)

15 Petitioner's defense rested with the conclusion of Veronica's  
16 testimony. (RT 759.) Stein never called Robert Howards, the plant  
17 manager of Proactive Packaging, to testify that Petitioner was at  
18 work at the time of the shooting, as he had promised in his opening  
19 statement. Stein also never put Petitioner on the stand to deny his  
20 involvement in the shooting and to identify the Ford gang member whom  
21 Petitioner believed actually shot Aguilera, even though his opening  
22 statement informed the jury that he would do so. In fact, Stein did  
23 not present evidence of third-party culpability at all. Stein came  
24 closest to doing so when he cross-examined Detective Delmuro  
25 regarding Ford gang member Manuel Mendoza. (RT 585.) Delmuro  
26 testified that, in a gang booklet photograph, Mendoza had a light  
27 goatee. (*Id.*) Delmuro also testified that Mendoza was then in  
28 custody for an unrelated shooting, but that the Los Angeles County

1 Sheriff's Department had not compared the bullets fired in that  
2 incident to the bullets fired at Aguilera. (*Id.*)

3 On January 18, 2002, after four days of deliberations following  
4 the three-day trial, the jury found Petitioner and Olivares guilty of  
5 all charges. (RT 920-23.)

6 **3. Petitioner's Motion for New Trial**

7 Prior to sentencing, the trial court granted Stein's motion to  
8 continue the case for preparation of a motion for new trial. (CT  
9 110.) After several continuances, Stein filed a motion on September  
10 6, 2002, for comparison testing of ballistic evidence from the  
11 Aguilera shooting with a .38 caliber revolver that had been seized  
12 from Manuel Mendoza on June 8, 2001. (Supplement to Clerk's  
13 Transcript ("SCT") 38, 48; RT 1001.) The results of the tests showed  
14 that the loaded .38 caliber revolver found in Mendoza's possession  
15 was the weapon used in the Aguilera shooting. (SCT 26, 64-65.) On  
16 May 9, 2003, Stein noticed a motion for a new trial to present the  
17 results of these tests as evidence of Mendoza's participation in the  
18 Aguilera shooting. (SCT 24.)

19 The trial court held a series of hearings on the motion for new  
20 trial in September 2003. At the hearing, Stein called Mendoza as a  
21 witness. After spelling his name and disclosing his date of birth,  
22 Mendoza asserted his Fifth Amendment right to remain silent on every  
23 question asked by Stein. (RT 935-950.)

24 Stein then examined Petitioner. Petitioner testified that in  
25 May 2000, he saw Mendoza and other Ford gang members at his sister  
26 Lorena Parra's house in East Los Angeles, where he often visited on  
27  
28

1 the weekends.<sup>8</sup> (RT 954-55, 957.) Petitioner testified that Mendoza  
2 had a gun and left with some of the gang members. (RT 955.) When  
3 Mendoza and the others returned after 20 minutes, Mendoza reportedly  
4 told Petitioner to get off the street because he had just "lit up a  
5 dude [Steve "Pollo" Romero] from Marianna at Baby's." (RT 956.)  
6 Petitioner testified that he was again at his sister's house in June  
7 2000 when he saw Mendoza and a gang member Petitioner knew only as  
8 "Bam-Bam." Mendoza and Bam-Bam reportedly told Petitioner to leave  
9 because "they had just blasted at Largo," a.k.a. "Froggy," a former  
10 Ford gang member who had become a Marianna gang member. (RT 957-58.)  
11 Petitioner testified that he was also at his sister's house on the  
12 day that Marcos "Fat Boy" Torres, a Ford gang member, was killed. (RT  
13 958-59.) Mendoza and several other Ford gang members whom Petitioner  
14 saw there reportedly discussed Torres' killing as retaliation for  
15 Romero's killing. (RT 960.)

16 Petitioner then testified about his interactions in jail with  
17 Mendoza - who was incarcerated at that time for an unrelated offense  
18 - and Olivares. (RT 964.) Petitioner testified that, sometime  
19 between July and December 2000, he was present during a conversation  
20 between Mendoza and Olivares in which they discussed a gun Mendoza  
21 had hidden and that Petitioner later believed to be the gun used in  
22 the Aguilera shooting. (RT 964.) Petitioner further testified that,  
23 sometime in the summer or fall of 2001, he observed Mendoza and  
24 Olivares arguing about the gun. (RT 967.) Olivares reportedly  
25 reproached Mendoza for getting arrested with the .38 caliber revolver  
26 after he had told Mendoza to get rid of it. (Id.) Petitioner also

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28 <sup>8</sup> Petitioner later clarified that the gang members were not at his  
sister's house, but congregated around a neighboring house.

1 testified that Mendoza later told Olivares that if he had known that  
2 Olivares was "going to act this way [about the gun] [Mendoza] would  
3 have never have done nothing with him." (RT 968.) Petitioner  
4 interpreted this as an admission by Mendoza that he shot Aguilera.  
5 (RT 968, 985.)

6 Petitioner testified that prior to trial, he had told Stein that  
7 Mendoza was Aguilera's shooter, but had not informed Stein why he  
8 believed this. (RT 968.) Petitioner testified that he had failed to  
9 inform Stein because: (1) Olivares threatened that Petitioner would  
10 be stabbed if he did so, and (2) Petitioner was at work at the time  
11 of the shooting, was demonstrably innocent, and therefore had no  
12 reason to implicate anybody else for the crime. (RT 969, 989.)  
13 Petitioner testified that he finally informed Stein of the jailhouse  
14 conversations and arguments between Mendoza and Olivares in March  
15 2003.<sup>9</sup> (RT 982, 985.)

16 Stein lastly questioned Detective Delmuro. Delmuro confirmed  
17 that Petitioner had put his life and the well-being of his family in  
18 jeopardy by implicating Mendoza. (RT 994-95.) Delmuro testified that  
19 in 2000, Mendoza was an active Ford gang member. (RT 992.) Police  
20 reports and testimony by Delmuro showed that Mendoza was the prime  
21 suspect in the March 11, 2001, walk-up shooting of Fraser Maravilla  
22 gang member Jose Vera with a .380 caliber semi-automatic handgun (to  
23 be distinguished from the .38 caliber revolver used in the Aguilera

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24  
25 <sup>9</sup> It is clear that Petitioner actually gave Stein this information  
26 earlier than March 2003, because Stein told the court at trial in  
27 January 2002 about the jailhouse conversation and argument between  
28 Olivares and Mendoza: "My client, if he testifies, is going to testify  
[that Olivares] and Mr. Mendoza, who is presently in custody for an  
unrelated shooting, confessed the crime to each other in front of him  
while he was in the county jail." (RT 592.) Petitioner's confusion on  
the timing is of no consequence here.

1 shooting). (RT 995, 1004; SCT 84-89.) Delmuro testified that it was  
2 common for a single weapon, such as the .38 caliber revolver, to be  
3 passed among members of the same gang. (RT 1001.)

4 Delmuro also testified regarding his failure to disclose  
5 information about Mendoza to the district attorney in Petitioner's  
6 case. Delmuro testified that he had never informed the prosecutor  
7 that Mendoza was a suspect in another gang shooting, even after the  
8 prosecutor told Delmuro that Stein believed Mendoza to be Aguilera's  
9 actual shooter. (RT 993, 1002-1003.) Delmuro also testified that he  
10 had not believed that the .38 caliber revolver found in Mendoza's  
11 possession on June 8, 2001, was used in the shooting of Aguilera  
12 because Petitioner had already been arrested for that crime. (RT  
13 1000-1001.)

14 The trial court denied Petitioner's motion for a new trial on  
15 September 26, 2003. (RT 1018.) As noted, the court sentenced  
16 Petitioner to 25-years-to-life with the possibility of parole plus an  
17 additional 28 years for the enhancements. (CT 131, 134-35.)

18 **C. Post-Sentence Procedural History**

19 Petitioner appealed his conviction to the California Court of  
20 Appeal, claiming that Stein was ineffective in failing to conduct  
21 ballistics comparison testing on the bullet casings from Aguilera's  
22 shooting with the .38 caliber revolver seized from Manuel Mendoza on  
23 June 8, 2001. (Lodgment 5.) On May 26, 2005, while his direct appeal  
24 was pending, Petitioner filed a petition for writ of habeas corpus in  
25 the California Court of Appeal, claiming ineffective assistance of  
26 counsel for failure to present the exculpatory ballistics evidence  
27 and other evidence of third-party culpability. (Lodgment 8.) On June  
28 6, 2005, the California Court of Appeal ordered that the state habeas

1 petition be considered concurrently with Petitioner's direct appeal.  
2 (Lodgment 9.) On October 17, 2005, the California Court of Appeal  
3 affirmed Petitioner's conviction (Lodgment 11), and also denied his  
4 petition for writ of habeas corpus. (Lodgment 12.)

5 On November 21, 2005, Petitioner filed a petition for review in  
6 the California Supreme Court (Lodgment 13), which was summarily  
7 denied on January 4, 2006. (Lodgment 14.) On October 31, 2006,  
8 Petitioner filed a petition for writ of habeas corpus in the  
9 California Supreme Court, raising the following grounds for relief:  
10 (1) IAC for multiple failures to present and investigate evidence of  
11 third-party culpability; (2) IAC for failure to investigate and  
12 present corroborating evidence of Petitioner's alibi defense; (3) IAC  
13 for failure to investigate and present other exculpatory evidence to  
14 corroborate Petitioner's innocence; and (4) denial of due process by  
15 failure of the prosecution to disclose exculpatory evidence.  
16 (Lodgment 15.)

17 Among the 23 exhibits filed in support of Petitioner's petition  
18 for writ of habeas corpus to the California Supreme Court was the  
19 transcript of a surreptitiously taped jailhouse conversation between  
20 Petitioner's co-defendant Olivares and Olivares' girlfriend on August  
21 17, 2001. (Lodgment 15, Ex. I.) Stein had been given a copy of the  
22 tape of this conversation on November 5, 2001, prior to trial. (CT  
23 76.) In the conversation, Olivares told his girlfriend that  
24 Petitioner had enlisted his brother, Victor Madrigal, to "find out  
25 who really did it," i.e., who really shot Aguilera. (*Id.*) This  
26 angered Olivares, who believed this to be "none of [Petitioner's]  
27 business." (*Id.*) Olivares also said that Petitioner "looks at me or  
28 he looks at Dreamer [Mendoza's gang moniker] you know what I'm

1 saying? So he either already knows but ... he don't know shit you  
2 know, he don't know what happened...." (*Id.*) The exhibits also  
3 included a letter from Stein to Eric Multhaup, who was representing  
4 Petitioner in his habeas petition before the California Supreme  
5 Court, in which Stein attempted to explain some of the choices he  
6 made at trial. (Lodgment 15, Ex. W.) The petition for writ of habeas  
7 corpus was summarily denied by the California Supreme Court on June  
8 13, 2007. (Lodgment 16.)

9 On November 1, 2007, Petitioner filed a petition for writ of  
10 habeas corpus in this Court, raising the same grounds for relief that  
11 were raised in the petition for writ of habeas corpus filed in the  
12 California Supreme Court. On February 5, 2008, Respondent filed an  
13 answer. On February 25, 2008, the Court appointed attorney Eric  
14 Multhaup to represent Petitioner. Petitioner is also represented pro  
15 bono by attorneys for the California Innocence Project. On May 1,  
16 2008, Petitioner filed a request for authorization to conduct  
17 discovery and a motion for an evidentiary hearing, which was granted  
18 in part and denied in part on July 3, 2008.

19 On November 3, 2008, the Court held an evidentiary hearing to  
20 more fully develop the record related to Petitioner's IAC and *Brady*  
21 claims. At the hearing, the Court heard testimony from Petitioner;  
22 Robert Howards, manager of Proactive Packaging, where Petitioner was  
23 employed at the time of the shooting; Petitioner's brother, Victor  
24 Madrigal; and Petitioner's trial counsel, Andrew Stein.<sup>10</sup> The Court  
25 also received records filed under seal from the Los Angeles County  
26 Sheriff's Office regarding the investigation of the May 27, 2000,

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27  
28 <sup>10</sup> The substance of each witness' testimony will be discussed in  
detail below.

1 murder of Steve "Pollo" Romero.

2 On December 5, 2008, Petitioner filed a post-hearing brief. On  
3 December 19, 2008, Respondent filed a reply to Petitioner's post-  
4 hearing brief. On December 29, 2008, Petitioner filed a reply to  
5 Respondent's post-hearing brief. On January 2, 2009, Respondent  
6 filed a sur-reply to Petitioner's reply brief. The matter is now  
7 ready for decision.

8

9 **II. Standard of Review**

10 Under the Antiterrorism and Effective Death Penalty Act of 1996  
11 ("AEDPA"), 28 U.S.C. § 2254(d)(1), a federal court may grant a writ  
12 of habeas corpus to a state prisoner on a claim that was decided on  
13 the merits in state court only if the state court's decision was  
14 "contrary to, or involved an unreasonable application of, clearly  
15 established Federal law, as determined by the Supreme Court of the  
16 United States." The only source for clearly established federal law  
17 is the holdings of the Supreme Court, as opposed to the dicta, at the  
18 time of the state court decision. *Carey v. Musladin*, 549 U.S. 70, 74  
19 (2007).

20 The Supreme Court has explained that a state court decision is  
21 "contrary to" clearly established federal law if the state court  
22 "applies a rule that contradicts the governing law set forth in our  
23 cases, or if it confronts a set of facts that is materially  
24 indistinguishable from a decision of this Court but reaches a  
25 different result." *Brown v. Payton*, 544 U.S. 133, 141 (2005). "A  
26 state court need not cite or even be aware of [Supreme Court]  
27 precedents, 'so long as neither the reasoning nor the result of the  
28 state-court decision contradicts them.'" *Mitchell v. Esparza*, 540

1 U.S. 12, 16 (2003) (per curiam) (quoting *Early v. Packer*, 537 U.S. 3,  
2 8 (2002) (per curiam)).

3 A state court decision involves an "unreasonable application of"  
4 clearly established federal law if the state court identifies the  
5 correct governing legal principle from the decisions of the Supreme  
6 Court, but unreasonably applies that principle to the facts of the  
7 case. *Brown*, 544 U.S. at 141; *Williams v. Taylor*, 529 U.S. 362, 407-  
8 08, 413 (2000). It is not enough that a federal court conclude "in  
9 its independent judgment" that the state court decision is incorrect  
10 or erroneous. *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004)  
11 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per  
12 curiam)). "The state court's application of clearly established law  
13 must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63,  
14 75 (2003). AEDPA imposes a "'highly deferential standard for  
15 evaluating state-court rulings' which demands that state-court  
16 decisions be given the benefit of the doubt." *Bell v. Cone*, 543 U.S.  
17 447, 455 (2005) (quoting *Woodford*, 537 U.S. at 24).

18 The claims raised in the instant petition were raised before the  
19 California Supreme Court, but that court did not issue a reasoned  
20 decision. (Lodgments 15 and 16.) Accordingly, this Court must "look  
21 through" the unexplained California Supreme Court decision to the  
22 last reasoned decision as the basis for the state supreme court  
23 judgment. See *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 (9th Cir.  
24 2000) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)); see  
25 also *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005) ("In  
26 reviewing a state court's summary denial of a habeas petition, this  
27 court must 'look through' the summary disposition to the last  
28 reasoned decision.").

1 The California Court of Appeal, in a reasoned opinion, rejected  
2 Petitioner's IAC claim regarding Stein's failure to have ballistics  
3 testing on the bullet casings found at the crime scene compared to  
4 the gun seized from Manuel Mendoza. (Lodgment 11.) The California  
5 Court of Appeal also issued a written decision on the merits  
6 rejecting Petitioner's IAC claim arising from Stein's failure to call  
7 Robert Howards as a defense witness. (Lodgment 12.) Therefore, this  
8 Court will consider the reasoning of the California Court of Appeal  
9 to determine whether the California Supreme Court's decision is  
10 contrary to, or an unreasonable application of, clearly established  
11 federal law.

12 However, as there is no reasoned state court decision denying  
13 any of the other claims raised in this petition, this Court must  
14 assume that the state court has considered all the issues and  
15 "perform an 'independent review of the record' to ascertain whether  
16 the state court decision was objectively unreasonable." *Reynoso v.*  
17 *Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006) (quoting *Himes v.*  
18 *Thompson*, 336 F.3d 848, 853 (9th Cir. 2003) (explaining that an  
19 independent review of the record "is not *de novo* review of the  
20 constitutional issue, but rather, the only method by which [the  
21 court] can determine whether a silent state court decision is  
22 objectively unreasonable").

23  
24 **III. Ineffective Assistance of Counsel for Failure to Investigate and**  
25 **Present Exculpatory Evidence**

26 Petitioner first contends that Stein's representation was  
27 deficient for failing to investigate and present exculpatory  
28 evidence. (Pet. at 6.) More specifically, Petitioner claims that

1 Stein provided ineffective assistance by: (1) failing to present as  
2 evidence at trial the jailhouse tape of co-defendant Olivares'  
3 conversation with his girlfriend in which Olivares made statements  
4 that seem to exculpate Petitioner; (2) failing to call Petitioner to  
5 the stand to testify to his innocence and the third-party culpability  
6 of Manuel Mendoza after promising the jury in opening statement that  
7 Petitioner would testify; (3) failing to interview or call Robert  
8 Howards, the plant manager at Petitioner's place of employment, who  
9 would have testified that Petitioner was at work, forty miles away,  
10 at the time of the Aguilera shooting, after telling the jury that he  
11 would testify; and (4) failing to interview or call Petitioner's  
12 brother, Victor Madrigal, as a witness at trial.

13 The Sixth Amendment right to counsel guarantees not only  
14 assistance, but effective assistance of counsel. *See Strickland v.*  
15 *Washington*, 466 U.S. 668, 687 (1984); *Duncan v. Ornoski*, 528 F.3d  
16 1222, 1233 (9th Cir. 2008). To prevail on a claim of ineffective  
17 assistance of counsel, a petitioner must establish two things: (1)  
18 counsel's performance fell below an "objective standard of  
19 reasonableness" under prevailing professional norms; and (2) the  
20 deficient performance prejudiced the defense, i.e., "there is a  
21 reasonable probability that, but for counsel's unprofessional errors,  
22 the result of the proceeding would have been different." *Strickland*,  
23 466 U.S. at 687-88, 694. A failure to make either showing is grounds  
24 for denying a petitioner's claim. *Id.* at 697.

25 With respect to the performance prong of the *Strickland*  
26 standard, a reviewing court must examine the reasonableness of  
27 counsel's challenged conduct under all the circumstances, including  
28 the facts of the particular case as viewed at the time of the

1 conduct. *Strickland*, 466 U.S. at 690. Scrutiny of counsel's  
2 performance must be "highly deferential," and the petitioner must  
3 overcome the presumption that, under the circumstances, the  
4 challenged action might be considered strategically sound. *Id.* at  
5 689; see also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam)  
6 ("The Sixth Amendment guarantees reasonable competence, not perfect  
7 advocacy judged with the benefit of hindsight."); *Bell v. Cone*, 535  
8 U.S. 685, 702 (2002) ("We cautioned in *Strickland* that a court must  
9 indulge a 'strong presumption' that counsel's conduct falls within  
10 the wide range of reasonable professional assistance because it is  
11 all too easy to conclude that a particular act or omission of counsel  
12 was unreasonable in the harsh light of hindsight."); see also  
13 *Pinholster v. Ayers*, 525 F.3d 742, 760 (9th Cir. 2008).

14 To establish prejudice under the second prong of *Strickland*, the  
15 petitioner must show that there is a reasonable probability that, but  
16 for counsel's unprofessional errors, the result of the proceeding  
17 would have been different. A reasonable probability is a probability  
18 sufficient to undermine confidence in the outcome." *Strickland*, 466  
19 U.S. at 694. It is not enough to show that counsel's errors had some  
20 conceivable effect on the outcome of the proceeding because  
21 "virtually every act or omission of counsel would meet that test, and  
22 not every error that conceivably could have influenced the outcome  
23 undermines the reliability of the result of the proceeding." *Id.* at  
24 693. The Ninth Circuit has recognized that "prejudice may result  
25 from the cumulative impact of multiple deficiencies." *Harris ex rel.*  
26 *Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (quoting *Cooper*  
27 *v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978)).

28 In evaluating a claim of ineffective assistance of counsel, the

1 Court must consider whether the state court's decision was  
2 objectively unreasonable under *Strickland*. See *Rompilla v. Beard*, 545  
3 U.S. 374, 380 (2005).

4 **A. Failure to Present the Jailhouse Audiotape**

5 Petitioner contends that he was deprived of effective assistance  
6 of counsel by Stein's failure to present at trial the secretly  
7 recorded jailhouse audiotape made of co-defendant Olivares'  
8 conversation with his girlfriend on August 17, 2001, during which  
9 Olivares makes statements that appear to exculpate Petitioner. (Pet'r  
10 Br. at 14.) The Court agrees with Petitioner that Stein's failure to  
11 introduce the tapes into evidence constituted ineffective assistance  
12 of counsel.

13 On November 5, 2001, prior to Petitioner's trial, the  
14 prosecution turned over to Stein a number of audiotapes. Stein  
15 sought and obtained a continuance of the trial, ostensibly to review  
16 and transcribe the tape recordings. (Evidentiary Hearing ("EH"), Ex.  
17 9 at 51.) However, Stein's trial file contains no transcripts of any  
18 audiotapes (EH, Ex. 2-a, 2-b), nor could he recall whether he ever  
19 listened to the audiotapes or arranged for transcripts of the  
20 audiotapes to be made. (EH 130-131.) The trial record demonstrates  
21 that Stein did not present any evidence of the August 17, 2001,  
22 audiotape to the jury. At the evidentiary hearing, Petitioner  
23 testified that when he asked Stein what was on the audiotapes that  
24 were turned over by the prosecution, Stein stated that "there was  
25 nothing on the tapes that could help [Petitioner] or anything that  
26 could hurt [him] on them either." (EH at 164.)

27 Relevant excerpts of the audiotape of the secretly recorded  
28 August 17, 2001, conversation between Olivares and his girlfriend are

1 as follows:

2 Olivares (co-defendant):

3 "I got in a fight."

4 Gloria (Olivares' girlfriend):

5 "Why?"

6 Olivares:

7 "I'm gonna tell you the truth. All right you ready? It's a  
8 long story. I got in a fight with Mugsy [Petitioner's  
9 nickname]."

10 Gloria:

11 "About what?"

12 Olivares:

13 "... I was in there with him and I told him you know what check  
14 this out ... I fucking heard that he told his brother to go  
15 find out who really did it and all this bullshit and I go ...  
16 what the fuck you wanna know for, it's none of your fucking  
17 business you know what I'm saying, and he goes well I'm here  
18 for you and we got into it and I go you know what - I'm not  
19 lying to you, I told him, it's none of your business why you  
20 should know, you know ... Right here I didn't put you here you  
21 know, I didn't jump you in or nothing you know. I didn't hang  
22 around with you out there, I don't hang around with you in  
23 here. I told him all that shit and you know what - he's trying  
24 to tell me like how come I don't want to tell him you know ...  
25 but you know I don't tell nobody shit you know because it's  
26 nobody's business, straight on you know ... I found out he was  
27 out there trying to fucking ask ... well he told his brother to  
28 ask the homies what happened you know so one, some foolish shy

1 boy ... My homeboy called him and ... that fool shy boy told  
2 him heh, the fool's asking you know so I told him, heh fool  
3 don't tell him shit ... no? And he said no, none of us told  
4 him shit, you know."

5 Gloria:

6 "So (unintelligible), what does he want?"

7 Olivares:

8 "Don't know. He told me what you think I'm going throw rat and  
9 I go, well, it's better, it's better this way that you don't  
10 know nothing that way I can't say if you rat you know what I  
11 mean? Uh huh. Cause to go around you have to know every detail  
12 of what happened, you know, if he doesn't know nothing it's  
13 better that way. I won't think that you know."

14 Gloria:

15 "What'd he say?"

16 Olivares:

17 "He said like well that's your opinion you know. I went that's  
18 my opinion you know and I know that .... and then that's when  
19 I told him, fool don't think that I don't know that your  
20 brother's out there asking you know ... it's none of his fucking  
21 business - I mean why does he want to know for."

22 Gloria:

23 "Oh, he got surprised?"

24 Olivares:

25 "Yeah, and he says, you know, and then after I told him that and  
26 I told him ... I know that every time you make a comment - like  
27 oh, you're a killer like you go, ya right, like you know what  
28 I mean. Cause they always clown him like ... fucking like Mugsy

1 ... putting him down and all this bullshit you know and he's  
2 like ya right and he looks at me or he looks at Dreamer [Manuel  
3 Mendoza's gang moniker] you know what I'm saying? So he either  
4 already knows but ... he don't know shit you know, he don't know  
5 what happened cause he's, he's I know he's been asking cause  
6 when I tell him I didn't have shit to do with it you know?"

7 (EH, Ex. 5, 6.)

8 It is apparent to the Court from reading the transcript and  
9 listening to the audiotape that Olivares, Petitioner's co-defendant,  
10 had recently had an argument with Petitioner regarding Petitioner's  
11 attempts to have his brother, Victor Madrigal, ask around to find out  
12 who committed the Aguilera shooting. Olivares was angry with  
13 Petitioner for making these inquiries and informed Petitioner that it  
14 was none of his business who committed the shooting. Further,  
15 Olivares repeatedly told his girlfriend that Petitioner did not know  
16 who actually committed the Aguilera shooting, although Olivares  
17 suspected that Petitioner believed Olivares and Manuel Mendoza to be  
18 the actual perpetrators.<sup>11</sup>

19 The Court finds that Stein's failure to transcribe and introduce  
20 this audiotape into evidence at trial was not reasonable under  
21 prevailing professional norms because the audiotape provides  
22 compelling evidence of Mendoza's and Olivares's involvement in the  
23

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24 <sup>11</sup> Respondent questions the tape's evidentiary value, arguing that  
25 the conversation is "confusing" because it is unclear to whom Olivares  
26 is referring in the discussion with his girlfriend. (Resp't Br. at 21-  
27 22.) The Court has listened to and read transcripts of the audiotape.  
28 Although the conversation is somewhat difficult to follow due to the  
poor quality of the recording and the extensive use of slang, the Court  
nevertheless finds that the tape is sufficiently clear to understand  
the context of the conversation between Olivares and his girlfriend, as  
well as the benefit of the tape to Petitioner's defense.

1 shooting, and of Petitioner's apparent non-involvement. *See Sanders*  
2 *v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994) (holding that trial  
3 counsel's failure to investigate evidence that someone else was the  
4 perpetrator constituted deficient performance). The failure to  
5 investigate is "especially egregious when a defense attorney fails  
6 to consider potentially exculpatory evidence." *Rios v. Rocha*, 299  
7 F.3d 796, 805 (9th Cir. 2002); *see also Reynoso*, 462 F.3d at 1112;  
8 *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999) ("A lawyer who  
9 fails to investigate, and to introduce into evidence, information  
10 that demonstrates his client's factual innocence, or that raises  
11 sufficient doubts as to that question to undermine confidence in the  
12 verdict, renders deficient performance."). "When an attorney fails  
13 to examine potentially exculpatory evidence, although he repeatedly  
14 assured the petitioner of his intention to do so, the *Strickland*  
15 presumption that the failure is 'sound trial strategy' is  
16 surmounted." *Jones v. Wood*, 114 F.3d 1002, 1011 (9th Cir. 1997).  
17 While the audiotape may not have completely demonstrated Petitioner's  
18 factual innocence, it likely would have "raise[d] sufficient doubts  
19 as to that question as to undermine confidence in the verdict," *Lord*,  
20 184 F.3d at 1093, particularly if introduced in conjunction with the  
21 alibi evidence that Stein also failed to present.

22 The Ninth Circuit has found evidence of "third party  
23 confessions" to be "highly exculpatory" because "if believed, would  
24 necessarily exonerate the defendant of the primary offense." *Perry*  
25 *v. Rushen*, 713 F.2d 1447, 1452 (9th Cir. 1983) (emphasis in  
26 original). There is simply no reasonable explanation for Stein's  
27 failure to introduce the jailhouse audiotape of Olivares' August 17,  
28 2001 conversation with his girlfriend, nor did Stein provide any

1 reasons during his testimony at the evidentiary hearing. Nor may  
2 this Court "assume facts not in the record in order to manufacture  
3 a reasonable strategic decision for [Petitioner's] trial counsel."  
4 *Alcala v. Woodford*, 334 F.3d 862, 871 (9th Cir. 2003). The Court  
5 must decide whether Stein's performance was deficient "based on what  
6 [Stein's] reasons for his decision actually were, not on the basis  
7 of what reasons he could have had for those decisions." *Moore v.*  
8 *Czerniak*, 534 F.3d 1128, 1144 (9th Cir. 2008).<sup>12</sup>

9 Stein failed to present highly reliable and exculpatory evidence  
10 in support of a defense that someone else, namely Olivares and Manuel  
11 Mendoza, committed the shooting.<sup>13</sup> Furthermore, Stein could have  
12 sought to authenticate and introduce the audiotapes into evidence  
13 without even having to call Petitioner to testify. This makes  
14 Stein's failure to introduce the tapes into evidence even more  
15 egregious. Accordingly, the Court finds that this amounts to  
16 deficient performance by Stein.

17 I further find that Petitioner has adequately demonstrated  
18

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19 <sup>12</sup> Respondent speculates as to possible reasons why Stein did not  
20 introduce the tape at trial, including that it would have been  
21 difficult to authenticate the audiotape because Olivares would have  
22 refused to testify and there is no record that Olivares' girlfriend was  
23 available. (Resp't Reply Br. at 22-23.) As discussed above, the Court  
24 is not permitted to speculate as to Stein's purported strategical  
25 decisions when there is no evidence in the record to support them.  
26 However, the Court notes that there are alternative ways in which the  
27 tapes could have been authenticated, such as by jail officials who had  
28 tape recorded the conversation or by another person sufficiently  
familiar with Olivares' voice.

25 <sup>13</sup> Had Stein listened to the tapes and identified the exculpatory  
26 passages, he could have attempted to offer the tapes into evidence at  
27 trial under Cal. Evid. Code § 1220 ("admission of party") or Cal. Evid.  
28 Code § 1230 ("declarations against interest"). Given the high probative  
value of the tape, it is reasonably probable that the trial court would  
have admitted the evidence under either of these hearsay exceptions  
over the prosecutor's objections.

1 prejudice arising from Stein's deficient performance. Stein's  
2 failure to introduce the tapes into evidence (or apparently even to  
3 listen to them) "served to deprive [Petitioner] of the most critical  
4 evidence supporting his best defense." *Sanders*, 21 F.3d at 1461. If  
5 Stein had introduced the audiotapes, the jury would have been  
6 presented with compelling evidence from Petitioner's co-defendant  
7 that Petitioner was innocent of the crime with which he had been  
8 charged and was, in fact, seeking to determine who actually had  
9 committed the crime. The audiotapes also provided compelling  
10 evidence to bolster Petitioner's claim that Mendoza was the actual  
11 shooter because, in the tapes, Olivares describes how Petitioner is  
12 looking suspiciously at Olivares and Manuel Mendoza. Thus, because  
13 the audiotapes could likely have been admitted into evidence at  
14 trial, Petitioner has met his burden of proof that Stein's failure  
15 to investigate and introduce this evidence caused him prejudice.

16 Additionally, Stein's failure to present the audiotapes at trial  
17 "was all the more questionable in light of the weaknesses in the  
18 prosecution's case" against Petitioner. *Lord*, 184 F.3d at 1094.  
19 Here, "the case against [Petitioner] was only weakly supported by the  
20 record and therefore more likely to have been affected by errors than  
21 one with overwhelming record support." *Alcala*, 334 F.3d at 872  
22 (quoting *Strickland*, 466 U.S. at 696) (internal quotations omitted).  
23 Because the only evidence against Petitioner were conflicting  
24 eyewitness statements, the prosecution's case was far from  
25 compelling. See *Rios*, 299 F.3d at 810 (finding prejudice more likely  
26 because the "State's case ... was at best a close one" where there  
27 was no physical evidence linking the defendant to the crime and "no  
28 weapon found, no fingerprints, no gunpowder residue, no DNA

1 evidence"). Similarly, in this case, there was no evidence linking  
2 Petitioner to the gun used in the Aguilera shooting, no matching  
3 fingerprints or hair, and no DNA evidence. Apart from the  
4 conflicting testimony of two eyewitnesses and Detective Delmuro's  
5 opinion that Petitioner was a gang member, there was no other  
6 evidence linking Petitioner to the crime for which he was convicted.

7 Finally, the fact that the jury deliberated for four days after  
8 a three-day trial underscores the weakness of the case against  
9 Petitioner. *See, e.g., Mayfield v. Woodford*, 270 F.3d 915, 932 (9th  
10 Cir. 2001) (one and one-half day deliberation during penalty phase  
11 shows close case, when jury arrived at guilty verdict in two hours);  
12 *Lawson v. Borg*, 60 F.3d 608, 613 (9th Cir. 1995) (five day  
13 deliberation shows close case); *United States v. Kojayan*, 8 F.3d  
14 1315, 1323 (9th Cir. 1996) (deliberations over two days show close  
15 case); *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980) (nine  
16 hours of deliberation shows close case).

17 Accordingly, I conclude that there is a reasonable probability  
18 that the verdict would have been different had Stein introduced the  
19 audiotape into evidence. The state supreme court's decision to the  
20 contrary is objectively unreasonable. Consequently, the Court finds  
21 that Petitioner is entitled to relief on his claim of ineffective  
22 assistance of counsel.

23 **B. Failure to Call Petitioner to the Stand After Promising to**  
24 **Do So in Opening Statement**

25 Petitioner next contends that Stein's representation was  
26 constitutionally deficient because he informed the jury in opening  
27 statement that Petitioner would testify but then failed to put  
28 Petitioner on the witness stand. Petitioner contends that he was

1 fully prepared to testify regarding his alibi that he was at work at  
2 the time of the Aguilera shooting as well as his reasons for  
3 suspecting that Manuel Mendoza was the actual shooter, but that Stein  
4 inexplicably, and without notifying Petitioner beforehand, failed to  
5 call him as a witness.

6 During his opening statement to the jury, Stein informed the  
7 jury that Petitioner would take the stand in his own defense:

8 You're also going to hear from the People's own gang expert  
9 that if a gang expert takes the - a gang member takes the stand  
10 and testifies against his own and says who did the crime it is  
11 like signing your death warrant. *And you're going to hear from*  
12 *my client. He'll explain to you who he believes did that crime*  
13 *that he is charged with.* And you will hear from the People's  
14 own witness that what that will mean to my client when he takes  
15 the stand in this case. That he's basically signing his own  
16 death warrant by testifying in open court that a fellow gang  
17 member committed this crime. (3 RT 200.) (Emphasis added.)

18 Despite this explicit promise that Petitioner would testify, Stein  
19 rested his case without ever calling Petitioner to the stand.

20 At the evidentiary hearing, Petitioner testified that he was  
21 fully prepared to testify at his trial (EH 166), and it was not until  
22 Stein's closing argument that he first realized that Stein was not  
23 calling him as a witness. (EH 173.) When asked why he did not take  
24 the stand, Petitioner testified: "He [Stein] just told me I'm not  
25 going to use you after all." (EH 174.) Stein, however, gave a  
26 contradictory explanation at the evidentiary hearing as to why he  
27 failed to call Petitioner to testify after promising to do so in  
28 opening statement: "The co-defendant was threatening my client during

1 trial, and my client changed his mind and wasn't going to testify.  
2 That stands out. I still remember. That's an unusual thing to have  
3 happened." (EH 154.) Stein further stated: "And then it all came  
4 back about what happened during trial with Mr. Olivares threatening  
5 to kill my client. And my memory is it wasn't just my client, it was  
6 my client's family - his wife, his children, if they knew where his  
7 family lived." (EH 155.)

8 Stein did admit at the evidentiary hearing that, at least at  
9 some time before he made his opening statement, he and Petitioner had  
10 agreed that Petitioner would testify. (EH 160.) When asked whether  
11 he recalled agreeing with Petitioner to put him on the stand, despite  
12 the threats from co-defendant Olivares and other active Ford gang  
13 members, Stein stated: "Again, I don't recall that agreement, but I  
14 would never make an opening statement to a jury saying the defendant  
15 is going to testify unless the defendant had agreed to testify ahead  
16 of time." (*Id.*)

17 Petitioner testified at the evidentiary hearing that the threats  
18 from co-defendant Olivares and other Ford gang members not to testify  
19 about Manuel Mendoza's alleged involvement in the Aguilera shooting  
20 continued unabated from the time of his altercation with Olivares in  
21 jail around August 2001 (which was the subject of the audiotaped  
22 conversation between Olivares and his girlfriend on August 17, 2001)  
23 to the time of his trial in January 2002. (EH 164-165.) Petitioner  
24 testified that, despite these continuing threats to his safety, he  
25 remained determined to testify at trial in order to prove his  
26 innocence. (EH 166-167.) Petitioner further testified that the  
27 threats from Olivares and other Ford gang members did not suddenly  
28 increase in seriousness immediately before his trial, as implied by

1 Stein's testimony at the evidentiary hearing. (EH 167.) Petitioner  
2 emphatically stated that Stein was not telling the truth when he  
3 testified at the evidentiary hearing that Petitioner had refused to  
4 testify at the last minute because of threats from co-defendant  
5 Olivares. (EH 167.)

6 After having heard the testimony of both Petitioner and Stein at  
7 the evidentiary hearing, the Court finds that Petitioner's testimony  
8 regarding this issue is more credible than Stein's. From the Court's  
9 observation of both witnesses' demeanor, the Court finds that Stein's  
10 "sudden" recollection as to why he did not put Petitioner on the  
11 stand was not believable. While testifying at the evidentiary  
12 hearing, Stein was hostile and uncooperative. He repeatedly stated  
13 that he could not recall any of the events that occurred from the  
14 time he began representing Petitioner through his motion for new  
15 trial after Petitioner's conviction. That he suddenly had a clear  
16 recollection of this single event, when he could not recall anything  
17 else, strains credulity.

18 Further, as Petitioner has pointed out, Stein's statements at  
19 the evidentiary hearing that Petitioner decided at the last moment  
20 not to testify because of threats from co-defendant Olivares are  
21 contradicted by multiple inconsistent statements on the subject made  
22 by Stein. (Pet'r Br. at 22-32.) For example, on September 26, 2003,  
23 Stein argued in support of a motion for new trial that the  
24 prosecution had committed a *Brady* violation by failing to disclose  
25 evidence of Manuel Mendoza's involvement in the March 11, 2001,  
26 shooting of Jose Vera. (6 RT 1008-1009.) When the trial court asked  
27 Stein to explain how evidence of Mendoza's assault on Vera would have  
28 been relevant and admissible at trial if disclosed by the

1 prosecution, Stein argued as follows:

2 Stein: I believe under [Evidence Code section] 1101 and *People*  
3 *v. Hall* that I would have been able to put on the evidence  
4 that at that time the defendant testifies -

5 The Court: Well, how is he connected to this crime? That's  
6 the -

7 Stein: The defendant would testify about the admission by the  
8 party to committing the crime. Then I would have put on  
9 evidence under 1101 to show not only has - did the perpetrator  
10 Mr. Mendoza do this crime but we have evidence that he did a  
11 similar crime and another crime in which he had the gun that  
12 was used in this case. (6 RT 1011-1012.)

13 Thus, Stein argued in September 2003 that he would have called  
14 Petitioner to testify if only the prosecution had disclosed evidence  
15 regarding Manuel Mendoza's March 2001 assault on Jose Vera.  
16 Logically, Stein would not have made the argument to the trial court  
17 that he would have put Petitioner on the stand if Petitioner had in  
18 fact refused to testify because of threats against him by Olivares.  
19 Stein made other statements at the September 2003 hearing on the  
20 motion for new trial that also contradict his testimony at the  
21 evidentiary hearing that Petitioner refused to testify because of  
22 Olivares' threats:

23 The Court: Right. But you're telling me you would have put it  
24 on because you could have connected it up through the  
25 defendant's testimony but the problem is that he didn't tell  
26 you so that you wouldn't have put it on, correct?

27 Stein: No. If the defendant - if I had known this I would  
28 have put the defendant on the stand. This evidence was not

1 given to me. It corroborates the defendant's version of the  
2 facts. (6 RT 1016-1017.)

3 Stein also stated that "[t]he new evidence allows me to make an  
4 informed decision to put the defendant on." (6 RT 1018.) Thus, in  
5 September 2003, much closer in time to Petitioner's trial than the  
6 evidentiary hearing held in November 2008, Stein repeatedly told the  
7 trial court that he exercised control over whether Petitioner would  
8 testify and would in fact have put Petitioner on the stand if the  
9 prosecution had disclosed the Vera assault. This directly  
10 contradicts Stein's testimony at the evidentiary hearing that  
11 Petitioner refused at the last moment to testify.

12 Stein's testimony at the evidentiary hearing that Petitioner  
13 refused to testify because of Olivares' threats is further  
14 contradicted by Stein's response to a letter written to him by  
15 Petitioner's appellate counsel, Eric Multhaup, on September 24, 2006.  
16 (EH, Ex. 12.) In the September 24, 2006, letter, Multhaup asked  
17 Stein, "Was there a reason that you did not call defendant to testify  
18 at trial?" Stein responded to Multhaup's question in a letter dated  
19 October 11, 2006, as follows:

20 With respect to [the question], the clearest answer I can give  
21 is that regardless of the subject matter in general, the  
22 defendant did not want to testify. Many defendants do not.  
23 The issue of priors would have been discussed as would the  
24 issue of what to expect on cross-examination. If you are  
25 asking about the alibi, he did not want to testify to it and  
26 felt strongly that it could be proved by other witnesses. As  
27 the jury was out for several days the alibi testimony must  
28 have been problematic for the jury. Also, had he wanted to

1 testify, which he did not, I would have advised him with  
2 respect to the state of the People's case and his defense  
3 case. As you can tell from the record, part of the defense  
4 was that he was employed, had dropped out of the gang life,  
5 had a family and was trying to start a new life.

6 (EH, Ex. 12 at 4.)

7 Thus, Stein's answer on October 11, 2006, suggested that, for  
8 various reasons, Petitioner never wanted to testify, not that  
9 Petitioner suddenly changed his mind during trial because of threats  
10 made against him by co-defendant Olivares. Stein's suggestion on  
11 October 11, 2006, that Petitioner never wanted to testify is belied  
12 by the fact that Stein informed the jury in opening statement that  
13 Petitioner would in fact testify, and Stein's statement at the  
14 evidentiary hearing that he "would never make an opening statement  
15 to a jury saying the defendant is going to testify unless the  
16 defendant had agreed to testify ahead of time." (EH 160.)

17 Therefore, because the Court credits Petitioner's testimony that  
18 he did not tell Stein in the middle of trial that he would not  
19 testify, there is no reasonable explanation for why Stein failed to  
20 call Petitioner to the stand. Moreover, the record does not  
21 demonstrate any tactical reason for Stein to announce to the jury  
22 that he would call his client to testify on his own behalf and then  
23 subsequently change his mind. See *Ouber v. Guarino*, 293 F.3d 19, 27  
24 (1st Cir. 2002) ("Neither the state court nor the [Respondent] has  
25 managed to identify any benefit to be derived from such a decisional  
26 sequence, and we are unable to see the combination as part and parcel  
27 of a reasoned strategy."); see also *Unites States ex rel. Hampton v.*  
28 *Leibach*, 347 F.3d 219, 259 (7th Cir. 2003) ("Making such promises and

1 then abandoning them for reasons that were apparent at the time the  
2 promises were made cannot be described as legitimate trial  
3 strategy." ).

4 While there are no Ninth Circuit Court of Appeals cases directly  
5 addressing the issue of ineffective assistance of counsel arising  
6 from a broken promise that a defendant will testify, the Court finds  
7 persuasive similar cases decided in other United States Courts of  
8 Appeal. For example, in *Hampton*, the court found ineffective  
9 assistance of counsel where the trial attorney promised the jury in  
10 opening statement that the defendant would tell the jury that he was  
11 innocent but then failed to deliver on his promise that the defendant  
12 would testify. 347 F.3d at 257-260. The defendant was charged with  
13 sexual assault, rape and robbery, stemming from an assault on two  
14 women at a concert by a large group of gang members. *Id.* at 222. The  
15 defendant was tied to the crimes solely by conflicting eyewitness  
16 testimony. *Id.* at 222-225. During opening statement, defendant's  
17 trial counsel promised the jury, "Mr. Hampton will testify and tell  
18 you that he was at the concert. Mr. Hampton will tell you that he  
19 saw what happened but was not involved with it." *Id.* at 257. The  
20 attorney later decided not to call the defendant to the stand because  
21 he was worried that the fact that his client was at the concert would  
22 aggravate the possibility of the jury thinking that the defendant was  
23 "guilty by association." *Id.* at 258.

24 The Court of Appeals for the Seventh Circuit found that the  
25 state appellate court's determination that the unfulfilled promise  
26 that the defendant would testify was simply a "change in trial  
27 strategy" was unreasonable. *Id.* The court noted that the possible  
28 "guilt by association" was already known to the attorney at the time

1 he stated that his client would testify. The court went on to note  
2 that the "broken promises themselves supplied the jury the reason to  
3 believe there was no evidence contradicting the State's case, and  
4 thus to doubt the validity of Hampton's defense." *Id.* at 260.

5 Similarly, in *Ouber*, the court found ineffective assistance of  
6 counsel where defense counsel asserted during his opening statement  
7 that jurors would hear what happened from the defendant herself but  
8 then subsequently decided to advise the defendant against testifying.  
9 293 F.3d at 27. The United States Court of Appeals for the First  
10 Circuit acknowledged that each of these decisions, taken alone, may  
11 have been professionally reasonable judgments, but "[t]aken together,  
12 however, they are indefensible." *Id.* The court concluded that, "in  
13 the absence of unforeseeable events forcing a change in strategy, the  
14 sequence constituted an error in professional judgment." *Id.*

15 As in *Hampton* and *Ouber*, Stein promised the jury that it would  
16 hear Petitioner himself identify who had actually committed the crime  
17 for which Petitioner was on trial, but then reneged on his promise  
18 without explaining to the jury why he did so. As discussed  
19 previously, there were no "unforeseeable events" at Petitioner's  
20 trial that would "warrant ... changes in previously announced trial  
21 strategies." *Ouber*, 293 F.3d at 29. According to Petitioner's  
22 evidentiary hearing testimony, the danger to Petitioner and his  
23 family from co-defendant Olivares' threats was obvious from the  
24 outset of the case, and thus does not justify Stein's decision to  
25 promise the jury that Petitioner would testify and then renege on  
26 that promise.

27 Therefore, when the failure to present the promised testimony  
28 cannot be chalked up to unforeseeable events, as the Court has

1 determined is the case here, the attorney's broken promise may be  
2 unreasonable, for "little is more damaging than to fail to produce  
3 important evidence that had been promised in an opening." *Anderson*  
4 *v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988); see also *Ouber*, 293 F.3d  
5 at 28 ("A broken promise of this magnitude taints both the lawyer who  
6 vouchsafed it and the client on whose behalf it was made."); *Hampton*,  
7 347 F.3d at 259 ("Promising a particular type of testimony creates  
8 an expectation in the minds of jurors, and when defense counsel  
9 without explanation fails to keep that promise, the jury may well  
10 infer that the testimony would have been adverse to his client and  
11 may also question the attorney's credibility.") The Court concludes  
12 that Stein's actions constitute deficient performance.

13       Petitioner was prejudiced by Stein's failure to call him as a  
14 witness after promising the jury in opening statement that he would  
15 do so. Because Petitioner did not take the stand, the jury did not  
16 get to hear Petitioner, in his own words, describe the details of his  
17 alibi that he was at work at the time of the shooting. Moreover, the  
18 jury was also deprived of hearing the basis for Petitioner's belief  
19 that Manuel Mendoza was the actual shooter. Finally, despite the  
20 standard instructions to the jury that it cannot hold a criminal  
21 defendant's failure to take the stand against him, it is reasonable  
22 to conclude that the jury nevertheless did so here. The jury could  
23 have surmised that the reason for Petitioner's failure to testify,  
24 after his trial attorney promised he would, was that Stein had  
25 realized, at some point during trial, that Petitioner was not a  
26 credible witness or, even worse, that he would commit perjury if  
27 allowed to take the stand. See *Hampton*, 347 F.3d at 238 ("Hampton's  
28 failure to take the stand as promised gave rise to a negative

1 inference about what the content of his testimony might have been.");  
2 see also *Ouber*, 293 F.3d at 28 ("When a jury is promised that it will  
3 hear the defendant's story from the defendant's own lips, and the  
4 defendant then reneges, common sense suggests that the course of  
5 trial may be profoundly altered.").

6 As noted before, the prosecution's case against Petitioner was  
7 weak, depending solely upon conflicting and inconsistent eyewitness  
8 accounts. In a borderline case, such as this one, "even a relatively  
9 small error is likely to tilt the decisional scales." *Ouber*, 293 F.3d  
10 at 33. Under these circumstances, the error here - failing to  
11 present the promised testimony of the defendant himself - was "not  
12 small, but monumental." *Id.* Because the error was egregious, the  
13 Court finds that, but for Stein's deficient performance, the outcome  
14 of the trial would likely have been different. Therefore, Petitioner  
15 is entitled to habeas relief.<sup>14</sup>

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16  
17 <sup>14</sup> Respondent contends that Petitioner waived his right to present  
18 this ineffective assistance claim because Petitioner did not personally  
19 raise the issue with the court when Stein did not call him. (Resp't  
20 Brief at 24.) Respondent cites *United States v. Nohara*, 3 F.3d 1239,  
21 1244 (9th Cir. 1993), for the proposition that a defendant's silence in  
22 the face of an attorney's decision not to have the defendant testify is  
a waiver of the right to testify and cannot form the basis of an  
ineffectiveness claim. The Court has reviewed the *Nohara* case, along  
with *United States v. Edwards*, 897 F.2d 445, 447 (9th Cir. 1990), on  
which *Nohara* relies, and finds that both cases are factually  
distinguishable.

23 Petitioner is not claiming that Stein was ineffective for refusing  
24 to allow him to testify, but that Stein's failure to have him testify,  
25 after telling the jury he would do so, was ineffective. *Nohara* and  
26 *Edwards* did not involve fact patterns similar to that in the present  
27 case: an attorney promising the jury that his client would testify but  
28 then failing to call his client to the stand. In both *Nohara* and  
*Edwards*, there was no indication made to the court or the jury that the  
defendant wished to testify. The concern in *Nohara* and *Edwards* was  
that "[t]o hold that a defendant may abide by his lawyer's advice and  
not take the stand and then invalidate the trial because he so acted is  
not fair to the government." *Edwards*, 897 F.2d at 447. In contrast,  
Petitioner informed Stein that he wished to testify and Stein relayed

1           **C. Failure to Investigate and Present Alibi Testimony from**  
2           **Robert Howards**

3           Petitioner contends that he was deprived of the effective  
4 assistance of counsel by Stein's failure to interview or present the  
5 alibi testimony of Petitioner's supervisor, Robert Howards. (Pet'r  
6 Br. at 3.) Petitioner first raised this IAC claim in his petition  
7 for writ of habeas corpus to the California Court of Appeal.  
8 (Lodgment 8.) In a brief written decision, the California Court of  
9 Appeal addressed Petitioner's claim as follows:

10          As to petitioner's claim that his trial counsel rendered  
11 ineffective assistance of counsel by failing to call Robert  
12 Howard [sic] as a witness at trial, a claim supported by a  
13 defense investigator's unsigned and unsworn statement  
14 containing hearsay, petitioner has failed to demonstrate  
15 ineffective assistance of counsel and has failed to allege  
16 facts sufficient to warrant the relief sought (citations).  
17 (Lodgment 12.)

18          Because the California Court of Appeal decided the claim in a  
19 written decision on the merits,<sup>15</sup> this Court is required to determine  
20 whether the Court of Appeal's decision was contrary to, or an

21 \_\_\_\_\_  
22 this information to the court, the prosecution, and the jury by  
23 proclaiming Petitioner's intent to take the stand in opening statement.  
24 It was that action that constituted deficient performance, and *Nohara*  
and *Edwards* have no bearing on that issue. Accordingly, Petitioner did  
not waive his right to raise this claim.

25          <sup>15</sup> It is unclear whether the California Court of Appeal decided  
26 Petitioner's claim on the merits or rather dismissed it because it was  
27 procedurally defaulted for failure to present sufficient evidence. The  
28 Court notes that Respondent has failed to raise the issue of procedural  
default. (Resp't Br. at 7.) Therefore, the Court will assume that the  
Court of Appeal intended this as a decision on the merits and will  
treat it as such.

1 unreasonable application of, clearly established federal law. The  
2 court of appeal found that Petitioner had not met his burden of  
3 establishing either deficient performance or prejudice.<sup>16</sup> The  
4 California Court of Appeal's decision was an objectively unreasonable  
5 application of *Strickland*.

6 When Stein was first retained and assumed representation of  
7 Petitioner in January 2001, the public defender provided Stein with  
8 a copy of the defense file compiled as of that date. (EH, Ex. 3.)  
9 The defense file contained an August 25, 2000, notarized statement  
10 by Robert Howards, attesting to the fact that Petitioner was at work  
11 at the time of the shooting. (EH, Ex. 3 at 99-100.) The defense file  
12 also contained a report of an initial telephone interview and a  
13 subsequent in-person interview of Howards by the public defender  
14 investigator. (EH, Ex. 3 at 94.) In both interviews, Howards stated  
15 unequivocally that Petitioner was at work on July 5, 2000, until 3:30  
16 p.m. Howards stated that he knew Petitioner was at work on July 5,  
17 2000 because Petitioner was the only employee who could run a certain  
18 labeling machine, and if the machine had stopped running, Howards  
19 would have known about it. Howards stated, "There is no way  
20 [Petitioner] could have left work early without me knowing it." (EH,  
21 Ex. 3 at 94.)

22 In the public defender file that Stein received, there was also  
23 a report from Detective Lugo of the Los Angeles County Sheriff's  
24 Department regarding his December 20, 2000, interview of Steve  
25 Finley, Petitioner's immediate floor supervisor at Proactive  
26

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27 <sup>16</sup> The Court of Appeal relied upon the state law standard for  
28 ineffective assistance of counsel from *People v. Ledesma*, 43 Cal. 3d  
171, 217-218 (1987), which cites the *Strickland* standard.

1 Packaging. (Ex. 2-b at 11-14.) Finley told Detective Lugo that he  
2 believed Petitioner worked until 3:30 p.m. on July 5, 2000. However,  
3 Finley conceded, under Detective Lugo's questioning, that, at least  
4 hypothetically, an employee could leave up to an hour before the end  
5 of his shift and not be noticed. (EH, Ex. 2-b at 13.)

6 It was established at both the trial and the evidentiary hearing  
7 that the Aguilera shooting occurred sometime between 3:15 to 3:20  
8 p.m. on July 5, 2000. (EH 21-22; RT 230-31.) Detective Lugo  
9 testified at Petitioner's trial that the driving time between  
10 Proactive Packaging at 10981 Jersey Boulevard in Rancho Cucamonga and  
11 the crime scene at 939 South McBride Street in East Los Angeles is  
12 approximately 50 minutes. (EH, Ex. 11-A-5; 5 RT 764-765.) Therefore,  
13 Stein knew at the time he assumed representation that the prosecutor  
14 would necessarily be required to present evidence that Petitioner  
15 could have left work up to an hour early, around 2:30 p.m., driven  
16 for 50 minutes to get to 939 South McBride Street, just in time to  
17 join co-defendant Oliveras in committing the shooting sometime  
18 between 3:15 and 3:20 p.m.

19 However, Stein failed to interview Howards or to call him as a  
20 witness. At the evidentiary hearing, Stein could not recall whether  
21 he ever even spoke with Howards. (EH 134.) Howards, on the other  
22 hand, clearly recalled that he only spoke to Stein on one occasion,  
23 when Howards was served with a subpoena duces tecum and directed to  
24 bring the Proactive Packaging employment records to court on April  
25 30, 2001.<sup>17</sup> (EH 62-63.) Howards testified that Stein did not ask him

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26  
27 <sup>17</sup> At the evidentiary hearing, Petitioner's counsel misstated the  
28 appearance date as April 13, 2001. The subpoena itself shows that the  
records were subpoenaed for April 30, 2001. (EH, Ex. 2A, at 41). The  
Clerk's Transcript shows only that a pretrial conference was held on

1 any questions regarding Howards' knowledge of Petitioner's  
2 whereabouts on July 5, 2000. (*Id.*) Howards testified that, after  
3 handing Stein the records and asking Stein what Howards should do  
4 next, Stein said, "We'll let you know. You can go." (*Id.*) Howards  
5 further testified that he never spoke with Stein again after bringing  
6 him the employment records and was never contacted to testify at  
7 Petitioner's trial. (*Id.*)

8 Stein's trial file reflects that, on November 1, 2001, he had  
9 an attorney service company attempt to subpoena nineteen Proactive  
10 Packaging employees, including Howards, for a November 5, 2001, trial  
11 date. (EH, Ex. 2-a at 88-139.) Of the nineteen employees, the  
12 attorney service actually served only Steve Finley and six others,  
13 but did not serve Howards. (EH, Ex. 2-a at 154.) Stein did not make  
14 any further attempt to subpoena Howards. Despite Stein never having  
15 interviewed Howards nor having him under subpoena for the trial that  
16 commenced on January 7, 2002, he gave an opening statement in which  
17 he specifically informed the jury that Howards would testify.<sup>18</sup>

18 Although Stein made a "sound strategic choice to present an  
19 alibi defense ... [he] nonetheless failed in his duty to present that  
20 defense reasonably and competently." *Alcala*, 334 F.3d at 870. First,  
21 despite the information Stein possessed from the beginning of his

22 \_\_\_\_\_  
23 April 30, 2001. (CT 62).

24 <sup>18</sup> During opening statement, Stein stated as follows: "You will  
25 hear that his employer, the manager of the plant, went to a notary on  
26 August 25th of the year 2000 and gave a statement saying my client was  
at work between the hours of 7:00 a.m. and 3:30 p.m. in the city of  
Rancho Cucamonga on July 5th, 2000 and has filed documentation to prove  
that.

27 [¶] Mr. Howard [sic] will further go on to tell you that, if my  
28 client had left early, the entire line would be shut down and Steve  
Finley, who you will also hear from, who runs the line, would have  
notified him." (2 RT 199.)

1 representation of Petitioner that Howards would be a very strong  
2 alibi witness, he failed to interview Howards. It is well  
3 established that "counsel has a duty to make reasonable  
4 investigations or to make a reasonable decision that makes particular  
5 investigations unnecessary." *Strickland*, 466 U.S. at 691. The Ninth  
6 Circuit has repeatedly held that a "lawyer who fails adequately to  
7 investigate, and to introduce into evidence, [evidence] that  
8 demonstrate[s] his client's factual innocence, or that raise[s]  
9 sufficient doubt as to that question to undermine confidence in the  
10 verdict, renders deficient performance." *Avila v. Galaza*, 297 F.3d  
11 911, 919 (9th Cir. 2002) (citing cases).

12 "A lawyer has a duty to investigate what information ...  
13 potential eye witnesses possess[], even if he later decide[s] not to  
14 put them on the stand." *Avila*, 297 F.3d at 920; see also *Lord*, 184  
15 F.3d at 1095 (noting that counsel cannot make judgments about the  
16 credibility and appearance of a witness without "looking him in the  
17 eye and hearing him tell his story"). As the Ninth Circuit has  
18 noted:

19 Counsel is not obligated to interview every witness  
20 personally in order to be adjudged to have performed  
21 effectively. However, where (as here) a lawyer does not put  
22 a witness on the stand, his decision will be entitled to less  
23 deference than if he interviews the witness. The reason for  
24 this is simple: A lawyer who interviews the witness can rely  
25 on his assessment of their articulateness and demeanor -  
26 factors [a court] is not in a position to second-guess."

27 *Lord*, 184 F.3d at 1095, fn.8 (internal citations omitted).

28 Second, Stein failed to call Howards to testify, despite the

1 fact that Howards' testimony would have been far more helpful than  
2 the testimony of the alibi witness that Stein did call. Although  
3 "[f]ew decisions a lawyer makes draw so heavily on professional  
4 judgment as whether or not to proffer a witness at trial," *id.* at  
5 1095, Stein offered no strategic reason for failing to call Howards,  
6 especially given the fact that he promised the jury in opening  
7 statement that Howards would testify. See *Alcala*, 334 F.3d at 872  
8 ("Although trial counsel's lack of recollection as to why he did not  
9 present this evidence does not, in and of itself, rebut the  
10 presumption that counsel acted reasonably, neither does it compel  
11 [the Court] to conclude that his actions were reasonable where all  
12 of the record evidence suggests otherwise.") (internal citations  
13 omitted).

14 Respondent argues that "it would have been reasonable" for Stein  
15 to decide to call Finley to testify, rather than Howards, because  
16 Finley was Petitioner's direct floor supervisor, while Howards was  
17 the plant manager. (Resp't Br. at 8.) However, there is no evidence  
18 in the record that this was in fact Stein's reason for failing to  
19 call Howards to testify.<sup>19</sup> As discussed earlier, the Court may not  
20 "assume facts not in the record in order to manufacture a reasonable  
21 strategic decision for [Petitioner's] trial counsel." *Alcala*, 334  
22 F.3d at 871. Respondent's suggestion that Stein's failure to call  
23 Howards was motivated by strategic considerations "resembles more a  
24

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25 <sup>19</sup> The rationale suggested by Respondent is contradicted by Stein's  
26 opening statement in which he stated that *both* Finley and Howards would  
27 testify. Furthermore, contrary to Respondent's contention, a defense  
28 attorney would reasonably wish to call Howards to testify, instead of  
Finley, given the disparity between Howards' unequivocal statement that  
Petitioner was at work at the time of the shooting and Finley's  
statement that Petitioner could have left work early.

1 post hoc rationalization of counsel's conduct than an accurate  
2 description of [Stein's] deliberations...." *Wiggins v. Smith*, 539  
3 U.S. 510, 526-527 (2003). Accordingly, the Court agrees with  
4 Petitioner that Stein's failure to interview and call Robert Howards  
5 as a witness constituted deficient performance.

6 The Court also finds that Petitioner has shown that he was  
7 prejudiced by this failure, particularly after Stein informed the  
8 jury that Howards would testify. Howards would have provided  
9 Petitioner with a complete alibi for the crime and undermined the  
10 eyewitness identification placing Petitioner at the scene of the  
11 Aguilera shooting, which was the only evidence against Petitioner.

12 Howards' testimony, unlike the testimony of Steve Finley, whom  
13 Stein actually chose to present at Petitioner's trial, was certain  
14 and unequivocal. Petitioner was at work at least until 3:00 p.m. on  
15 July 5, 2000.<sup>20</sup> (EH 78-79.) At the evidentiary hearing, Howards  
16 testified as to his reasons for knowing that Petitioner was present  
17 at work at Proactive Packaging until at least 3:00 p.m. on July 5,  
18 2000. Petitioner had been working for Howards since March 1998. (EH  
19 58.) In July 2000, Proactive Packaging employed approximately 15  
20 people. (EH 58.) Howards explained Petitioner's job and interpreted  
21 Petitioner's production sheet for July 5, 2000. Petitioner was  
22 assigned as a laminating machine operator. (EH 64.) Howards  
23 explained that the records for July 5, 2000, showed that Petitioner  
24 broke off a production run on the machine at 1:20 p.m. and then began  
25 working on another order, pre-folding boxes from 1:50 p.m. until 3:00

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26  
27 <sup>20</sup> For this reason, the Court finds unpersuasive Respondent's  
28 contention that Howards' testimony was merely cumulative of that of  
witness Steve Finley.

1 p.m., 15 minutes before the shooting occurred. (EH 70-72; Ex. 4.)  
2 A production run would not have been broken off in the absence of a  
3 supervisor's instructions. (*Id.*) The production sheet was required  
4 to be filled out and turned in by the person who operated the  
5 machine. (EH 72.)

6 Further, Howards characterized himself as a "hands on" manager.  
7 (EH 66.) He stated that he was on the production floor a couple of  
8 times an hour and, if there was a problem, he was there all of the  
9 time. (EH 66-67.) He also described a series of controls which  
10 governed employee behavior and attendance, including time cards, the  
11 production sheets, the small number of employees, termination for  
12 leaving a shift early, and direct supervision by Steve Finley. (EH  
13 73-77.) Howards also testified that he brought this production sheet  
14 to a court session and gave it to Stein, but that Stein never asked  
15 for an explanation and never called him to testify. (EH 80.)

16 Howards' testimony was important because he was a disinterested  
17 third party and had no apparent motive to fabricate an alibi for  
18 Petitioner. After hearing Howards' testimony at the evidentiary  
19 hearing, the Court notes that Howards would have made a very strong  
20 witness on Petitioner's behalf at trial because his testimony was  
21 clear, straightforward, and credible. Thus, if he had been called  
22 as a witness, Howards' testimony would have provided Petitioner with  
23 strong support for his alibi defense and undermined the prosecution's  
24 case against him.

25 Furthermore, because the jury was expecting to hear Howards  
26 testify, there was likely a "negative inference" against Petitioner  
27 based on Howards' absence. *See Washington v. Smith*, 219 F.3d 620, 634  
28 (7th Cir. 2000) (finding that absence of alibi witnesses identified

1 by trial counsel gave the jury "good reason to find Washington's  
2 alibi dubious"); see also *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir.  
3 1990) (holding that, in light of counsel's failure to interview  
4 certain alibi witnesses, his reference to these witnesses in opening  
5 argument was "particularly disturbing").

6 For the reasons noted above, the Court concludes that there is  
7 a reasonable likelihood that, if Robert Howards' testimony had been  
8 presented to the jury, the outcome of the trial would have been  
9 different. It was objectively unreasonable for the California Court  
10 of Appeal to find that Petitioner failed to demonstrate ineffective  
11 assistance of counsel for Stein's failure to call Howards as a  
12 corroborating alibi witness at trial.

13 **D. Trial Counsel's Failure to Call Victor Madrigal as an Alibi**  
14 **Witness**

15 Petitioner also contends that he was denied the effective  
16 assistance of counsel by Stein's failure to interview Petitioner's  
17 brother, Victor Madrigal, or to call him as a witness to corroborate  
18 Petitioner's alibi defense.<sup>21</sup> (Pet'r Br. at 33.) Because there is no  
19 reasoned state court decision denying this claim, the Court will  
20 assume that the state court decided the issue and "perform an  
21 'independent review of the record' to ascertain whether the state  
22

---

23 <sup>21</sup> The Court disagrees with Petitioner's argument that Stein failed  
24 to adequately interview Victor Madrigal. At the evidentiary hearing,  
25 Victor testified that he had spoken on the phone with Stein regarding  
26 the fact that he was with Petitioner at work at the time of the  
27 shooting. (EH 102-104.) Victor also testified that Stein requested  
28 that Victor come to Petitioner's trial to testify. (EH 101).  
Therefore, because Stein spoke with Victor by telephone, obtained the  
relevant information from him, and asked him to come to testify, the  
Court finds that Stein adequately interviewed Victor. However, this  
does not explain or excuse Stein's failure to call Victor as a witness.

1 court decision was objectively unreasonable." *Reynoso*, 462 F.3d at  
2 1109 (quoting *Himes*, 336 F.3d at 853).

3 At the evidentiary hearing, Victor Madrigal testified that he  
4 carpooled with Petitioner every day to work at Proactive Packaging,  
5 and that he worked as Petitioner's assistant on the machine that  
6 Petitioner operated. (EH 104.) Victor further testified that  
7 Petitioner had driven him to work on July 5, 2000, and had driven him  
8 home after work, leaving Proactive Packaging around 3:30 p.m. (EH  
9 104.) Victor also testified that he had spoken to Stein briefly by  
10 telephone on one occasion prior to Petitioner's trial, but had never  
11 spoken with Stein in person. (EH 102.) Victor testified that, when  
12 he spoke with Stein on the telephone prior to trial, he told Stein  
13 specific details of the events of July 5, 2000: " I told [Stein] the  
14 whole day, how it went - [Petitioner] picked me up in the morning,  
15 [Petitioner] went to work, the laminator machine had broke [sic]  
16 down." (EH 104.)

17 Victor stated that Stein asked him to testify on Petitioner's  
18 behalf, a request to which Victor readily agreed. (EH 101.) However,  
19 when Victor came to court to testify at Petitioner's trial, Stein  
20 "took [Victor] back outside and told [Victor] you got to leave  
21 because you're going to make it bad for your brother." (EH 102.)  
22 Victor testified that Stein offered no explanation for why Victor  
23 should not testify on Petitioner's behalf, so Victor did as Stein  
24 suggested and left the courthouse without testifying. (*Id.*) He did  
25 not speak with Stein again. (*Id.*) When questioned at the evidentiary  
26 hearing, Stein recalled speaking with Victor, but could not remember  
27 any specifics of the conversation, such as whether he asked Victor  
28 to testify on Petitioner's behalf. Nor could Stein recall whether

1 he intended to call Victor as a witness at trial. (EH 139-141.)

2 Respondent contends that there were strategic reasons for  
3 Stein's failure to call Victor as a witness at Petitioner's trial,  
4 namely that Victor, as Petitioner's brother, was a biased witness,  
5 and that Victor would make a poor witness because he was a gang  
6 member and on parole. However, the mere fact that Victor was a  
7 family member does not render Stein's failure to present his  
8 corroboration of Petitioner's alibi harmless. The Ninth Circuit has  
9 found prejudicial counsel's failure to investigate and/or present the  
10 testimony of family members and loved ones. See, e.g., *Luna v.*  
11 *Cambra*, 306 F.3d 954, 962 (9th Cir. 2002) (finding prejudice where  
12 defense counsel failed to call petitioner's sister and mother as  
13 witnesses to corroborate alibi defense); *Brown v. Myers*, 137 F.3d  
14 1154, 1157 (9th Cir. 1998) (finding prejudice where trial counsel  
15 failed to contact alibi witnesses, including petitioner's sister and  
16 girlfriend); *Johnson v. Baldwin*, 114 F.3d 835, 839-840 (9th Cir.  
17 1997) (finding prejudice where trial counsel failed to interview  
18 petitioner's girlfriend and grandmother because he would have  
19 discovered that the alibi was false and elected another trial  
20 strategy). Similarly, although Victor is Petitioner's brother and  
21 therefore not a disinterested witness, he nevertheless strongly  
22 corroborated Petitioner's alibi defense. Victor testified that he  
23 was with Petitioner all day on July 5, 2000, and was, in fact,  
24 driving home from work with Petitioner around 3:30 p.m., after the  
25 shooting had occurred more than 40 miles away.

26 From Stein's comments to Victor that his presence at court  
27 would "make it bad" for Petitioner, it can be inferred that Stein  
28 believed Victor would not make a good witness because he was a gang

1 member and had recently been paroled from the California Youth  
2 Authority in 1999. (EH 94.) However, that a witness "might not ...  
3 make the best appearance" at trial is not a reasonable basis for  
4 failing to call a witness. See *Avila*, 297 F.3d at 920 (emphasis in  
5 original); see also *Black v. Larson*, 45 Fed. Appx. 653, 655 (9th Cir.  
6 2002) (unpublished) (holding that defense counsel's failure to  
7 interview a witness was unreasonable where it was based only on  
8 counsel's belief that the witness "would not make a good appearance  
9 because he had been on juvenile probation, had gone to juvenile  
10 probation camp, and 'probably looked like a gang member'").  
11 Accordingly, the Court finds that Stein's failure to call Victor  
12 Madrigal as an alibi witness constituted deficient performance.

13 The Court also concludes that Petitioner was prejudiced by  
14 Stein's failure to call Victor Madrigal as a witness at trial to  
15 corroborate Petitioner's alibi. If Stein had presented Victor's  
16 testimony that, at the time of the shooting, Petitioner was in  
17 Victor's presence, over forty miles away from the scene of the crime,  
18 "there is a reasonable probability that ... the result of the  
19 proceeding would have been different."<sup>22</sup> *Strickland*, 334 F.3d at 694.  
20 Despite Victor being Petitioner's brother, Victor's testimony was  
21 nevertheless highly corroborative of Petitioner's alibi, and it would  
22 have clearly undermined the prosecution's relatively weak case

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23  
24 <sup>22</sup> The Court finds unpersuasive Respondent's contention that  
25 Petitioner was not prejudiced by the failure to call Victor Madrigal to  
26 testify because Victor's testimony was merely cumulative of that of  
27 another alibi witness, Steve Finley. (Resp't Reply Br. at 31.) While  
28 Finley did in fact testify that Petitioner and his brother usually  
carpooled to work every day, he had no personal knowledge as to whether  
they carpooled together on July 5, 2000, the day of the Aguilera  
shooting. On the other hand, as Victor testified to at the evidentiary  
hearing, he was driving home from work with his brother around 3:30  
p.m. on July 5, 2000, after the shooting occurred.

1 against Petitioner.<sup>23</sup> Victor's testimony was consistent with  
2 Finley's, who was the only alibi witness Stein called at trial. More  
3 importantly, it also accounted for Petitioner's whereabouts between  
4 2:30 and 3:30 p.m., the time when Finley testified that he was not  
5 certain whether Petitioner was at work. In addition, Victor's  
6 testimony would have been mutually corroborative of Howards'  
7 testimony that Petitioner was at work until at least 3:00 p.m.

8 Victor was prepared to testify on Petitioner's behalf at trial,  
9 and he even came to the courthouse expecting to testify. This  
10 demonstrates that Victor could have been called to testify.  
11 Moreover, the testimony given by Victor at the evidentiary hearing  
12 was sufficient to establish what his testimony would have been if he  
13 had testified at trial. *See Alcala*, 334 F.3d at 872.

14 Stein informed the jurors that he would prove that Petitioner  
15 was at work on the day and at the time of the shooting, but he failed  
16 to call the witnesses best able to support that theory, undermining  
17 the credibility of Petitioner's entire defense. *See Alcala*, 334 F.3d  
18 at 872. Further, the harm to Petitioner arising from Stein's failure  
19 to present the testimony of Victor Madrigal, as well as Petitioner  
20 himself and Howards, must be viewed in the context of the  
21 prosecution's relatively weak case, which depended upon questionable  
22 eyewitness identification placing Petitioner at the scene of the  
23 Aguilera shooting. Therefore, the Court finds that Stein's failure

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24  
25 <sup>23</sup> Respondent argues that Petitioner was not prejudiced by Stein's  
26 failure to call Victor Madrigal as a witness because (1) he was subject  
27 to impeachment as he had "multiple juvenile adjudications and was on  
28 parole at the time of trial" and (2) as Petitioner's brother, Victor  
was "obviously biased." (Resp't Reply Br. at 31.) For the reasons  
discussed in detail above, these facts alone do not preclude a finding  
of prejudice to Petitioner from Stein's failure to call Petitioner's  
brother as an alibi witness.

1 to call Robert Howards and Victor Madrigal as witnesses to  
2 corroborate Petitioner's alibi was constitutionally deficient  
3 performance that resulted in prejudice to Petitioner. The California  
4 Court of Appeal's decision to the contrary is objectively  
5 unreasonable. Accordingly, habeas relief is warranted on this claim.

6 **E. Cumulative Effect of Counsel's Errors**

7 Petitioner also contends that, even if each of the grounds on  
8 which Petitioner is seeking relief is not alone sufficient to justify  
9 relief, the cumulative effect of these errors is. (Pet'r Br. at 38.)  
10 See *Alcala*, 334 F.3d at 893 ("[E]ven if no single error were  
11 [sufficiently] prejudicial, where there are several substantial  
12 errors, 'their cumulative effect may nevertheless be so prejudicial  
13 as to require reversal.'" (quoting *Killian v. Poole*, 282 F.3d 1204,  
14 1211 (9th Cir. 2002))).

15 The Ninth Circuit has repeatedly recognized that, in claims of  
16 ineffective assistance of counsel, prejudice may result from the  
17 cumulative impact of an attorney's multiple deficiencies. See, e.g.,  
18 *Boyde v. Brown*, 404 F.3d 1159, 1176 (9th Cir. 2005) (quoting *Cooper*  
19 *v. Fitzharris*, 586 at 1333); see also *Harris ex rel. Ramseyer*, 64  
20 F.3d at 1438-39. "When an attorney has made a series of errors that  
21 prevents the proper presentation of a defense, it is appropriate to  
22 consider the cumulative impact of the errors in assessing prejudice."  
23 *Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998). In the context  
24 of ineffective assistance of counsel claims, a court must analyze  
25 each of a petitioner's claims separately to determine whether his  
26 counsel was deficient, but "prejudice may result from the cumulative  
27 impact of multiple deficiencies." *Boyde*, 404 F.3d at 1176.

28 The Court agrees with Petitioner that not only were the multiple

1 deficiencies individually prejudicial, but they also were  
2 cumulatively prejudicial. Stein did not just botch one witness or  
3 one argument or one issue - he repeatedly demonstrated the lack of  
4 diligence required for a vigorous defense.

5 First, despite his claim to the jury that he would provide proof  
6 that Manuel Mendoza, and not his client, was the actual perpetrator,  
7 Stein failed to investigate or to present important evidence  
8 corroborating Petitioner's third-party culpability defense. Stein  
9 did not introduce into evidence, or apparently even listen to, the  
10 surreptitiously taped jailhouse conversation between co-defendant  
11 Olivares and his girlfriend, in which Olivares makes multiple  
12 statements that strongly exculpate Petitioner.

13 Second, Stein failed to put Petitioner on the stand, after  
14 promising the jury in the opening statement that he would do so, to  
15 testify that he was at work at the time of the shooting as well as  
16 to his knowledge that Manuel Mendoza and Olivares were the actual  
17 perpetrators. This not only deprived the jury of hearing Petitioner  
18 discuss the basis for his belief that Mendoza was the actual  
19 perpetrator, but this broken promise also likely tainted the jury's  
20 perception of both Petitioner and Stein.

21 Finally, Stein presented an inadequate alibi defense by failing  
22 both to interview and to call Petitioner's supervisor, Robert  
23 Howards, or to call Petitioner's brother, Victor Madrigal. This  
24 failure to adequately present an alibi defense is made all the more  
25 egregious by the fact that these two witnesses, if called, would have  
26 significantly bolstered Petitioner's alibi defense, accounting for  
27 the time left open by Finley's testimony.

28 Given the cumulative effect of these very serious errors

1 committed by Stein, the Court concludes that there is a reasonable  
2 probability that, absent the deficiencies, the outcome of  
3 Petitioner's trial would have been different. *Strickland*, 466 U.S.  
4 at 695. In fact, "the plethora and gravity of [Stein's] deficiencies  
5 rendered the proceeding fundamentally unfair." *Harris ex rel.*  
6 *Ramseyer*, 64 F.3d at 1438; see also *Strickland*, 466 U.S. at 696  
7 (determining that the "ultimate focus of inquiry must be on  
8 fundamental fairness of the proceeding whose result is being  
9 challenged"). Although each of these errors on its own was  
10 sufficiently prejudicial to Petitioner to warrant habeas relief, when  
11 viewed in their totality, the cumulative impact of these errors  
12 deprived Petitioner of a fundamentally fair trial and severely  
13 undermines the Court's confidence in the jury's verdict. Petitioner  
14 is entitled to relief on this claim.<sup>24</sup>

15  
16 **IV. Brady Claim for the Prosecution's Failure to Produce Exculpatory**  
17 **Evidence**

18 Petitioner argues that he was denied the right to due process  
19 by the prosecution's alleged failure to disclose certain exculpatory  
20 evidence. (Pet. at 6.) More specifically, Petitioner claims that the  
21 district attorney was aware, prior to trial, that Petitioner's

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22  
23 <sup>24</sup> Petitioner also argues that defense counsel provided ineffective  
24 assistance by failing to investigate evidence that Manuel Mendoza was  
25 the actual perpetrator. (Pet. at 5.) Petitioner specifically claims  
26 that Stein provided ineffective assistance by failing to present  
27 evidence at trial that Manuel Mendoza: (1) was subsequently arrested in  
28 possession of the gun used in the Aguilera shooting; (2) had a specific  
motive to commit the Aguilera shooting; and (3) had committed other  
gang shootings in the same time frame as the Aguilera shooting. (*Id.*)

Because the Court finds Petitioner's other IAC claims to be  
meritorious, see *supra* sections III.A. - III.E., the Court declines to  
address this IAC claim or to determine whether it would independently  
warrant habeas relief.

1 defense counsel believed Manuel Mendoza to be the actual perpetrator  
2 in the Aguilera shooting, but failed to disclose police reports which  
3 implicated Mendoza in the murder of Steve "Pollo" Romero. (*Id.*)  
4 Petitioner argues that these reports were exculpatory because they  
5 would have buttressed Petitioner's third-party culpability defense  
6 by showing that Mendoza had a retaliatory motive to shoot Aguilera  
7 on July 5, 2000. For the reasons discussed below, the Court finds  
8 this claim to be without merit.

9 A *Brady* violation has three components: "The evidence at issue  
10 must be favorable to the accused, either because it is exculpatory,  
11 or because it is impeaching; that evidence must have been suppressed  
12 by the State, either willfully or inadvertently; and prejudice must  
13 have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).  
14 Evidence "known only to police investigators and not to the  
15 prosecutor" is also encompassed by this rule. *Id.* (quoting *Kyles v.*  
16 *Whitley*, 514 U.S. 419, 438 (1995)); see also *Gantt v. Roe*, 389 F.3d  
17 908, 919 n.3 (9th Cir. 2004). However, the intent of the government  
18 actor(s) charged with suppressing favorable, material evidence is  
19 irrelevant to the *Brady* inquiry. The constitutionally suspect  
20 suppression may be either willful or inadvertent. *Strickler*, 527 U.S.  
21 at 282; see also *Gantt*, 389 F.3d at 912 ("*Brady* has no good faith or  
22 inadvertence defense.").

23 A successful *Brady* claim requires a showing that the suppressed  
24 evidence was both favorable to the accused and material, in the sense  
25 that there is a "reasonable probability that, had the evidence been  
26 disclosed to the defense, the result of the proceeding would have  
27 been different." *Bagley*, 473 U.S. at 682; see also *Kyles v. Whitley*,  
28 514 U.S. 419, 433 (1995). *Brady* analysis is by its nature

1 retrospective. *United States v. Coppa*, 267 F.3d 132, 140 (2d Cir.  
2 2001) (“[U]nder *Brady*...the scope of the government’s constitutional  
3 duty - and concomitantly, the scope of a defendant’s constitutional  
4 right - is ultimately defined retrospectively, by reference to the  
5 likely effect that the suppression of particular evidence had on the  
6 outcome of the trial.”); *United States v. Hayes*, 376 F.Supp.2d 736,  
7 739 (E.D. Mich. 2005) (“The typical *Brady* issue is retrospective,  
8 that is, the court examines the materiality of the non-disclosed  
9 evidence in the context of a completed criminal trial which has  
10 resulted in a verdict of guilty, to assess the probable effect of the  
11 evidence on the verdict.”).

12 As discussed above, the Aguilera shooting apparently was  
13 triggered by the murder of Marianna gang member Steve “Pollo” Romero  
14 on May 27, 2000, and the subsequent murder of Ford gang member Marcos  
15 “Fat Boy” Torres on June 29, 2000. Aguilera’s shooting followed six  
16 days later. The records filed under seal with the Court by the Los  
17 Angeles County Sheriff’s Department regarding the investigation of  
18 the May 27, 2000, murder of Steve Romero indicate that Manuel Mendoza  
19 was considered a suspect. (EH, Ex. 13.)

20 Petitioner contends that the prosecution had a duty to disclose  
21 these records once Stein informed the prosecution that he was  
22 pursuing a third-party culpability defense that Mendoza was the  
23 actual perpetrator in the Aguilera shooting. (Pet’r Br. at 37.)  
24 Petitioner argues that Mendoza’s involvement in the Romero murder  
25 provided Mendoza with a motive to shoot Ricardo Aguilera on July 5,  
26 2000, that is, to “atone” for the murder of fellow Ford gang member  
27 Marcos Torres, which was committed in retaliation for Mendoza’s  
28 alleged involvement in the murder of Marianna gang member Steve

1 Romero. Therefore, according to Petitioner, the police records of  
2 the Romero murder investigation are exculpatory material that should  
3 have been disclosed by the prosecution under *Brady*.

4 Petitioner's *Brady* claim fails because he has not proven the  
5 first *Brady* element, i.e., that evidence of Manuel Mendoza's  
6 involvement in the Steve Romero murder contained in the Los Angeles  
7 County Sheriff's Department reports was exculpatory. The Court finds  
8 that the connection between Mendoza's alleged involvement in the  
9 Steve Romero murder, which in turn led to the retaliatory murder of  
10 Marcos Torres, which then led to the retaliatory attempted murder of  
11 Ricardo Aguilera is too attenuated to be exculpatory. Even if the  
12 prosecution improperly withheld police reports of Manuel Mendoza's  
13 other gang activity, such as his involvement in the murder of Steve  
14 Romero, this information is not necessarily exculpatory to  
15 Petitioner. All that disclosure of this information would have shown  
16 is that Mendoza was involved in Ford gang activity, possibly  
17 including the murder of Steve Romero, but it would not have  
18 demonstrated that Mendoza was guilty (and Petitioner innocent) of the  
19 Ricardo Aguilera shooting.

20 Second, Petitioner has failed to establish that the prosecution  
21 withheld any evidence at all, let alone favorable evidence.  
22 Petitioner cannot establish a *Brady* violation because the information  
23 allegedly withheld was already known to defense counsel at the time  
24 of trial - the suspicion that Mendoza was the actual perpetrator of  
25 the Aguilera shooting. The Court is therefore not convinced that the  
26 prosecution concealed this information from Petitioner.

27 Finally, the Court also finds that Petitioner has not satisfied  
28 the materiality element of a *Brady* violation. Petitioner has failed

1 to establish that disclosure of the police reports regarding the  
2 investigation of the Steve Romero murder alone would have "put the  
3 case in such a different light as to undermine confidence in the  
4 verdict." *Kyles v. Whitley*, 514 U.S. 419, 433-435 (1995). In other  
5 words, it cannot be said that the result of the proceeding would have  
6 been different had defense counsel presented this evidence at trial.

7 Even if disclosed by the prosecution, it is doubtful that the  
8 police reports of the Romero murder would have been admitted at  
9 Petitioner's trial. Under California law, evidence of Mendoza's  
10 prior criminal history or conduct contained in police reports would  
11 likely have been inadmissible hearsay. *People v. Adams*, 115 Cal. App.  
12 4th 243, 253 (2004); Cal. Evid. Code §§ 1101, 1271. Further,  
13 inadmissible hearsay cannot form the basis of a third-party  
14 culpability defense. *Adams*, 115 Cal. App. 4th at 253. Also, the  
15 police reports would likely have been excluded because third-party  
16 culpability evidence must include direct or circumstantial evidence  
17 linking the third party to the actual perpetration of the crime.  
18 *People v. Geier*, 41 Cal.4th 555, 582 (2007). Mere motive or  
19 opportunity to commit the crime is insufficient. *Id.* Because  
20 Petitioner did not produce any independent third-party culpability  
21 evidence at trial that Manuel Mendoza was the actual perpetrator of  
22 the Aguilera shooting, the police reports of the Steve Romero murder  
23 would likely have been inadmissible at Petitioner's criminal trial.

24 Therefore, because Petitioner has failed to state a viable *Brady*  
25 violation, the California Supreme Court's denial of habeas relief  
26 based upon Petitioner's *Brady* claim was not contrary to, nor an  
27 unreasonable application of, clearly established Supreme Court  
28 precedent. Nor was such denial an unreasonable determination of the

1 facts. Accordingly, habeas corpus relief is not warranted on this  
2 claim.

3

4 **V. Conclusion**

5 For the reasons stated above, it is recommended that a  
6 conditional writ of habeas corpus be **GRANTED**, requiring Petitioner  
7 be brought to retrial within sixty (60) days of the date the judgment  
8 herein becomes final or alternatively be discharged from the adverse  
9 consequences of the conviction and judgment in this case.

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11 Dated: July 15, 2009

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Marc L. Goldman  
United States Magistrate Judge

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