COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

GUY DONELL MILES,	)
	)
Petitioner,	)
v.	) Court of Appeal Case No._____
	) Habeas Court Case No. M-13228
TERRI GONZALEZ, WARDEN,	) Court of Appeal Case No. G027421
	) Superior Court Case No. 98NF2299
	)
Respondent.	)
_____	)

Superior Court: SUPERIOR COURT OF ORANGE COUNTY,
HONORABLE FRANK F. FASEL, JUDGE

PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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Superior Court: SUPERIOR COURT OF ORANGE COUNTY,
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TO: THE HONORABLE DAVID G. SILLS, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE:

Because of occasional but devastating mistakes inherent in our justice system that lead to the conviction of the innocent, the law has recognized for more than 80 years that, no matter the cost, justice must be served and the innocent must not suffer for crimes they have not committed. (*In re Alpine* (1928) 203 Cal. 731, 739, 744; *In re Branch* (1969) 70 Cal.2d 200, 214.)

Over the past decade, through the efforts of the California Innocence Project and other projects in the National Innocence Network, hundreds of people who were wrongfully convicted in the United States have been exonerated. The largest cause of these wrongful convictions, by far, is eyewitness misidentifications.[1] The California Innocence Project itself has been instrumental in the exoneration of nine factually innocent individuals in the past ten years, including the exoneration of Timothy Atkins, whose conviction was reversed based upon new evidence of innocence and false evidence procured at trial, despite an un-recanted eyewitness identification.[2]

Each year, the California Innocence Project screens thousands of

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[1] Rob Warden, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row: An Analysis of Wrongful Convictions since restoration of the death penalty following Furman v. Georgia* (May 2, 2001) <http://www.deathpenaltyinfo.org/StudyCWC2001.pdf> [as of February 2, 2012].

[2] Silverstein, *Accused accomplice in 1985 slaying wrongly convicted, judge rules*, L.A. Times (Feb. 9, 2007).

applications for legal assistance from California inmates. As expected, most applications for assistance are denied because subsequent investigation confirms culpability. Indeed, it is relatively rare the investigation indicates factual innocence. Guy Miles' case is one such rare and extraordinary case.

In 1999, Guy Miles and co-defendant Bernard Teamer were convicted of two counts of second degree robbery and one count of being a felon in possession of a firearm stemming from the 1998 robbery of Fidelity Financial Institution [Fidelity] in Fullerton, California. Despite a strong alibi composed of family members, friends, and acquaintances placing Miles in Nevada at the time of the crime, the jury returned a guilty verdict based solely on the questionable identifications by two eyewitnesses – Trina Gomez and Max Patlan. Miles has always maintained his innocence.

After nine years of investigation into Miles' claim of innocence, Miles finally located the three true perpetrators of the robbery – Bernard Teamer, Jason Steward, and Harold Bailey. The three perpetrators came forward and confessed to the crime. These confessions were corroborated by a plethora of new scientific studies in the field of stranger eyewitness identifications since the time of Miles' conviction, studies which raise even further doubt about Gomez's and Patlan's identifications.

Sadly, despite discovering and unveiling the truth behind the 1998 robbery in a post-conviction evidentiary hearing to Miles' original trial judge,

Judge Frank Fasel, Miles remains incarcerated for a crime he did not commit. Judge Fasel's ruling denying Miles' habeas petition in the court below was based on an erroneous rendition of the facts adduced at both Miles' original trial and Miles' evidentiary hearing as well as the incorrect legal standard. The instant petition ensued.

All of the allegations contained in the attached petition are supported by the record and by declarations of people who have personal knowledge of the case and its facts. It is the California Innocence Project's contention that, after reviewing Miles' claims and attached exhibits in support of those claims, this Court will no longer have confidence in Miles' conviction, contrary to the trial court's findings. Miles respectfully requests that this Court exercise its original jurisdiction and grant his petition for writ of habeas corpus.

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Guy Miles, by and through his attorneys, Jan Stiglitz, Justin Brooks, Alexander Simpson, and Alissa Bjerkhoel of the California Innocence Project, respectfully petitions this Court for a writ of habeas corpus and by this verified petition, sets forth the following facts and causes for the issuance of the writ:

I.

STATEMENT OF THE CASE

1. Miles' imprisonment is in violation of his federal and state

constitutional rights as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution. This petition is authorized pursuant to Penal Code section 1473.[3]

2. Miles is currently unlawfully incarcerated and confined by Warden Terri Gonzalez at California Men's Colony in San Luis Obispo, California, pursuant to a judgment pronounced against him by the Orange County Superior Court in case number 98NF2299.

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

4. On March 12, 1999, the Orange County District Attorney filed an Amended Information charging Miles and co-defendant Bernard Teamer [Teamer] with second degree robbery in violation of sections 211, 212.5(c), and 213(a)(2) and felon in possession of a firearm in violation of section 12021(a). (1 C.T. 359-360.)[4] The information alleged the robbery was

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[3] Unless otherwise specified, all sectional references are to the California Penal Code.

[4] "R.T." and "C.T." stand for the Reporter's Transcript of Proceedings and Clerk's Transcript in Orange County Superior Court case number 98NF2299. "H.T." refers to the Reporter's Transcript of Proceedings of the evidentiary hearing in Orange County Superior Court case number M-13228. Copies of the hearing transcripts in case number M-13228 are being lodged with this Court.

committed for the benefit and in furtherance of a criminal street gang in violation of section 186.22(b). (1 C.T. 360.) It was further alleged that Miles was armed with a firearm in violation of section 12022.53(b) and that Miles personally inflicted great bodily injury on a victim in violation of section 12022.7. (1 C.T. 360.) Additionally, the prosecution alleged Miles had incurred three serious or violent felonies within the meaning of section 667 and that Miles had served two prior prison terms within the meaning of section 667.5(a), (b). (1 C.T. 361.) At trial, Miles pleaded not guilty to all charges and denied the allegations.

5. Miles' jury trial commenced on May 17, 1999, in the Superior Court of Orange County before the Honorable Frank F. Fasel [Judge Fasel] and concluded on Tuesday, June 8, 1999; the jury began deliberations. (2 C.T. 665, 705.)

6. On Thursday, June 10, 1999, the jury requested clarification as to when a jury is considered a "hung jury." (2 C.T. 711.) On the following Tuesday, June 15, 2011, after deliberating for over five days, the jury found Miles and Teamer guilty of the three charged offenses and found true all enhancements. (2 C.T. 705-706, 709-716; 3 C.T. 802-810, 820, 822-838; 9 R.T. 2230-2238.) Upon advice from his newly retained counsel, Miles admitted he incurred three prior "strikes" within the meaning of section 667(d) stemming from a single incident that occurred on September 9, 1991 and that

he had served a single prior prison term within the meaning of section 667.5(a) and a prior conviction within the meaning of section 667.5(b). (10 R.T. 2270-2275; 1 C.T. 361; 3 C.T. 854-865.)

7. On May 4, 2000, Miles filed a Motion for New Trial. (3 C.T. 891.) The Motion for New Trial contained six unsigned declarations and included a Motion to Grant Immunity to two declarants who refused to testify for fear of being labeled snitches. (3 C.T. 870, 903-917.) The unsigned declarations were drafted in response to conversations that defense investigator Ed Acosta had with Tiant Spears and Contre Snowden, who implicated Harold Bailey, Bernard Teamer, and an unknown male in the robbery. (See Exhibit A, Declaration of Ed Acosta; Exhibit B, Unsigned Declaration of Contre Snowden; Exhibit C, Unsigned Declaration of Tiant Spears.) On May 19, 2000, Judge Fasel denied both motions. (3 C.T. 947; 10 R.T. 2361-2362.) Judge Fasel refused to grant immunity to the declarants and denied the motion. (10 R.T. 2355-2357.)

8. At sentencing, both Miles and Teamer admitted they had previously been convicted of three prior "strikes" within the meaning of section 667(d). (C.T. 853- 928, 946; 10 R.T. 2269-2275.) After an unsuccessful motion pursuant to *People v. Romero* (1996) 13 Cal.4th 497 to strike the past allegations for the purposes of sentencing, the trial court, pursuant to section 667(e)(2) sentenced Miles to seventy-five years-to-life. (3 C.T. 949, 954-955;

10 R.T. 2363, 2365-2366, 2372.) After the prosecution struck one of Teamer's prison priors, the trial court sentenced Teamer to a determinate term of 17 years.

9. On May 19, 2000, Miles filed a timely notice of appeal. (3 C.T. 951.) On direct appeal, Miles alleged numerous trial court errors including the erroneous admission of gang testimony, improper jury instructions, improper limiting of the defense's eyewitness identification expert testimony, and misstatements of the law. Miles also raised a claim of insufficiency of the evidence to support the conviction and the gang enhancement. (*People v. Teamer and Miles* (April 30, 2003, G027421 [nonpub. opn. located at 2003 WL 1989678].)

10. On April 30, 2003, in an unpublished opinion, this Court found the evidence was insufficient to support the criminal street gang enhancement, reversed Miles' conviction as to that enhancement, and remanded the matter for re-sentencing. This Court affirmed Miles' conviction in all other respects. (*People v. Teamer and Miles* (April 30, 2003, G027421 [nonpub. opn. located at 2003 WL 1989678].)

11. On June 9, 2003, Miles filed a Petition for Review in the Supreme Court of California raising the sole issue of whether it was constitutional error for the trial court to have permitted the prosecution to use an unauthenticated document, originally admitted as the foundation for its gang expert's

testimony, as independent proof of Miles' gang membership. On July 16, 2003, the Supreme Court of California summarily denied the petition. (S116532.)

12. On May 11, 2004, Miles filed a Petition for Writ of Habeas Corpus, *pro per*, in the Superior Court of Orange County alleging ineffective assistance of trial counsel for failure to call additional alibi witnesses and improper advisement to admit strike priors, as well as ineffective assistance of appellate counsel failure to raise all meritorious issues. Miles also raised claims of due process violations when the trial court erroneously denied his Motion for a New Trial. On May 26, 2004, the Superior Court of Orange County denied the Petition for Writ of Habeas Corpus.[5] (*In re Guy Donell Miles on Habeas Corpus*; Superior Court Case No. M-10210.)

13. On July 12, 2004, Miles filed a Petition for Writ of Habeas Corpus, *pro per*, in this Court raising the same issues. On September 9, 2004, this Court denied the petition. (*Miles v. The Superior Court of California et al.*; Court of Appeal Case No. G034183.)

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[5] Petitioner's does not presently have a copy of this petition. Petitioner's attorneys attempted to order a copy from the Records Department at the Orange County Superior Court; the court did not provide a copy because the file had been marked in their system as "confidential." The court staff informed petitioner's attorneys that, although nothing appeared to be confidential in the file, petitioner's attorneys must obtain a court order to acquire a copy of the petition. Should this Court so request, petitioner will file a motion to obtain a court order for a copy of the petition.

14. On October 3, 2005, Miles filed a second Petition for Writ of Habeas Corpus, *pro per*, in the Superior Court of Orange County. Miles raised claims of ineffective assistance of trial counsel for failure to call additional alibi witnesses and improper advisement to admit strike priors, as well as ineffective assistance of appellate counsel's failure to raise all meritorious issues. Miles also raised claims of due process violations when the trial court erroneously denied his Motion for a New Trial and refused to strike at least one of his priors. On October 17, 2005, the Superior Court denied the petition. (Exhibit D, *Miles v. Giubino on Habeas Corpus*; Superior Court Case No. M-10702.)

15. On November 1, 2005, Miles filed a second Petition for Writ of Habeas Corpus, *pro per*, in this Court raising the same issues. On November 3, 2005, this Court denied the petition. (*Miles v. Orange County Superior Court et al.*; Court of Appeal Case No. G036256.)

16. On November 17, 2005, Miles filed a Petition for Review in the Supreme Court of California. On February 1, 2006, the Supreme Court of California denied the petition. (*Miles (Guy Donell) on Habeas Corpus*; Supreme Court No. S138895.)

17. On August 11, 2006, Miles filed a Petition for Writ of Habeas Corpus, *pro se*, in the United States District Court, Central District of California, alleging substantially the same issues as in his state petitions.

(Exhibit E, *Miles v. Marshall*; United States District Court No. 06-cv-00743-AHM (PJW).) April 13, 2009, the District Court denied the petition. (*Miles v. Marshall* (April 13, 2009, 06-cv-00743-AHM (PJW)) [nonpub. opn. located at 2009 WL 1014851].)

18. On September 17, 2007, Miles filed a Petition for Writ of Habeas Corpus, *pro per*, in the Supreme Court of California raising the aforementioned issues. On March 19, 2008, the California Supreme Court denied the petition citing *In re Waltreus* (1965) 62 Cal.2d 218 [issues actually raised and rejected on appeal cannot be renewed in petition for writ of habeas corpus] and *In re Lindley* (1947) 29 Cal.2d 709 [habeas corpus is not an available remedy to correct errors of procedure occurring at trial]. (*Miles (Guy Donell) on Habeas Corpus*; Supreme Court No. S156453.)

19. In 2002, Miles contacted the California Innocence Project to assist in the investigation of his case. The California Innocence Project completed its extensive screening process of Miles' case and commenced an investigation into Miles' claims in 2003. Investigation continued with eight different student investigators and concluded in 2010. (Exhibit F, Declaration of Jan Stiglitz.)

20. On July 15, 2010, the California Innocence Project filed a Petition for Writ of Habeas Corpus in the Superior Court of Orange County raising three claims: (1) newly discovered evidence in the form of confessions from

the true perpetrators – Teamer, Steward, and Bailey – completely undermined the prosecution's case against Miles and pointed unerringly to his innocence; (2) the prosecution introduced material false evidence against Miles in the form of Trina Gomez's and Maximilian Patlan's testimony; and (3) Miles is actually innocent of the charged offense. (Exhibit G, *In re Guy Donell Miles on Habeas Corpus*; Superior Court No. M-13228.)

21. An evidentiary hearing on the merits of Miles' claims commenced on May 23, 2011 before the original trial judge, Judge Fasel. (1 H.T. 1.) At the close of the hearing, on September 1, 2011, the court denied Miles' petition in a written opinion. (Exhibit H, Order Denying Petition.)

22. On September 26, 2011, Miles mailed Judge Fasel a motion for reconsideration or, in the alternative, a motion to reopen Miles' case in light of Judge Fasel's factual conclusions that were unsupported by the evidence or record. (Exhibit I, Motion for Reconsideration.) The same day the motion was mailed, Judge Fasel denied the motion without comment. (Exhibit K, Minute Order Denying Motion.) The instant petition ensued.

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II.

STATEMENT OF FACTS

A. Facts Adduced At Miles' Trial Which Formed The Basis Of His Wrongful Conviction.

1. The incident.

23. On June 29, 1998, around closing time, Trina Gomez and Maximilian Patlan were working at Fidelity Financial Services [Fidelity]. (1 R.T. 212; 2 R.T. 291-292, 300; 3 R.T. 563-564, 569.) Two men, one tall and slender with short hair wearing a grey or blue-green suit, and one stocky with short hair, a moustache or goatee, and wearing Levis and a white T-shirt, knocked on Fidelity's front door.[6] (2 R.T. 301, 304; 3 R.T. 499-500, 552, 569; 4 R.T. 750, 822.)

24. Patlan opened the door and asked if they were there to make a payment; the men responded, "Yes," and Patlan let them in. (2 R.T. 301, 304; 3 R.T. 569; 4 R.T. 750.) The slender man approached Patlan and gave him the name of an account that began with the letter "J." (2 R.T. 304; 3 R.T. 569-573.) While Patlan looked up the slender man's account information, the stocky man asked to use the restroom and was directed toward the back of the business. (2 R.T. 304; 3 R.T. 569, 572-574, 627-628.) The stocky man

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[6] Gomez has stated that there was no real distinguishable difference between the height of the slender man and the height of the stocky man. (Exhibit L, Trina Gomez-Alvarez Transcript, pp. 2-3.)

returned, pulled out a handgun, and struck Patlan from behind on his face, causing him to bleed. (2 R.T. 305-307, 332; 3 R.T. 576, 580.) The slender man pulled out a shotgun. (2 R.T. 307-308, 323; 3 R.T. 578, 580.)

25. The stocky man pushed Patlan to the ground and ordered him to lay on the ground; Patlan complied. (2 R.T. 307; 3 R.T. 577, 579.) The stocky man asked Gomez for the money. (2 R.T. 308; 3 R.T. 579-580, 584.) Gomez told the stocky man there was money in the drawer of her desk and in a file cabinet. (2 R.T. 309-311; 3 R.T. 592.) Gomez walked over to where the money was and gave them all the money that was wrapped up and ready to be deposited into the bank. (2 R.T. 310; 3 R.T. 584-585, 592.) In all, the men took $1,410 in cash and $4,138 in personal checks. (1 R.T. 218.)

26. In the meantime, an employee named Andrew Holguin was working at Trio Auto Parts [Trio], which was located a few doors down from Fidelity. (1 R.T. 212; 3 R.T. 493-494, 564.) A muscular man with long, straight hair came into Fidelity and asked about brake pads, a cam shifter, and lifters for a 454 cubic engine in a 1975 Chevrolet Caprice – a very rare car. (2 R.T. 273; 3 R.T. 498-499; 3 R.T. 504-506; 529-531, 548.) The conversation ended when Holguin saw two men – one slender and one stocky – at the customer's black Toyota Corolla trying to get the customer's attention. (3 R.T. 506-508.) The customer left and the three men drove away. (3 R.T. 508-510.)

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2. Police investigation.

27. Officer Michael Bova of the Fullerton Police Department was dispatched to the scene after a 911 call. (1 R.T. 209, 212.) Officer Bova interviewed Patlan and Gomez separately but generated no leads. (1 R.T. 213, 215-218.) The following day, Officer Bova interviewed Holguin at Fidelity. (1 R.T. 211, 229-230; 2 R.T. 251, 262; 3 R.T. 511-512, 533.) During this interview, a Fidelity employee, Shannon Alaniz, overheard Holguin's description of the car and its driver and thought the description of the driver sounded like Bernard Teamer, a customer of Fidelity. (2 R.T. 268-269; 3 R.T. 512-513, 542, 695-696.) Alaniz retrieved Teamer's file, showed Holguin a copy of Teamer's driver's license, and asked him if that was the car's driver. (3 R.T. 513-514, 538-539, 700-701.) Holguin stated the driver was the person in the photograph. (3 R.T. 514, 702.) Police had a lead.

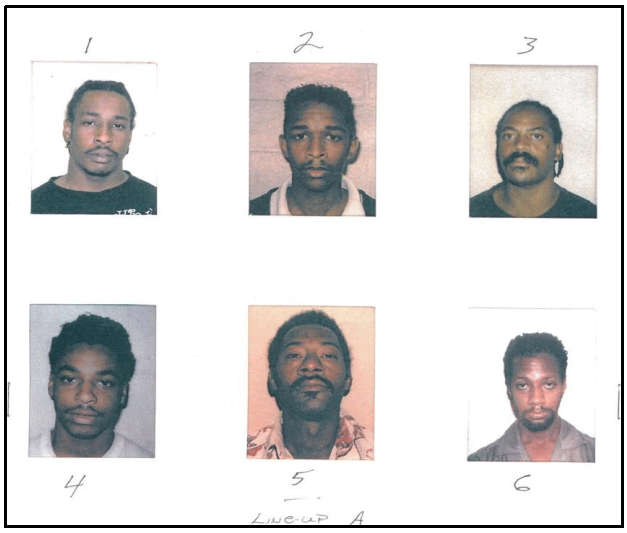
28. Teamer had obtained car loan from Fidelity for a black 1995 Toyota Corolla. (3 R.T. 598-599, 676-679.) In the loan document, Teamer listed a 1975 Chevrolet Caprice as an asset. (3 R.T. 677; 4 R.T. 757.) Subsequent police surveillance showed Teamer owned a 1975 Chevrolet Caprice with carburetor problems. (4 R.T. 770, 788.) Detective Michael Montgomery, the designated investigating officer, compiled six-pack photo lineups [lineups A through H] depicting individuals who were known to or associated with Teamer and showed them to the three eyewitnesses. (4 R.T.

843, 847, 853.) Before viewing any lineups, Patlan told Detective Montgomery he would be able to identify the slender male because he looked like Warren G., a celebrity he had seen before. (3 R.T. 630-631; 4 R.T. 852.) Patlan told Detective Montgomery he would not be able to identify the stocky man. (3 R.T. 629-630, 753; 4 R.T. 813-814.)

3. Identifications of the remaining two perpetrators.

a. Lineup A – Prosecution Exhibit 17.

29. Detective Montgomery placed suspect Teamer's photo in position number one in Lineup A. (2 H.T. 239.) In Lineup A, Holguin selected the individual in position number one, Teamer, as the driver. (3 R.T. 518.) Neither Gomez not Patlan saw either the slender or stocky robber in the lineup. (2 R.T. 341, 347; 3 R.T. 609-618.)

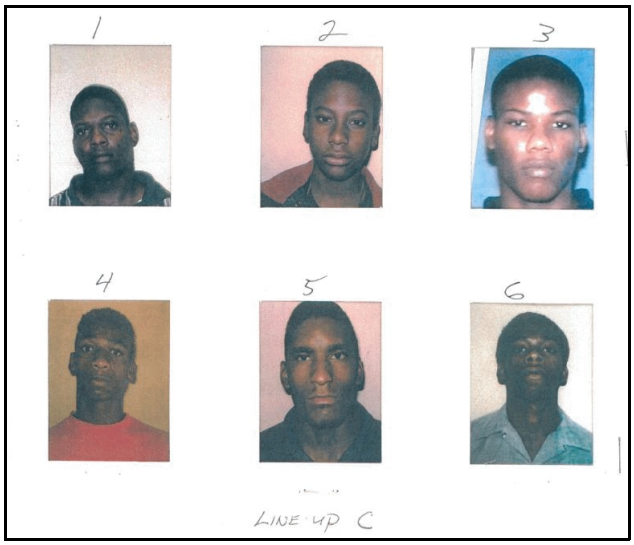


b. Lineup B – Prosecution Exhibit 18.

30. In Lineup B, Detective Montgomery placed suspects Darrell Smith in position number one and Kasey Bean in position number six. (2 H.T. 242.) Gomez said that the individual in position number three looked similar to the stocky man. (2 R.T. 343, 345,400- 401.) Patlan stated that the individual in position number one had the same facial features as the slender man. (3 R.T. 609-618.) Holguin did not recognize anyone. (3 R.T. 520-522.)

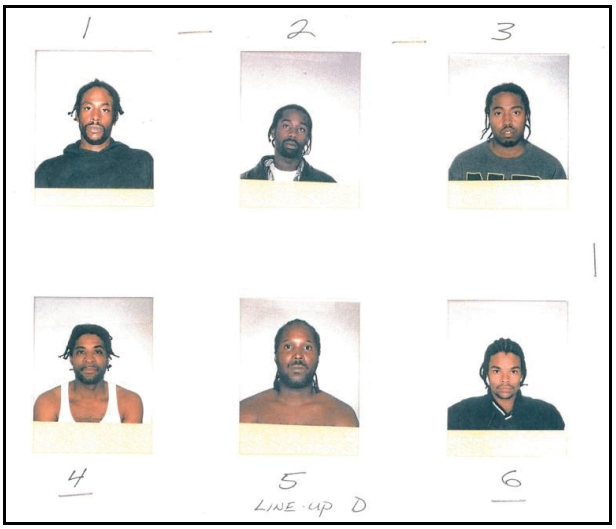
c. Lineup C – Prosecution Exhibit 19.

31. In Lineup C, Detective Montgomery placed suspects John Hicks in position number one and Michael Scott in position number three. (2 H.T. 242-243.) Gomez, Patlan, and Holguin did not identify anyone as either the stocky man or the slender man. (2 R.T. 341, 347; 3 R.T. 520-522, 609-618.)



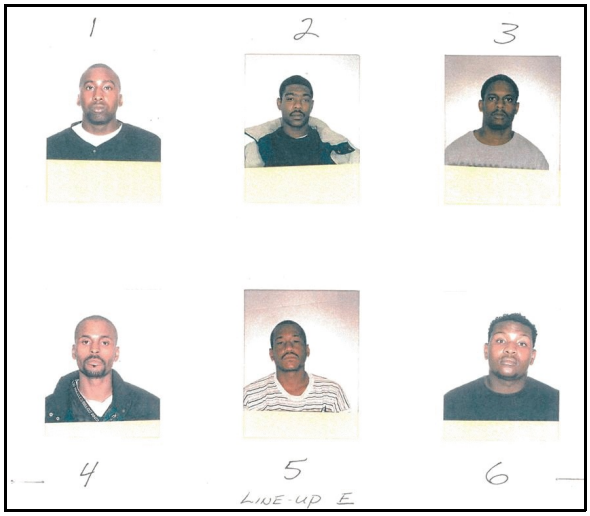
d. Lineup D – Prosecution Exhibit 20.

32. Although none of the witnesses described the perpetrators as having braided hair, Detective Montgomery compiled Lineup D which consisted only of individuals with braids. (2 H.T. 243.) Gomez, Patlan, and Holguin did not identify anyone as either the stocky man or the slender man. (2 R.T. 341, 347; 3 R.T. 520-522, 609-618.)



e. Lineup E – Prosecution Exhibit 21.

33. In Lineup E, Detective Montgomery placed suspects Sean Strong in position number one, Keith Patrick in position number three, Corey Mason in position number four, and Antonio Miller in position number six. (2 H.T. 244.) Gomez said the man in position number six, Antonio Miller, had similar facial similarities to the stocky man. (2 R.T. 343, 345,400- 401.) Patlan did not recognize anyone. (2 R.T. 341, 347; 3 R.T. 609-618.) Holguin said number four, Corey Mason, looked similar to the slender man. (3 R.T. 520-522.)



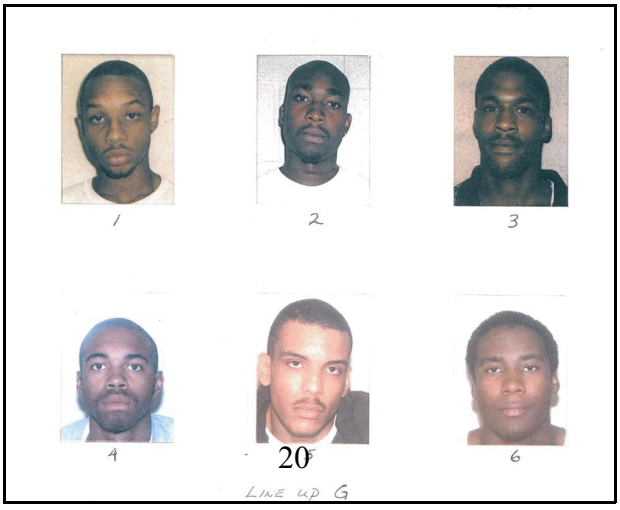
f. Lineup F – Prosecution Exhibit 22.

34. In Lineup F, Detective Montgomery placed suspect Ernest Wells in position number one. (2 H.T. 245.) Gomez did not recognize anyone. (2 R.T. 341, 347.) Patlan said that both the individual in position one and the individual in position five looked similar to the stocky man. (3 R.T. 609-618.)

Holguin was fairly certain that the individual in position one was the stocky man. (3 R.T. 521; 4 R.T. 821.)

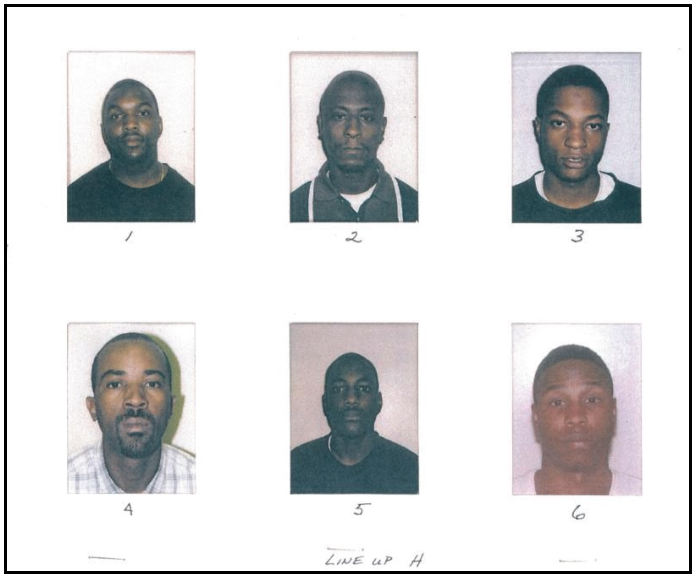
g. Lineup G – Prosecution Exhibit 23.

35. In Lineup G, Detective Montgomery placed a photo of suspect Harold Bailey in position number two. (2 H.T. 245.) Gomez noted that Harold Bailey looked familiar. (2 R.T. 343, 345,400- 401.) Patlan thought the individual in position five resembled the slender man. Holguin noted that both Harold Bailey, and the individual in position two looked like the slender man.



h. Lineup H – Prosecution Exhibit 25.

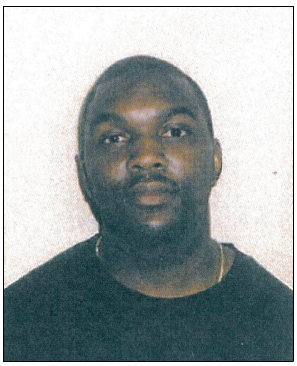
36. In Lineup H, Detective Montgomery placed photos of suspects Guy Miles in position number one and Brian Burnette in position number two. (2 H.T. 246.) Gomez and Patlan positively identified Miles as the stocky man. (2 R.T. 354-355, 369, 402; 4 R.T. 775; 3 R.T. 617-619, 621; 4 R.T. 777-778.) Holguin stated the stocky man could have been either Miles or the individual in position five, but he did not make a definitive identification. (3 R.T. 523.)

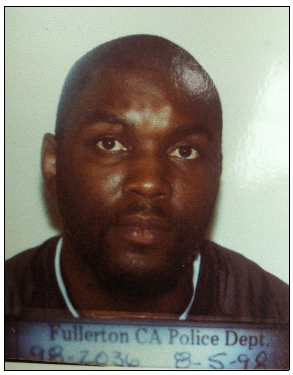


4. Gomez's trial identification.

37. Based on these identifications, the prosecution of Miles commenced. At trial, Gomez again identified Miles as the stocky man but stated Miles looked thinner than the day of the robbery. (2 R.T. 372-373, 445.) In a proceeding outside the jury's presence, Gomez could not positively identify Miles even when she stood at the counsel table and observed him from

various different vantage points. (2 R.T. 414-419.) Gomez stated that the photograph she picked out in the lineup appeared different than Miles in person. (2 R.T. 415.) Gomez said, "I'm not certain that that's him," and "he looks different." (2 R.T. 419.) Gomez stated, "I'm sure that that's him in the photo, but I'm not sure if that's him over there." (2 R.T. 437.) Gomez explained that Miles' complexion was darker in person than the in photograph in the lineup. (2 R.T. 419.) The prosecutor then showed her a different photograph of Miles – Prosecution Exhibit 29 – and this additional photo made her more certain of her identification of Miles in person. (2 R.T. 444.)





Photograph from Lineup H (left); Photograph of People's # 29 (right)

5. Miles' alibi and misidentification defense.

38. Miles had a total of nine alibi witnesses, six of whom testified that Miles was living in Las Vegas, Nevada, at the time of the charged offense. (5 R.T. 1215-1216, 1224, 1242-1243; 6 R.T. 1307; 7 R.T. 1479-1480.) He had come to Carson, California, to pick up his son during the early morning hours of June 29, 1998 and promptly returned to Las Vegas. (5 R.T. 1226-1228,

1232, 1244; 6 R.T. 1311-1312; 8 R.T. 1815-1816.) Miles was present in Las Vegas during the time when the crime was committed. (8 R.T. 1817-1819.)

39. In addition to his alibi, Miles presented the testimony of Dr. Scott Fraser; Dr. Fraser testified to the factors generally affecting eyewitness identifications. (7 R.T. 1507-1510, 1512-1514, 1516-1518, 1555-1557, 1561-1562.) In rebuttal, the prosecution called Dr. Ebbe Ebbsen, who criticized the methodology used by defense experts and opined there was no support for the defense expert's contentions. (8 R.T. 1662-1664, 1668-1681, 1684-1685, 1688-1691.)

6. The conviction.

40. After deliberating for five days, the jury found Miles guilty on all counts. (3 C.T. 705-706, 709-716, 802-810, 820, 822-838; 9 R.T. 2230-2238.) Pursuant to California's Three Strike's Law, Judge Fasel sentenced Miles to seventy-five years-to-life. (3 C.T. 949, 954-955; 10 R.T. 2372.)

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B. Facts Adduced At Miles' 2011 Evidentiary Hearing That Established He Was Wrongfully Convicted.[7]

1. Testimony of Bernard Teamer.

41. On May 23, 2011, Bernard Teamer testified on behalf of Miles. (1 H.T. 24.) Teamer grew up in Carson, California, which is close to Compton, California. (1 H.T. 25.) Growing up, Teamer became involved in the East Coast 190 Crips and took up the moniker "Little K.O." (1 H.T. 26, 67, 87.) For Teamer, gang life was a social activity. (1 H.T. 26, 46.) Harold Bailey, a stocky built man who grew up across the street from Teamer, was also a gang member. (1 H.T. 31-32, 66-67.) Bailey became Teamer's "little homie" in the gang and went by the related moniker "Baby K.O." (1 H.T. 31-32, 66-67.)

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[7] The statement of facts as it pertains to the evidentiary hearing is derived from the hearing transcripts of the evidentiary hearing in case number M-13228 and will be designated"H.T" for the hearing transcripts. Additionally, the statement of facts will incorporate the following admitted exhibits and stipulations: Petitioner's Exhibit H-A (Teamer Declaration) [Exhibit M]; Petitioner's Exhibit H-B (Steward Declaration) [Exhibit N]; Respondent's Exhibit H-1 (Four Pages of Interviews) [Exhibit O]; and Respondent's Exhibit H-2 (Confidential Interoffice Memo) [Exhibit P]. Finally, facts are derived from admitted joint stipulations including: Stipulation 1 (Interview Report With Gomez-Alvarez) [Exhibit Q]; Stipulation 2 (Trina Gomez-Alvarez Transcript) [Exhibit R]; Stipulation 3 (Mike Montgomery Supplemental Report) [Exhibit S]; Stipulation 4 (Michael Munn Supplemental Report) [Exhibit T]; Stipulation 5 (Interview Report of Karen McKinney) [Exhibit U]; Stipulation 6 (Interview Report of Karen McKinney) [Exhibit V]; Stipulation 7 (Bailey DMV Photo) [Exhibit W]; Stipulation 8 (Steward CDCR Photo) [Exhibit X]; Stipulation 9 (Height and Weight) [Exhibit Y]; Stipulation 10 (Photographs of Warren G.) [Exhibit Z]; and Stipulation 11 (Photograph of Jason Steward) [Exhibit AA].

Through Bailey, Teamer met Jason Steward who was known by the moniker "Tiny Wimp." (1 H.T. 32.)

42. Over the years, Teamer was arrested and prosecuted several times for crimes he committed as a member of the gang. (1 H.T. 26-27, 43.) Teamer spent time in prison on more than one occasion. (1 H.T. 27.) Teamer's last stint in prison was due to his participation in the instant robbery of Fidelity. (1 H.T. 27-28.) At the time of the Fidelity robbery, Teamer needed money and was familiar with Fidelity because he used to pay his bills there. (1 H.T. 31.) Teamer knew Max Patlan because he dealt with Patlan in paying his bills and Patlan warned Teamer that Fidelity was going to repossess Teamer's car, which they eventually did. (1 H.T. 29-30.)

43. Teamer testified he was the one who approached Bailey and Steward about the Fidelity robbery plan; he had never committed a robbery with either Bailey or Steward before. (1 H.T. 32, 71, 74; Exhibit M, p. 1.) The plan was for Bailey and Steward to rob Fidelity while Teamer waited in the car. (1 H.T. 31, 72.) Teamer would not go inside because the employees would recognize him. (1 H.T. 31.) Bailey and Steward agreed to the plan. (1 H.T. 32.)

44. The three drove to Fidelity in Teamer's black Toyota Corolla with Teamer driving, Bailey in the passenger seat, and Steward in the back. (1 H.T. 33.) Steward was wearing a suit and both Teamer and Bailey were wearing T-

shirts and jeans. (1 H.T. 33, 73.) Steward was carrying Teamer's shotgun and Bailey had Steward's handgun. (1 H.T. 33, 72-73, 82.) Once they got to the parking lot, Teamer backed his car into a spot in front of an auto parts store which was to the left of Fidelity. (1 H.T. 33, 75.) Bailey and Steward headed to Fidelity while Teamer waited in the car. (1 H.T. 33-34.)

45. Teamer waited a few minutes and then decided to go into the auto parts store. (1 H.T. 33-34, 75; Exhibit M, pp. 1-2.) Inside, Teamer asked the clerk about buying parts for his 1975 Chevy Caprice Classic because it was backfiring. (1 H.T. 34, 35; Exhibit M, p. 2.) Teamer got an estimate on how much the parts would cost. (1 H.T. 34.) While he was talking to the store clerk, the clerk told him, "Your buddies are waiting on you." (1 H.T. 34; Exhibit M, p. 2.) Teamer turned around and he saw Bailey and Steward standing outside of the car because the car was locked. (1 H.T. 35, 76.) Teamer immediately left the store and headed back to the car. (1 H.T. 77-78; Exhibit M, p. 2.) Teamer unlocked the doors, they got in the car, and he drove off. (1 H.T. 77.)

46. The three split up the money later that day. (1 H.T. 77, 79.) The proceeds consisted of checks and small amount of money. (1 H.T. 79.) They tossed the checks because they could not do anything with them. (1 H.T. 80.) Each received around $400 - $500. (1 H.T. 79.)

47. A few months later, police arrested Teamer for the Fidelity robbery

and interviewed him. (1 H.T. 35; 3 H.T. 118-199.) At the time, Teamer lied to police and denied any involvement in the robbery. (1 H.T. 47-48; 3 H.T. 119-120.) Police had also arrested Miles, someone from the same neighborhood as Teamer and who had also been associated with the East Coast 190 Crips. (1 H.T. 35, 45, 48, 50.) Teamer did not know Miles growing up because the neighborhood and the gang were pretty large. (1 H.T. 82.) Teamer had met Miles about ten years prior and had only seen him once in passing before they were arrested for the instant robbery. (1 H.T. 36, 44-45.)

48. Although he could get in trouble in the gang for letting a fellow gang member get arrested for a crime that he did not do, Teamer did not tell anyone that Miles was not involved in the robbery. (1 H.T. 50, 89.) Teamer felt bad that Miles was charged with a crime he did not commit, but he could not come forward at the time because he would have had to snitch on Bailey and Steward. (1 H.T. 54, 89.) Teamer faced a very difficult decision – either tell on Bailey and Steward and be labeled a snitch, or let a fellow gang member go down for a crime he did not commit. (1 H.T. 90.) Teamer decided to keep quiet and told no one about who participated in the robbery. (1 H.T. 90.)

49. After a partially successful appeal, Teamer served a little over five years for the robbery and was released on parole. (1 H.T. 35, 37, 52.) Upon his release, Teamer turned his life around and disassociated himself from the gang life. (1 H.T. 27, 35, 49-50, 52, 86.) He moved his immediate family to

Lancaster, California, which was the furthest away he could be from Carson while still residing in Los Angeles County as part of his parole. (1 H.T. 26-27.) There, Teamer took up a job as a truck driver for Greater Harvest Trucking Through Christ. (1 H.T. 24.)

50. In 2005, the California Innocence Project contacted Teamer. (1 H.T. 39, 53, 55; Exhibit M, p. 1; Exhibit F, pp. 1-2.) Teamer "just didn't want to speak with them" and told the California Innocence Project nothing about his involvement in the robbery. (1 H.T. 53, 57.) In 2010, the California Innocence Project contacted Teamer again and told him Steward had given a statement. This time, Teamer was ready to talk about the robbery. (1 H.T. 40, 60, 62-63, 83; Exhibit M, pp. 1-3; Exhibit F, p. 2.) Teamer was no longer afraid of being labeled a snitch with respect to Steward and finally told the California Innocence Project the truth. (1 H.T. 40-41, 65; Exhibit M; Exhibit F, p. 2.)

51. Teamer was glad to come forward. The fact that Miles was serving time for a crime he was innocent of had been weighing on Teamer's conscience for a long time. (1 H.T. 42, 83; Exhibit M, p. 1.) Teamer would not lie in order to help Miles and apologized for letting Miles get convicted of the crime. (1 H.T. 42; Exhibit M, p. 2.) Teamer hoped that, one day, Miles would be able to forgive him for his actions and silence. (Exhibit M, pp. 2-3.)

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2. Testimony of Jason Steward.

52. Jason Steward also testified on Miles' behalf at the evidentiary hearing. (1 H.T. 94.) Steward grew up in Compton, California. (1 H.T. 95.) There was a gang presence in Compton and, growing up, Steward was involved in the Farm Dog Compton Crips gang. (1 H.T. 95-96; Exhibit P, p. 1.) He continues to associate with the gang because his friends are in the gang; however, he also goes to Cerritos City College and is studying accounting. (1 H.T. 96-97, 122.)

53. On June 29, 1998, Steward's nineteenth birthday, he robbed Fidelity with Teamer and Bailey. (1 H.T. 97-98; Exhibit N, p. 1; Exhibit O, p. 3; Exhibit P, p. 1.) Steward knew Bailey because he went to elementary school with him in Carson, California. (1 H.T. 98-99, 123.) Steward knew Teamer through Bailey. (1 H.T. 99.) Bailey was about Steward's height or a little shorter and weighed about 190 lbs. (1 H.T. 183-186.) Bailey had noticeable rolls on the back of his head which, according to Steward, would have been impossible for someone not to notice. (Exhibit P, p. 1.)

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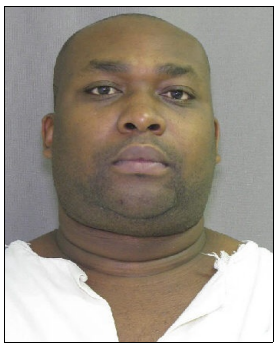
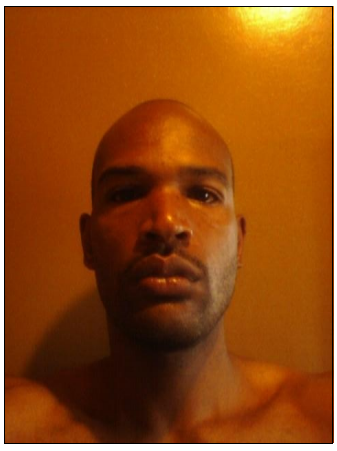


At Miles' evidentiary hearing in the court below, the prosecution refused to stipulate to the introduction of this 2009 photo of Bailey which clearly depicts rolls on the neck

54. At the time of the crime, Steward was about 6'0" to 6'1" and 160-165 lbs. (1 H.T. 166.) He looked just like Warren G., a famous rapper. (Exhibit P, p. 1.) In fact, his friends called him "Warren J." because of the similarities between the two. (Exhibit P, p. 1.)



Pictures admitted by stipulation.
Warren G. (left); Jason Steward (right)

55. The day of the robbery, Teamer told Steward and Bailey about

robbing Fidelity, a place with which Teamer was familiar. (1 H.T. 100; Exhibit N, p. 1; Exhibit O, p. 3.) Steward would not normally commit crimes with members of other gangs, but because he grew up with Bailey, he decided to this time. (1 H.T. 155.) The plan was for Teamer to wait in the car while Bailey and Steward went inside and stole the money. (1 H.T. 101, 135-136; Exhibit N, p. 2.) Teamer was not going to go inside because he had prior dealings with the employees so they would recognize him. (1 H.T. 102, 135; Exhibit N, p. 1.) Teamer was supposed to wait in the car. (1 H.T. 106.)

56. Steward put on a suit in preparation for the robbery. (1 H.T. 102, 134; Exhibit N, p. 2; Exhibit O, p. 2.) Steward had committed between six and ten robberies wearing suits and he considered them his "lucky suits" because it gave him a better chance of gaining access to a secure building and he never got caught when he wore one. (1 H.T. 102, 141-142, 156, 179; Exhibit O, p. 3.) Steward's cousins Marlin Rodgers, Keyone Owens, and Cedric Owens saw Steward put on his suit and thought Steward was crazy for committing the robbery on his birthday. (1 H.T. 134-135; Exhibit N, p. 1; Exhibit O, p. 2.)

57. The three drove to Fidelity in Teamer's car with Teamer driving, Bailey in the passenger seat, and Steward in the back. (1 H.T. 103-104; Exhibit N, p. 2; Exhibit O, p. 1.) Steward was carrying a shotgun he got from Teamer, and Bailey was carrying Steward's handgun. (1 H.T. 103, 132.) Steward put the shotgun in his suit pocket and hid the rest of the gun by sliding

it up his jacket sleeve. (1 H.T. 105, 132; Exhibit O, p. 4.) When they arrived, Teamer backed the car into a parking space so they could quickly leave after the robbery without having to reverse the car out of the space. (1 H.T. 104-105, 135.) Steward and Bailey got out and headed to Fidelity. (1 H.T. 104-105, 147-148.)

58. Steward got one of the employees, a male, to open the locked door and let them in by telling them he had to make a payment on an account. (1 H.T. 105-107, 132-133, 136; Exhibit N, p. 2; Exhibit O, p. 4.) Steward accurately described the exact layout of Fidelity. (1 H.T. 107-108, 136.) Inside, the male employee, who Steward identified as a white male, asked for Steward's name. (1 H.T. 107; 3 H.T. 114.) Steward almost messed up and gave the male employee his real name, "Jason," but ended up giving a name that started with the letter "J." (1 H.T. 107, 136-137; Exhibit O, p. 4.) He believed it was something along the lines of "James Johnson." (Exhibit N, p. 1.) Bailey then came in and acted as if he needed to use the restroom which was located in the back of Fidelity. (1 H.T. 108, 133; Exhibit N, p. 1.) Bailey came back from the restroom area and pulled out his gun. (1 H.T. 108, 137; Exhibit O, p. 2.) Steward pulled out his shotgun and told the employees not move or to touch the phones. (1 H.T. 108, 137, 158; Exhibit N, p. 2; Exhibit O, p. 4.)

59. Bailey forced the female employee to get on the floor. (1 H.T. 109,

137-138, 158; Exhibit N, p. 2.) Bailey punched the male employee in the face by his mouth/nose area to "knock that nervous stuff out of him some." (1 H.T. 138-140.) The male employee opened the drawer and gave Bailey a Ziploc bag with the money, and the two robbers left. (1 H.T. 109-110, 138, 140-142, 144.)

60. Back at the car, Steward and Bailey realized Teamer was not waiting for them and the doors to the car were locked. (1 H.T. 110, 145, 158; Exhibit N, p. 2; Exhibit O, p. 4.) The two got worried, almost started to panic, and then spotted Teamer inside the auto parts store. (1 H.T. 110, 146, 159; Exhibit N, p. 2.) They motioned for him to come back to the car and Teamer did. (1 H.T. 110-111, 146; Exhibit N, p. 3.) The three men got into the car and left. (1 H.T. 146; Exhibit N, p. 3; Exhibit O, p. 4.)

61. Steward recalled the group did not get very much money from the robbery. (1 H.T. 109, 143, 161.) It was less than $2,000 and possibly not even $1,000. (1 H.T. 109.) Steward testified they had stolen a bunch of receipts and papers with people's information on it because it was inside the bag of money. (1 H.T. 109, 150.) Steward did not think the robbery was worth the small amount of money they got from it. (1 H.T. 143.)

62. Steward was never arrested for the robbery. (1 H.T. 111.) He found out Teamer had been arrested and possibly someone else from the neighborhood, but the information was not clear. (1 H.T. 111, 167; Exhibit N,

pp. 1-2; Exhibit O, p. 2.) Steward believed that if Teamer had been waiting in the car as planned, no one would have ever been arrested for the robbery and thought Teamer was "stupid" for going inside the auto parts store to take care of personal business during a robbery. (1 H.T. 145-146.) Steward was eventually arrested on June 4, 1999 for a different robbery. (1 H.T. 115, 121, 141-142.) That was the last time Steward saw Bailey. (1 H.T. 115.)

63. In 2007, while Steward was serving time at California Men's Colony, Steward found out Miles, a fellow inmate, was also arrested and convicted along with Teamer for the robbery of Fidelity. (1 H.T. 111-112, 118; Exhibit P, p. 2.) Before that date, Steward had never even heard of or met Miles. (1 H.T. 111, 113, 117; Exhibit P, p. 2.) Miles requested to speak to Steward about the robbery. (1 H.T. 112, 128-129.) Initially, Steward did not want to talk about the crime and it took him some time to really think about whether or not he wanted to come forward. (1 H.T. 112, 118, 180, 182; Exhibit N, p. 4.) Steward was trying to get his life back together and was afraid that admitting involvement could add more time to the sentence he was already serving. (1 H.T. 119.) He chose to meet Miles because he believed it was the right thing to do. (1 H.T. 119-120.)

64. Steward briefly met with Miles and could not believe someone was actually convicted of something he did not do. (1 H.T. 112, 115, 129-131.) Miles' conviction was mind-boggling to him because he thought it was

impossible for someone to be convicted when he was not even present for the crime. (1 H.T. 129; Exhibit N, pp. 1, 3-4.) Steward was also shocked Teamer allowed Miles to be convicted. (Exhibit N, p. 4.)

65. After Steward's meeting with Miles, Jessica Jerving, a student from the California Innocence Project, met with Steward to see what he knew about the robbery. (1 H.T. 124; Exhibit F, p. 2.) Jerving did not show Steward any police reports or other documents about the crime; nevertheless, Steward accurately recounted the details of the incident. (1 H.T. 151; Exhibit F, pp. 3-4.) In early 2008, Jerving met with Steward again to obtain a declaration. (1 H.T. 113-114, 124; Exhibit F, p. 4.) Again, she did not show Steward any police reports or tell him what facts needed to be in his declaration; his declaration accurately recounted details of the crime. (1 H.T. 151-152; Exhibit N.)

66. Steward had nothing to gain by confessing to the robbery if it was not, in fact, the truth. No one had promised him anything in exchange for his testimony. (1 H.T. 117.) Neither would admitting to this robbery give him any more status in his gang. (1 H.T. 154.) In addition, at the time he executed the declaration and at the time he testified, Steward thought he could still be prosecuted for the crime. (1 H.T. 119-120, 126-127, 131, 164.) Steward believed he risked adding more time to the sentence he was already serving by admitting to his involvement in this case. (1 H.T. 117, 172-173.) Even after

Montgomery threatened Steward with violation of his parole for lying to a peace officer if his involvement was a lie, Steward still admitted his role in the robbery. (3 H.T. 139.) Regardless of the consequences, Steward came forward because he genuinely felt the need to correct the situation; he knew the truth, he knew who was involved, and he knew Miles was not one of the robbers. (1 H.T. 115, 117-118, 120, 125, 127, 131.)

3. Testimony of Guy Miles.

67. On May 24, 2011, Miles testified on his own behalf. (2 H.T. 188.) Miles grew up in Carson, California. (2 H.T. 189.) Carson was a gang-infested neighborhood and, growing up in that environment, Miles ended up dropping out of school in the eighth or ninth grade. (2 H.T. 189.) He started associating with the 190 East Coast Crips. (2 H.T. 190.) Considering both of his parents were ministers and disapproved of his associations, Miles was forced to leave home. (2 H.T. 191.) He started living at friends' houses. (2 H.T. 191.) Miles picked up several criminal convictions and spent time in custody for some of them. (2 H.T. 190-191, 206-208.) On May 4, 1997, Miles was released from prison on parole, and he moved to Las Vegas, Nevada. (2 H.T. 192.)

68. On August 5, 1998, Detective Montgomery arrested Miles in connection with the robbery of the Fidelity. (2 H.T. 191-192, 209-210; 3 H.T. 121.) Initially, Miles thought that he had been arrested for violation of parole

because he was out on parole and living in Las Vegas when he was supposed to be residing in Los Angeles County. (2 H.T. 192, 219-220.) When Miles found out it was not for a parole violation but for a robbery in Orange County, he could not believe it because he had no involvement in the robbery whatsoever. (2 H.T. 205; 3 H.T. 117.) In fact, he had only been to Orange County once, to Fullerton, in 1987 when he was younger. (2 H.T. 192; 3 H.T. 122.)

69. Additionally, Miles found out later he had an alibi. (2 H.T. 193.) The night before the Fidelity robbery, he had driven from Las Vegas to Carson through the night and into the early morning hours to pick up his son from his parents' house. (2 H.T. 193, 195.) Miles had to drive when the sun was down because he did not have air conditioning in his car and it would be unbearably hot in the day. (2 H.T. 195-196.) He returned to Las Vegas the morning of the Fidelity robbery and was there during the time the robbery took place. (2 H.T. 193-194, 196.) Miles tried several times to get in touch with Detective Montgomery to tell him about his alibi to no avail. (2 H.T. 229.) The next time Miles saw Detective Montgomery was at trial. (2 H.T. 229.)

70. Regardless of witnesses who placed him in Las Vegas at the time of the crime, Miles was eventually convicted of the robbery. (2 H.T. 197.) After his conviction, Miles tried to find out who really committed the crime. (2 H.T. 198-199.) Miles heard from Contre Snowden and Tiant Spears that

Teamer had committed the crime with Bailey and someone else. (2 H.T. 199.) Miles had never met Bailey before in his life. (2 H.T. 200.) Miles tried to follow up on this information and started calling around the neighborhood to see if anyone had any information. (2 H.T. 200.) He found out where Bailey lived and sent someone to Bailey's house. (2 H.T. 200-201.) Miles discovered that Bailey had moved to Texas. (2 H.T. 201.) Over the next few years, Miles wrote to numerous organizations for help. (2 H.T. 204.) He wrote to the District Attorney, Mike Capizzi, and then the new District Attorney, Tony Rackaukas. (2 H.T. 204.) He wrote to the New York Innocence Project, the Northern California Innocence Project (based out of Santa Clara), and even to Judge Fasel. (2 H.T. 204-205.)

71. It was not until 2007, after serving nine years for the robbery, that Miles obtained a solid lead. (2 H.T. 201.) Rory Dungy told Miles he [Miles] needed to talk to someone named "Tiny Wimp" or "Wimp" because "Tiny Whimp" had something to do with the Fidelity robbery. (2 H.T. 201.) Miles also found out "Tiny Wimp" or "Wimp" worked at the prison on a different yard. (2 H.T. 202.) Miles was able to arrange a meeting with "Tiny Wimp" or "Wimp," who turned out to be Steward. (2 H.T. 202-203, 232.) During the meeting, Miles never discussed the statute of limitations with Steward. (2 H.T. 233.) After the meeting, Miles told his parents and told the California Innocence Project the identities of the three true robbers. (2 H.T. 204.)

4. Eyewitness identification procedure testimony.

72. On May 24, 2011, Investigator Montgomery testified about the photo identification process he used in the instant case. (2 H.T. 237.) At the beginning of the investigation, the only suspect Montgomery had was of the getaway driver, Teamer, who witnesses described as a black male, 5'8"-5'9", 180-190 lbs, with a heavy build, long straight hair, a moustache, and a dark complexion. (2 H.T. 238-239, 254-255.) Montgomery knew one of the armed robbers was tall, skinny, black, with close-cut hair, clean shaven, wearing a suit, and possibly having a small goatee. (2 H.T. 238.) The other armed robber was black with dark skin, around 5'8"-5'9", stocky, having a shaved head and facial hair, and with possible rolls on the back of his neck. (2 H.T. 239.) With only these few details, Montgomery started putting together numerous lineups. Montgomery selected photos of individuals with whom Teamer was associated. (2 H.T. 238, 254-255.)

73. Doctor Mitchell Eisen [Dr. Eisen] testified that Montgomery's method of conducting the lineups was flawed in many respects, thereby increasing the chance of a misidentification. (3 H.T. 4.) As Dr. Eisen explained, just as in the collection of physical evidence, if the procedure used to collect the eyewitness identification is unreliable, then the resulting eyewitness evidence can be contaminated. (3 H.T. 18-19.) In the instant case, the identification procedure had numerous flaws, thus contaminating the

identification of Miles as the stocky man.

a. The six-packs shown to the eyewitnesses were suggestive or biased.

74. The single overriding rule in conducting photo identifications is that no photo should unduly stick out from the others. (3 H.T. 20.) Hence, all fillers and the suspect should generally fit the description the eyewitness provided to law enforcement. (3 H.T. 21-22, 88.) If only one person in the six-pack matches the description the eyewitness gave, the six-pack is considered unduly suggestive or biased because the eyewitness is more likely to pick that photo simply given it is the only possible choice in the group. (3 H.T. 22-23, 25-26.)

75. Dr. Eisen saw suggestibility problems with Lineup H, the lineup containing Miles' photo. Dr. Eisen noted: "In looking for a dark-skinned, shaved head, heavy enough to have a couple rolls on the back of his neck," the only one person who sufficiently matched the description in its entirety was Miles. (Prosecution Exhibit 25; 3 H.T. 40.)

b. The lineups contained multiple fillers, a technique that rendered the identifications unreliable.

76. Dr. Eisen also explained there are problems with using more than one suspect in a six-pack lineup. (3 H.T. 30.) If you increase the number of suspects in a six-pack, you also increase the chances that someone who is not the suspect is going to be chosen. (3 H.T. 31, 41.) With only one suspect in

the lineup, the witness only has a one in six chance of picking someone the police suspect may have committed the crime. (1 H.T. 31.) By placing more than one suspect in the lineup, you increase the chance of a police suspect being picked. (1 H.T. 31.) In the instant case, Montgomery put numerous suspects into a single photo lineup, including Lineup H. (2 H.T. 240, 242-244, 246; Prosecution Exhibits 18, 19, 20, 21, 25.) By having more than one suspect in Lineup H, it was more likely that the witnesses would mistakenly pick Miles' photo.

c. The witnesses were not admonished properly before viewing the lineups, further rendering their identifications unreliable.

77. Dr. Eisen also testified that many people automatically assume the suspect must be in the six-pack they are viewing. (3 H.T. 42-43.) With that assumption, witnesses naturally want to find the most likely choice and pick that photo. (3 H.T. 43.) In order to work against these natural assumptions, police give pre-lineup admonishments to reduce the possibility that a witness will choose the person who most resembles the culprit. (3 H.T. 43.) However, if a witness is told prior to viewing a six-pack that an arrest has been made in the case, the entire admonishment becomes ineffective and the witness will take the knowledge of the arrest as a communication that the suspect's photo is in the six-pack. (3 H.T. 43-44, 90-91.)

78. Here, prior to Montgomery showing Patlan Lineup H, he told

Patlan that two arrests had been made in the case. (2 H.T. 247.) The message was clear – the suspect was in the six-pack.

79. Furthermore, if a witness makes an identification and then is shown subsequent lineups, the witness will pick up on the fact that he or she did not choose the right person the first time around. (3 H.T. 52-53.)

80. This is what happened when Holguin viewed Lineup G and made a positive identification, only to be subsequently shown Lineup H with Miles' picture. The message was clear to Holguin – he had not identified the right person who police thought was the stocky man in Lineup G, so police were giving him another chance with Lineup H.

d. The lineups were infected with experimenter bias.

81. Experimenter bias is the concept that the person conducting an experiment or test can inadvertently influence the results of the test if they know the right answer. (3 H.T. 44.) When the investigating officer knows the suspect is in the six-pack, he may inadvertently communicate the suspect's identity to the witness. (3 H.T. 46.) Studies have shown this is a serious problem in administering six-pack identifications. (3 H.T. 47.)

82. Here, Montgomery knew who the potential suspects were in each lineup. (2 H.T. 251.) Regardless of his knowledge, he still conducted the lineups with the witnesses. This is a classic example of experimenter bias.

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e. There is no meaningful correlation between confidence and accuracy in identifications.

83. Since the time of Miles' conviction, there has been an accumulation of data and a better understanding of the relationship between the confidence of a witness in his or her identification and the accuracy of that identification, making prosecution witness Dr. Ebbe Ebbsen's opinion at Miles' trial obsolete. (3 H.T. 54, 94.) Research has shown it is impossible for someone to differentiate between an eyewitness who incorrectly believes they have chosen the right person and the eyewitness who correctly believes they have chosen the right person. (3 H.T. 54-55.) There is no significant correlation between the accuracy of the identification and the confidence of the eyewitness in that identification. (3 H.T. 55-56, 92 [only as high as 0.35% or 0.40%].)

84. Studies have shown that once a witness makes an identification, that witness will stand by the decision, regardless of whether the identification is right or wrong. (3 H.T. 50-51.)

85. Gomez still remains confident in her identification that the man in People's Exhibit 29 is Miles. (Exhibit R, p. 9; Exhibit Q, pp. 1-2.) However, Gomez never identified Miles in person, absent reference to People's Exhibit 29, as the perpetrator.

86. In fact, Gomez did not even remember questioning her identification at trial despite other witnesses including Montgomery, D.A.

Investigator Michael Munn, and Miles' defense attorney, Frank Williams, who were in the room and remembered. (Exhibit R, p. 5; Exhibit S, pp. 1-2; Exhibit T, p. 1; 4 H.T. 5-6.)

87. At the hearing, Williams detailed Gomez's problems with her identification at trial. (4 H.T. 3-39.) Williams related that, during a morning recess in the middle of Gomez's testimony, he went out to the hallway to speak to Miles' family. (4 H.T. 6, 9.) When Williams returned to the court room, he saw Gomez on the witness stand and prosecutor Karen Wulc standing directly to her left. (4 H.T. 6-7.) Neither the judge nor the jury were present in the court room. (4 H.T. 6, 9.) Gomez was looking at Miles and making statements such as "I don't think that's him. It doesn't look like him." (4 H.T. 7-8.) Gomez wanted Miles to stand up, turn to the right and left, and wanted to get a closer look at him, which he did. (4 H.T. 7, 25-26.) Even after observing Miles further, Gomez said Miles was thinner and his complexion was different than the stocky man. (4 H.T. 26.) Gomez *unequivocally* said Miles *in person* was not the stocky man. (4 H.T. 35.) Williams did not put a stop to this proceeding or move for a mistrial because he felt what Gomez said was very favorable to Miles' case. (4 H.T. 19-20, 29, 35.) Later, Wulc showed Gomez a picture of Miles in the hallway outside of Williams' presence – a photo that Gomez had not seen before – and after Gomez saw that photo, she became confident that the person *in the photo* was Miles. (4 H.T. 36; see

also Exhibit S [Detective Montgomery recalled the same – Gomez was uncertain Miles was the stocky robber, she was shown a photo of Miles and she positively identified the person in the photograph as the person who robbed her, and after Gomez studied Miles, she realized that Miles *in person* was the same person *in the photograph* and, because he was the same person *in the photograph*, she was able to make a positive identification of Miles *in person*].) In post-trial interviews from the District Attorney's Office, Wulc claimed she could not remember what happened during Gomez's identification. In fact, she claimed she did not remember the case at all.[8] (Exhibit U, p. 1; Exhibit V, p. 1.)

5. The trial court's ruling after the evidentiary hearing.

88. The trial court ultimately denied Miles' petition stating that both the evidence presented as to Miles' false evidence claim and as to his new evidence claim "does not cast fundamental doubt on the accuracy and reliability of the proceedings" and Miles' evidence "does not undermine the entire prosecution case and does not point unerringly to innocence or reduce

[8] Wulc's statement to the District Attorney's Office that she could not remember the case was directly contradictory to what Wulc had told the Project. During its investigation of Miles' claim of innocence, the California Project contacted Wulc to inquire, in part, as to the contents of the conversation during the meeting with Gomez. (Exhibit BB, Declaration of Brook Barnes.) Ms. Wulc's attorney, Andrew Stein, called the California Innocence Project back and stated that, based on what he knows, Petitioner is innocent of the instant offense, but Ms. Wulc would not speak to the California Innocence Project's students or attorneys about the case. (Exhibit BB.)

culpability." (Exhibit H, p. 5.)

III.

DECLARATION OF HAROLD BAILEY

89. Harold Bailey did not testify at the evidentiary hearing.[9] The California Innocence Project contacted Bailey on January 26, 2010, and interviewed him on February 5, 2010. (Exhibit CC, Declaration of Harold Bailey; Exhibit J.) At the conclusion of that interview, Bailey signed a handwritten declaration. The declaration provides the following information:

(a) Bailey was aware that Teamer and an innocent person were convicted of the crime he committed; in spite of this knowledge, he did not come forward earlier because he did not want to face the possibility of arrest. At the time, Bailey did not care that Miles was innocent; Bailey was simply happy that he got away with the crime. However, as he matured, had a family, and made goals in his recovery program, he decided he needed to come forward with the truth. (Exhibit CC.)

(b) Bailey and Steward grew up together and were good friends.

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[9] Between the time Harold Bailey confessed to the crime and the evidentiary hearing, Bailey was arrested in Texas for another robbery and assault with a deadly weapon. (Exhibit J.) Because Bailey was incarcerated at the time of the hearing, he did not wish to be transported to California. (Exhibit J.) Further, Bailey felt that accepting responsibility would affect his parole date in Texas and did not wish to testify even if granted immunity. (Exhibit J.) The District Attorney refused to stipulate to the admission of Bailey's declaration. (Exhibit J.)

According to Bailey, on June 29, 1998, he, Steward, and Teamer were at the house of Steward's grandmother. Bailey recalled he wanted to get Steward drunk in celebration of Steward's birthday. While at the house, Teamer told Bailey about a possible "stick up job" of Fidelity. Bailey discussed Teamer's idea with Steward and Steward agreed to participate in the robbery. Bailey recalled Steward's cousin told Steward he was "crazy" for involving himself in a robbery on his birthday. (Exhibit CC.)

(c) Shortly thereafter, Steward changed into a suit and tie and the three men got into Teamer's car and headed to Fidelity in Orange County. Bailey had decided not to wear a suit. Teamer drove as Bailey sat in the passenger's seat and Steward sat in the rear seat. Bailey knew where they were headed as he recalled previously accompanying Teamer to Fidelity so that Teamer could make his car payments. (Exhibit CC.)

(d) According to Bailey, the plan was for Bailey to accompany Steward into Fidelity while Steward pretended he needed a car loan. Steward would go in first since he had the suit on so his professional appearance would not raise the tellers' suspicions. Once the tellers became distracted assisting Steward, Steward and Bailey would rob them. Steward was armed with a shotgun and Bailey carried a .38 revolver. (Exhibit CC.)

(e) Once inside, Steward provided the male teller [Patlan] with fake information. Shortly thereafter, Bailey noticed Steward had his gun pointed

at the male teller. Bailey pulled out his gun and pointed it at the female teller [Gomez] and ordered her to give him the money. (Exhibit CC.)

(f) The female teller pointed to a drawer and Bailey took the money out of the drawer and informed Steward it was time to go. Steward and Bailey then directed the tellers to go into the back room. As the tellers were going into the back room, Steward left. Bailey waited a short while because he did not want anyone to see him coming out with Steward. As Bailey waited to leave, he noticed Steward had dropped one of his gloves. Bailey picked up the glove, placed it in his back pocket, and left. (Exhibit CC.)

(g) As Bailey approached Teamer's car, he noticed Steward was by the car. Steward saw Teamer in the auto parts store and signaled him to return to the car. The three got inside the car and drove to Teamer's house. (Exhibit CC.)

(h) While at Teamer's house, the three men disappointedly discovered they had more receipts than cash. They determined that they would count the money once they arrived in Carson. They left Teamer's house and drove to Carson. Once in Carson, Teamer, Bailey and Steward divided the proceeds from the robbery. (Exhibit CC.)

(i) Not long after the robbery, Bailey learned that Teamer was charged with robbing Fidelity. Teamer was looking for Bailey and Steward in hopes of gathering funds to pay for an attorney to defend him in the matter. Bailey

was upset because he now had to hide from the authorities and he blamed Teamer for getting caught. (Exhibit CC.)

(j) Bailey stayed with his sister as he tried to avoid authorities. He informed his family in Texas of his predicament and his need to leave California. Approximately an hour after talking with his family, Bailey was on a plane headed to Texas. (Exhibit CC.)

IV.

PETITIONER'S CLAIMS

90. In the instant petition, Miles presents three claims: (1) Miles' due process rights were violated because his conviction was based upon suggestive and false eyewitness identifications; (2) new evidence of confessions from the true perpetrators completely undermines the prosecution's case and points unerringly to Miles' innocence; and (3) Miles is actually innocent of the offense for which he stands convicted. The trial court's denial of these claims, based on an erroneous rendition of the facts and misapplication of habeas law, violated Miles' due process rights.

A. Miles' Due Process Rights Were Violated Because His Conviction Was Based Upon Suggestive And False Eyewitness Identifications.

91. A petitioner may prosecute a writ of habeas corpus where false evidence that is substantially material or probative on the issue of guilt was introduced against the petitioner at trial. (Pen. Code, § 1473, subd. (b)(1).) To

meet the false evidence standard, the petitioner must show: (1) false evidence was introduced against the petitioner at trial; and (2) the false evidence was substantially material or probative on the issue of guilt. (Pen. Code § 1473, subd. (b)(1).)

1. New developments in the science of stranger eyewitness identification, coupled with credible confessions from true perpetrators, shows that Miles' conviction was based upon material false evidence.

92. At Miles' trial, the prosecution linked Miles to the crime through the questionable identifications of the Gomez and Patlan. Given the developments in the area of eyewitness identifications since the time of Miles' trial coupled with the facts that the three true perpetrators of the crime have confessed, making it impossible for Miles to have been one of the perpetrators, the eyewitness testimony against Miles was false by a preponderance of the evidence. Furthermore, the false testimony was substantially material and probative as to the issue of Miles' guilty because, absent the false evidence, nothing linked Miles to the crime.

2. The trial court made several serious factual mistakes which led him to conclude the evidence was not false and he ultimately denied Miles' false evidence claim when he applied an incorrect legal standard.

93. The trial court's denial of Miles' false evidence claim was based upon a serious misinterpretation of the facts at Miles' trial and at his hearing. The trial court erroneously found Dr. Eisen testified at Miles' original trial

when he did not. (Exhibit H, p. 5.) The trial court erroneously rejected Dr. Eisen's testimony regarding eyewitness identifications by claiming that Dr. Eisen's reasoned opinion, based on numerous studies and years of experience, was just as good as a lay person's opinion. (3 H.T. 28, 30, 35, 38-39, 40.)

94. Contrary to the science and facts, the trial court found the three eyewitnesses identifications of Miles from a photo lineup were reliable because they were "independent of each other" and two eyewitnesses eventually identified him in court. (Exhibit H, pp. 3-4.)

95. With respect to Gomez's identification, the trial court made the erroneous factual finding that "the use of People's trial exhibit #29 was taken from the photo six-pack (People's trial exhibit #25) wherein Miles was in position #1" and, therefore, her identification was based upon her earlier identification from the six-pack. (Exhibit H, p. 4.) In fact, People's 29 was not the same photo from the lineup.

96. The trial court erroneously classified Patlan's in-court identification of Miles as "strong, positive and convincing" by ignoring the fact that Patlan initially told Detective Montgomery that he would *not* be able to identify the stocky robber, only did so at a time when he was avoiding officers and only after Detective Montgomery informed him arrests had been made, and even noted that Miles looked different at trial. (3 R.T. 617-618, 631-631, 642; 4 R.T. 777-778, 815-816; 3 H.T. 40.)

97. The trial court gave undue weight to Holguin's photo identification when it failed to recognize the fact that Holguin had positively identified an individual in Lineup G as the stocky robber and then only made a possible identification of Miles in Lineup H as the robber. (3 R.T. 521, 523; 4 R.T. 821.) Holguin failed completely to identify Miles in court. (3 R.T. 518.) Holguin admitted that the only criteria he used in picking out Miles' photo was "short hair and eyes." (3 R.T. 556.)

98. Finally, the trial court erroneously concluded that Miles was the only person identified as the stocky robber because he fit the description of "stocky, 5'8"-5'9" in height and 180-200 pounds" and Bailey was identified as the slender robber when, in fact, Gomez may have identified Bailey as the stocky robber. (Exhibit H, pp. 4-5; 2 R.T. 343, 345, 400-401.) Further, eyewitnesses are frequently mistaken in determining how tall or short a suspect is.

99. The trial court ultimately denied Miles' petition because the confessions and the testimony on the flawed eyewitness identification process "does not cast fundamental doubt on the accuracy and reliability of the proceedings" (a new evidence standard) and Miles' evidence "does not undermine the entire prosecution case and does not point unerringly to innocence or reduce culpability" (also a new evidence standard). (Exhibit H, p. 5.) In a false evidence claim, a petitioner is only required to establish, by a

preponderance of the evidence, the eyewitness testimony was false and that such testimony was material to the outcome of the petitioner's trial. (*In re Pratt* (1980) 112 Cal.App.3d 795, 865; *In re Hall* (1981) 30 Cal.3d 408, 425.) Hence, the trial court applied the incorrect legal standard in denying Miles' false evidence claim.

3. Conclusion.

100. Because substantially material and probative false evidence was introduced against Miles at trial and the trial court erred in finding otherwise, this Court should grant the instant petition on this ground.

B. New Evidence Of Third-Party Culpability Completely Undermines The Prosecution's Case And Points Unerringly To Miles' Innocence.

101. A petitioner may prosecute a writ of habeas corpus where new evidence completely undermines the case of the prosecution and points unerringly to the petitioner's innocence. (*In re Hardy* (2007) 41 Cal.4th 977, 1016.) When the new evidence consists of a third party confession, habeas corpus relief is warranted where: (1) the confession exonerates the petitioner; and (2) the confession is credible. (*In re Branch*, *supra*, 70 Cal.2d at p. 215, emphasis in original.)

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1. New evidence of credible confessions by the true perpetrators of the crime completely undermines the prosecution's case and points unerringly to Miles' innocence.

102. The confessions obtained from Steward, Teamer, and Bailey are new evidence in that they could not have been discovered with reasonable diligence prior to judgment because none of the three were willing to come forward until after Miles' conviction.

103. Miles has established that the confessions exonerate him in that it is undisputed three individuals participated in the robbery and those three individuals have been identified as Steward, Teamer, and Bailey.

104. Finally, the confessions are credible in that (1) the confessions are corroborated by other evidence in the case, including the physical evidence; (2) there is no apparent reason for Bailey, Steward, and Teamer to lie and the reasons behind the confessions are genuine; (3) the confessions are internally consistent with each other; and (4) the confessions were made under oath with an understanding of the ramifications.

2. In denying Miles' petition on new evidence grounds, the trial court made erroneous credibility determinations and speculations about what witnesses would have testified to had they been called which was unsupported by the record.

105. The trial court found that both Teamer and Steward were not credible, *per se*, because both had prior felony convictions and prior or current gang membership. If these were irrefutable reasons for finding a witness

incredible, the prosecution would never be able to use felons or gang members in its cases. Miles could not choose the background of those who committed the crime for which he was wrongfully convicted.

106. The trial court did not take into account the numerous facts in the record which weigh in favor of a credibility finding including the fact that Teamer's and Steward's descriptions of the crime were consistent with the facts of the case and with each other. Further, Teamer and Steward, strangers to Miles, have no motivation to lie and, if anything, put themselves at risk for gang retaliation or further prosecution.

107. The trial court erroneously decided that it was essential for other, additional witnesses testify in order for Miles to proceed on his new evidence claim. (Exhibit H, pp. 2-3; 1 H.T. 1-3; see also *In re Hall*, *supra*, 30 Cal.3d at p. 417 [habeas relief granted where two witnesses recanted their trial testimony that the petitioner was the shooter and implicated another individual as the real shooter; the shooter never testified].) Judge Fasel's erroneous assumptions about what these witnesses would have testified to, if called, cannot be a basis for denying the petition.

3. Conclusion.

108. Because evidence of new, credible confessions exonerate Miles, this Court should grant the instant petition on new evidence grounds.

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C. Miles Is Actually Innocent Of The Offense For Which He Stands Convicted.

109. Habeas corpus is a tool to vindicate a claim that the prisoner is actually innocent. (*In re Hardy*, *supra*, 41 Cal.4th at p. 1016.) As demonstrated by Bailey's declaration, Teamer's declaration, and Steward's declaration, Miles is actually innocent of the crime. Additionally, Miles has an incredibly solid alibi placing him in Las Vegas at the time of the crime and the serious problems with stranger eyewitness identification render Gomez's and Patlan's identifications useless in determining Miles' guilt.

D. The Instant Petition Is Not Subject To A Procedural Bar.

110. The petition is not subject to a procedural bar because Miles sought relief in a "timely fashion" after obtaining evidence of his innocence. Even if it was subject to a procedural bar, his claims fall within an exception to the timeliness and successive petitions bar, namely, that there was good cause for the delay because Miles was conducting and ongoing investigation and Miles is innocent of the crime. (*In re Robbins* (1998) 18 Cal.4th 770, 780 [holding off on filing a petition until all of the claims have been investigated amounts to good cause for delay].)

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V.

PRAYER FOR RELIEF

Guy Miles has no other plain, speedy, or adequate remedy at law other than by this petition. Wherefore, Miles requests that this Court:

1. Pursuant to Evidence Code section 452, subdivision (d), take judicial notice of the transcripts, files, and briefs, in Orange County Superior Court Case Nos. 98NF2299 and M-13228 and Court of Appeal Case No. G027421;

2. Issue an order directing that Terri Gonzales, Warden at California Mens' Colony in San Luis Obispo, California, and the California Department of Corrections and Rehabilitation to show cause why the Court of Appeal should not vacate the judgment and sentence in the case of Miles;

3. Appoint a referee pursuant to California Rules of Court rule 8.386 (f)(2) should this Court deem a hearing is necessary in this matter;

4. Vacate the judgment and sentence imposed on Miles in Orange County Superior Court No. 98NF2299;

5. Grant Miles such further relief as is appropriate in the interests of justice.

Respectfully submitted,

Dated: 02/22/2012

ALISSA BJERKHOEL
Attorney for Petitioner
GUY DONELL MILES

VERIFICATION

I, Alissa Bjerkhoel, declare as follows:

1. I am a member of Bar of the State of California. As such, I am admitted to practice before the courts of the State of California.

2. I represent Guy Miles in filing and arguing his petition for writ of habeas corpus. Miles is confined at California Men's Colony in San Luis Obispo, California.

3. I am authorized to file this petition for writ of habeas corpus on Miles' behalf. I make this verification because Miles is incarcerated and because these matters are more within my knowledge than his.

4. I have drafted and read the foregoing petition for writ of habeas corpus. I declare that all the matters alleged here are true of my own personal knowledge or are supported by the record or by the attached exhibits.

5. The attached declarations are true copies of original declarations. I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed on 02/22/2012, in San Diego, California.

ALISSA BJERKHOEL
Attorney for Petitioner
GUY DONELL MILES

MEMORANDUM OF POINTS AND AUTHORITIES

In order to avoid undue repetition of the facts, the Memorandum of Points and Authorities will rely on the facts presented on pages 13-49 of the petition, *supra*.

ARGUMENT

Miles' conviction should be reversed for the following reasons: (1) Miles' due process rights were violated because his conviction was based upon suggestive and false eyewitness identifications; (2) new evidence of confessions from the true perpetrators completely undermines the prosecution's case and points unerringly to Miles' innocence; and (3) Miles is actually innocent of the offense for which he stands convicted. The trial court's denial of these claims was based on an erroneous rendition of the facts and misapplication of habeas law in violation of Miles' due process rights.

I.

STANDARD OF REVIEW

Where an application for writ of habeas corpus has been denied in the superior court after an evidentiary hearing and a new application for habeas corpus is thereafter made to an appellate court, the appellate court is *not bound* by the factual determinations of the superior court but, rather, must independently evaluate the evidence and makes its own factual determinations which may be contrary to the superior court's findings. (*In re Sodersten*

(2007) 146 Cal.App.4th 1163, 1223; *In re Wright* (1978) 78 Cal.App.3d 788, 801 [emphasis added].) The appellate court must independently review the superior court's resolution of legal issues and mixed questions of law and fact. (*In re Sodersten*, *supra*, 146 Cal.App.4th at p. 1223; *In re Pratt* (1999) 69 Cal.App.4th 1294, 1314.) However, if the factual determinations of the superior court are supported by the record, particularly with respect to questions of the credibility of witnesses, those findings are entitled to great weight. (*In re Wright*, *supra*, 78 Cal.App.3d at pp. 801-802.) On the other hand, great weight is not afforded where the court of appeal has a differing opinion on an issue that does not rely upon the credibility of witnesses. (*In re Sodersten*, *supra*, 146 Cal.App.4th at p. 1223.)

II.

THE COURT SHOULD GRANT MILES' PETITION BECAUSE HIS CONVICTION WAS OBTAINED IN VIOLATION OF HIS DUE PROCESS RIGHTS WHEN SUBSTANTIALLY MATERIAL AND PROBATIVE FALSE EYEWITNESS IDENTIFICATIONS BROUGHT ABOUT BY A SUGGESTIVE IDENTIFICATION PROCEDURE WERE INTRODUCED AGAINST HIM AT HIS TRIAL.

A court may grant a writ of habeas corpus if "false evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration." (Penal Code, § 1473, subd. (b)(1); U.S. Const., amend. XIV; Cal. Const., art.

I, § 15, cl. 7; *In re Malone* (1996) 12 Cal.4th 935, 939; see *In re Wright*, *supra*, 78 Cal.App.3d at p. 808.)

When an eyewitness misidentification is brought to light, a court must vacate the conviction where: (1) the eyewitness identification is false by a preponderance of the evidence; and (2) the false eyewitness identification was substantially material or probative on the issue of guilt. (*In re Malone*, *supra*, 12 Cal.4th at p. 939; see *In re Wright*, *supra*, 78 Cal.App.3d at p. 808; *In re Hall*, *supra*, 30 Cal.3d at p. 424.)

A. The Eyewitness Identifications Of Miles Were Clearly False, By A Preponderance Of The Evidence.

With regard to the first prong of the false evidence standard, Miles is only required to prove, by a preponderance of the evidence, that the testimony was false; there is no obligation to show that the testimony was perjured or even that the prosecutor is aware of the impropriety. (Penal Code, § 1473, subds. (a), (c); *In re Pratt*, *supra*, 112 Cal.App.3d at p. 865; *In re Hall*, *supra*, 30 Cal.3d at p. 425.)

Numerous California courts have concluded that stranger eyewitness identifications are oftentimes unreliable. (*People v. Cardenas* (1982) 31 Cal.3d 897, 908, citing *United States v. Wade* (1967) 388 U.S. 218, 228 and *People v. Bustamante* (1981) 30 Cal.3d 88, 98; see also *People v. McDonald* (1984) 37 Cal.3d 351, 363-364.) The United States Supreme Court has recognized for

years that "[t]he vagaries of eyewitness identification are well known and the annals of criminal law are rife with instances of mistaken identification." (*United States v. Wade*, *supra*, 388 U.S. at p. 228.) Hence, the constitution requires a due process check on the admission of eyewitness identification(s) when the police have arranged suggestive circumstances leading the witness(es) to identify a particular person as the perpetrator of a crime. (*Perry v. New Hampshire* (2012) __ U.S. __ [132 S.Ct. 716, 720].)

1. Developments in the science of eyewitness testimony since the time of Miles' conviction show that the identifications elicited from the eyewitnesses in Miles' case were suggestive and biased and, therefore, false by a preponderance of the evidence.

With the plethora of new literature and experiments conducted in the area of eyewitness misidentification, it can no longer be argued that stranger eyewitness identifications are usually reliable and accurate. As far back as 1977, the United States Supreme Court recognized serious problems with eyewitness identifications that can amount to a violation of due process. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114 [*Manson*].) In the *Manson* case, the United States Supreme Court established guidelines for judges in determining whether an eyewitness identification should be admitted against a defendant at all. (*Id.* at p. 114.) At the time, there were only a few experiments conducted on eyewitness memory and only four published articles even addressing problems with eyewitness identification. (*State v. Henderson*

(N.J. 2011) 27 A.3d 872, 918.) However, since the time of the *Manson* decision, more than two thousand studies have been published relating to eyewitness identification and, for the first time in thirty-four years, a court has thoroughly examined the scientific literature on misidentification in order to answer the question: how reliable are stranger eyewitness identifications? (*Ibid.*) That court was the New Jersey Supreme Court which, in a true step of intellectual courage and integrity, published the revolutionary decision of *State v. Henderson* (N.J. 2011) 27 A.3d 872 [*Henderson*].[10]

The *Henderson* court did what no other court has yet done – it explored all of the scientific data and research regarding witness perception and memory in order to determine the reliability of eyewitness identification evidence. (*Id.* at p. 877.) It did so by appointing a Special Master – Retired New Jersey Appellate Division Judge, Geoffrey Gaulkin – to hold hearings, systematically review the scientific evidence, and issue an extensive report on his findings. (*Id.* at pp. 877, 884.) Judge Gaulkin conducted a ten day hearing in which seven expert witnesses testified. (*Id.* at p. 884.) Judge Gaulkin also reviewed 360 exhibits which included more than 200 published scientific studies on

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[10] Though limited to New Jersey courts, the *Henderson* ruling is expected to have a nationwide impact because New Jersey has been a leader in identification standards. (Koppel, *New Jersey High Court Alters Witness Identification Standards*, The Wall Street Journal (August 24, 2011); DeFalco, *NJ Court Orders Changes To Witness ID Evidence*, Associated Press (August 24, 2011).

human memory and eyewitness identification. (*Id.* at p. 884.)

a. Documented unreliability of stranger eyewitness identification.

The *Henderson* court found that scientific studies and research showed a "troubling lack of reliability in eyewitness identifications" and that the possibility of mistaken identification is a very real problem in our legal system. (*Id.* at pp. 877, 886.) Take, for example, the following studies the *Henderson* court relied upon in coming to this conclusion:

The *Henderson* court examined live-data studies from Sacramento and London to determine the accuracy of real-world identification procedures. (*Id.* at p. 886.) The Sacramento studies involved roughly 500 people who were eyewitnesses to staged criminal conduct and participated in a later photo array identification. (*Ibid.*) Of the 500 participants, 33% could not make an identification and 16% identified an innocent person. (*Ibid.*) The London studies involved more than 2,100 people. (*Id.* at p. 887.) Of those 2,100 participants, 41% could not make an identification and 20% identified an innocent person. (*Ibid.*) Studies involving real criminal activity, as opposed to staged criminal activity, revealed the same levels of inaccuracies. (*Id.* at p. 17.)

In another experiment, the researchers sent an individual to have conversations of a few minutes each with store clerks or bank tellers. (*Id.* at

p. 887.) Five hundred clerks and bank tellers were involved and they were not advised they were participating in the study. (*Ibid.*) Between two and 24 hours later, an undercover researcher would talk with the clerk about the individual they had a conversation with the prior day and ask the clerk to pick the person out of a line-up. (*Ibid.*) Of the 500 clerks and tellers, 17% could not identify the individual and 41% picked a filler. (*Ibid.*) Perhaps even more troubling is that, in some cases, the lineups shown to clerks did not contain the individual to whom they had spoken. (*Ibid.*) In those cases, 36% of clerks still made an identification. (*Id.* at p. 887-888.) This experiment revealed that, even when the perpetrator is not in the lineup, the eyewitness will nonetheless select an innocent person more than one-third of the time. (*Ibid.*)

The misidentification rates gleaned from these studies were truly alarming. (*Id.* at p. 888.) Indeed, in a real world police investigation, the body of research shows that an eyewitness will select an innocent person 1/3 of the time. (*Ibid.*) This research casts serious doubt on the reliability of eyewitness identifications. If, for example, that a DNA report on a rape case was wrong 1/3 of the time, the evidence surely would not pass the reliability test in order for it to be admissible against a criminal defendant. At a minimum, the jury would be instructed on the high probability the results may very well be wrong.

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b. An array of variables affect eyewitness memory and lead to these misidentifications.

The current scientific research supports the position that the human memory is malleable and that an array of variables can affect memory and lead to misidentifications. (*Id.* at pp. 892, 895.) Just as Dr. Eisen testified at Miles' evidentiary hearing, scientific literature has divided those variables into two categories: (1) system variables (factors such as lineup procedures that are within the control of the criminal justice system); and (2) estimator variables (factors related to the witness, the perpetrator, or the event itself – i.e., distance, lighting, or stress – over which the legal system has no control). (*Id.* at p. 895.)

(1) System variables contributed to the misidentification of Miles in the instant case.

With respect to system variables, there is an increased likelihood of misidentification where: (1) the identification procedure is administered by someone who knows the identity of the suspect because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect (*id.* at pp. 896-897); (2) the administrator fails to give proper pre-lineup instructions, because not doing so increases the chance that a witness will pick an innocent filler (*id.* at p. 897); (3) the lineup is not composed of a suspect and fillers who look sufficiently similar to the suspect or the lineup contains multiple suspects because it increases the chances that the witness would make a "lucky guess" (*id.* at pp.

897-899);[11] (4) either pre- or post-identification feedback is given to the witness by administrators because it can falsely enhance the witnesses recollection of the suspect (*id.* at pp. 899-900); and (5) the eyewitness views more than one photo of the suspect because successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure (*id.* at p. 900-901).

The misidentification of Miles in the instant case was a product of many of these system variables which were not fully explored by Miles' eyewitness identification expert at trial. Dr. Eisen testified that Montgomery's method of conducting the lineups was flawed in many respects, thereby increasing the chance of a misidentification. (3 H.T. 4.) As Dr. Eisen explained, just as in the collection of physical evidence, if the procedure used to collect the eyewitness identification is unreliable, then the resulting eyewitness evidence can be contaminated. (3 H.T. 18-19.)

First, the identification procedure was administered by someone who

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[11] The *Henderson* court also conducted experiments to determine how a witness may choose a lineup member simply because, relative to the fillers, he looks the most like the suspect they remember seeing. (*Id.* at p. 888.) In one experiment, 200 witnesses were shown a staged crime and then shown a lineup. (*Ibid.*) Half of the witnesses viewed lineups that contained a photo of the perpetrator and five fillers while the other half viewed lineups that only contained fillers. (*Ibid.*) All of the witnesses were advised that the perpetrator might not be in the lineup. (*Ibid.*) In the second group, 68% of the witnesses identified a filler. (*Ibid.*)

knew the identity of the suspect – Detective Montgomery. (4 R.T. 843, 847, 853.) Dr. Eisen explained that this procedure produces "experimenter bias," the concept that the person conducting an experiment or test can inadvertently influence the results of the test if they know the right answer. (3 H.T. 44.) This procedure was inconsistent with the U.S. Attorney General's guidelines that prohibits the primary investigator on the case from conducting the identification procedure. (U.S. Department of Justice research report, *Eyewitness Evidence, A Guide for Law Enforcement* (Oct. 1999); *State v. Henderson*, *supra*, 27 A.3d at p. 880; see also California Commission on the Fair Administration of Justice, *Report and Recommendations Regarding Eyewitness Identification Procedures* (April 13, 2006), at p. 5.) According to the guidelines, primary investigators should not administer photo lineups "to ensure that inadvertent verbal cues or body language do not impact on a witness." (*State v. Henderson*, *supra*, 27 A.3d at p. 880.) Here, Montgomery knew who the potential suspects were and he was still the person who administered the photo lineups and may have very well subtly influenced the identification. (2 H.T. 251.)

Second, although Detective Montgomery gave pre-lineup admonishments, those admonishments were meaningless in Miles' case. Dr. Eisen testified that many people automatically assume that the suspect must be in the six-pack they are viewing. (3 H.T. 42-43.) With that assumption,

witnesses naturally want to find the most likely choice and pick that photo. (3 H.T. 43.) In order to work against these assumptions that witnesses invariably bring to the table, pre-lineup admonishments are given to reduce the possibility that a witness will simply choose the person who most resembles the culprit. (3 H.T. 43.) However, if a witness is told prior to viewing a six-pack that an arrest has been made in the case, then the entire admonishment becomes ineffective and the witness will take it as a communication that the suspect's photo is in the six-pack. (3 H.T. 43-44, 90-91.) Here, Detective Montgomery's pre-lineup instructions with respect to Lineup H were meaningless in light of the fact that he told Patlan two arrests had been made in the case and no tall slender robbers were contained in Lineup H. (2 H.T. 247.) This sent a clear message to Patlan – the stocky robber was in Lineup H. Similarly, although Holguin had already made a positive identification of the stocky robber in Lineup G, Detective Montgomery still proceeded to show him Lineup H which sent a message to Holguin – the suspect was in lineup H, not Lineup G. (3 R.T. 521, 523; 4 R.T. 821; Prosecution Exhibits 23 and 25.) As Dr. Eisen testified, if a witness makes an identification and then is shown subsequent lineups, the witness will pick up on the fact that he or she did not choose the right person the first time around. (3 H.T. 52-53.)

Third, the lineups in Miles' case were not composed of a suspect and fillers who look sufficiently similar to the suspect. (2 H.T. 238, 240, 242-244,

246, 254-255; 3 H.T. 20, 22-23, 25-26, 30-31, 40-41; Prosecution Exhibits 18, 19, 20, 21, 23, 25.) Dr. Eisen testified that the single overriding rule in conducting photo identifications is that no photo should unduly stick out from the others. (3 H.T. 20.) Hence, all fillers and the suspect should generally fit the description the eyewitness provided to law enforcement. (3 H.T. 21-22, 88.) If only one person in the six-pack matches the description the eyewitness gave, the six-pack is considered unduly suggestive or biased and the eyewitness is more likely to pick that photo simply because it is the only possible choice in the group, rather than because that person was the actual perpetrator. (3 H.T. 22-23, 25-26.) Dr. Eisen immediately saw suggestibility problems with Lineup H, the lineup containing Miles' photo. Dr. Eisen noted: "In looking for a dark-skinned, shaved head, heavy enough to have a couple rolls on the back of his neck," the only one person who sufficiently matched the description in its entirety was Miles. (Prosecution Exhibit 25; 3 H.T. 40.)

Fourth, the lineups in Miles' case contained multiple suspects. Dr. Eisen also explained that there are problems with using more than one suspect in a six-pack lineup. (3 H.T. 30.) If you increase the number of suspects in a six-pack, then you also increase the chances that someone who is not the suspect is going to be chosen. (3 H.T. 31, 41.) In the instant case, Montgomery put numerous suspects into a single photo lineup, including Lineup H. (2 H.T. 240, 242-244, 246; Prosecution Exhibits 18, 19, 20, 21, 25.)

By having more than one suspect in Lineup H, it was more likely that the witnesses would mistakenly pick Miles' photo.

Finally, Gomez viewed multiple photos of Miles including viewing Lineup H, which she viewed on two separate occasions, and People's 29, which contained an entirely different photo than the one she saw in Lineup H. (2 R.T. 444.) Clearly, the system variables in Miles' case led the eyewitnesses to only one possible conclusion when viewing the lineups – Miles was the perpetrator.

(2) Estimator variables contributed to the misidentification of Miles in the instant case.

With respect to estimator variables, there is an increased likelihood of misidentification where: (1) the eyewitness experiences a high level of stress, (*State v. Henderson*, *supra*, 27 A.3d at p. 904);[12] (2) there is a presence of weapons (*id.* at pp. 904-905); (3) the eyewitness only spent a short amount of time with the suspect(s) (*id.* at p. 905);[13] (4) there is a lapse of time between the

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[12] "Contrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for 30 min[utes], . . . [t]hese data provide robust evidence that eyewitnesses memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to *substantial* error." (*Id.* at p. 904 quoting Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J.L. & Psychiatry 265, 269-270 (2004), emphasis added).)

[13] It is important to note that "witnesses consistently tend to overestimate short durations, particularly where much was going on or the event was

event and the identification – it is indisputable that memories decay over time, they never improve (*id.* at p. 907); (5) the identification is cross-racial, (*Id.* at p. 907); and (6) the eyewitness is exposed to co-witness feedback about what the suspect(s) looked like (*id.* at pp. 907-908). The court also noted that the speed at which a witness makes an identification *is not* a factor indicating the reliability of that identification (*id.* at pp. 909-910.) The misidentification of Miles in the instant case was also a product of many of these estimator variables.

First, the witnesses in Miles' case experienced a very high level of stress, even resulting in Patlan getting struck in the face with a gun. (2 R.T. 305-308, 323, 332; 3 R.T. 576, 580.) Second, there were weapons present during the commission of the robbery – a shotgun and a handgun. (2 R.T. 305-307, 332; 3 R.T. 576, 578, 580.) Third, Gomez and Patlan only spent a brief period of time with the robbers. Fourth, there was a lapse of time between the robbery and the identification of Miles as the stocky robber because the robbery happened in June 29, 1998 and the Gomez and Holguin did not view Lineup H until July 17, 1998, several weeks after the robbery; Patlan viewed Lineup H several *months* after the robbery. (2 R.T. 337, 341-344, 347-348.) Fifth, the

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particularly stressful." (*Id.* at p. 905 quoting Elizabeth F. Loftus et. Al., *Time Went by So Slowly: Overestimation of Even Duration by Males and Females*, 1 Applied Cognitive Psychol. 3, 10 (1987).)

identifications were cross-racial in that Gomez was Hispanic, Patlan was Caucasian, and the robbers were African American. (3 C.T. 957.) Finally, there was, to some extent, co-witness feedback between Patlan and Gomez as evidenced by the 9-1-1 call made by Gomez when Gomez was asking questions of Patlan about the description of the robbers. (3 C.T. 957-962.) The fact that Gomez immediately picked out Miles' photo is no indication of the identification's reliability.

c. There is no scientific data supporting the notion that a fact finder has the ability to differentiate between a misidentification and the truth.

The American justice system presumes that fact finders are able to detect liars from truth tellers. (*State v. Henderson*, *supra*, 27 A.3d at p. 889.) However, research has shown that most eyewitnesses think they are telling the truth even when that testimony is inaccurate. (*Ibid.*) Even the most honest and objective eyewitnesses make mistakes in recalling and interpreting a witnessed event. (U.S. Dept. of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999).) Yet, because the eyewitness is testifying sincerely and honestly about their own belief, they will not display signs of deception to alert the fact finder that the identification is false. (*State v. Henderson*, *supra*, 27 A.3d at p. 889.) Many mistaken eyewitnesses, even if uncertain of their identification before trial, "exude supreme confidence" in their identification at trial. (*Ibid.*) This is troublesome because the research shows the single most

important factor for any given juror's decision-making is whether he or she perceived a witness as "confident" because jurors equate confidence with truthfulness. (*Id.* at pp. 889, 911.) There is almost *nothing more convincing* [to a fact finder] than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" (*Id.* at p. 889 quoting *Watkins v. Sowders* (1979) 449 U.S. 341, 352 [emphasis in original]; *Id.* at p. 911 [eyewitness confidence is the most powerful predictor of whether or not the jury will find the defendant guilty].)

Dr. Eisen explained these points to the trial court, and further testified that, since the time of Miles' conviction, there has been an accumulation of data and a better understanding of the relationship between the confidence of a witness in his or her identification and the accuracy of that identification, making prosecution witness Doctor Ebbe Ebbsen's opinion at Miles' trial obsolete. (3 H.T. 54, 94.) Research has shown that it is impossible for someone to differentiate between an eyewitness who believes they have chosen the right person, but they are wrong, and the eyewitness who believes they have chosen the right person, and are right. (3 H.T. 54-55.) There is really no significant correlation between the accuracy of the identification and the confidence of the eyewitness in that identification. (3 H.T. 55-56, 92 [only as high as 0.35% or 0.40%].)

Gomez, in viewing Lineup H, was 100% certain the picture of Miles

contained the picture of the stocky robber because Miles had the same eyes as the stocky robber. (2 R.T. 355, 374-375, 415; 4 R.T. 775.) At trial, after a suggestive identification procedure, Gomez also testified that she was certain in her identification of Miles' photograph. (2 R.T. 444.) Patlan, likewise, in viewing Lineup H identified Miles' photo. (3 R.T. 617-619; 4 R.T. 777-778.) At trial Patlan was sure Miles was the stocky robber. (3 R.T. 621.) Despite these "certain" identifications, the scientific research shows that the Court should give absolutely no credence to Gomez's or Patlan's *confidence* in their identifications of Miles at trial because such a conclusion is not supported by scientific research in the area of misidentification.

Neither should the Court give credence to the fact that Gomez still believes in her identification. Studies have shown that once a witness makes an identification, that witness will "stick to it," no matter how right or wrong that identification is. (3 H.T. 50-51.) In accordance with this fact, Gomez still remains confident in her identification of the photo of Miles as the stocky man. (Exhibit Q, p. 9; Exhibit R, pp. 1-2.) In fact, she did not even remember questioning her identification at trial despite numerous other witnesses including Montgomery, Munn, and Miles' defense attorney, Frank Williams [Williams], who were in the room and remembered that she did. (Exhibit Q, p. 5; Exhibit S, pp. 1-2; Exhibit T, p. 1; 4 H.T. 5-6.)

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2. Confessions from the true perpetrators also show that the eyewitness identifications were false.

In addition to all of the serious problems with the identification procedure in Miles' case which clearly show the identification was false by a preponderance of the evidence, the three true perpetrators of the crime confessed, making it impossible that Miles was one of the three perpetrators. (Exhibit N, Exhibit M, Exhibit CC; 1 H.T. 24-186.) The confessions from Teamer, Steward, and Bailey identifying the true participants in the robbery has shown that Patlan's and Gomez's identification of Miles was false.

B. The False Eyewitness Testimony Was Substantially Material And Probative On The Issue Of Miles' Guilt.

False evidence is substantially material or probative on this issue of guilt if there is a reasonable probability that, had the evidence not been introduced, the result of the trial would have been different. (*In re Malone, supra*, 12 Cal.4th at p. 966.) "Reasonable probability" means that the reviewing court no longer has confidence in the outcome of the trial, absent the false evidence. (*Id*. at p. 965; *In re Sassounian* (1995) 9 Cal.4th 535, 546; cf. *United States v. Bagley* (1985) 473 U.S. 667, 678.) If the false eyewitness testimony was "virtually the only damning evidence against petitioner," then it clearly satisfies the statute's test of materiality. (*In re Hall*, *supra*, 30 Cal.3d at p. 424; see also *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, 1017 [where eyewitness identification evidence was weak, additional evidence showing lack of motive

for the crime was sufficient to satisfy the materiality standard].)

Here, there was no "overwhelming evidence" supporting Miles' conviction. No physical evidence linked Miles to the crime and Miles had an elaborate and reasonable alibi that involved his property manager, neighbors, friends, parents, and his young son. (5 R.T. 1215-1216, 1224, 1226-1228, 1232, 1242-1244; 6 R.T. 1307, 1311-1312; 7 R.T. 1479-1480, 8 R.T. 1815-1819.) The jury even deliberated for five days and even requested clarification as to when a jury is considered a "hung jury" before finding Miles guilty. (2 C.T. 705-706, 711, 709-716; 3 C.T. 802-810, 820, 822-838; 9 R.T. 2230-2238; see *In re Martin* (1987) 44 Cal.3d 1, 51 [the California Supreme Court has recognized a close case where jury deliberations lasted as little as nine or twelve hours].) Clearly, the jury was struggling to find Miles guilty beyond a reasonable doubt based on the weak identifications of Miles as one of the perpetrators and thus the materiality test is satisfied.

C. The Trial Court Denied Miles' Petition On False Eyewitness Evidence Grounds Because Of An Erroneous Interpretation Of The Facts Adduced At The Hearing And At The Trial And Because Of The Application Of The Wrong Legal Standard.

With respect to Miles' false evidence claim, the trial court made several serious factual mistakes which warrant reversal of his order denying the petition.

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1. The trial court found, based on an egregiously erroneous rendition of the facts, that Gomez's identification was not suggestive.

With respect to Gomez's identification, the trial court made the finding that "the use of People's trial exhibit #29 was taken from the photo six-pack (People's trial exhibit #25) wherein Miles was in position #1" and, therefore, Gomez's identification was based upon her earlier identification from the six-pack. (Exhibit H, p. 4.) This statement is not correct. People's Exhibit 29 was not taken from People's Exhibit 25. It was Miles' booking photo for the instant offense, a photograph Gomez had never seen. Even the District Attorney at the evidentiary hearing stated, "I suppose you can make the argument that [the use of People's 29] was somewhat suggestive." (5 H.T. 52.) The showing of People's 29 to Gomez after she definitively sated she could not identify Miles as the robber was clearly suggestive, not based upon any prior identification, and therefore prejudicial. Even if it was based on a prior identification, Gomez was still only identifying the *photo* of Miles, not Miles in *person* as the stocky robber.

The trial court also determined that, because Gomez's identification was "thoroughly examined on cross-examination," the issue of whether Gomez's identification was false was already addressed. (Exhibit H, p. 4.) Just because false evidence was the subject of cross-examination at trial does not make that evidence any more accurate. In fact, research and experience show us that

cross-examination may actually tend to force the stressed victim or witness to defend their perception and further encourage them to be more confident. (Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony, Civil and Criminal* § 2-3 (3d ed. 1997).) Further, the issue of whether Gomez's identification was false was *never* addressed in light of the developments in the area of eyewitness identification since Miles' trial.

Finally, the trial court determined that, because Gomez could not initially identify Miles in court, Miles "evidently had some momentary gain from this unusual event." (Exhibit H, p. 4.) It is difficult to see what momentary gain Miles had from this suggestive and prejudicial procedure. Afer the prosecution showed Gomez People's trial exhibit #29, whatever momentary gain Miles had was destroyed because the prosecution was able to rehabilitate Gomez and likely make her a sympathetic witness. Even if there was some momentary gain, he was still convicted of a crime he did not commit based on a flawed and unreliable identification and is serving a life sentence for that conviction. (2 C.T. 705-706, 709-716; 3 C.T. 802-810, 820, 822-838; 9 R.T. 2230-2238.)

2. The trial court denied the petition because of an erroneous rendition of Dr. Mitchell Eisen's testimony.

The trial court erroneously made the finding that Dr. Eisen also testified at Miles' original trial; he did not. (Exhibit H, p. 5.) Further, Dr. Eisen's

testimony at the hearing was much more elaborate than the expert eyewitness testimony elicited at Miles' trial. Dr. Eisen's testimony was based upon developments in the area of eyewitness identification since the time of Miles' conviction and his testimony has completely debunked the prosecution's eyewitness identification expert from Miles' trial. Dr. Eisen testified both generally regarding the problems with stranger eyewitness identifications, as well as specifically about the problems with the stranger eyewitness identifications in Miles' case. (3 H.T. 4-94.)

The trial court dismissed Dr. Eisen's testimony in its entirety and rejected his scientific testimony that the lineups were flawed and unreliable. (Exhibit H, p. 5.) It appears that the trial court rejected Dr. Eisen's testimony because, in the trial court's erroneous interpretation of Dr. Eisen's testimony, Dr. Eisen "admitted that his personal evaluation of photos and witness testimony is no better than that of any non-expert." (Exhibit H, p. 5.) In actuality, Dr. Eisen's testimony that the lineups shown to the witnesses were suggestive or biased was based on scientific research, not a lay person's opinion. (3 H.T. 28, 30, 35, 38-39, 40.) Dr. Eisen testified that there was a "science-based" reason that a witness would pick Miles' photograph out of Lineup H. (3 H.T. 40.) Although Dr. Eisen stated that, from a lay person's point of view, he could determine which photo in Lineup H the eyewitnesses would be drawn to, there was both a logical and scientific basis why this would

occur. (3 H.T. 40.) The trial court seemed to have disregarded the scientific basis Dr. Eisen's testimony. (Exhibit H, p. 5.) For this reason, Miles asks this Court to reverse the trial court's order denying the petition.

3. The trial court erroneously found that multiple identifications enhance the reliability of an identification.

The trial court relied heavily on the fact that three eyewitnesses identified Miles from a photo lineup "independent of each other" and two eyewitnesses eventually identified him in court. (Exhibit H, pp. 3-4.) The fact that Miles was identified by more than one witness is not compelling. Roughly 35% of defendants convicted and later exonerated through DNA testing were misidentified by more than one eyewitness. (Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 8-9, 279 (2011).)

Further, the witness identifications were far from "independent of each other." After all, Gomez was the first person to positively identify Miles out of an already suggestive photo lineup which would, by an expert's own testimony, lead her to choose Miles' photo. Patlan's and Holguin's identifications of Miles' photo was a product of Gomez's identification. For example, Detective Montgomery arrested Miles based on Gomez's identification and told Patlan that two arrests had been made before even showing him the lineup. (2 H.T. 247.) Considering there were no tall, skinny robbers in the lineup, Patlan made an identification of the best-looking stocky

robber – obviously the same person Gomez picked – Miles. The same is true of Holguin. Holguin had already made a positive identification of the stocky robber in a previous lineup and it was only after Gomez made an identification of Miles that Detective Montgomery proceeded to show him yet another lineup. (3 R.T. 521, 523; 4 R.T. 821; Prosecution Exhibits 23 and 25.) As Dr. Eisen testified, if a witness makes an identification and then is shown subsequent lineups, the witness will pick up on the fact that he or she did not choose the right person the first time around. (3 H.T. 52-53.)

4. The trial court made an erroneous factual determination that Patlan's identification was reliable.

The trial court characterized Patlan's in court identification as "strong, positive and convincing." (Exhibit H, p. 4.) In making this finding, the trial court ignored the fact that Patlan initially told Detective Montgomery that he would *not* be able to identify the stocky robber and only did so at a time when he was avoiding officers and only after Detective Montgomery informed him arrests had been made. (3 R.T. 617-618, 631-631; 4 R.T. 777-778, 815-816; 3 H.T. 40.) The trial court also failed to consider the fact that Patlan said Miles had lost weight at the time of trial. (3 R.T. 642.) Patlan's in-court identification of Miles under these circumstances cannot be characterized as "strong, positive and convincing" when the science and circumstances are properly considered. (Exhibit H, p. 4.)

5. The trial court made an erroneous factual determination that Holguin's identification was reliable.

As for Holguin's identification of Miles' photo, the trial court failed to recognize the fact that Holguin had positively identified an individual in Lineup G as the stocky robber and then only made a possible identification of Miles in Lineup H as the robber. (3 R.T. 521, 523; 4 R.T. 821.) Holguin failed completely to identify Miles in court. (3 R.T. 518.) Holguin admitted that the only criteria he used in picking out Miles' photo was "short hair and eyes." (3 R.T. 556.) This calls into question the reliability of Holguin's identification of Miles in Lineup H. His positive photo identification does nothing to bolster the finding that Miles is the true stocky robber.

6. The trial court found that Gomez never identified Bailey as the stocky robber, contrary to the facts, and that Miles is the only party who fits the description of the stocky robber.

The trial court concluded that Miles was the only person identified as the stocky robber and Bailey was identified as the slender robber. (Exhibit H, p. 4.) On the contrary. Gomez thought Bailey "looked familiar," but she did not specify which robber he reminded her of. (2 R.T. 343, 345, 400-401.) It was Holguin who thought Bailey also looked familiar and might be the slender robber. Bailey may very well have looked familiar to Gomez because he was, indeed, the stocky robber.

Further, the trial court concluded that Miles must be the stocky robber

because all three witnesses described the second robber as "stocky, 5'8"-5'9" in height and 180-200 pounds" and that Miles was the only known party to match that description. (Exhibit H, p. 5.) First, this statement is factually inaccurate. Gomez stated that there was no real distinguishable difference between the height of the slender man and the height of the stocky man. (Exhibit R, pp. 2-3.) Meaning, the stocky robber could very well have been as tall as 6'1". Second, eyewitnesses are frequently mistaken in determining how tall or short a suspect is. (See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1223 [jury found defendant guilty where eyewitness described assailant as 5'9" and the defendant was 5'6"]; *Hubbard v. Pinchak* (3d Cir. 2004) 378 F.3d 333, 340 [jury found defendant guilty where eyewitness described perpetrator as 6'2" and the defendant was 5'9"]; *United States v. Carpenter* (7th Cir. 2003) 342 F.3d 812, 815 [a two inch height difference between the eyewitness descriptions and the defendant was not material]; *United States v. Smith* (D.C. Cir. 1972) 473 F.2d 1148, 1149 [description and height difference of 4-5" understandable where victim viewed defendant while he was sitting in the car]; and *People v. Brown* (Ill. 1982) 443 N.E.2d 665, 667 [a discrepancy of 7" and 30 pounds did not lead to "substantial likelihood of misidentification"].) For these reasons, the trial court was wrong in determining that Miles was the only person who could be the stocky robber.

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7. The trial court applied the incorrect legal standard to Miles' false evidence claim, holding Miles to the higher "new evidence" standard.

The trial court ultimately denied Miles petition because the confessions and the testimony on the flawed eyewitness identification process "does not cast fundamental doubt on the accuracy and reliability of the proceedings" and Miles' evidence "does not undermine the entire prosecution case and does not point unerringly to innocence or reduce culpability." (Exhibit H, p. 5.) While this language may apply to Miles' new evidence claim, the trial court did not apply the correction false evidence standard to Miles' identification issue. Namely, that a petitioner is only required to establish, by a preponderance of the evidence, that the eyewitness testimony was false and that such testimony was material to the outcome of the petitioner's trial. (*In re Pratt*, *supra*, 112 Cal.App.3d at p. 865; *In re Hall*, *supra*, 30 Cal.3d at p. 425.) The petition should have been granted had the trial court applied the correct legal standard.

8. Conclusion.

The trial court made several critical erroneous findings with respect to Miles' false evidence claim that resulted in an erroneous denial of the petition. Further, the trial court applied the incorrect legal standard in denying Miles' false evidence claim. Miles, therefore, respectfully requests this Court reverse the trial court's decision and grant the petition.

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D. Conclusion.

In light of the developments in the science of eyewitness identification and the array problems specifically with the identification of Miles, Miles has clearly satisfied his burden of proving, by a preponderance of the evidence that the eyewitness identifications of him by Gomez and Patlan were false. This Court simply can no longer have confidence in Miles' conviction, the trial court erred in applying the wrong standard to this claim, and the writ must therefore issue on this ground.

III.

THE COURT SHOULD GRANT MILES' PETITION BECAUSE NEW EVIDENCE OF THIRD-PARTY CULPABILITY COMPLETELY UNDERMINES THE PROSECUTION'S CASE AGAINST HIM AND DEMONSTRATES THAT HE IS INNOCENT.

A criminal judgment may be collaterally attacked on the basis of newly discovered evidence if such evidence casts a "fundamental doubt on the accuracy and reliability of the proceedings" and "undermine[s] the entire prosecution case and point[s] unerringly to innocence." (*In re Hardy*, *supra*, 41 Cal.4th at p. 1016; *In re Hall*, *supra*, 30 Cal.3d at p. 417; *In re Weber* (1974) 11 Cal.3d 703, 724.) When a third-party confession is the basis for habeas relief, the petitioner must satisfy two prongs: (1) the confession exonerates the petitioner; and (2) the confession is credible. (*In re Branch*, *supra*, 70 Cal.2d at p. 215.) In Miles' case, Steward, Teamer, and Bailey have

all confessed to the crime, are credible, and completely exonerate Miles.

A. The Confessions Are "Newly Discovered."

The standard for determining whether evidence is "newly discovered" is whether the evidence could have been discovered with reasonable diligence prior to judgment. (*In re Hardy*, *supra*, 41 Cal.4th at p. 1016; *In re Lawley* (2008) 42 Cal.4th 1231 [evidence considered "newly discovered" where co-defendant did not come forward at the time of trial].) The confessions obtained from Steward, Teamer, and Bailey are new evidence in that they could not have been discovered with reasonable diligence prior to judgment because none of the three were willing to come forward until after Miles' conviction. (Exhibit N, Exhibit M, Exhibit CC.)

B. Miles Has Met The First Prong: The Confessions Exonerate Miles.

It was undisputed by the eyewitnesses and the victims that three individuals committed the crime. (1 R.T. 231; 3 R.T. 496-497.) Teamer testified that he committed the robbery with Steward and Bailey. (1 H.T. 31-34, 71-74, 77, 79, 80.) Steward testified that he committed the robbery with Teamer and Bailey. (1 H.T. 97-98, 101, 103-105, 108-111, 133, 135-142, 144-146, 147-148, 158.) Bailey confessed that he committed the robbery with only Steward and Teamer. (Exhibit CC.) The confessors confirmed that Teamer acted as the getaway driver while Steward and Bailey committed the actual robbery and that Miles was not involved in the crime at any point. (1 H.T. 42,

54, 83, 89-90, 112, 115, 129; Exhibit CC.) Given this information, the confessions from Steward, Teamer and Bailey individually and collectively exonerate Miles.

C. Miles Has Met The Second Prong: The Confessions Are Credible.

The testimony from Teamer and Steward as well as the declaration from Bailey are credible for numerous reasons. Not only were the participants' descriptions of the crime consistent with the facts of the case and with each other, but none of the participants have the motivation to lie and, if anything, put themselves at risk by coming forward.

1. The confessions are sufficiently corroborated by other evidence in the case and the confessors knew facts only the true perpetrators would know.

Corroboration by other evidence is one of the main factors a court considers when assessing credibility. (*In re Miranda* (2008) 43 Cal.4th 541, 547, 567; *In re Cox* (2003) 30 Cal.4th 974, 1006; *Luna v. Cambra* (9th Cir. 2002) 306 F.3d 954 *amended*, 311 F.3d 928; cf. CALCRIM No. 334 (2010) [testimony of an accomplice is corroborated and may be considered where independent evidence tends to connect a defendant with the commission of the crime].) Further, an absence of specific peripheral details in the confessions do not amount to a finding of incredibility. (*Opper v. United States* (1954) 348 U.S. 84, 93 [corroboration is satisfied where there is independent evidence "which would tend to establish the trustworthiness of the statement"].)

Teamer's and Steward's testimony consistently and accurately described how the crime took place, including facts only the true perpetrators would know: (1) the robbery took place on June 29, 1998, (see 1 R.T. 212; 2 R.T. 291-292, 300; 3 R.T. 563-564, 569 and 1 H.T. 27-28); (2) Teamer's black Toyota was used in the robbery and Teamer drove, (see 3 R.T. 595, 597, 656-657, 685-686 and 1 H.T. 33, 103-104); (3) Steward was tall and slender and Bailey was stocky at the time of the robbery, (see 1 H.T. 32, 97-98, 166, 183-186); (4) Bailey had noticeable rolls on the back of his head and it would have been impossible for someone not to notice the rolls, (Exhibit P, p. 1); (5) Steward looked liked Warren G., just as Patlan described, (see 3 R.T. 630-631; 4 R.T. 852 and Exhibit P, p. 1); (6) Steward was wearing a suit and Bailey and Teamer were wearing jeans and T-shirts, (see 2 R.T. 301, 304; 3 R.T. 569; 4 R.T. 750 and 1 H.T. 33, 73); (7) Steward had a shotgun and Bailey had a handgun (see 2 R.T. 305-307, 332; 3 R.T. 576, 580 and 1 H.T. 33, 72-73, 82, 103, 132); (8) Steward was the first person to gain access to Fidelity, (see 2 R.T. 301, 304; 3 R.T. 569; 4 R.T. 750 and 1 H.T. 105-107, 132-133, 136); (9) Steward accurately identified the male employee as a white male, (1 H.T. 107; 3 H.T. 114); (10) Steward gave the male employee a false name beginning with a "J," (see 2 R.T. 245, 247, 304-305, 332-333; 3 R.T. 499-500, 552, 570; 4 R.T. 822 and 1 H.T. 107, 136-137); (11) Bailey pretended as if he was going to use the restroom, (see 2 R.T. 304; 3 R.T. 569, 572-574, 627-628 and 1 H.T.

108, 133; Exhibit P, p. 1); (12) Bailey told Gomez to get down on the floor, (see 1 H.T. 109, 137-138, 158); (13) Bailey punched Patlan once in the face by his mouth/nose area, (see 2 R.T. 305-307, 332; 3 R.T. 576, 580 and 1 H.T. 138-140); (14) Teamer went into the autoparts store during the robbery and asked about parts for his 1975 Chevy, (see 2 R.T. 504-506; 3 R.T. 530-531, 548 and 1 H.T. 33-34, 75); (15) while inside the autoparts store, Holguin told Teamer his friends were back at the car, (see 3 R.T. 508 and 1 H.T. 34); and (16) the culprits did not get much money from the heist, (see 1 R.T. 218 and 1 H.T. 79, 109). Unless Teamer and Steward were actually participants in the robbery, they simply would not know all of the vital details of the crime.

Far more telling of the veracity of these witnesses is the fact that each was subjected to extensive cross-examination and neither wavered in their recollection of the crime. Had Teamer and/or Steward been told what to say or had Steward read the extensive record in the case to familiarize himself with the facts in order to falsely confess, surely it would have been impossible for either of them to keep their story straight. In fact, both Teamer and Steward testified that no one had told them what to say. (See 1 H.T. 111, 113, 117, 151-152.) Hence, it is undeniable that Teamer's and Steward's confessions are credible.

Bailey's confession is also credible. In the case of *Luna v. Cambra*, *supra*, 306 F.3d 954 [*Luna*], the Ninth Circuit found that a statement submitted

by Lopez, the real perpetrator of the crime, had sufficient indicia of reliability because he memorialized it on paper, under oath, and presented it to a court of law. (*Id.* at p. 306.) Plus, there was no evidence in the record to suggest that Lopez signed the declaration just "to aid his friend." (*Ibid.*) Finally, there was no evidence suggesting that Lopez made the statement without understanding the ramifications. (*Ibid.*) In fact, to the contrary, Lopez had been involved in the criminal justice system and knew or should have known that his sworn declaration could be used against him in a subsequent criminal trial and he confessed to the crime in a court document under the threat of perjury. (*Id.* at pp. 963-964.) For like reasons, the Bailey's confession is credible.

Further, the initial description of the second male matched the description of Bailey. Witnesses described the second male as approximately 190-200 pounds with a stocky build and possibly a goatee; Gomez did not notice any tattoos or scars. (Exhibit DD, Excerpts of Police Reports, p. 5, 28; 2 R.T. 245, 247, 304-305, 332-334, 389-390, 394-395, 425, 430, 445-447; 3 R.T. 477, 499-500, 552, 570-571; 4 R.T. 822.) When police linked Teamer to the crime and began surveillance on Teamer's house, they noticed a man approximately 170s pound with a goatee. (Exhibit DD, p. 22.) Subsequent investigation confirmed that this individual was Bailey. (Exhibit DD, p. 22.) Gomez even identified Bailey on two separate occasions, stating he looked familiar. (Exhibit DD, p. 22, 25.)

Additionally, police reports acknowledged that Bailey was in the same gang as Teamer, shared a similar moniker with Teamer, and was "a close personal friend of suspect Teamer." (Exhibit DD, p. 22.) Teamer and Bailey were such good friends that Teamer listed Bailey and Bailey's sister, Franchelle Bailey, as references in Teamer's application for credit to buy the black Toyota Corolla. (Exhibit EE, Credit Documents.)

Finally, similar to Steward, Bailey was able to accurately remember the date of the crime because it occurred on June 29, 1998, Steward's birthday and remembered the location of the crime scene – at Fidelity in Fullerton. (Exhibit CC.) Bailey stated that he, Steward, and Teamer drove to Fidelity in a Teamer's car. (Exhibit CC.) Bailey stated that Steward was wearing a suit, which is consistent with the evidence. (Exhibit CC.) In accordance with the evidence, Bailey related that Steward was giving the male employee [Patlan] "some bogus info." (Exhibit CC.) At that point, Steward pulled out the shotgun and Bailey ordered the female [Gomez] to get down on the floor; Steward was pointing a gun at the male [Patlan]. (Exhibit CC.) Bailey stated that he ordered Gomez to show him where the money was located; Gomez recalled the same. (Exhibit CC.) Bailey stated that he was the one who ordered the two employees into the back room, which is also supported by the victims' statements. (Exhibit CC.) Once he arrived back at the car with Steward, Teamer was not inside, which is consistent with Holguin's statements

that Teamer's friends were waiting for him at the car. (Exhibit CC.) Bailey also confessed that he was carrying a .38 revolver and Steward had a shotgun, which is also consistent with the witness accounts. (Exhibit CC.)

2. The confessors have no reason to lie for Miles.

As in *Luna*, there is no indication that Bailey, Steward, and Teamer have confessed simply to "aid a friend." In fact, the evidence is to the contrary because each has "implicated a friend" in a crime. The only logical explanation for why they would come forward is because they are telling the truth. Bailey, Steward, and Teamer were friends with each other, not with Miles. (1 H.T. 31-32, 66-6798-99, 123.) Teamer hardly every saw Miles and Steward did not know even who Miles was until years later, when he discovered that Miles had been convicted of the crime. (1 H.T. 36, 44-45, 111, 113, 117.) Furthermore, Bailey was in the same gang as Teamer and was essentially Teamer's "little brother." (1 H.T. 31-32, 66-67.) For that reason, Teamer could not "snitch" on Bailey and made the decision to let Miles be prosecuted for the crime, hoping Miles would beat the case. (1 H.T. 1 H.T. 54, 89-90.) At the time of trial, Teamer, who was still active in the gang, truly was stuck between a rock and a hard place.

It was not until years later that Teamer found the strength to come forward and he has no motivation to lie for Miles. After all, if one was to believe that Teamer is still active in the gang and his motivation to testify at the

evidentiary hearing was to aid another gang member, then he is not only admitting that he let a fellow gang member get convicted for something he did not do, but he is also pinning the crime on a fellow gang member (Bailey) – who is allegedly his protégée. (1 H.T. 50, 54, 89-90.) Surely he would suffer retaliation for the thirteen years Miles has spent behind bars that could have been prevented. However, if Teamer is not still active in the gang, he has no motivation to lie and his motivation for testifying is pure – he truly feels guilty for what he has done. (1 H.T. 42, 83.) Additionally, Teamer has subjected himself to prosecution for perjury for testifying falsely under oath about who was involved.

Steward's reasons for coming forward are also genuine. Steward testified credibly even though he thought he could still be prosecuted for the crime. (1 H.T. 119-120, 126-127, 131, 164; 3 H.T. 127, 139.) There was no gang-related reason to lie for Miles. After all, as Steward related, unless you committed a robbery against other gang-bangers, admitting to the robbery would not increase your status in the gang. (1 H.T. 154.) It makes no sense that Steward would come forward other than the simple reason that his testimony was the truth. (1 H.T. 117.)

Bailey's reasons for confessing are likewise genuine. Bailey came forward because "it was the right thing to do." Bailey stated that he thought long and hard about coming forward, admitted that he knew Miles was locked

up for the crime, but he did not care in the past because he was just glad he did not get caught. However, as Bailey matured and had a family, the implications of what he had done to Miles became ever more apparent and he decided to do the right thing. (Exhibit AA.)

3. The running of the statute of limitations does not make the confessions incredible.

The running of the statute of limitations does not inherently mean the confessions are not credible. The law recognizes that a statement may still be reliable even if it is not against penal interests, but, instead is against other interests. (See, e.g., Cal. Evid. Code, § 1230 [there is a sufficient indicia of reliability of a hearsay statement where the statement that was "so far contrary to the to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."].) The statements made by Teamer, Steward, and Bailey surely would make all of them "an object of hatred, ridicule, or social disgrace in the community," such that "a reasonable man in his position would not have made the statement unless he believed it to be true." (Cal. Evid. Code, § 1230.)

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4. The fact the confessors came forward, after they discovered Miles was convicted and because they felt bad, weighs in favor of a credibility finding.

Steward, Teamer, and Bailey have expressed genuine feelings of responsibility and remorse, indicating that their confessions are credible.

Steward executed a declaration exonerating Miles when he thought he could still be prosecuted for the crime. (1 H.T. 119-120, 126-127, 131, 164.) Regardless of the consequences, Steward came forward because he genuinely felt he needed to correct the situation because he knew the truth, he knew who was involved, and he knew that Miles was not one of the robbers; it was the right thing to do. (1 H.T. 115, 117-118, 120, 125, 127, 131.) As Steward stated, "I feel that I can't sit back and let this innocent man do some time for a crime that I did . . . I also thought of how would I feel if I was him and [i]nnocent sitting in here doing all this time . . . for something I didn't do." (Exhibit N.)

Likewise, fact that Miles had been in for a crime he did not do had been weighing on Teamer's conscience for a while and he was relieved it was finally being addressed. (1 H.T. 42, 83; Exhibit M, p. 1.) Teamer hoped that, one day, Miles would be able to forgive him for what he had done. (Exhibit M, pp. 2-3.) Teamer went on to state, "I would like to apologize to Guy Miles for all the trouble I've put him & his family through. There's no way to replace the time you've lost due to this robbery, but I'm sorry & hope one day you find a way

to forgive me." (Exhibit M.)

Bailey also stated he would never want what happened to Miles to happen to anyone and he is coming forward to do the right thing. (Exhibit CC.)

These genuine feelings of responsibility and remorse indicate that their confessions are credible. Could there possibly be a better reason for confessing other than doing so out of a sense of moral obligation to alleviate the suffering of an innocent person and bring the truth to light?

D. The Trial Court Denied The Petition On New Evidence Grounds Without Full Consideration Of The Reasons Why The Evidence Was Credible And Made Erroneous Speculations About What Additional Witnesses Would Testify Had They Been Called.

1. Someone who has a felony conviction, former gang membership, or present gang membership does not lack credibility *per se*.

The trial court found that both Teamer and Steward were not credible, *per se*, because both had prior felony convictions. However, the government regularly uses witnesses with felony convictions in its case in chief and those witnesses are routinely found credible. (See *People v. Rogers* (2006) 39 Cal.4th 826, 904; *People v. Horning* (2004) 34 Cal.4th 871, 901; *People v. Medina* (2003) 11 Cal.4th 694, 757.) The same is true of prior or current gang membership, which the trial court found weighed against credibility. If these were irrefutable reasons for finding a witness incredible, the prosecution would never be able to use felons or gang members in its cases. In finding the witnesses not credible for these reasons, the trial court placed Miles in an

impossible "catch 22" situation given the of the background of the people who really committed the crime. On the one hand, the only witnesses who could definitively exclude Miles are the ones who committed the felony in question and who also happen to have felony records and, on the other hand, the trial court will not believe someone with a felony record.

2. There were numerous, irrefutable reasons that the testimony of Teamer and Steward was credible, which the trial court failed to address.

Not only were Teamer's and Steward's descriptions of the crime consistent with the facts of the case and with each other, but Teamer and Steward have no motivation to lie and, if anything, put themselves at risk for gang retaliation or further prosecution as discussed in section III(C), *supra*. The reasons for finding a lack of credibility with Teamer and Steward are simply not sufficient in the context of the entire case.

3. The trial court erroneously found that Bailey's testimony is essential to the determination of a new evidence claim predicated on third-party culpability.

In its order denying the petition, the trial court held: "it is absolutely essential that Harold Bailey testify in any Habeas Corpus proceeding alleging newly discovered evidence. He is supposed to be the culpable third party. His credibility and physical appearance has to be evaluated, especially in contrast to the photo identification by witness Holguin as well as the photo and in-court identifications by victims Gomez and Patlan . . . without the testimony of

Bailey, he is totally lacking in his ability to establish his burden of proof." (Exhibit H, pp. 2-3.) This holding contradicted the trial court's earlier ruling on the matter that Miles may be entitled to relief absent Bailey's testimony. (1 H.T. 1-3.) Further, nothing in the law requires that the actual perpetrator of the offense for which the Miles was convicted testify in order to obtain habeas relief. (See *In re Hall*, *supra*, 30 Cal.3d at p. 417 [habeas relief granted where two witnesses recanted their trial testimony that the petitioner was the shooter and implicated another individual as the real shooter; the shooter never testified].)

4. The trial court erred when it speculated about what witnesses would have testified to had they been called and when he suggested that Miles could not succeed on his claim without calling such witnesses.

In an in-chambers meeting, Judge Fasel informed Miles and the District Attorney that he was interested in hearing from additional witnesses on the Gomez identification procedure and allowed Miles and the District Attorney time to conduct further investigation. (Exhibit J.) At no point during the hearing did the trial court inform Miles that Bailey was a necessary witness or that the trial court also wanted to hear from Steward's cousins – Marlin, Cedric, and Keyone as well as Contre Snowden and Tiant Spears. (Exhibit J; see 1 H.T. 1-3 [evidentiary hearing proceeded when Bailey refused to testify].) The California Innocence Project tried to contact Steward's cousins, to no avail. (Exhibit J.) Further, the District Attorney had interviewed Snowden and

Spears and they both denied having any information on the robbery, hence the reason Miles did not call them as witnesses. (Exhibit FF; Report of Contre Snowden Interview; Exhibit GG, Report of Tiant Spears Interview.) The trial court's erroneous assumptions about what these witnesses would have testified to, if called, cannot be a basis for denying the petition.

E. Conclusion.

The confessions by Steward, Teamer, and Bailey exonerate Miles and are credible. The trial court was wrong in deciding otherwise. The law is clear, because the confessions are credible and they exonerate Miles, they necessarily undermine all critical evidence presented against Miles and demonstrate that Miles is, in fact, innocent. Therefore, Miles' conviction must be reversed.

IV.

THE COURT SHOULD GRANT MILES' PETITION BECAUSE HE IS ACTUALLY INNOCENT OF THE CRIME FOR WHICH HE STANDS CONVICTED.

"Concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." (*Schlup v. Delo* (1995) 513 U.S. 298, 325.) Hence, the justice system provides the writ of habeas corpus as a tool to vindicate a claim that the prisoner is actually innocent. (*Harris v. Nelson* (1969) 394 U.S. 286, 290-299; *In re Hardy*, *supra*, 41 Cal.4th at p. 1016.)

The California Supreme Court has long recognized the viability of an actual innocence claim, insofar as the claim is based on new evidence or false evidence (discussed in sections I and II, *supra*). (*In re Lawley*, *supra*, 42 Cal.4th at p. 1238.) However, there is currently no articulated standard for a freestanding claim of actual innocence; a claim of innocence not solely reliant upon new evidence or false evidence. In assessing the possible standard for a freestanding claim of actual innocence, the United States Supreme Court has stated, without holding, that if a petitioner can make a "truly persuasive demonstration of 'actual innocence,'" then imprisonment . . . would be unconstitutional. (*House v. Bell* (2006) 547 U.S. 518, 520 citing *Herrera v. Collins* (1993) 506 U.S. 390, 417.) A persuasive demonstration of actual innocence requires that the evidence the petitioner is depending on to establish his innocence could not and cannot be reasonably rejected by a jury. (*In re Clark* (1993) 5 Cal.4th 750, 798, n. 33.)

Miles truly has made a persuasive demonstration of actual innocence. Given the lack of any physical evidence linking Miles to the crime, Miles solid alibi, the credible confessions of Steward, Teamer, and Bailey, the physical evidence which corroborates the confessions of Steward, Teamer, and Bailey, as well as questionable identifications by Patlan and Gomez, none of the evidence establishing Miles' innocence could reasonably be rejected by a jury. Hence, Miles has sustained his burden of proving he is actually innocent and

the writ must therefore issue on this ground.

V.

THE INSTANT PETITION IS TIMELY AND IS NOT OTHERWISE PROCEDURALLY BARRED.

"It is fundamentally unfair for an innocent person to be incarcerated." (*In re Branch*, *supra*, 70 Cal.2d at p. 214.) Although the law recognizes an interest in the finality of judgments in criminal matters, it also recognizes the substantial interest that justice be served – that the innocent not suffer for crimes they have not committed. (*In re Alpine*, *supra*, 203 Cal. at pp. 739, 744.) To avoid the bar of untimeliness, a petitioner has the burden of establishing either (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that his claims fall within an exception to the bar of untimeliness. (*In re Robbins*, *supra*, 18 Cal.4th at p. 780.) The same is true for successive petitions. (*In re Clark*, *supra*, 5 Cal.4th at p. 797.) Not only is there an absence of substantial delay, but, in the event the Court determines his claims are not timely or that the bar of successive applies, both of the exceptions to the bar delineated in *Robbins* apply.

A. Miles Sought Relief In A Timely Fashion Because He Only Recently Obtained Evidence Substantiating His Claims That He Was Innocent And False Eyewitness Testimony Was Presented Against Him At Trial.

There is no fixed time period in which to seek habeas corpus relief. Generally, habeas relief must be sought in a "timely fashion." (*In re Sanders*

(1999) 21 Cal.4th 697, 703; *In re Robbins*, *supra*, 18 Cal.4th at p. 777.) Miles spent years diligently pursing his claim of innocence. Since his conviction, from the confines of prison, Miles diligently tried to find out who was responsible for the crime. (2 H.T. 200-204.) He personally made phone calls. (2 H.T. 200.) He had friends try to find out whether Bailey was responsible for the crime. (2 H.T. 200-201.) He tried to find out where Bailey was living in Texas, once he found out Bailey had fled the state. (2 H.T. 201.) He wrote to the Orange County District Attorney at the time – Mike Capizze. (2 H.T. 204.) He wrote to the following Orange County District Attorney – Tony Rackauckas. (2 H.T. 204.) He wrote to Judge Fasel. (2 H.T. 204; see also 1 C.T. 325.) He wrote to the New York Innocence Project, which transferred him to the Northen California Innocence Project. (2 H.T. 204.) Finally, the California Innocence Project took his case. (Exhibit F.)

Even then, it was not until years later that Steward, Teamer, and Bailey took responsibility for the crime. Hence, the confessions from Teamer, Steward, and Bailey are"new evidence" because it was not until recently that Miles was actually able to secure confessions from all three true perpetrators. (Exhibit F; *In re Weber*, *supra*, 11 Cal.3d at p. 724 [a confession of guilt by a third party is newly discovered evidence].) There is nothing to suggest that Miles has not been diligent in pursuing and presenting his claim of third-party culpability.

B. Even Assuming Petitioner Has Not Brought His Claims In A Timely Fashion, There Is Good Cause For The Delay.

In the event a petition is not timely, the petitioner can escape the bar of untimeliness by showing there was good cause for the delay. (*In re Robbins*, *supra*, 18 Cal.4th at p. 780.) "Good cause for substantial delay may be established if . . . the petitioner can demonstrate that . . . he or she was conducting an ongoing investigation into at least one potentially meritorious claim, [or]. . . delayed presentation of one or more other known claims in order to avoid the piecemeal presentation of claims." (*Ibid.*)

Here, Miles contacted the California Innocence Project in 2002 to assist in the investigation of his case. (Exhibit F.) The California Innocence Project completed its extensive screening process of Miles' case and an investigation into Miles' claims thereafter commenced. (Exhibit F.) This investigation concluded in 2010 after the California Innocence Project obtained a confession from the final perpetrator, Bailey. (Exhibit F.) Miles agrees that he waited to obtain confessions from all three perpetrators of the crime before filing the instant petition so as to avoid a piecemeal presentation of his claims and it was entirely appropriate for him to do so. (*In re Robbins*, *supra*, 18 Cal.4th at p. 780 [holding off on filing a petition until all of the claims have been investigated amounts to good cause for delay].)

In addition to conducting an ongoing investigation, another exception

to the timeliness bar or successive petition bar occurs when the petitioner's conviction constitutes a fundamental miscarriage of justice because the petitioner is innocent of the crimes for which he was convicted. (*In re Clark*, *supra*, 5 Cal.4th at pp. 759, 798-799.) As the California Supreme Court stated, "[i]t is fundamentally unfair for an innocent person to be incarcerated." (*In re Branch*, *supra*, 70 Cal.2d at p. 214.) When the fallibility of the justice system is brought to light, procedure cannot be exalted over substance. (*People v. Ebaniz* (2009) 175 Cal.App.4th 142, 153 [partially published].) Because Miles has demonstrated that he is factually innocent of the crime, procedural bars do no preclude him from presenting the instant claims.

VI.

CONCLUSION

It is abundantly apparent that confidence in the verdict pronounced by the Orange County Superior Court in case number 98NF2299 is flawed. As the California Supreme Court in *People v. Ebaniz*, *supra*, 175 Cal.App.4th 142 stated, "We must act when guilt is clearly called into question and the probability of innocence becomes a matter of reality rather than speculation." (*Id.* at p. 154.) In light of the faulty eyewitness identifications introduced against Miles at trial and the confessions from the perpetrators fo the crime, Miles' innocence is not a matter of speculation, but a matter of reality. This Court should therefore vacate the judgment and sentence imposed on Miles at

trial, or alternatively, appoint a referee to conduct an evidentiary hearing to make its own independent factual determinations in this very serious matter.

Dated: 02/22/2017

ALISSA BJERKHOEL
California Innocence Project
Attorney for Petitioner
GUY DONELL MILES

WORD COUNT CERTIFICATION

In accordance with California Rules of Court 8.204(c)(1) and 8.384(2) limiting the memorandum accompanying a petition to 14,000 words, I hereby certify that the Memorandum of Points and Authorities in support of the attached Petition for Writ of Habeas Corpus contains 11,560 words, including footnotes, as ascertained by the word count function of the computer program (WordPerfect) used to prepare the memorandum.

Dated: 02/22/2017

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