

2003 WL 25851307

Only the Westlaw citation is currently available.

United States District Court,
N.D. California.

John TENNISON, Petitioner,

v.

Ivalee HENRY, Respondent.

No. 98-3842 CW. Aug. 26, 2003.

Opinion

ORDER GRANTING AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND DENYING MOTION FOR EVIDENTIARY HEARING AS MOOT

[CLAUDIA WILKEN](#), District Judge.

*1 Petitioner John Tennison, a State prisoner currently incarcerated at Mule Creek State Prison, has filed an amended petition for writ of habeas corpus pursuant to [28 U.S.C. § 2254](#) and a motion for an evidentiary hearing, if necessary. Respondent has filed an answer to the amended petition and opposition to the motion for evidentiary hearing. Tennison has filed a traverse. Having considered all of the papers filed by the parties, the Court GRANTS the amended petition for writ of habeas corpus and DENIES the motion for an evidentiary hearing as moot.

BACKGROUND

I. Summary of the Case

On August 19, 1989, Roderick Shannon, also known as Cooley, was shot to death in the parking lot of the Super Fair Market, located on the corner of Leland and Rutland Streets in San Francisco. The murder followed a car chase through the neighborhood, after which Shannon fled from his vehicle on foot, was cornered by a group of young men in the Super Fair parking lot, and then was shot to death with a 12-gauge shotgun.

The case was investigated by San Francisco Police Inspectors Napoleon Hendrix and Prentice Earl Sanders, with the assistance of San Francisco Gang Task Force Officers Neville Gittens and Michael Lewis.

The backdrop for the shooting was an ongoing, violent series of confrontations between youths from the San Francisco neighborhoods of Sunnydale and Hunters' Point. Several days before Shannon's murder, two Hunters' Point youths had been murdered in a drive-by shooting, purportedly by people from Sunnydale. Shannon was from Sunnydale.

In December, 1989, Tennison, who was seventeen at the time of the events at issue, was arrested and processed at the Youth Guidance Center (YGC). On April 2, 1990, a hearing was held at YGC to determine if Tennison would be tried as an adult; the hearing officer determined that he would be. On June 18, 1990, a preliminary hearing was held. On June 29, 1990, Tennison was charged in an information with the first degree murder of Shannon, assault with a deadly weapon, and conspiracy to commit assault with force likely to produce great bodily injury and murder, in violation of [California Penal Code §§ 182\(1\), 187, and 245\(a\)\(1\)](#). The assault charge was later dismissed. The information also alleged that Tennison knew that another principal was personally armed with a shotgun. In the conspiracy charge, the information alleged that the following overt acts occurred on August 19, 1989: (1) conspirators and co-conspirators met at the intersection of Manzell Street and Visitation Avenue; (2) conspirators and co-conspirators said, "There go that nigger Pat, he going to pay the price now;" (3) conspirators and co-conspirators followed a Buick Skylark, California license number UHL 124; (4) conspirators and co-conspirators met in a

parking lot at the intersection of Leland Avenue and Rutland Street; (5) conspirators and co-conspirators beat Shannon with hands and fists; (6) Anton Goff, also known as Sodapop, removed a shotgun from a vehicle; (7) Tennison held Shannon; (8) Goff said, "I'm getting ready to blow this mother-fucker out;" and (9) Goff told Masina Fauolo, "Shut the fuck up." Clerk's Transcript on Appeal (CT) at 1-3.

*2 Tennison's case was consolidated with Goff's. From September 20, 1990 through October 3, 1990, a jury trial was held. Tennison was represented by then Deputy Public Defender Jeff Adachi. Assistant District Attorney George Butterworth prosecuted the case. The prosecution's theory was that many young men, including Tennison, chased Shannon and caught him as he was trying to climb over the fence of the Super Fair parking lot. After they caught Shannon, the young men, including Tennison, pulled Shannon back into the parking lot. Tennison was holding Shannon when Shannon was shot by Goff.

The only evidence that connected Tennison to the killing was the identification testimony of two young Samoan girls, Masina Fauolo, who was eleven years old at time of the shooting, turning twelve the next day, and Pauline Maluina, who was fourteen at the time of the shooting. Both girls testified that, on the night in question, Masina had been driving around in a stolen car, with Pauline as her passenger. They testified that they were parked at Lovers' Lane, a parking lot on a hillside off Visitacion Avenue, when a car chase began. Because Masina recognized the car that was being chased as belonging to a good friend of hers, she decided to follow the car chase. The girls testified that, with Masina driving, they closely followed the last car in the car chase, going straight down Visitacion Avenue, until the chased car crashed into a fence. They testified that they never lost sight of the cars during the chase. They saw the person get out of the car that crashed and Masina recognized him as her friend Shannon. Masina stopped the car, and both girls ran after Shannon to the Super Fair parking lot where they witnessed the shooting.

On October 3, 1990, the jury returned a verdict of Tennison's guilt on the first degree murder and conspiracy charges and found true the allegation that Tennison knew another principal was personally armed with a shotgun.

After the trial, Adachi withdrew as Tennison's counsel based upon a conflict of interest. LeRue Grim was then appointed to represent Tennison. From May 15 through May 21, 1991, Tennison's motion for a new trial was heard. The motion was primarily based upon the newly discovered evidence that had been obtained by Adachi of the confession of Lavista Ricard, who said that he was the person who shot Shannon on August 19, 1989 and that Tennison was not present at the Super Fair parking lot that night. The last day of the hearing was devoted to motions regarding another confession by Ricard that had been obtained by the police six months earlier, but which the prosecutor had turned over to Grim on the next to last day of the motion for new trial.

On June 20, 1991, the trial court denied the motion for new trial on the grounds that Ricard's confession was untrustworthy and he was not shown to be unavailable. The court ruled that hearsay evidence of a statement against interest is inadmissible unless it is shown that the declarant is unavailable and the evidence is trustworthy. The court sentenced Tennison to twenty-five years to life on the murder charge, stayed a consecutive one-year enhancement for the arming allegation and stayed the life sentence on the conspiracy charge.

*3 After Tennison's trial and sentencing, he pursued post-trial remedies, ultimately obtaining counsel who found, pursuant to a discovery order from a magistrate judge of this Court, that (1) a woman named Chante Smith had contacted the police prior to the trial and told them that she knew that Ricard had committed the murder; (2) after interviewing Smith, the police interviewed a man named Luther Blue relying on a theory of the case based on Smith's information, inconsistent with Masina and Pauline's; (3) the police had requested and received permission to offer a \$2,500 reward from a Secret Witness Fund to encourage witnesses to Shannon's murder to come forward but could not remember what became of the money; and (4) when Pauline recanted her testimony, police gave her a polygraph examination with inconsistent results, after which they persuaded her to return to her original story.

II. Procedural History

Tennison appealed his conviction to the California appellate court arguing, *inter alia*, that the trial court erred in denying his motion for new trial based on the newly discovered evidence of Ricard's confession. On October 8, 1992, in an unpublished opinion, the court of appeal affirmed the conviction. On December 31, 1992, the California Supreme Court denied review

without issuing a written opinion. On April 20, 1997, Tennison filed a petition for writ of habeas corpus in the San Francisco superior court. On April 22, 1997, the petition was denied on the grounds that (1) the evidence submitted was insufficient to warrant relief; (2) insufficient evidence was submitted to establish that false evidence was offered at trial; (3) the trial court did not abuse its discretion in denying the motion for new trial on the ground that Ricard's statements were inadmissible; and (4) the prosecution did not deprive Tennison of due process by failing to concede that a new trial was warranted or by failing to support Tennison's effort to vacate his conviction. On April 30, 1997, Tennison filed a petition for writ of habeas corpus in the court of appeal. On May 7, 1997, the court of appeal denied the petition without issuing an opinion. On January 29, 1998, Tennison filed his petition for writ of habeas corpus in the California Supreme Court. Citing two United States Supreme Court cases, Tennison argued that the federal constitutional due process right trumps the California Evidence Code and thus, he was entitled to present the newly discovered evidence of his innocence. Tennison also argued that his due process rights had been violated because the prosecution had relied on perjured testimony. On September 30, 1998, the California Supreme Court denied the petition without comment.

On October 5, 1998, Tennison filed his first federal habeas petition. On March 30, 1999, this Court dismissed the petition as untimely, but was reversed by the Ninth Circuit under *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir.1999), which was decided subsequent to this Court's dismissal and which clarified the law regarding the tolling of AEDPA's statute of limitations. This Court appointed counsel, who moved for discovery and a stay of proceedings to exhaust newly discovered claims in State court. This Court granted the stay and referred the discovery request to a magistrate judge. On September 21, 2001, the magistrate judge granted certain discovery, ruling that Tennison could take the depositions of Lewis, Gittens, Sanders, Hendrix, Ricard, Smith and Blue and make requests for document production. On December 3 through December 6, 2001, Tennison took the depositions of Lewis, Gittens, Sanders and Hendrix. The remaining depositions were never noticed. Tennison also served subpoenas duces tecum on the San Francisco County District Attorney and the San Francisco Police Department.

*4 On August 28, 2001, Tennison filed a second petition for writ of habeas corpus in the California Supreme Court consisting of four claims: (1) the State's failure to turn over material exculpatory evidence violated Tennison's due process rights; (2) the State's reliance on perjured testimony violated Tennison's due process rights; (3) defense counsel Grim rendered ineffective assistance; and (4) the cumulative effect of all these violations warranted habeas relief. On May 15, 2002, the California Supreme Court denied the petition without comment. On August 21, 2002, Tennison filed the amended petition for writ of habeas corpus which the Court now considers.

III. The Investigation

A. Interview of Patrick Barnett

On the day of Shannon's death, San Francisco Police Inspector Frank Falzon interviewed Patrick Barnett, Shannon's cousin and owner of the car Shannon was driving on the day of his death. Falzon asked Barnett to find the police a witness to Shannon's shooting. Pet's. Ex. 29 (August 19, 1989 Police Interview of Patrick Barnett) at 14-17. Falzon informed Barnett that the only information the police had at that time was that two cars and a large-sized, older model pick-up truck were involved. *Id.*

B. Phone Calls from Masina Fauolo

On August 22, 1989, Masina Fauolo called Hendrix from Los Angeles three times. Resp.'s Ex. K (Hendrix Depo.) at 91, 104. Masina informed Hendrix that she had been in a parked car at Lovers' Lane and she saw guys from Hunters' Point in the parking lot. *Id.* at 106. Masina said the guys from Hunters' Point were there for a while when a car went by; they said, "that's Patrick, he's going to pay now," and they took off after the car. *Id.* Masina drove the car she was in behind the other cars chasing Patrick's car. *Id.* Then the chased car crashed, and the victim got out and ran. *Id.* The victim was chased into a loading dock of a supermarket, where the guys beat him and then he was shot. *Id.* Masina identified four of the vehicles involved in the car chase that led up to Shannon's murder: a two-door yellow and white Skylark, yellow inside; a two-door green Ford Maverick; a four-door gangster-type Chevy or Ford; and a black pick-up truck, larger than the imports, but not the real large kind. *Id.* at 97-98. Masina stated that she had seen all of these vehicles in Hunters' Point. *Id.* at 99. Masina did not, or could not, identify any person involved in the murder. *Id.*

Masina testified that, during the time she was in Los Angeles, from August 22, 1989 through October 30, 1989, she and Hendrix talked on the phone almost every other day. *Id.* at 119; Reporter's Transcript (RT) at 554. Hendrix testified that he spoke to Masina on the phone more than six times but less than twenty. RT at 123. Hendrix did not make notations in his file concerning the substance of his conversations with Masina. *Id.* Hendrix did not recall if, in those telephone conversations, Masina identified anyone whom she was with who could corroborate her story. *Id.* Hendrix would have made a note for the file if Masina had told him of a corroborating witness. *Id.* at 107. At some point, Hendrix could not recall when, Masina told him that on the night of Shannon's murder, Pauline Maluina was in the car with her. *Id.* at 162. Masina did not know Pauline's last name, she only knew that she lived in the area and went to a school located on either Visitacion or Leland. *Id.* at 163. Hendrix searched the schools in that area, found Pauline, and interviewed her on November 28, 1989. *Id.* at 163, 165.

C. Request for Money from “Secret Witness Program”

*5 On October 4, 1989, Sanders and Hendrix wrote a memorandum to their supervisors requesting approval for \$2,500 from the Secret Witness Program to encourage witnesses to come forward in the Shannon murder case. Resp.'s Ex. K at 127-28; Pet.'s Ex. 31 (October 4, 1989 Memo from Hendrix and Sanders). The request was approved. Resp.'s Ex. K at 131. There is no evidence of what became of this money and in his December, 2001 deposition, Hendrix stated that he could not remember what happened to it. The request for and approval of the \$2,500 was not disclosed to Adachi; Tennison did not learn of it until 2001 when he received a copy of the October 4, 1989 memo from Hendrix and Sanders pursuant to this Court's discovery order.

D. Reenactment With Masina

On October 31, 1989, Masina met Hendrix for the first time in person; Hendrix and Sanders conducted a reenactment of the events leading up to Shannon's murder by driving Masina to the Lovers' Lane parking lot and down Visitacion Avenue to the Super Fair parking lot and asking her to describe what occurred. *Id.* at 113; Pet.'s Ex. 51 (Transcript of Reenactment). After the reenactment, Hendrix and Sanders took Masina to the homicide detail and conducted a formal interview of her. Resp.'s Ex. K at 114.

E. Formal Interview of Masina

In the afternoon of October 31, 1989, Hendrix and Sanders formally interviewed Masina at the homicide detail. Pet.'s Ex. 32 at 1. Masina began by saying that on the night of August 19, 1989, she and her friend, Pauline, were parked in Lovers' Lane. *Id.* While they sat in the car that Masina was driving, four cars came into the parking lot. *Id.* Masina had seen all those cars in Hunters' Point. *Id.* The cars parked together. *Id.* at 4. The cars were all occupied by young black males. *Id.* at 4, 5. She didn't get a chance to see any of their faces. *Id.* at 5. The four cars had been parked at Lovers' Lane about ten minutes when the boys in the cars saw Patrick's Skylark go down the Visitacion hill. *Id.* at 6.¹ She heard two male voices say, “there goes that nigger Pat, Pat gonna pay the price right now.” *Id.* at 7. Then the boys got in their cars and started chasing Patrick's car. *Id.* at 8. Sanders asked which car got out of the parking lot first and Masina responded, “This car.” *Id.* Sander stated, “All right for the record. On the table in front of the witness, is a couple of cars, ah this car you had pointed out to us before is a similar car to one of the cars. This is a photograph of a white over yellow Skylark and ah one of the cars was like this car?” *Id.* Masina responded, “Yes it was like that.” *Id.* Sanders asked Masina which car followed the yellow Skylark and Masina pointed to a photo of a green Maverick. *Id.* at 10. The blue shiny car with gold rims went out of the parking lot next. *Id.* Sanders said, “the last car out of that group was the truck,” and Masina replied in the affirmative. *Id.* at 10, 11. Masina stated that the vehicles kept chasing the victim's car and then he crashed into a fence. *Id.* Sanders said, “Up to that point you didn't know who it was? Is that right? You thought it was Patrick driving it?” *Id.* Masina responded, “Yes.” *Id.* Then Masina said when she saw Patrick's car driving by Lovers' Lane, she knew it was Shannon driving because earlier that day she had seen Shannon drop Patrick off. *Id.* at 11, 12. When Shannon crashed into the fence, he got out of the car and started running down the hill. *Id.* at 13. Then, Masina and Pauline got out of the car Masina was driving and Masina started running, but Pauline left. *Id.* When Masina got to the parking lot she saw five or six boys beating Shannon up. *Id.* at 15. All four vehicles that had been chasing Patrick's car were parked in the parking lot. *Id.* Some boys chased Shannon on foot, and some stayed in the cars. *Id.* at 16. The boys who were chasing Shannon on foot passed by Masina as she was chasing Shannon. *Id.* at 17. The boys who were chasing Shannon on foot caught him first. *Id.*

at 16. Masina stated that the boy that drove, and she pointed to the Maverick, went to the trunk of one of the cars. *Id.* at 17. Sanders stated, "And ah you said the boy that was driving the green Maverick, ah, went over to one of the cars, you don't know which one and take out ah ah ah a long gun?" *Id.* Masina responded, "Yes." *Id.* Masina said he opened the trunk and took the long gun out and started "pulling with it." *Id.* at 18. Sanders said, "Ah would it be like sliding, working, making the gun like loading it or working the action?" *Id.* Masina responded, "Yeah. Working with the action, he just kept pulling it." *Id.* Sanders said, "Okay, he just kept pulling it, okay. But it wasn't shooting, the gun wasn't going boom, he was just pulling it?" *Id.* at 18-19. Masina responded, "I don't know." *Id.* at 19. Sanders asked, "Had you heard a shot by now?" *Id.* Masina responded, "Yes." *Id.* Sanders stated, "You heard shots. Okay. Well then you think he might have been pulling shooting the gun?" *Id.* Masina replied, "I don't know." *Id.* Masina stated that when he pointed the gun at Shannon, she screamed, "don't shoot him, don't shoot him." *Id.* Before the shooter came over with a gun, Shannon stood up and was wiggling. *Id.* at 20. Masina did not know how many times Shannon was shot. *Id.* at 21. There were four or five shots, but she didn't know if the person was shooting in the air or if he was shooting Shannon. *Id.* When the shooter came over with the gun, the six boys that were beating the victim up stepped back. *Id.* at 22. After the shooting, all of the boys left in the same cars they came in. *Id.* at 22. Then Masina went over to Shannon who said to her, "Get Patrick" and then he said, "Patrick," and then he didn't say anything more. *Id.* Then Masina left. *Id.* at 23. She didn't go back to the car she had driven. *Id.* Sanders stated that earlier he had shown Masina eight mugshots and she had picked out some people. *Id.* Sanders stated that he was again laying out the mugshots and asked Masina if she saw anyone that was there at the shooting. *Id.* Sanders stated, "For the record you've pointed out of the eight mugshots, you pointed to two photographs." *Id.* Masina stated, "He's the one that ran to the car and got the gun," referring to Goff. *Id.* at 24. Masina picked out another of the eight photos and said, "he was one of 'em that was beating Cooley up." *Id.* Masina had not seen this second person with a gun. *Id.* at 25. The second person identified by Masina was Tennison, who Masina knew as Fat JJ. *Id.* Masina stated that she knew Tennison before any shooting happened. *Id.* She had seen him before in Hunters' Point. *Id.* Even though Masina lived in Sunnydale, she would go to Hunters' Point to visit her mother's cousin. *Id.* Masina had seen Fat JJ drive a yellow Skylark, but that wasn't the Skylark she had seen chasing Shannon on the night of the murder. *Id.* at 26. Hendrix stated, "It should also be noted that earlier this morning, the witness also saw that same photograph and depicted in that photograph is the, JJ's car, JJ himself talking to Inspector Hendrix out in the street on Northridge Road and she identified him as being at the scene." *Id.* at 27. Sanders asked Masina if she had seen either person since the shooting. *Id.* Masina pointed to the photograph of Sodapop. *Id.* She explained that at some point in the past, she had come from Los Angeles to San Francisco to see Hendrix, but Hendrix had been away in Texas, and during her visit to San Francisco, she had seen Sodapop driving the green Maverick in Sunnydale. *Id.* At that time, Masina recognized him as the person who had shot Shannon and she also recognized the car. *Id.*

1 Masina was referring to Patrick Barnett, whom she knew. Barnett was the owner of the car Shannon had been driving.

F. Interview of Pauline

*6 On November 28, 1989, Hendrix first interviewed Pauline at Visitacion Valley Middle School. Pet.'s Ex. 35. Pauline's father and the principal of the school were present during the interview. *Id.* at 1.

Hendrix started the interview by asking Pauline to tell him the events she witnessed regarding Shannon's murder. *Id.* at 1. Pauline replied, "I was across the street until I heard a lot of, a lot of screaming." *Id.* at 2. Hendrix asked where across the street and Pauline responded, "by the Market." *Id.* Hendrix stated, "Okay, you were on top of the hill in the beginning?" *Id.* Pauline replied, "uh-uh (negative)." Pauline stated, "Well, we just-me and Masina we just walked in and we, see some people beating up somebody.... And then we looked and then we hear them say, the kids from Hunters Point said, 'Hit 'em, hit 'em, it's your turn,' or something.... Then Cooley came out looking all frightened. All of a sudden there's a car right next to them. Someone got the gun and shot him right there and me and Masina we just ran and we hopped on a bus. We went down 24th and Mission." *Id.* When Hendrix asked her to describe the car, Pauline replied, "I couldn't really tell the car. But all I know is it's a mob car ... Like a Cadillac or something a long car." *Id.* at 2-3. Hendrix stated, "Okay. Let me refresh your memory or try to ... uh when this was taking place, do you remember seeing a truck there?" *Id.* at 3. Pauline replied, "Nu-uh. No I was too busy looking at Masina." *Id.* Hendrix asked, "How about any of the other cars involved? Could you describe or tell me what colors they were or anything like that?" *Id.* Pauline replied, "I just seen Patrick's car.... Parked somewhere. I just looked and I seen it and I say okay, and I was thinking of Patrick in the car getting something to help Cooley, but when I was looking at the car and

no one was coming out.” *Id.* Hendrix stated, “When you saw the car parked right into the curb?” *Id.* Pauline replied, “Yeah.” *Id.* Hendrix stated, “Nosed into the curb? Okay. Do you know what street that was on?” *Id.* Pauline replied, “Sunnydale Street, no.” *Id.* Hendrix replied, “Visitacion.” *Id.* Pauline asked, “Visitacion?” *Id.*

Hendrix showed Pauline a map of the area and showed her where Shannon's car was located. *Id.* at 4. Pauline stated that after she and Masina saw Shannon's car they continued to talk and walk slowly through the park. *Id.* Hendrix stated, “Okay. All right. So you get over to the Market and saw a bunch of boys beating up on one individual and that's Cooley. Okay, and now they' re saying ‘get you some licks’ or ‘your turn,’ okay. And then one individual went to a car and got a gun. Without saying who that individual was, what car did he go to, to get a gun? Do you remember what it looked like? What color was it?” *Id.* at 4-5.

Pauline replied, “I don't remember the color.” *Id.* at 5. She also could not remember whether the person got the gun from the trunk of the car or the front of the car. *Id.* Hendrix stated, “Okay. Now, he gets a gun from the car and he goes back to where Cooley is staggering, getting up from the ground. How many shots did he fire?” *Id.* Pauline did not respond. Hendrix asked, “How many did you hear?” *Id.* Pauline responded, “Right after he shot one shot, me and Masina ran cause we thought he was gonna point the gun at us and shoot at us.” *Id.* Hendrix responded, “Okay. Fine. Did you hear a second shot?” *Id.* Pauline responded, “I think so.” *Id.* Hendrix replied, “You think so. You're not sure.” *Id.* Pauline responded, “Because my heart was beating so fast and.” *Id.* Hendrix asked, “Let's back up when he goes to the car to get the gun, okay? Did you hear, when he got the gun-what kind of gun was it? When I say ‘kind of gun,’ was it a handgun like policemen carry or was it a long gun?” *Id.* at 6. Pauline responded, “I think it was (pause).” *Id.* Hendrix stated, “Now we know that he was shot with a shotgun, okay?” *Id.* Pauline responded, “Uh-huh.” *Id.* Hendrix asked, “How long would you say it was? Just make an estimation ... Take a look, my left hand, my right hand I'm holding approximately three feet apart. Would you say the gun was like that or would it have been longer?” *Id.* Pauline responded, “I think shorter.” *Id.* Hendrix replied, “Like this?” *Id.* Pauline responded, “A shotgun or something.” *Id.*

*7 Later in the interview, Hendrix asked Pauline to describe the guy who shot Shannon. *Id.* at 8. Pauline replied, “He was kinda uh, you know, I really didn't pay attention to his face.” *Id.* at 9. Hendrix replied, “Okay. Let's do it this way: was he short or tall?” *Id.* Pauline replied, “Short.” Hendrix said, “Short. Would you say he was between 5#6# and 5#10#?” *Id.* Pauline replied, “Yeah.” *Id.* Hendrix asked if he was chubby or skinny. *Id.* Pauline replied, “He had a heavy jacket on, I couldn't really ...” *Id.* Pauline thought he was sixteen to eighteen years old and he wore fashion shoes like Nike. *Id.* Hendrix asked if Pauline recognized anyone else there and she replied, “Nun uh. (Negative)” *Id.* Hendrix asked, “Was there a large guy who was larger than the rest, taller than the rest, there?” *Id.* Pauline did not respond to this question. *Id.* Hendrix stated, “Okay. Let me say this, let me ask this rather: since that day, that morning of the shooting, have you seen any of these other guys in your travel up in Hunters Point?” *Id.* at 9-10. Pauline responded, “Nuh uh.” *Id.*

Hendrix showed Pauline photos of two Mavericks to shake her memory. *Id.* Pauline did not recognize either of them. *Id.* Then Hendrix showed Pauline eight photos of people who he said might or might not have been present that night. *Id.* at 10-11. Pauline pointed to one photo and said, “I remember him being there, yeah.” *Id.* at 11. The photo Pauline picked out was Tennison. *Id.* at 13. Pauline confirmed that he was not the person with the shotgun. *Id.* Pauline picked out one other photo of a person who she remembered seeing that night. *Id.* This second photo was a person that Hendrix and Sanders knew as Wayland Gibson AKA Buck. *Id.* at 12.

Pauline stated, “ ‘Cause I remember holding Cooley and I just glanced at them.” *Id.* Hendrix asked, “You were holding Cooley?” *Id.* Pauline responded, “No, not me-them, no not them-some boy was ...” *Id.* Hendrix asked, “When they were beating him or holding him?” *Id.* Pauline replied, “I was just glancing at them.” *Id.*

G. Chante Smith's Statements to Police

On January 3, 1990, Chante Smith called Sanders and told him that she knew that Lavista Ricard shot Shannon. She also told him the names of other individuals who were present at the shooting and described several of the cars involved in the car chase. Pet.'s Ex. 19 (Sanders' notes, dated January 3, 1990, of Smith interview); Pet's Ex. 22 (July 24, 1992 Police Interview with Smith in which she discusses her 1990 interview with the police) at 42, 61.² Smith's statement to the police was not disclosed

to Adachi; Tennison learned of it from Smith when he contacted her in 1992. He first received a copy of Sanders' January 3, 1990 notes pursuant to this Court's discovery order. Sanders' notes list the names Luther Blue, Coug Nut, Louie Lou, Laventa or Vista, Troy Barnes who drives a black Skylark, Mark Anthony, Mad Hatter, and Shardeddee. Pet.'s Ex. 19. The words "The Ill Mannered Posse" and "We're going over to Sunnydale and start some shit" are also in the notes. *Id.* After the phone call, Sanders went out to Smith's house to talk to her in person. Pet.'s Ex. 22 at 61. Smith told him that she had heard who had killed Shannon. *Id.* at 62. She said that after Shannon had been shot, she saw the people who had been involved in the shooting and their cars in a park called the Sundial. *Id.* Sometime before the trial, three officers from the San Francisco Gang Task Force came out to Smith's house to show her pictures of the truck that she had described to Sanders and Hendrix. *Id.* Tennison did not learn of the latter two police contacts with Smith until after Adachi contacted [Smith in 1992](#).

- 2 In the July 24, 1992 interview, Smith told police that she had been an eyewitness to the shooting, but that in 1990, she had not told them that she was an eyewitness because she had been afraid of testifying. The July 24, 1992 interview is described in detail below.

H. February 8, 1990 Police Interview with Ricard

*8 On February 8, 1990, Hendrix and Lewis interviewed Lovinsky Ricard. Pet.'s Ex. 39 at 1. Hendrix named the people mentioned by Smith and asked Ricard if he knew any of them. Ricard denied knowing any of them. *Id.* at 7-12. Hendrix asked Ricard if he was present on the night Shannon was shot. *Id.* at 14. Ricard replied, "No." *Id.* Hendrix told Ricard that someone had told the police that Ricard had shot Shannon to avenge the death of Cheap Charlie and asked Ricard if he shot Shannon. *Id.* at 16-17. Ricard again denied shooting Shannon. *Id.* at 17. Toward the end of the interview Hendrix told Ricard, "I'm saying your name came up in this investigation, with Cooley. Someone says you were there at the scene. Now, I don't think this person would have a grudge with you. I don't think this person would do it maliciously or try to damage you in any way because it doesn't appear to be that type of individual. However, it's something that has to be explained, one way or another. And we'd be less than diligent, sworn to do our duty if we didn't pursue, check it out." *Id.* at 22-23.

Apparently, in interviewing Ricard, the police were following up on Smith's statement, which, as indicated above, they did not disclose to Tennison until they produced Sanders' January 3, 1990 notes of his conversation with Smith pursuant to this Court's 2001 discovery order.

I. February 9, 1990 Police Interview with Luther Blue

On February 9, 1990, Sanders and Gittens interviewed Luther Blue. Pet.'s Ex. 23. Sanders informed Blue that his name had come up in connection with the Shannon homicide. *Id.* at 4. Blue said that he had never heard anything about the Shannon incident. *Id.* at 5. Later in the interview, Blue stated that he had heard that Shannon had got shot, but that he was not there. *Id.* at 10. Sanders stated, "Now we're gonna get to the bottom of Roderick Shannon being shot. Now, we know and its [sic] obvious to you, or it should be, that somebody has talked to us ..." *Id.* at 21. Sanders stated, "I believe you were there, 'cause I believe the person who told me.... But what I'm saying son the people we talked to told us exactly what happened. They told us about the truck. We know who the truck belongs to. We know about the truck. We know about the chase, we know that he was-the person just out drove him, Roderick, he didn't know much about drivin' cars. After he wrecked the car they chased him and when they made that turn, he thought behind that market ... there used to be a lower fence ... he thought if he could get over the fence he could get in the backyard and get away. Only when he got up there they caught him. There were people standing around. Some came to see.... So, can you tell me ... why these individuals would say 'yeah, Luther was there,' they didn't say you were doing nothing ..." *Id.* at 23, 24. Blue replied, "I don't know why they'd say I was there." *Id.*

*9 Sanders stated, "I believe the people who talked to me. I believe you were there. You were there ... and I can understand you being afraid, that's no ... Son, that is no crime to be afraid...." *Id.* at 25. Later, Sanders stated, "Now tell me, if I were to tell you that on the night of the incident you were at the 7-11 on Third Street³ ... You became possessed up with a group of other young men and gave chase to an automobile driven by-actually you didn't know who it was driven by, they thought it was Patrick's car. Roderick Shannon was Patrick's cousin. Gave chase to the car. The car, lost it, picked it up again, chased it until it ran the fence and then the truck backed down the street-that was some pretty skillful driving. And when the witnesses told us about that-that took some pretty skillful driving. All the time, the people that were in the truck, and in the other vehicles, they all knew

each other. Everybody knew everybody else-And you were there. You were there Luther. Tell you what I'm going to do, son ... I'm going to give you time to think about it.... Meanwhile we are going to continue our investigation.” *Id.* at 27.

- 3 The 7-11 on Third Street is east of the Super Fair Market where Shannon was shot. Lovers' Lane is west of the Super Fair Market. See Pet.'s Ex. 24 (Map of area surrounding Super Fair Market).

Again, it appears that the information with which Sanders confronted Blue was Smith's statement, which was not disclosed to Tennison. This interview with Blue was likewise not disclosed to Tennison until 2001, pursuant to this Court's discovery order.

J. February 14, 1990 Police Interview of Luther Blue

On February 14, 1990, Hendrix and Sanders interviewed Blue a second time. Pet.'s Ex. 25. Sanders asked Blue if he had thought about what Sanders had told him at the last interview. *Id.* at 2. Blue responded that he had thought about it and he didn't know anything about the incident. *Id.* at 2. Sanders gave Blue a *Miranda* warning and asked him if he wished to continue to talk about the incident. *Id.* at 3, 4. Blue replied in the negative and the interview was concluded. *Id.* at 4.

This interview, not the earlier interview with Blue, was disclosed pretrial to Adachi.

IV. Pretrial Proceedings

A. Tennison's Hearing at Youth Guidance Center

On March 27 and April 2, 1990, Tennison's § 707 hearing was held at the Youth Guidance Center (YGC).⁴ Pet.'s Ex. 55. The case was prosecuted by Butterworth. *Id.* at 1. Pauline testified for the prosecution that before she ran from the scene of Shannon's shooting, she heard a shot and she saw the individual with the gun fire it in Shannon's direction. *Id.* at 30. Butterworth asked, “Was [Shannon] standing at the time, or sitting at the time that the shot was fired?” *Id.* Pauline testified, “He was kind of standing.” *Id.* Butterworth asked, “What happened to the people who were-had been beating him up? Where were they when the first shot was fired?” *Id.* Pauline replied, “Beside him.” *Id.* Butterworth asked, “Now, while they were beating him up, was there anybody holding Coolie?”⁵ *Id.* Pauline replied, “Yeah. Yeah, I think so.” *Id.* Butterworth asked, “Were some of the people holding him and some of the people hitting him?” *Id.* Pauline replied, “Yeah.” *Id.* Butterworth asked, “But when the gun was fired, was anybody holding him at that time?” *Id.* Pauline replied, “Yes.” *Id.* Butterworth asked, “What happened after you heard the first shot? What did Coolie do?” *Id.* at 30-31. Pauline replied, “I just seen him went down and then I just ran.” *Id.* at 31. Butterworth said, “I'm sorry?” *Id.* Pauline responded, “I just seen him go down and me and Masina just ran.” *Id.* Butterworth asked, “Where did you run to?” *Id.* Pauline replied, “First we went to the park, then we said-then we tried-started checking ourselves for money and we got money and hopped on a bus.” *Id.*

- 4 Because Tennison was a minor at the time of the offense, a hearing pursuant to [California Welfare and Institutions Code § 707](#) was held to determine if he should be tried as an adult. The record contains only selected portions of this hearing.

- 5 Shannon's street name, “Cooley,” is spelled “Coolie” in this transcript.

*10 Butterworth asked, “Now, during this incident, was Masina with you the whole time?” *Id.* Pauline responded, “Yes.” *Id.* Butterworth asked, “Was she standing next to you when Coolie was shot?” *Id.* Pauline responded, “Yes.” *Id.*

Later in the hearing, Butterworth showed Pauline eight photographs and asked her if one of the people who was at the scene that night was in any of the photos. *Id.* at 35. Pauline responded, “Yes.” *Id.* However, when Butterworth asked Pauline to pull that photograph out of the stack of eight photographs, she did not do so. *Id.* Butterworth stated, “The record should reflect, your Honor, that the witness looked down in her lap and was playing with the photographs but is apparently reluctant to identify anything from the photographs.” *Id.*

On cross-examination, Pauline testified that she and Masina had been together all day walking around. *Id.* at 38. They heard noises like talking or shouting and they walked over to see what was happening. *Id.* Before that time, she never saw a bunch

of kids in a car chasing Shannon. *Id.* at 40-41. The first unusual thing she saw involving Shannon was a fight going on in the parking lot. *Id.* at 41. She was watching the fight while she was standing on the sidewalk in front of the parking lot with Masina beside her. *Id.* Pauline did not remember if the people were all beating Shannon at one time or were taking turns. *Id.* at 47. She didn't remember if they were all around him in a circle. *Id.* She didn't know how long the beating went on. *Id.* She didn't remember if anyone was chasing Shannon on foot before they started to beat him. *Id.* Pauline just heard one gunshot. *Id.* She did not see the person who had the gun. *Id.* Pauline testified that after the shooting, she and Masina jumped on the bus and went to 24th and Mission Streets. *Id.* at 64.

On April 4, 1990, Tennison was booked as an adult. Pet.'s Ex. 20 (Police Chronology).

B. Pauline's Pretrial Recantations

1. April 22, 1990-the First Recantation

On April 22, 1990, Pauline flew to San Francisco from Hawaii to testify at Tennison's preliminary hearing on April 23, 1990. Pet.'s Ex. 36 (April 23, 1990 Police Interview with Pauline Maluina) at 1. On April 22, Butterworth told Pauline that he wanted to go over the transcript of her testimony at the § 707 proceeding because there were some discrepancies between what she had testified to and what Masina had indicated in her tape recorded conversation with Hendrix. *Id.* at 1-2. Pauline told Butterworth that she was not there when Shannon got shot. *Id.*

2. April 23, 1990-the Second Recantation

Butterworth interviewed Pauline the next day, April 23, 1990, and she repeated her statement that she was not there when Shannon was shot. *Id.* Butterworth, Hendrix and Pauline's mother were present at the interview. *Id.* at 1. Butterworth asked Pauline if she was telling the truth now and she responded, "yes." *Id.* Butterworth asked, "Okay, why is it that you decided to tell us that you were not in fact a witness to the slaying of Cooley?" *Id.* Pauline responded, "Because I didn't want to get into any more trouble." *Id.* Butterworth asked her how she came to identify Tennison among the photos that Hendrix had given her at the interview in November, 1989. *Id.* at 3. Pauline responded, "Because Masina told me to pick the one that looked the biggest, and the largest one out of all the pictures." *Id.* Pauline said she had lied to the police about being at the shooting because Masina had asked her to do so. *Id.* Butterworth asked if Pauline owed Masina something because Masina had covered for Pauline when she ran away from home a couple of times. *Id.* at 3-4. Pauline responded, "Yes." *Id.* Pauline said that all the information about the shooting that she had told Hendrix at the November, 1989 interview had been given to her by Masina. *Id.* Pauline also told Butterworth that Masina sometimes told lies. *Id.* at 5. Later, Hendrix asked her to explain what Masina lied about and Pauline responded that she had told Pauline a lie about her boyfriend. *Id.* at 8.

*11 Butterworth asked, "And is the reason you are telling us the information you are telling us today because that's the truth or is it just because you are afraid to testify against Mr. Tennison?" *Id.* at 6. Pauline responded, "It's the truth." *Id.*

3. April 24, 1990-the Third Recantation

a. Pauline's Polygraph

On April 24, 1990, Sanders and Hendrix arranged for Pauline to take a polygraph test. Pet.'s Ex. 37 (April 27, 1990 Memorandum from Henry Hunter, Polygraphist, to Hendrix and Sanders). The polygraph examination was not disclosed to Adachi; Tennison did not learn of it until 2001 when he received a copy of Hunter's April 27, 1990 memo pursuant to this Court's discovery order.

In his memo, Hunter stated that on April 24, 1990, he administered a polygraph examination to Pauline regarding the Shannon homicide. He wrote,

During the pre-test interview Ms. Maluina told me that at the time of the shooting she was at 24th Street and Mission. She said that she told the police she was there because her friend Masina Fauolo had asked her to do so. She said she was able to pick out the suspect in a photo spread because her friend described the photo to her. She said she wanted to tell the truth now and that no one had threatened her nor was she afraid of retaliation.

She said that her friend was present at the shooting and had described the incident to her, that was how she was able to answer the investigators [sic] questions.

Id. at 1.

The polygraph examination consisted of three relevant questions: (1) Were you with Masina when the shooting happened; (2) Were you present when the shooting happened; and (3) Did you see the shooting? *Id.* Pauline responded, “No” to each question. *Id.*

Hunter stated that his analysis of the polygrams produced by Pauline yielded inconclusive results. *Id.* at 2. In the last paragraph of the memo, Hunter wrote:

I discussed some discrepancies in Ms. Maluina's new statements to investigators and told her that if she had changed her story because of fear of retaliation or intimidation she should not do so because we would give her protection. Ms. Maluina then asked to return to Homicide Detail so she could speak to Insp. Hendrix.

Id.

The actual results of the polygraph examination were not in the police file that was turned over to Tennison pursuant to the magistrate judge's order. Tennison assumes the actual results of the polygraph examination were destroyed by the police. Respondent does not dispute this.

b. Pauline's Telephone Conversation with Masina

When Pauline returned to Hendrix after her polygraph examination, she reiterated that she had not witnessed the Shannon homicide. Hendrix then telephoned Masina who was in Samoa at that time. RT at 193.⁶ Hendrix put Pauline on the line to talk to Masina and left the room during their conversation. *Id.* at 193-194. The phone conversation was not monitored in any way. Pet.'s Ex. 13 (Hendrix Depo.) at 179. After she spoke to Masina, Pauline went back to Hendrix and told him she was changing her story back to what she had said originally: that she had witnessed Shannon's murder. RT at 195.

⁶ Because the polygraph examination was not discussed during Hendrix and Sanders' April 24th Interview with Pauline or disclosed at trial, the fact that the phone call to Masina took place after the polygraph must be deduced from the evidence now before the Court. Because Pauline withdrew the recantation of her prior testimony after she spoke to Masina, the phone call must have taken place after the polygraph examination.

c. Formal Police Interview

*12 Then, Hendrix and Sanders formally interviewed Pauline. Pet.'s Ex. 38 (April 24, 1990 Police Interview with Pauline Maluina). Butterworth and Pauline's mother were not present. At the beginning of the interview, Sanders stated that Pauline had told Butterworth “that you were not present at the time when this thing supposedly took place.... And you further told him that you had made it up because Masina, your friend, was lying some more, had coerced you into, asked you to do this, am I correct?” *Id.* at 1-2. Pauline responded, “Yes.” *Id.* at 2. Sanders continued, “Alright, then at a later time, when I say a later time I'm talking about this morning Tuesday, I sat down with you so that Mr. Butterworth from the District Attorney's office and talked for a short period of time. [sic] Is that correct?” *Id.* Pauline responded, “Yes.” *Id.* Sanders continued, “Later, I let you talk to Samoa to Masina, am I correct?” *Id.* Pauline responded, “Yeah.” *Id.* Sanders continued, “Alright, then after talking to Masina, you called me to the room, that you wished to make a statement to me. And that was that you now wish to tell the truth.” *Id.* Pauline responded, “Uh-huh.” *Id.* Sanders continued, “About the different aspects that night. And you said that when I interviewed you at the school that day, that at that time you were telling the truth, am I correct?” *Id.* Pauline responded, “Uh-huh.” *Id.* Sanders continued, “And that was not, and I repeat, not a prefabrication of your imagination or anything, this was the people that you remember seeing at the scene that night.” *Id.* Pauline responded, “Yeah.” *Id.* Sanders continued, “With Masina.” *Id.* Pauline responded, “Uh-huh.” *Id.* Sanders continued, “Okay, the statements that you made in YGC on the 707 hearing in reference to John Tennison, were those correct?” *Id.* at 3. Pauline responded, “Yes.” *Id.* Sanders continued, “Okay, thank-you. So everything that you told us early on in the investigation when you were interviewed by Inspector Hendrix, nothing has

changed except the fact yesterday you had said that you did not want to go forward because you were not there. However, now you're telling the truth and that was just a ploy because you were upset and afraid and didn't want to testify in the case." *Id.* Pauline responded, "Yes." *Id.*⁷

⁷ After Pauline recanted, the prosecution dropped the charges against Tennison. Sometime later, they were reinstated. *See* RT at 1010 (Adachi Closing Argument).

C. Preliminary Hearing

On June 18, 1990, Masina testified at Tennison's preliminary hearing. Pet.'s Ex. 30 (several pages of hearing transcript, full transcript not included in the record). Masina testified that she heard four or five shots. *Id.* at 91. She testified that two days after the Shannon homicide, she went to Los Angeles to stay at her Dad's sister's house where she received a message to call the inspector. *Id.* at 103. Masina testified that after she received this message, she called the inspector and then she spoke to him over and over every day. *Id.*

*13 On June 29, 1990, an information was filed charging Tennison with first degree murder and conspiracy to commit murder.

V. Trial

As noted above, before the trial, the following information was not turned over to Adachi: (1) Hendrix and Sanders' memo requesting and receiving approval for \$2,500 reward from the Secret Witness Program to offer to witnesses in the Shannon homicide case and the disposition of the money; (2) Chante Smith's discussions with Sanders and Hendrix in which she identified Ricard as the person who shot Shannon and described the cars and people involved with the shooting; (3) the videotape of the first February 9, 1990 police interview with Luther Blue; (4) Pauline's April 24, 1990 polygraph and interview with the police polygrapher. Hendrix and Sanders did not enter these events into their investigative log, which they turned over to Adachi. *See* Pet.'s Ex. 20 (Chronological Report of Investigation compiled by Hendrix and Sanders).

A. Testimony of Neighborhood Residents

Two residents in the neighborhood of the Super Fair Market testified. They were not able to identify anyone involved in the shooting of Shannon. However, their testimony established several facts.

Rose Marie Dowd testified that at about 1:00 a.m. on August 19, 1989, she was awakened by the sound of tires screeching and then seconds later she heard a shotgun blast. RT at 17, 21. Dowd looked out of her window and saw a young black male come out of a car, go to the corner of the Super Fair parking lot and holler, "Don't shoot. Don't shoot him, man. Don't shoot him." RT at 23-24. Dowd saw the person jump into the back of a two-toned, American-made sedan and the car take off down Leland Street. RT at 25. Just after the car left, Dowd heard another gun blast from the inside of the parking lot. RT at 26. She heard just one gun blast from the parking lot. *Id.* Then other guys jumped into the back of a pick-up truck and took off in the direction of Cora Street. *Id.* She didn't see anyone else in the area. RT at 24.

Bernardo Santos testified that at 1:00 a.m. on the morning of August 19, 1989, he had just arrived home from his job as a bartender and heard screeching tires and a gunshot or two. RT at 40. He looked out his window and saw a car "flying down the street down Visitacion ... backward." RT at 41. Santos testified that the car was flying backward at about thirty miles an hour. *Id.* The car was a dark-green Monte Carlo or some kind of sedan like a Monte Carlo. *Id.* Santos saw the car fly backward up a little four foot high hill of grass and then crash into a fence. *Id.* Then a person in the car swung the door open and ran up the hill. *Id.* Then Santos saw a shiny black Chevy or Ford stepside pick-up truck also flying backward right in front of his house. *Id.* He saw a bunch of guys in the back of the truck screaming and yelling. *Id.* He saw about four or five guys in the back of the pick-up. RT at 46.

*14 Santos testified that the person who got out of the car that crashed was a young black male. RT at 44. Santos saw this person run toward Leland Avenue and that was the last he saw him. *Id.*

Santos saw another car behind the pick-up that looked like a yellow or beige Volkswagon Rabbit with at least two people in it. RT at 48. This car appeared to be with the truck because it was driving right behind it. RT at 47. It was following the front end of the truck closely as the truck was going backwards. RT at 51-52. Then Santos called the police. RT at 48. While he was on the phone with the police, he heard a shot. *Id.* Except for the man who got out of the car that crashed, Santos did not see anyone else running; he did not see any young girls following the individual on foot. RT at 50, 55. Santos did not see any cars other than the car that crashed, the pick-up truck and the yellow or beige Volkswagon Rabbit.

B. Physical Evidence

Shannon sustained two gunshot wounds, one to the right side of the face and another to the right shoulder area. RT at 97-98. The medical examiner found no evidence of any injuries from any other kind of weapon or any defensive wounds that might be expected if someone were defending themselves from being hit. RT at 105, 106, 109.

The green Skylark driven by Shannon had damage between the driver's door and the rear panel of the car which appeared to have been caused by a shotgun blast at close range. RT at 84. At the scene of the shooting a shotgun shell was found that came from a gun similar to a Winchester Model 1897, 12-gauge pump action. RT at 747, 751.

C. Pauline's Trial Testimony

1. Direct Examination

Pauline testified that about 8:00 or 9:00 p.m. on the evening of August 18, 1989, she was hanging out with friends on the corner of 24th and Mission. RT at 116. While she was there, her friend Masina came up to her. RT at 118. Then they went riding around in a car. RT at 119. Pauline did not know where Masina got the car, although she knew it did not belong to Masina. *Id.* Masina was driving and Pauline was in the front passenger seat. RT at 121. Later that night, they stopped at Lovers' Lane, a parking lot located at Mansell Street and Visitacion. *Id.* They were parked fifteen or twenty minutes and then one or two other cars came into the parking lot. *Id.* at 122-23. The cars parked in the back of the parking lot and Masina and Pauline were parked in the front of the parking lot. *Id.* Pauline didn't hear anything once the cars parked. She knew they were there from their headlights. *Id.*

Then, Masina saw another car go down the Visitacion Street hill. RT at 124. Pauline didn't see the car herself, she became aware of it because Masina told her about it. RT at 125. Masina said something about Patrick and the car. *Id.* After the car went by, the other cars left, "and we left the parking lot fast." RT at 126. Pauline heard and saw the cars leave. *Id.* The cars left so fast, "You can see dirt flying." RT at 127. Pauline did not know how many cars left the parking lot. *Id.*

*15 When Masina left the parking lot, she was driving fast down Visitacion. RT at 128. Pauline didn't know why Masina was doing this. *Id.* Masina said, "That's Patrick's car," but Pauline didn't know at first what car she was referring to. *Id.*

Pauline saw the cars from the Lovers' Lane parking lot again on Visitacion when Masina was driving after them. RT at 129. Pauline still did not know how many cars there were. *Id.* Pauline had seen Patrick's car before and knew he was a friend of Shannon. *Id.* Shannon was Masina's friend. RT at 130. Pauline first saw Patrick's car that night when it was crashed in the park. *Id.* She saw the car bang into the fence located next to the playground. RT at 132. Pauline did not see what happened before the car crashed into the fence. *Id.* She did not know if any other cars bumped Patrick's car. *Id.* Pauline did not hear any shots before Patrick's car crashed into the fence. *Id.*

After Patrick's car crashed, Masina stopped the car she and Pauline were driving in. RT at 133. Pauline did not remember where Masina stopped the car, although it was somewhere on Visitacion. *Id.* After Masina stopped the car, Masina ran out of the car. *Id.* Pauline saw the person driving Patrick's car running. RT at 134. She saw the person get out of Patrick's car, but she couldn't remember if he got out of the driver's side or the passenger's side. *Id.*

When Pauline saw Masina running, she ran with her because she wondered where Masina was going. RT at 135. Masina ran to the Super Fair. *Id.* Pauline did not know what happened to the other cars that had been following Patrick's car. RT at 138. When Masina was running, Pauline was ten to eight feet behind her. RT at 139. They were both running fast. *Id.*

When she got to the Super Fair parking lot, Pauline heard voices talking loud. RT at 144. She did not remember what they were saying. *Id.* She saw someone was getting mobbed, jumped. RT at 145. She didn't know who it was when she first looked over there, but she thought it was the guy who ran out of Patrick's car. *Id.* That person turned out to be Shannon. *Id.* Pauline knew it was Shannon because Masina had said something about Cooley before she got out of the car. *Id.*

Pauline watched what was going on for a few minutes. RT at 146. She didn't remember how long. *Id.* She saw cars in the parking lot, but did not remember how many. *Id.* She didn't remember if the cars had their headlights on. RT at 147.

Pauline did not remember how many people were jumping Shannon. RT at 149. It was more than one or two, but she did not know if it was more than ten or twelve. *Id.* She saw people punching him in the face. *Id.* She saw someone holding Shannon on one side of the arm. RT at 150. It was his left side. *Id.* That person was in between Pauline and Shannon while the mobbing was going on. *Id.* Pauline identified Tennison as the person who was holding Shannon. RT at 151.

*16 Pauline could not remember if Tennison was holding Shannon with one hand or two hands. *Id.* Shannon was doing nothing while Tennison was holding him. RT at 152. Pauline did not remember what the other people were doing while Tennison was holding Shannon. *Id.* At some point, Pauline became aware of someone holding a gun. *Id.* She first became aware of the gun when it was in front of Shannon. *Id.* It was six or ten feet away from Shannon. RT at 152-53. Pauline did not see where the person with the gun had come from. RT at 153. She did not remember what the other people were doing before the man with the gun came up. *Id.* Pauline saw someone holding Shannon on the right side, also. RT at 154. She didn't know how long Shannon was being held by two people. *Id.*

Pauline did not see or hear the man with the gun do anything with the gun before he shot Shannon. RT at 155. Pauline knew the gun was fired because she heard it. *Id.* Before the gun was fired, the two people who had been holding Shannon let go of him. *Id.* Pauline did not know where they went. *Id.* Pauline did not remember what Shannon did after they let go of him. RT at 156. She did not remember him moving anywhere. *Id.* She thought the person with the gun shot Shannon because he fell down after the gun was fired. *Id.* Pauline did not know whether anyone said anything to Shannon or to anyone else before the gun was fired. *Id.* But, when asked if she heard Masina say anything before the gun was fired, Pauline remembered that Masina said something like, "Don't do it. Leave him alone." RT at 157. Pauline remembered Masina yelling, but she did not remember how many times she yelled. *Id.* Pauline did not remember how long after Masina yelled that the gun was fired. *Id.*

Pauline remembered the gun was long, but she didn't remember how long. RT at 157-58. Pauline thought it looked more like a rifle than a hand gun. RT at 158. After she heard the gun go off, Pauline ran to her friend Lerma's house because she was scared. RT at 158-59.

Pauline did not remember whether, after she left the parking lot, she saw Masina again that night. RT at 167. Pauline did not remember whether she heard any other shots when she was running from the parking lot. RT at 173.

Pauline testified that when she spoke to Hendrix for the first time, she told him that she had been walking around before she saw Shannon get shot because she thought she would be arrested if she told him that she had been in a stolen car. RT at 177. She told Hendrix that she had been with Masina immediately before she saw Shannon being mobbed, and that was true. RT at 178. Pauline was not able to identify the person who had the gun. RT at 184.

Pauline acknowledged that, at a prior court hearing, she had testified about the Shannon homicide. RT at 189. She admitted that at that hearing, she had testified that Tennison was not present at the mobbing of Shannon and she had not identified him in the courtroom, even though Butterworth had asked her to identify him and Tennison was in the courtroom. *Id.* Pauline testified that she didn't identify Tennison because she was scared. RT at 190. At the prior court hearing, Butterworth had put photographs in front of Pauline and asked her to point to the photograph of the person who was involved in the mobbing of Shannon and Pauline had not pointed to Tennison's photograph because she was scared. *Id.* After that hearing, Pauline moved to Hawaii so that she could be safe. RT at 191.

*17 Pauline testified that on April 23, 1990, she had told Butterworth that she wasn't at the Super Fair parking lot when Shannon got shot. RT at 192. Pauline testified that she told Butterworth that because she was scared and because she had not wanted to testify any more. *Id.* Pauline remembered that Hendrix came in to talk to her and she reiterated that she was not at the shooting. RT at 193. Pauline remembered that the day after, Hendrix put her in touch by telephone with Masina who was living in Samoa. *Id.* While she was talking to Masina, Hendrix was outside the room. RT at 194. Pauline told Masina that she had just told the police she was not present when Shannon was shot. *Id.* Masina started getting mad and told Pauline she was stupid. *Id.* Masina told her not to be scared and to tell the truth. RT at 195. Then Pauline went back to Hendrix and told him the truth, that she had been present when Shannon got shot. *Id.* Pauline did not remember exactly what she had told Hendrix. *Id.*

2. Cross-Examination

Pauline did not remember the type or color of the car that she and Masina were driving in the night of the shooting. RT at 208. She didn't know if it was a two-door or a four-door car. RT at 209. That night was the first time Pauline had ever been in a car with Masina driving. *Id.* Before the night of Shannon's shooting, Pauline had never seen Masina drive a car. *Id.* Pauline did not remember whether Masina had a key to start up the stolen car or got it started some other way. RT at 213. Pauline did not remember whether they ran into any other friends that night before they went to Lovers' Lane. RT at 214. She did not remember whether they stopped the car anywhere before they went to Lovers' Lane. *Id.*

Masina was Pauline's best friend and they helped each other out when they got into trouble. RT at 217. Masina was good friends with Shannon. RT at 218.

Pauline could not tell what kind of cars came into the parking lot at Lovers' Lane because she didn't pay attention to it. RT at 225. Pauline did not hear any voices say anything after the cars arrived. RT at 228. She never heard anyone say, "There goes that nigger Pat. He going to pay the price." *Id.* Pauline never saw a truck at Lovers' Lane. *Id.*

The idea to chase the cars was Masina's, not Pauline's. RT at 231. Pauline did not remember how Masina started up the car in the parking lot, whether she used a key or hot-wired it. *Id.* Masina was driving fast down the hill behind the other cars. RT at 232. Pauline was not scared; she just wanted to see what was going on. *Id.* At some point, Masina caught up to the other cars while they were going down the hill. *Id.* Visitacion curves as it goes downhill. *Id.* As they were going down the hill, Pauline could only see the car they were directly behind, but she did not remember what kind of car it was, although it was not a truck. RT at 233. After Masina caught up with the last car, she kept up with that car through the rest of the chase. *Id.* Pauline did not see Patrick's car crash because there were cars in front of her. *Id.* The car had already crashed when she first saw it when they came down the Visitacion hill. RT at 234. Pauline did not see anyone in the crashed car. *Id.* Pauline saw other cars in the street, but didn't know what kind of cars. *Id.*

*18 Pauline testified that when she was watching Shannon get mobbed, she couldn't tell that it was Shannon because there were a lot of people in the way. RT at 239. She couldn't see how Tennison was holding Shannon and she didn't know where his hand was because she was looking at him towards his side, but she knew Shannon couldn't just stand there by himself. RT at 239-40. Pauline was looking toward Tennison's left side. *Id.* Pauline did not see any weapons in anyone's hands other than the gun that shot Shannon. RT at 242. Pauline did not remember Tennison hitting or beating Shannon. RT at 246. Pauline at one time told Hendrix that Tennison was one of the people who had beaten Shannon. *Id.* Her memory then was better than it was at the trial. *Id.*

Pauline affirmed that she was testifying that nobody was holding Shannon when he was shot. RT at 283.

3. Re-direct

On re-direct, Pauline testified that she couldn't see Tennison's hands, but she knew that Tennison was holding Shannon because Shannon couldn't stand up by himself after he was mobbed or when he was getting mobbed. RT at 314-15. Pauline testified that Shannon was trying to get away but he didn't because two boys were holding him. *Id.*

D. Masina's Testimony

1. Direct Examination⁸

8 The record submitted by Respondent does not include RT pages 324-408. Tennison has submitted some of the missing pages.

Masina testified that about 8:00 or 9:00 p.m. on the evening of August 18, 1989, she was driving around in a stolen car. Pet.'s Ex. 10, RT at 360. The car was a two-door gray automatic that was hot-wired. RT at 360-61. Masina testified that her cousin, Richard Fiapoto, gave her the car. RT at 361. She had been driving for a year before August 18, 1989. RT at 362. Pauline was a passenger in the car and they drove all over San Francisco-downtown, down Mission, Fisherman's Wharf. *Id.*

After Masina parked at Lovers' Lane, four cars came into the parking lot and she thought they were Hunters' Point cars because she had seen them before. RT at 367. Masina didn't become aware of who was in the cars that were parked behind her other than they were "HP niggers." RT at 371-72. In the vehicles there were twelve to fourteen young men who were sixteen to eighteen years old. RT at 372, 379. All the young men were black. RT at 372. The four cars were parked for about ten to fifteen minutes. RT at 371. Masina saw a green Skylark that Patrick usually drove going down Visitacion. RT at 378. One of the people in the four parked cars said, "There go that nigger Pat. He going to pay the price now." RT at 378-79. Then the four cars pulled out of the Lovers' Lane lot fast. RT at 379. A yellow Skylark pulled out of the lot first. RT at 380. Masina knew that Shannon was driving the car that was being chased. *Id.* Masina had known Shannon for about a year and a half and they were buddies, like brother and sister. *Id.* The last car that pulled out of the parking lot was a pick-up truck. RT at 381. Masina followed them driving as fast as she could so she could catch up with them. *Id.* She didn't lose sight of the truck as it went down Visitacion. *Id.* None of the cars stopped at any of the stop signs on Visitacion. RT at 385. Masina saw the green Skylark crash into the fence at the park. RT at 386. Sometime during the car chase, Masina saw the yellow Skylark hit the green Skylark. RT at 387-88. After she saw the green Skylark crash, Masina parked her car on Visitacion, across the street from the school. RT at 388. After the green Skylark crashed, Masina saw a person, whom she recognized as Shannon, get out of the car and run down Visitacion. RT at 388-89. Shannon was running fast. RT at 389. Masina followed him, also running fast. *Id.* Masina testified that Pauline ran with her, but she wasn't paying attention to her because she was worried about Shannon and she didn't know where Pauline went. RT at 389-90. Masina testified that the three cars and the pick-up parked on Schwerin Street and some of the occupants got out of the cars. RT at 390-91. The boys that got out of the cars ran after Shannon on Visitacion Street. RT at 391. Four or five boys were running behind Masina and at some point they passed her. *Id.*

*19 As Masina was running to the Super Fair parking lot, she saw Shannon try to climb over the fence. RT at 419. Masina did not remember what happened to the boys on foot who were chasing Shannon as he ran into the parking lot. RT at 421. Masina saw the four cars involved in the chase in the parking lot stalls. RT at 422. The cars arrived there after she did and she saw them pull into the parking lot. *Id.* Shannon couldn't climb over the fence because the boys who had been in the cars grabbed him. RT at 423. Masina couldn't remember whether the boys who grabbed him were the ones who were chasing him on foot or the ones who got out of the cars. RT at 424. Four or five boys grabbed Shannon and dragged him down. *Id.* Then they surrounded him. *Id.* Masina couldn't see what they were doing. *Id.* Masina heard them laughing. *Id.* Masina did not know where the other boys from the cars were. *Id.*

The boys dragging Shannon off the fence had bats and sticks. RT at 425. Two of them had handguns. RT at 425-26. About three minutes after they dragged Shannon off the fence, Masina saw Shannon wiggling like he was dazed. RT at 426.

Shannon couldn't get away because "they had him." RT at 430. Masina identified Tennison as one of the people that dragged Shannon off the fence. RT at 431. Masina testified that she saw Tennison come out from one of the cars. *Id.* Masina knew some, but not all, of the other people who dragged Shannon down from the fence. RT at 432. Masina identified Goff as another person who grabbed Shannon off the fence. *Id.* Masina testified that she didn't see Goff drag Shannon off the fence, but he was around in the crowd that surrounded Shannon. RT at 433. She became aware of Goff when she saw him walk to one of the cars after Shannon was dragged off the fence. *Id.* at 433-34. She couldn't remember which car, but she knew it was not the pick-up truck. *Id.* He got a long gun out of the trunk of the car. RT at 434-35. The trunk was already open when he got there. RT at 435. After

Goff got the car out of the trunk, he was making a noise like “chick-chick-chick” or a “banging noise” with the gun. *Id.* Masina heard Goff say, “I’m going to blow this mother-fucker out.” RT at 438. Masina was screaming, “Don’t shoot him. Don’t shoot him.” *Id.* Goff said to Masina, “Shut the fuck up.” *Id.* He said it in a loud voice. RT at 441.

Then Goff walked toward the crowd and he shot the gun. RT at 439. The other young men who had been around Shannon backed up before Goff fired the gun. RT at 440. Masina heard four or five shots fired. RT at 441. Before the gun was fired, Shannon was standing and after the gun was fired, Shannon fell to the ground. RT at 442. After Goff fired the first shot, Masina saw him fire a second shot. RT at 443. Masina testified that then Goff shot the gun in the air. RT at 444. Then Masina testified that she didn’t see him shooting it again. *Id.* Then she testified that she just heard “fun fires,” and she heard two or three more shots. RT at 445.

*20 After she heard the shots, she stood there and looked. *Id.* About a minute or two after Shannon had been shot, the boys all left in the same cars that they’d come in. *Id.* She didn’t remember which car Goff got into. RT at 446. She testified that she had seen Goff in a green Maverick but didn’t know whether it was on the night Shannon was shot. *Id.*

After the young men left the Super Fair parking lot, Masina ran over to Shannon who was lying face-up on the ground and he told Masina three times, “Go get Patrick.” RT at 456-57. Then Masina ran on foot to Sunnydale to find Patrick. RT at 458. Masina never went back to the stolen car. *Id.* Masina couldn’t find Patrick. *Id.* During the shooting incident, Masina never saw where Pauline was. *Id.* After she looked around for Patrick, Masina went to her best friend Lerma’s house. RT at 459. When Masina got to Lerma’s house, Pauline was already there. RT at 461.

Masina testified that the first time she saw Tennison that night was in the yellow Skylark in Lovers’ Lane. RT at 447. Masina testified that she didn’t know if Tennison was driving, but that she knew “I used to see-he used to be in a Skylark.” RT at 447. When asked by Butterworth, “The night in question when Cooley was killed, did you see John Tennison in a Skylark,” Masina replied, “Yes.” *Id.* Masina testified that she saw him in the Skylark in the Lovers’ Lane parking lot when she looked in her rear-view mirror at the cars parked behind her car. RT at 448. Masina had never met Tennison before, but she knew about him and knew his nickname was Fat JJ. RT at 448-49. Masina testified that she saw Tennison in his car, a yellow and white Skylark, every time she visited her cousins who lived in Hunters’ Point. RT at 449, 451. Butterworth showed Masina a photograph of Tennison’s car. RT at 451-52. Masina testified that was not the car that was at Lovers’ Lane the night Shannon was killed because it didn’t have a vinyl top. RT at 452.

One of the photographs Hendrix showed to Masina in a photo line-up was a photograph of a yellow Skylark with Tennison and Hendrix. RT at 480. Masina forgot whether she told Hendrix that the car in the photo was the car she had seen on the night of the shooting. *Id.* She knew she eventually said it was not the same car. *Id.*

2. Cross-Examination

Masina claimed that she got a different car to drive every other day from when she was ten years old to the time she was eleven years old. RT at 562. She testified that when the four cars drove into the parking lot at Lovers’ Lane their headlights were off. RT at 564. Masina stated that the cars parked directly behind her and she never saw any headlights on. *Id.* Masina testified that she saw Tennison driving the yellow Skylark in Lovers’ Lane. RT at 565. Adachi questioned Masina about her October 31, 1989 interview with Hendrix in which she stated that she did not get a chance to see any faces at Lovers’ Lane. RT at 567. He also asked her about her testimony at the preliminary hearing that she did not see Tennison at Lovers’ Lane. RT at 567-68.

*21 Masina testified that she never saw a black truck going backwards on Cora Street, RT at 572, and that she never saw a yellow or beige small car involved in the incident. RT at 573.

Tennison was not one of the four boys that were chasing Shannon on foot. RT at 574. Masina did not know whether the boys who caught Shannon on the fence were the ones on foot or the ones who had been in the cars. RT at 575. Adachi questioned Masina about her interview with Hendrix when she said that the ones who chased Shannon on foot caught him first. RT at 576.

Masina testified that she wasn’t sure that anyone hit Shannon but that “when somebody was surrounding somebody like that something is going to go wrong.” RT at 581. Masina testified that she saw the boys beat Shannon with fists and baseball bats.

RT at 582. Masina could not remember if Tennison beat Shannon. *Id.* She remembered only Tennison holding Shannon. RT at 584. Masina testified that the boys were not beating Shannon up when she arrived at the parking lot, but in her interview with Hendrix she had said that they were already beating him up when she got there. RT at 585.

Masina testified that she had not spoken to Pauline after the shooting incident, but at Goff's preliminary hearing she had testified that she went to see Pauline at her school to tell her that the inspectors from homicide were coming to talk to her. RT at 591-92.

2. Re-direct Testimony

Masina testified that the first time she saw Tennison was when he was driving into the Lovers' Lane parking lot. RT at 609. She did not see him when the cars were parked because "they was in back of us." RT at 610. Masina testified that at the preliminary hearing, what she meant to say was that she did see Tennison when he first came into the Lovers' Lane parking lot. RT 614-15.

Masina testified that she first became aware of Tennison in the Super Fair parking lot when Tennison grabbed Shannon down. RT at 616. She didn't remember seeing him before that. *Id.* Masina testified that at the time Shannon was pulled down from the fence, all the cars were in the parking lot. *Id.* Then, she testified that she couldn't remember whether the cars got there before or after she arrived at the parking lot. RT at 617.

Masina testified that she told Hendrix and Sanders on October 31, 1989, that she saw Tennison strike Shannon. RT at 618. Masina testified that now she could not remember whether Tennison actually did strike Shannon. *Id.*

E. Defense Case

To counter Masina and Pauline's eyewitness testimony, the defense put on two witnesses, a meteorologist and a videographer. The meteorologist testified that it was cloudy the night of the homicide. The videographer showed photos of the Super Fair parking lot.

VI. Post Trial Events

A. Lovinsky Ricard's Confession

On November 7, 1990, shortly after Tennison's conviction but six months before Tennison's motion for new trial, Officers Lewis and Gittens of the Gang Task Force arrested Ricard for outstanding narcotics and traffic warrants. Pet.'s Ex. 40. Instead of talking about the warrants, Ricard addressed the events of August 19, 1989 and admitted to shooting Shannon on that night. A video tape was made of Ricard's confession. *Id.* Ricard's version of the events of August 19, 1989 was as follows.

*22 Ricard had been hanging out, drinking with two other people, and they had been riding in a convertible. *Id.* at 18, 21. Ricard didn't want to describe this car or the people in it because they were uninvolved with the shooting. *Id.* at 18. Ricard was thinking about a friend of his, Cheap Charlie, who had just been killed. *Id.* at 3. Ricard had a 12-gauge shotgun with him. *Id.* at 3. At a liquor store on Third Street, they hooked up with occupants of another car and a pick-up truck. *Id.* at 6, 21. The car accompanying the pick-up truck was dark-colored, either black or brown, medium-sized, had four-doors and looked new. *Id.* at 19. Ricard was drinking, and became drunk. *Id.* at 5, 16. The group, two cars and the pick-up truck, ended up in the parking lot of the Bayshore 7-11. *Id.* at 9. Ricard was in back of the pick-up truck. *Id.* at 9. There were two, three or four people in the back of the truck with Ricard. *Id.* at 9. Ricard had never seen them before, but he knew they were from Lakeview. *Id.* at 9-10, 13. They were driving around and then saw a black car driven by someone from Sunnydale. *Id.* at 6. Ricard shot at the car from the back of the truck. *Id.* at 6.

Eventually the car from Sunnydale was put in reverse. *Id.* at 6. The pick-up truck went in reverse to continue to chase the car. *Id.* at 6. While the truck was chasing the car, Ricard was shooting at it. *Id.* at 6-7. The car they were chasing ran up on the curb and crashed into a fence. *Id.* at 7. Then, on foot, Ricard and others started chasing the driver of the car that had just crashed. *Id.* at 7. Ricard got back in the truck, and the truck continued to chase the driver. *Id.* at 7. When the truck arrived at the "place where the incident happened," some people ahead already had caught the victim and were beating him up. *Id.* at 7. Ricard did not know the individual that was getting beat up, but this person was picked out because everyone knew he was

from Sunnydale. *Id.* at 7. Ricard got out of the pick-up with the 12-gauge shotgun and heard people shouting, “do it, do it.” *Id.* at 7. Everyone cleared back and Ricard shot the man. *Id.* at 7. Then Ricard jumped back into the pick-up and everyone drove off in different directions. *Id.* at 7-8.

In response to police questions, Ricard said that neither Tennison nor Goff were present during the murder. *Id.* at 15. Ricard said he knew both of them well. *Id.* at 15. He said the shooting was bothering him because some of his friends were going down for a long time because of what he did and he wanted to do the right thing, to clear them of something they did not do. *Id.* at 13, 15.

When asked what kind of rounds the shotgun had in it, Ricard replied, “buckshot and slug shells” which he had bought from Big Five where he had bought a few, not a box. *Id.* at 5. When asked whether he used his name when he bought the shells because the store asks for a name when a person buys shotgun shells, Ricard responded that he asked someone to buy them for him. *Id.* at 12. When asked who that person was, Ricard responded that he had asked someone off the street to buy them for him. *Id.* at 12. When asked what happened to the shotgun, Ricard answered that it had been stolen. *Id.* at 8. When asked where the rest of the shotgun shells were, Ricard answered he had gotten rid of them because he didn't have a need for them. *Id.* at 9.

*23 This confession was not given to Tennison's counsel until the last day of testimony at the hearing on his motion for new trial, more than six months later.

B. Motion for New Trial

On May 15 through 21, 1991, the trial court held a hearing on Tennison's motion for new trial which was primarily based on new evidence obtained by Adachi that Ricard was the person who shot Shannon. On February 20, 1991, Adachi had made a videotape of Ricard confessing to Shannon's murder, but Ricard did not want to identify himself and wore a hood over his face. On February 21, 1991, Adachi learned that Ricard was represented by the Public Defender's office on another matter and withdrew as Tennison's attorney based on a conflict of interest. Sometime later, LaRue Grim was appointed to represent Tennison.

At the hearing of the motion for new trial, Grim called Adachi as a witness to authenticate the tape he had made of Ricard's confession, but Adachi refused to authenticate the tape based upon attorney-client privilege. Grim called Tennison to testify in an attempt to authenticate the tape. Tennison's testimony was not admitted for the truth of the matter, but to provide the court with the background of the making of the tape.

Tennison testified to the following. In October, 1990, a week after the verdict was returned, Tennison had heard from friends that a person named Lavista or Lavinsky Ricard was involved in the shooting. RT at 136 (Motion for New Trial). Tennison called Ricard. RT at 137. Tennison never met Ricard, but he knew who he was. RT at 138. Ricard told Tennison that he fired a shot at Shannon. RT at 139. Ricard didn't want to mention any other individuals who were there. RT at 139. Tennison told Ricard that Shannon had been shot twice, but Ricard only admitted to firing one shot. RT at 140. Tennison asked Ricard to come forward and admit what he did. RT at 141. Ricard said he was scared and didn't know what to do, but he agreed to speak to Tennison's attorney. RT at 141. The day after Tennison spoke with Ricard, Tennison asked Adachi to contact Ricard. RT at 143. Late in November, 1990, Adachi met with Tennison and told him that he had spoken to Ricard by phone and that Ricard had admitted to being the shooter and had said Tennison had nothing to do with it. RT at 146. Adachi made a date to meet with Ricard, but Ricard failed to show up. RT at 147. In December, 1990, Tennison ran into Luther Blue in jail and asked him what he knew of the shooting incident. RT at 148. Blue admitted to being present at the incident. RT at 148. Blue said he would be willing to testify that he was there and that Tennison was not present at the shooting. RT at 148. Blue also mentioned a person named Chaunty White. RT at 173. Tennison gave Adachi the information about Blue. RT at 149. Later, Adachi told Tennison that he interviewed Blue who had denied being present at the shooting. RT at 149. Tennison's brother, Bruce Tennison, agreed to go out with Adachi to find Ricard. RT at 150.

*24 In February, 1991, Adachi told Tennison about a videotape he had made. RT at 151. In the video, a hooded gentleman told what he knew about the killing. RT at 176. Tennison testified that the voice on the tape asking questions was Adachi's, and that the voice on the tape answering questions was Ricard's. RT at 177. Butterworth asked Tennison if he was sure it was

Ricard because he had testified that his only contact with Ricard was a total of twenty-three minutes of telephone conversation. RT at 179. Tennison answered, "yes." RT at 179.

In order to impeach Tennison's ability to identify Ricard's voice, Butterworth played the tape of Ricard's February 8, 1990 police interview in which Ricard had denied any knowledge of or participation in the killing of Shannon. RT at 185.

Grim moved to admit Adachi's tape of Ricard into evidence. RT at 186. Butterworth objected on grounds of hearsay and irrelevance. RT at 186. Grim argued it should be admitted under an exception to the hearsay rule as an admission against penal interest. RT at 186. Butterworth said there was information that he was going to provide to Grim on the next court day, which was the following Monday. RT at 188.

On that Monday, the last day of testimony on the motion for new trial, Butterworth told the court, "this morning ... I provided Mr. Grim with a copy of the interview tape between Officer Luis of the gang task force and someone purporting to be Lavinsky Ricard back in November which tape I did receive on Friday, largely as a result of a coincidental conversation that I had with Mr. Luis over the lunch hour down in the cafeteria." RT at 196.

Tennison then testified that five or six months ago, he had heard about Ricard's confession to the police from his brother, but didn't know any specifics and only assumed it had been videotaped. RT at 205-06, 208.

Bruce Tennison, Tennison's brother, testified. RT at 212. Bruce had contacted Ricard. Ricard said he wanted to do the right thing, but didn't want to come in and go to jail. RT at 214. About two days later, Ricard told Bruce that he had a conversation with two homicide police officers. RT at 215. Bruce spoke to Ricard again and Ricard told him that he "wanted to come in because he felt that he was doing the wrong thing." Bruce and Ricard decided that Ricard would talk to Adachi. RT at 215. This happened in April, 1991. RT at 216. Bruce talked to Ricard about six or seven times about him taking the blame for what he had done. RT at 217. Bruce never coerced or threatened Ricard. RT at 217. Ricard, Bruce and Adachi met and decided that Ricard would make a videotape stating he was the shooter and Tennison was not there. RT at 218. Ricard did not want to go on tape showing his face, so they decided to put a mask over his face, disguising his face. RT at 218. Then they went to the Public Defender's office. RT at 218. Bruce sat in Adachi's waiting room area and Adachi and Ricard went upstairs and made the videotape. RT at 218.

*25 Adachi had asked Bruce to find a person named Chauntey White to ask her if she knew anything about Shannon's murder. RT at 228. Bruce couldn't find her. RT at 228.

Portions of the tape of Ricard's November 7, 1990 confession to the police were played for the court. RT at 236. Supplemental briefs from the parties, together with the tapes and the transcripts of the tapes, were to be submitted to the court.

On June 20, 1991, the parties argued the motion. RT at 100-121 (labeled Sentencing Hearing). Grim argued that the tapes were admissible as statements against penal interest. RT at 102. He acknowledged that "procedurally it hasn't arrived for Mr. Ricard that he's a legally unavailable witness," but that at some point Ricard's admissions would become legally admissible because, if he were arrested, he would be appointed counsel who would tell him not to testify and that would render him legally unavailable. RT at 102.

Butterworth argued that the admission of a statement against interest is predicated upon a showing of legal unavailability. RT at 110. Butterworth also argued that the part of Ricard's statement that exonerated Tennison, that Tennison was not present at the time of the shooting, was not admissible in any case, because it was not against Ricard's penal interest. RT at 111.

The court denied the motion for new trial. RT at 121. The court stated:

I'm going to find that the videotape (Adachi's tape) and the portions of the tape taken by the inspectors of Lavista Ricard are legally inadmissible. And even if they were admissible for purposes of this hearing, having viewed the video tapes and having heard portions of the audio tapes, the court finds so many inconsistencies in the testimony or the statements of Mr. Ricard that it finds that the evidence is untrustworthy.

And, therefore, I am going to find that the evidence presented in support of this motion for new trial on the grounds of newly discovered evidence is not likely to result in a different verdict and does not actually exonerate this defendant.

RT at 121.

In an unpublished opinion, the California court of appeal affirmed the trial court's decision. Pet.'s Ex. 59 (*People v. Tennison*, no. A054353 (October 8, 1992)). The court cited *People v. McDaniel*, 16 Cal.3d 156, 178-79 (1976) for the rule that a defendant moving for a new trial based on newly discovered evidence must show: (1) that the evidence is newly discovered; (2) that it is not cumulative to other evidence; (3) that it would make a different result probable on retrial; (4) that the moving party could not, with reasonable diligence, have discovered and produced the evidence at trial. The court noted that newly discovered evidence that would not be admissible at trial is insufficient for granting a new trial. *Id.* at *5 (citing *People v. Steele*, 210 Cal.App.3d 67, 74-76 (1989)). The appellate court upheld the trial court's decision based on the ground that Tennison “had made no showing that he had diligently attempted to obtain Ricard's attendance at the hearing on the motion for new trial, or that he would be legally unavailable to testify at a new trial, a prerequisite for application of the declaration against interest exception.” *Id.* at *7. The court also found the confession untrustworthy because of the inconsistencies between Ricard's two statements, between his statement and the evidence at trial and between his statement that he was good friends with Tennison and Tennison's statements that he did not know Ricard and that he had spoken to Ricard for the first time on the telephone after the verdict. *Id.* at *8.

C. Chante Smith's July 24, 1992 Statement

*26 In 1992, Adachi found Chante Smith and convinced her to give a statement to the police. Pet.'s Ex. 22 (Transcript of July 24, 1992 interview). Butterworth, Sanders, Adachi, two additional people from the Public Defender's office and one other person from the District Attorney's office were present at the interview. *Id.* at 1-2. At some point, Hendrix joined the interview. *Id.* at 54.

In her statement, Smith said that she was at the scene when Shannon was shot on August 19, 1989. *Id.* at 2-5. The following is Smith's description of the events of that day.

In the earlier part of the day, she was driving around in her blue Mustang convertible with Luther Blue, who was her boyfriend at the time, Mark Anthony and Lavista Ricard. *Id.* at 3, 4, 68. They were at a liquor store on Third Street. *Id.* at 11. A pick-up truck came into the parking lot with two or three people in the front and four or five in the back. *Id.* at 10. They were all young black men. *Id.* at 10. There were two cars behind the pick-up. *Id.* at 3. One of the cars was a dark-colored or dark blue rental car. *Id.* at 3. She thought this car was a new Skylark. *Id.* at 49. Smith could not remember what the other car looked like. *Id.* at 3. Some of the people in the cars and truck were from Lakeview. *Id.* at 3. Ricard and Anthony were talking with the people in the truck. *Id.* at 3. They all decided to go to the 7-11 on Bayshore and then spend the evening drinking. *Id.* at 3. Smith didn't want to go, but she said she'd drop them off at the 7-11. *Id.* at 3. They had just arrived at the Bayshore 7-11, when someone she knew, Troy Barnes, pulled into the parking lot driving a black or blue Skylark. *Id.* at 3, 12. Smith explained that Barnes was very close to her family; her mother was Barnes' godmother and Barnes was like a “god brother” to her. *Id.* at 3. Smith talked to Barnes. *Id.* at 4. One of the people in one of the cars asked Barnes if he was from Sunnydale. *Id.* at 4, 12-13. Smith said, “no,” and she told Barnes that he had to hurry up and leave because they might realize that he was from Sunnydale, and at the time. Hunters' Point and Sunnydale were feuding. *Id.* at 4. Barnes left. *Id.* at 4, 13. Immediately after he left, another blue or black Skylark, exactly like the one Barnes was driving,⁹ came around the corner. *Id.* at 4, 13. The guys in the cars and the truck were pointing at the second Skylark and they all jumped in their car to go after it because they thought the person driving it was from a rival gang. *Id.* at 4, 14. The Skylark being chased went down Bayshore and made a right on Leland Ave. *Id.* at 14. When the cars started chasing the Skylark, Smith wanted to make sure they weren't chasing Barnes and she followed the cars chasing the Skylark. *Id.* at 4, 14. She did not see any other cars in front of her or behind her. *Id.* at 50-51. The car being chased didn't get far. *Id.* at 15. Smith could see the Skylark going backwards with its tires smoking. *Id.* at 5, 15. When the Skylark was going backwards, the other cars were right there with the Skylark and Smith heard gunshots, but she didn't know who shot, whether it was the person in the Skylark shooting or the people chasing shooting at the driver of the Skylark. *Id.* at 19. Smith turned off the street because she didn't want her car to be hit by the Skylark or one of the cars that was chasing it. *Id.* at 5, 16, 18. Mark Anthony got out of her car and ran over “there,” because a lot of people were getting out of their cars. *Id.* at 16. When she drove back, she

didn't see the Skylark anymore, but she saw the person who had been driving the Skylark running. *Id.* at 5, 17. She realized that the person running was not Barnes, but Shannon. *Id.* at 5, 17. Smith saw some of the people from the two cars and the pick-up get out of their cars and chase Shannon. *Id.* at 19. When she saw the person was not Barnes, she turned off that street. *Id.* at 5. Luther wanted her to go back because Ricard was in the pick-up truck. *Id.* at 5, 16. She drove back down Rutland Street,¹⁰ and couldn't see Shannon running anymore, but saw everybody in the corner over by the supermarket. *Id.* at 5, 17. Smith stopped her car on Rutland, across the street from the supermarket. *Id.* at 26. The truck was parked in the entrance/exit to the parking lot, blocking it. *Id.* Smith began to drive, so she didn't see all of it. *Id.* at 27. The people were saying, "He's from Sunnydale," but they didn't say a name. *Id.* at 17. Smith saw the other cars were in the parking lot and people were beating Shannon up. *Id.* at 26. There were between ten to thirteen people in the parking lot. *Id.* at 29. Not all of them were beating Shannon. *Id.* at 29. There were so many people standing there, that she couldn't actually see Shannon, but she knew something was going on. *Id.* at 29.

9 At that time #68 Skylarks were the hot car. Pet.'s Ex. 22.

10 The Super Fair Market is located on the corner of Leland Avenue and Rutland Street. Pet.'s Ex. 24 (Map of area around Super Fair market).

*27 Smith saw Ricard walk over to the passenger side of the truck and get a shotgun. *Id.* at 26, 30, 32. She didn't see the door to the truck open and couldn't see whether he got the gun out of the cab of the truck or the back of the truck. *Id.* at 30, 32. She didn't see what he was doing in the truck, but when he walked away, he had a shotgun in his hand. *Id.* at 32. Then everybody moved out of the way, they all backed up. *Id.* at 32. And then Ricard shot Shannon. *Id.* at 32. She couldn't see him shoot, because there were too many people around, but she heard the shot. *Id.* at 32. She only heard one shot. *Id.* at 33. Smith saw Ricard come back to the pick-up and get into the back of it still carrying the shotgun. *Id.* at 55-56. Even though Smith didn't actually see Ricard shoot because everything happened so quickly, her impression was that he didn't have time to give the gun to anyone else. *Id.* at 56. Smith stated that Tennison and Goff were not present. *Id.* at 59. She said that she did not see any females there and she did not hear any females yelling, "Don't hurt him, don't hurt him." *Id.* at 71.

Anthony got into the car and Smith took off. *Id.* at 33. Anthony asked her why she didn't pick up Ricard and she answered "he's not getting in my car after he just did what he did." *Id.* at 33. Then Smith drove back to the Hunters' Point area and parked by the Sundial, a park in Hunters' Point. *Id.* at 34. The truck and the other cars also ended up by the Sundial. *Id.* at 33. She heard Ricard say to the others "that was one down and it felt good." *Id.* at 33. Luther, Anthony and a person she knew named Coog Nut were among the people at the park who heard Ricard. *Id.* at 34-35. Ricard also said that they were going to get ten people from Sunnydale for the two people that died in Hunters' Point. *Id.* at 35.

Smith said that Ricard had told Sodapop about the shooting; a few days later Sodapop told her that he had heard that she was at the Super Fair parking lot when it happened. *Id.* at 37. Smith said she went to Ricard to ask him why he was telling people what happened and Ricard responded that it felt good to say they killed his friend, so they had to die. *Id.* at 38. Smith said that Ricard had told many people around Oakdale about the shooting and it was not a secret. *Id.* She said that many people questioned her about the shooting, but she told them that she was not there. *Id.*

Smith stated that she had called Hendrix and Sanders before the trial with this information, but had told them that she had heard it from someone else because she didn't want to put herself "into more trouble." *Id.* at 42. Sanders came out to her house and they sat in the parking lot to talk. *Id.* at 61.¹¹ Smith had told Sanders that she knew that Ricard was the shooter. *Id.* at 61-62. Sanders had asked her if she would come to court and she said she didn't want to come to court. *Id.* at 61. Smith said she told Sanders that she knew who had killed Shannon, but she repeated that the way she put it was that she heard it; she didn't want to say she saw it because then she'd have to go to court. *Id.* at 62. She told Hendrix and Sanders that, after the shooting, she saw the people who were at the shooting and their cars and truck at the Sundial. *Id.* at 62. Then three officers from the Gang Task Force came out to her house to show her pictures of the pick-up truck she had described to Sanders. *Id.* at 36, 62. She identified the pick-up in the photograph they showed her as the truck that was involved in the shooting or as one similar to it. *Id.* at 36-37. She didn't say at that point that she had been at the scene of the shooting. *Id.* at 63. After the trial, she called Sanders and told him they had convicted the wrong people. *Id.* at 63.

11 At this point in the interview, Butterworth was questioning Smith. After Smith said that she had spoken to Sanders before the trial, Butterworth indicated that he was confused by her statement. *Id.* at 61.

*28 Smith stated that after Tennison was convicted, Luther and Ricard told her not to say anything and threatened her. *Id.* at 64. She moved after she began receiving the threats and was living in Richmond and in Daly City. *Id.* at 65.

Smith stated that after they were arrested, Sodapop and Tennison, through their friends, were sending her messages to talk to their attorneys. *Id.* at 41, 66-67. Smith told the “messengers” that these requests were putting her in an awkward position because Luther and Ricard had told her they would pay someone \$10,000 to kill her if she talked to anyone about the Shannon homicide. *Id.* at 40, 41. Smith stated that she told the “messengers” not to give her name, address or telephone number to either Sodapop or Tennison.

Smith also stated that when she was a telephone operator, she happened to “catch” collect calls placed by Sodapop and Tennison when they were in jail. *Id.* at 67. Tennison asked her why she hadn't said anything; he knew she had some information, but he did not know that she had been a witness to the homicide. *Id.* at 67, 68. Smith stated that this chance telephone conversation was the only time she spoke to Tennison. *Id.* at 67.

The first time she told anyone she was an eye-witness was two days before this interview. *Id.* at 64. Butterworth asked her what caused her to talk to somebody at this late date and she said, “I don't know, but Jeff Adachi and Robert Stemme had gotten a hold of my name, address and phone number and everything, and they had come out to my house and talked to my mother, and she, Robert Stemme gave her his phone number. And I called back.” *Id.* at 64-65. She stated that if Adachi had contacted her before the trial and he had subpoenaed her, she would have had to testify. *Id.* at 45.

E. Declarations

In a declaration obtained by Tennison dated November 6, 2000, Luther Blue stated that he was a witness to the shooting of Shannon on August 19, 1989, that he had known Tennison and that Tennison was not among the people at the scene of the shooting. Pet.'s Ex. 26. In a declaration obtained by Tennison dated June 25, 2001, Anthony Jones, the person Smith called Mark Anthony, stated that on the night of August 19, 1989, he, Blue and Ricard were passengers in Smith's car, with Smith driving, and at a liquor store on Third Street they ran into several guys from Lakeview who were in a pick-up truck and two cars. Pet.'s Ex. 27 at 1. They all drove over to a 7-11 on Bayshore when a Buick Skylark drove by and the people got “all excited.” *Id.* Smith said she thought it was her cousin in the Skylark. *Id.* Ricard jumped into the truck as it took off to chase the Skylark, followed by the two other cars and Smith's car. He saw the Skylark jamming into reverse ahead of them. *Id.* Blue told Smith to turn the corner and he jumped out of the car. He saw people getting out of vehicles to chase the driver of the Skylark. *Id.* Before long, he heard a big boom. *Id.* at 2. He was acquainted with Tennison and knew that he was not present that night. *Id.* The reason he did not come forward was because he was afraid he would implicate himself in the eyes of the police and because “there can be serious consequences for people who tell on other people.” *Id.* at 2.

*29 In a declaration obtained by Tennison dated June, 2003, Pauline Maluina stated that in late 1989, her then friend Masina Fauolo asked her to lie about having witnessed the murder of Roderick Shannon. Pet.'s Supplementation of Record, Ex. A at ¶ 4. Pauline stated that she did not witness Shannon's murder and was not even aware of it until Masina told her about it and told her some of the things she should say to the police and which person to point to if the police showed her a photo lineup. *Id.* at ¶¶ 4, 5. Pauline stated that when Inspector Hendrix questioned her about where she had been on the night of Shannon's murder, partly out of loyalty to Masina, and partly out of fear of her, Pauline told him that she had witnessed the killing. *Id.* at ¶ 6. Pauline stated that her testimony at Tennison and Goff's trial that she had witnessed Shannon's murder was a lie that she did not want to tell, but that she felt pressured to do so by Masina, the police and the prosecutor. *Id.* at ¶ 8.

LEGAL STANDARD

I. Standard of Review of State Court Determinations

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a district court may grant a petition challenging a State conviction or sentence on the basis of a claim that was reviewed on the merits in State court only if the State court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). In any event, habeas relief is warranted only if the constitutional error at issue is structural error or had a "substantial and injurious effect or influence in determining the jury's verdict." *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)).

"Clearly established federal law, as determined by the Supreme Court of the United States" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000); see *Alvarado v. Hill*, 252 F.3d 1066, 1068-69 (9th Cir.2001) ("the question ... is not whether [State law] violates due process as that concept might be extrapolated from the decisions of the Supreme Court. Rather, it is whether [State law] violates due process under 'clearly established' federal law."). "Section 2254(d)(1) restricts the source of clearly established law to [the Supreme] Court's jurisprudence." *Williams*, 529 U.S. at 412. A State court decision may no longer be overturned on habeas review simply because of a conflict with circuit-based law. *Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir.), *overruled on other grounds in Lockyer v. Andrade*, 123 S.Ct. 1166 (2003); *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir.1999); *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir.), *cert. denied*, 521 U.S. 1111 (1997). Nonetheless, circuit decisions may still be relevant as persuasive authority to determine whether a particular State court holding is an "unreasonable application" of Supreme Court precedent or to assess what law is "clearly established." *Van Tran*, 212 F.3d at 1154; *Duhaime*, 200 F.3d at 600.

*30 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the State court arrives at a conclusion opposite to that reached by this Court on a question of law or if the State court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413. As summarized by the Ninth Circuit: "A state court's decision can be 'contrary to' federal law either 1) if it fails to apply the correct controlling authority, or 2) if it applies the controlling authority to a case involving facts 'materially indistinguishable' from those in a controlling case, but nonetheless reaches a different result." *Van Tran*, 212 F.3d at 1150 (citing *Williams*, 529 U.S. at 405-07).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the State court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 412-13.

Under 28 U.S.C. § 2254(d)(2), a federal habeas court may grant the writ if it concludes that the State court's adjudication of the claim resulted in a decision that "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir.2000) (quoting 28 U.S.C. § 2254(d)(2) and *Williams*, 529 U.S. at 412-13). The "clearly erroneous" standard of unreasonableness that applies in determining the "unreasonable application" of federal law under § 2254(d)(1) also applies in determining the "unreasonable determination of the facts in light of the evidence" under § 2254(d)(2). *Id.* at 1107-08 (citing *Van Tran*, 212 F.3d at 1153-54). To grant relief under § 2254(d)(2), a federal court must be "left with a firm conviction that the determination made by the state court was wrong and that the one [petitioner] urges was correct." *Id.* at 1108 (quoting *Van Tran*, 212 F.3d at 1153-54) (internal quotation marks omitted). A district court must presume correct any determination of a factual issue made by a State court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In determining whether the State court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, a federal court looks to the decision of the highest State court to address the merits of a petitioner's claim in a reasoned decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *LaJoie v. Thompson*, 201 F.3d 1166, 1172 n. 9 (9th Cir.2000).

The standard of review under AEDPA is somewhat different where the highest State court gives no reasoned explanation of its decision on a petitioner's federal claim and there is no reasoned lower court decision on the claim. In such a case, a review of the record is the only means of deciding whether the State court's decision was objectively reasonable. *Greene v. Lambert*, 288 F.3d 1081, 1089 (9th Cir.2002); *Bailey v. Newland*, 263 F.3d 1022, 1028 (9th Cir.2001); *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir.2000). When confronted with such a decision, a federal court should conduct “an independent review of the record” to determine whether the State court clearly erred in its application of controlling federal law. *Id.* The federal court need not otherwise defer to the State court decision under AEDPA: “A state court's decision on the merits concerning a question of law is, and should be, afforded respect. If there is no such decision on the merits, however, there is nothing to which to defer.” *Greene*, 288 F.3d at 1089. In sum, “while we are not required to defer to a state court's decision when that court gives us nothing to defer to, we must still focus primarily on Supreme Court cases in deciding whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law.” *Fisher v. Roe*, 263 F.3d 906, 914 (9th Cir., 2001), *abrogated on other grounds*, *Mancuso v. Olivarez*, 292 F.3d 939, 944 n. 1 (9th Cir.2002). A summary decision by a State court does not “implicitly” make any factual findings in support of the decision. *Id.* at 913 (refusing to infer factual findings from State court summary denial of habeas petition).

*31 Here, because the State courts did not provide a reasoned decision on any of Tennison's constitutional claims, this Court must conduct “an independent review of the record” to determine whether the State court clearly erred in its application of controlling federal law. *See Delgado*, 223 F.3d at 982; *Greene*, 288 F.3d at 1089.

DISCUSSION

Tennison argues that he is entitled to habeas relief on four grounds: (1) violation of his due process rights guaranteed by the Fourteenth Amendment based on his actual innocence and on the State's failure properly to address evidence of his actual innocence; (2) violation of his Fourteenth Amendment due process rights based on the prosecution's failure to reveal exculpatory evidence, the prosecutor's reliance on perjured testimony, and the prosecutor's failure to gather and maintain additional exculpatory evidence; (3) violation of his Sixth Amendment right to effective assistance of counsel based on the deficient performance of LeRue Grim; (4) the error resulting from the cumulative effect of the foregoing violations.

As discussed below, the Court grants the petition based upon Supreme Court jurisprudence articulated in *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. The Court does not address Tennison's other arguments.

I. Legal Standard

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87. The Supreme Court later made clear that the duty to disclose such evidence applies even when there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Id.* at 682.

“There are three components of a true *Brady* violation: [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-82-(1999). Prejudice will be found if the suppressed evidence was “material” under State law to the accused's guilt or punishment. *Anderson v. Calderon*, 232 F.3d 1053, 1062, 1066 (9th Cir.2000).

Neither the prosecutor's good faith nor actual unawareness of exculpatory evidence in the government's hands is determinative of the prosecution's disclosure obligations. *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir.1997) (en banc); *United States v.*

Kearns, 5 F.3d 1251, 1254 (9th Cir.1993). Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). This includes exculpatory information in the hands of the police. *Id.* Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned. *Id.*

*32 A defendant need only demonstrate a reasonable probability that the result of the proceeding would have been different. *United States v. Koiavan*, 8 F.3d 1315, 1322 (9th Cir.1993). The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial. *Kyles*, 514 U.S. at 434; *United States v. Golb*, 69 F.3d 1417, 1430 (9th Cir.1995) (ultimate question is whether there is reasonable probability that had material been disclosed, result of proceeding would have been different such that confidence in outcome is undermined).

Whether a “reasonable probability” exists may not be based on mere speculation without adequate support. *Wood v. Bartholomew*, 516 U.S. 1, 6-8 (1995); see, e.g., *Downs v. Hoyt*, 232 F.3d 1031, 1037 (9th Cir.2000) (rejecting as speculative argument that withheld material might have led to some admissible evidence which might have been sufficiently favorable to meet the *Bagley* standard).

As noted, impeachment, as well as exculpatory, evidence falls within the *Brady* rule. *Bagley*, 473 U.S. at 676; *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). “*Brady* information [therefore] includes ‘material ... that bears on the credibility of a significant witness in the case.’” *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1461 (9th Cir.1992) (quoting *United States v. Strifler*, 851 F.2d 1197, 1201 (9th Cir.1988), cert. denied, 489 U.S. 1032 (1989)); see, e.g., *Killian v. Poole*, 282 F.3d 1204, 1210 (9th Cir.2002) (conviction reversed where undisclosed letters would have been valuable to the defense in impeaching “make-or-break” witness' credibility before the jury); *Singh v. Prunty*, 142 F.3d 1157, 1161-63 (9th Cir.1998) (petitioner entitled to habeas relief where prosecution suppressed evidence of agreement to provide benefits to key witness in exchange for his testimony, and reasonable probability existed that had evidence been disclosed one or more members of jury would have viewed the testimony differently).

The materiality of suppressed evidence is considered collectively, not item by item. See *Kyles*, 514 U.S. at 436; *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir.1997) (en banc).¹²

12 The government cannot satisfy its *Brady* obligation to disclose exculpatory evidence by making some evidence available and claiming the rest would be cumulative. *Carriger*, 132 F.3d at 481. Rather, the government is obliged to disclose all material information. *Id.* at 481-2.

In *Agurs*, the Supreme Court explained materiality under *Brady* as follows:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is not justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt.

*33 *Agurs*, 427 U.S. at 112-113.

II. Strength of Case Against Tennison

Because *Brady* omissions must be evaluated in the context of the entire record, before analyzing the individual items of suppressed evidence, the Court will assess the strength of the case against Tennison. Respondent implies that the case against Tennison was strong, but focuses on discrediting the evidence presented by Tennison rather than citing the record to establish that the evidence presented at trial was strong. The Court finds that the prosecution's case against Tennison was weak.

No physical evidence was presented at trial tying Tennison to Shannon's shooting. The prosecution's entire case was dependent upon the testimony of Masina and Pauline, two young girls whose eyewitness identifications of Tennison were questionable. The stories presented by Masina and Pauline are internally inconsistent, inconsistent with each other and inconsistent with physical evidence and the neighbors' evidence regarding the car chase.

In his closing argument, Butterworth suggested to the jury that, in considering the charges against Tennison, they should look at the conspiracy charge first because Tennison "was not the one who pulled the trigger, his liability for the homicide is bound up in what you find the nature of the conspiracy to have been." RT at 982. Butterworth summed up the evidence linking Tennison to the conspiracy as follows: (1) Masina's identification of Tennison at Lovers' Lane; (2) Masina's identification of Tennison as the driver of the yellow Skylark; (3) Masina's testimony that the yellow Skylark rammed Patrick's car; (4) Masina and Pauline's identification of Tennison as one of the people at the Super Fair parking lot; and (5) Masina and Pauline's identification of Tennison as holding Shannon when he was shot. RT at 982-83.

Butterworth had previously listed other evidence that indicated the existence of a conspiracy: (1) the act of gathering at Lovers' Lane, if that was done in furtherance of a conspiracy to kill; (2) the statements at Lovers' Lane; (3) chasing Patrick's car; (4) ramming the car; (5) firing the gun at the car. RT at 980-82.

Butterworth did not indicate to the jury what items of evidence established that Tennison was guilty of first degree murder.

A. Identification at Lovers' Lane

At trial, Masina first testified that she was not aware of the identity of the occupants of the cars parked behind her at Lover's Lane, she just knew they were "HP niggers." RT at 372. Later, Masina testified that she recognized Tennison in the Skylark parked behind her at Lovers' Lane when she looked in the rear view mirror of her car. RT at 448. Later still, Masina testified that she saw Tennison at Lovers' Lane when he was driving into the Lovers' Lane parking lot and that she couldn't see him when the cars were parked because "they was in back of us." RT at 609-10. Masina previously had told Hendrix during the formal interview on October 31, 1989, that she did not recognize any of the people at Lovers' Lane. RT at 566-67. Masina had also testified at Tennison's preliminary hearing that she did not recognize anyone at Lovers' Lane. RT at 568.

*34 Thus, Masina's testimony was internally inconsistent. It would be difficult, looking through the rear-view mirror of a car, to recognize a face in another car either driving into a dark parking lot or parked in a dark parking lot. The evidence that Masina actually saw and recognized Tennison in a yellow Skylark in the Lovers' Lane parking lot was weak.

Pauline testified that she did not recognize anyone at the Lovers' Lane parking lot, and she did not hear the threat against Pat.

B. Identification of Tennison as Driving a Yellow Skylark

It follows that if Masina did not recognize Tennison at the Lovers' Lane parking lot, she could not know that he was driving a yellow Skylark. Furthermore, Masina testified that at the Super Fair parking lot, she saw Tennison come out of one of the cars, but she could not remember which car. RT at 431. Later, Butterworth asked her when she first saw Tennison that night and Masina responded that she knew Tennison was driving the yellow Skylark on the night in question because she had seen him in a yellow Skylark before. RT at 446-48. Pauline never identified Tennison in a yellow Skylark.

C. Yellow Skylark Rammed Patrick's Car

The following is Masina's testimony regarding the ramming of Patrick's car, the green Skylark:

Q: Do you know whether while the green Skylark was going down Visitacion any of the other cars ever touched it in any way?

A: Yes.

Q: Do you remember which car or the truck it was that actually touched the green Skylark?

A: The one I was in back of it. The Skylark.

Q: Which one?

A: The one that I was in back of, the green Skylark.

Q: So that would be the yellow Skylark?

A: Yes.

Q: That would be the first car that was out of the parking lot?

A: Yes.

Q: Do you remember where that occurred, where that contact between those two cars occurred?

A: I don't know. But I know it hit it.

Q: All right. Was that before or after the car crashed, the green Skylark?

A: I don't remember.

RT at 387-88.

Based on Masina's testimony, it is unlikely that she actually witnessed a yellow Skylark hit Patrick's car. According to Masina's testimony, directly in front of Masina's car was the pick-up truck, then two other cars, then the yellow Skylark and then Patrick's car. The prosecution never tried to explain how Masina could see the cars in front of the pick-up let alone notice that the yellow Skylark, the fourth car in front of Masina's car, hit Patrick's car, the fifth car in front of her car, as the cars were racing down a winding street, not even stopping at stop signs, and Masina was racing down behind them to catch up to them and then keep up with them.

Furthermore, Pauline testified that there was a car, not a truck, directly in front of the car she and Masina were in. RT at 233. Pauline had also testified that, as they were speeding down Visitacion, she could not see the cars in front of the vehicle that was directly in front of the car she and Masina were in. RT at 233.

D. Identification of Tennison in Super Fair Parking Lot and Tennison Holding Victim

*35 Masina and Pauline's testimony that they identified Tennison as the person, or one of the people, holding Shannon when he was shot is very sketchy, as is evident from the summary of it in the factual background section above. Pauline testified that Tennison was holding Shannon on Shannon's left side "like on one side of the arm," but couldn't remember if she saw Tennison holding Shannon with one hand or both hands. RT at 150-51. Pauline remembered another person holding Shannon on the right side at the same time Tennison was holding him on the left. RT at 153-54. Pauline testified that before the person with the gun shot Shannon, the two people who had been holding Shannon let go of him. RT at 155. Later, Pauline testified that she couldn't see how Tennison was holding Shannon because there were a lot of people in the way. RT at 239. She couldn't see Tennison's hand because she was looking at him toward the side. RT at 239-40. Pauline confirmed, on cross-examination, that nobody was holding Shannon when he was shot. RT at 283.

Masina testified only that Tennison was one of the people that dragged Shannon off the fence. RT at 431. About forty or fifty seconds before Goff fired the gun at Shannon, Masina saw the young men who had been around Shannon back up. RT at 440-41.

Based upon the girls' testimony, a fact-finder might conclude that Tennison was among the people who pulled Shannon down from the fence and that, at some point, he and another person may have been holding Shannon. However, there is no testimony that Tennison was holding Shannon just before he was shot.

Thus, only one of the facts that Butterworth argued would link Tennison to the conspiracy to commit murder—Pauline and Masina's identification of him as one of the people in the Super Fair parking lot—was actually testified to by both girls.

E. Inconsistencies Between Masina and Pauline's Testimony and Other Evidence

Pauline and Masina's testimony is further weakened by other evidence. The neighbor witnesses heard tires screeching and shotgun blasts during the chase. They saw Shannon's car driving in reverse down the street at a high rate of speed. They saw the black pick-up truck chasing Shannon also switch into reverse and, driving backward at a high rate of speed, continue chasing Shannon's car until Shannon lost control of his car and it crashed into a fence. The neighbors heard only one gunshot from the Super Fair parking lot which came within a few minutes after the car crash. RT at 26, 48. A police investigator testified that Shannon's car had recently been damaged by a shotgun blast at close range between the driver's door and the rear panel. RT at 84.

In contrast, Masina and Pauline testified that the car chase went in a straight line down Visitacion, until Shannon's car crashed into a fence. Although Masina said the cars never left her sight, she never saw either Shannon's car or the black pick-up truck, which she said she was directly behind, drive in reverse. Neither Masina nor Pauline testified that they heard shotgun blasts during the chase.

*36 Masina testified that she saw boys beating Shannon with fists and baseball bats. RT at 582. However, the coroner testified that there was no physical evidence that Shannon had been beaten with baseball bats. RT at 106, 112. Masina reported hearing four or five shots when Shannon was killed. RT at 441. Masina and Pauline testified that they left the stolen car on Visitacion close to the murder scene, but no stolen vehicle was ever found there. RT at 458, 133, 713-14.

F. Other Credibility Factors

When Hendrix first interviewed Pauline, he was suggesting the relevant information about the homicide to her rather than questioning her to see if her story corroborated the story told by Masina. She remembered very little and what she did remember was inconsistent with Masina's version. *See e.g.*, Interview quoted in § IIF, above; RT at 259-263. Pauline's testimony at Tennison's § 707 hearing was different from her testimony at trial. At the § 707 hearing, Pauline had not identified Tennison. Then, Pauline recanted her testimony that she was at the scene of the murder at all and she persisted in that recantation for three days. She was given a lie detector test and was encouraged by the polygrapher to return to her original story. Hendrix then arranged for her to speak privately, in an unmonitored telephone conversation, with Masina, the person Pauline said had persuaded her to lie in the first place. This was extraordinarily suggestive police procedure. Therefore, the credibility of one of the prosecution's two eye-witnesses was extremely questionable. This conclusion is strengthened by Pauline's 2003 declaration in which she states that she did not testify truthfully at Tennison's trial and she was not present when Shannon was shot.

Masina's earlier statements conflicted with some of the testimony she gave at the trial. Some of the testimony was internally inconsistent and some was inherently improbable. If Pauline witnessed the events, her failure to corroborate Masina on important points is noteworthy. If Pauline was not a witness, then Masina lied repeatedly and suborned perjury. Therefore, although Masina's credibility was not as compromised as Pauline's, her credibility and identification of Tennison were also questionable.

In sum, given that only Pauline and Masina's evidence linked Tennison to any criminal activity, that their testimony conflicted with other evidence, that Pauline's credibility was highly questionable, and that Masina's credibility was somewhat questionable, the Court finds that the prosecution's case against Tennison was weak.

III. Withheld Evidence

Tennison argues that the prosecution committed *Brady* violations by suppressing the following exculpatory or impeachment evidence which was produced to Tennison pursuant to this Court's 2001 discovery order: (1) Sanders and Hendrix' approved request for \$2,500 from the Secret Witness Fund and the undisclosed disposition of those funds; (2) Pauline's polygraph interview and test; (3) Smith's pre-trial statements to the police; and (4) Blue's February 9, 1990 police interview. Tennison argues that the prosecution's suppression of Ricard's November 7, 1990 confession for over six months until the last day of

testimony at the hearing on Tennison's motion for new trial also constitutes a *Brady* violation. Respondent does not dispute that the four items of evidence were not produced to Adachi. Nor does Respondent dispute that the prosecution should have provided Ricard's November 7, 1990 confession to Tennison's trial attorney in a more timely fashion. Respondent proffers other arguments, which will be addressed below.

A. The Secret Witness Fund

*37 Six weeks after Masina came forward as a witness, Hendrix requested and received approval for \$2,500 from the Secret Witness Program to encourage witnesses to come forward in the Shannon murder case. *See* Pet.'s Ex. 31. At his deposition, Hendrix said he could not remember what happened to the \$2,500. Resp.'s Ex. K at 125-32. Tennison argues that because Masina was the only known witness at that time, the only reasonable inference is that Hendrix used the money to pay Masina to testify. Tennison argues that the prosecution's suppression of these facts is a violation of *Brady* and *Giglio* because prosecutors must disclose any benefits given to a government witness. Tennison states that if Adachi had known about the payment, he would have been able to pursue discovery to ascertain the recipient of the money and used that information as powerful impeachment testimony.

Respondent counters that because Masina had come forward as a witness six weeks before the reward request was submitted, she would not qualify for a reward whose purpose was to encourage witnesses to come forward. Therefore, according to Respondent, the failure to disclose the request for the reward money is not a *Brady* violation because there is no showing of materiality.

Respondent's arguments are unpersuasive given that the prosecution is unable to explain who did receive this money. Whether the money was paid to another prosecution witness or was paid to Masina wrongfully to keep her as a good witness, the failure to disclose it was a *Brady* violation.

B. Pauline's Polygraph Examination

Tennison argues that if Adachi had known of the polygraph test given by police to Pauline, he would have been able to utilize the test, and the use the police made of it, in his cross-examination of Pauline. Tennison argues that Adachi "would have been able to establish that Pauline's testimony was coerced by the use of the polygraph (after two days of constant retractions) ... [and] he would have been able to establish that Hendrix had not followed proper police procedure and had brought enormous pressure to bear on a 14-year old girl who had already complained that her testimony had been coerced."

Citing *Wood v. Bartholomew*, 516 U.S. 1, 6-7 (1993), Respondent replies that even if Adachi had the information regarding Pauline's polygraph examination, he could not have used it to impeach her because [California Evidence Code § 351.1](#) prohibits the admission of evidence concerning polygraph examinations.

[California Evidence Code § 351.1](#) provides:

(a) ... the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings ... unless all parties stipulate to the admission of such results.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

*38 Tennison replies that even if [§ 351.1](#) would have excluded the results of the polygraph at trial, Respondent's suppression of the polygraph constitutes a *Brady* violation because "the prosecution can[not] use self-help in the form of evidence suppression to win its own motion in limine." Tennison also argues that under [§ 351.1\(b\)](#), Pauline's statements to the police polygrapher that she was not a witness to the crime and had been coerced by Masina are admissible. In addition, Tennison argues the fact "that Hendrix turned Pauline over to another police inspector to challenge her recantation could have been used to show the prosecution's herculean efforts to force Pauline to recant."

The Court agrees. Regardless of § 351.1, California law requires the prosecution to inform the defense of polygraph results that cast doubt on the credibility of a prosecution witness. See *California v. Price*, 1 Cal.4th 324, 419-20 (1991), *superseded by statute on other grounds as stated in People v. Hinks*, 58 Cal.App. 4th 1157, 1161-65 (1997). Thus, California law does not excuse the prosecution's failure to disclose this information. Pauline's statements to the police polygrapher that: (1) she was elsewhere at the time of Shannon's shooting; (2) that she had told the police that she was at the shooting because Masina asked her to do so; and (3) that she was able to pick out Tennison from the photo spread because Masina had described the photo to her, see Pet.'s Ex. 37, were admissible under § 351.1(b). In addition, the police polygrapher's statement to Pauline that "if she had changed her story because of fear of retaliation or intimidation she should not do so because we would give her protection," see *id.*, was admissible to show that another police officer also told Pauline to go back to her original story.

Bartholomew is distinguishable even though it involved a situation where the prosecutor failed to produce polygraph examinations of two of its witnesses and the State law regarding the admissibility of polygraph examinations was similar to § 351.1. *Bartholomew*, 516 U.S. at 5. In *Bartholomew*, the Ninth Circuit granted habeas relief and the Supreme Court reversed on the ground that the Ninth Circuit was merely speculating when it concluded that the disclosure of the polygraph to the defense would have motivated the defense counsel to conduct additional discovery which would have led to admissible evidence. *Id.* at 6. Here, Adachi would not have had to undertake additional discovery to uncover admissible evidence. Admissible evidence of Pauline's statements to the police polygrapher and his statements to her was also suppressed. Particularly because Pauline's credibility was crucial to the prosecution's case and because her credibility was already highly suspect, this evidence should have been disclosed under *Brady*.

Furthermore, Butterworth's questioning of Pauline reveals that he may have been aware of the polygraph examination and may have deliberately engaged in artful questioning to avoid the disclosure. The questioning proceeded as follows:

*39 Q: Okay. And you persisted, did you not, in saying that you weren't there when Cooly was killed?

A: Yes.

Adachi: I'm going to object at this time. He's leading the witness.

Butterworth: That's true. I'll try to reframe that.

Q: Did you maintain that position, that is, that you were not there, for a period of time?

A: Yes.

Q: And did you talk to some folks about that?

A: About what?

Q: Some people in the police department?

A: Yes.

Q: Okay, And Inspector Hendrix, the day after that, put you in contact-

Did Inspector Hendrix the day after that put you in contact with Masina?

A: Yes.

RT at 193.

Butterworth avoided asking Pauline questions eliciting the fact that Hendrix had sent her to Officer Hunter, that Pauline continued to recant her prior statements and that he encouraged Pauline to retract her recantation. This artful questioning is

troubling given that the prosecution should have disclosed evidence related to the polygraph examination to Adachi prior to the trial.

C. Suppression of Smith's Identity and Pre-trial Statements

Tennison argues that, had the police told Adachi in January, 1990 of the identity of Chante Smith and the substance of her statements, Adachi would have been able to: (1) interview Smith and learn the full extent of her eyewitness testimony, including the fact that Ricard was the actual killer and that the car chase started at the Bayshore 7-11, not at Lovers' Lane; (2) interview the individuals Smith named as eyewitnesses to the murder, including Ricard, Blue and Mark Anthony Jones for corroboration; (3) seek corroboration of Smith's version of the events, disputing additional elements of Masina and Pauline's testimony; and (4) subpoena additional witnesses for trial. Tennison argues that "Chante Smith was the thread that, when pulled, would cause the prosecution's case against Tennison to unravel. But the state's suppression of Smith's statements exonerating Tennison robbed Adachi of the opportunity to pull the thread."

Respondent counters that any failure to disclose what the prosecution knew about Smith before the trial did not violate Tennison's due process rights because the information was not material and it was readily available to Tennison through the exercise of due diligence.

1. Materiality of Smith's Identity and Pre-trial Statement

The test for favorability and materiality relies on State law, not federal law. *Anderson v. Calderon*, 232 F.3d 1053, 1066 (9th Cir.2000). The circuits are split regarding whether inadmissible evidence can form the basis for *Brady* claims. *Paradis v. Arave*, 240 F.3d 1169, 1178 (9th Cir.2001). The Ninth Circuit has not decided this issue as yet. *Id.* at 1179. The Supreme Court has not rejected the suggestion that inadmissible evidence can be material under *Brady*, if it could have led to the discovery of admissible evidence. *Id.* at 1178 (citing *Bartholomew*, 516 U.S. at 6). In *Bartholomew*, the Supreme Court ruled that mere speculation that two polygraph tests that were inadmissible under State law even to impeach could have led to discovery of admissible evidence was insufficient to establish a *Brady* claim. *Bartholomew*, 516 U.S. at 8.

*40 Therefore, to determine whether Smith's 1990 statement is material the Court must consider whether her testimony would have been admissible or whether, based on more than mere speculation, it would have led to admissible evidence. Smith's 1990 statement indicates that she could have testified that she was at the Sundial after Shannon's murder, that she heard the people at the Sundial talk about the shooting, that she heard Ricard make incriminating statements indicating that he was the shooter and that she could describe the cars that were at the scene of the shooting. Although Smith's testimony regarding what she heard other people say might have been excluded as hearsay, her testimony regarding Ricard's statement at the Sundial would have been admissible as an admission against interest, and her testimony identifying the cars would not be hearsay and thus would be admissible.

Tennison argues further that had Adachi interviewed Smith, she would have told him that she was an eyewitness to the crime and this testimony would have been admissible. That Smith did tell Adachi she was an eyewitness when he contacted her in 1992 lends credence to this claim. Also, at the 1992 interview, when asked if she would have testified at the trial if contacted by Adachi, she said she would have had to if she had been subpoenaed. *See* Pet.'s Ex. 22 at 45. However, her reason for lying about being an eyewitness in 1990 was that she was scared and she did not want to go to court to testify. Smith did not explain what changed so that in 1992 she was willing to reveal that she was an eyewitness. Thus, it is not clear that Smith would have told Adachi that she was an eyewitness to the murder.

Tennison argues that even if Smith would not have agreed to testify as an eyewitness, her information would have led to admissible evidence. For instance, it would have led to Adachi's interviews of Ricard, Blue and Anthony. He would have discovered that the chase started at the Bayshore 7-11 and would have been able to prepare a defense to refute Masina and Pauline's version of the car chase. He could have interviewed employees at the Bayshore 7-11 to find a witness corroborating Smith's story, and he could have looked for witnesses who would have denied seeing a chase down Visitacion from Lovers'

Lane. Without Smith's information, Adachi did not have an alternative theory to the car chase down Visitacion, and thus he had no reason to try to refute that part of Masina and Pauline's testimony.

As evidence of Smith's trustworthiness, Tennison submits a polygraph examination of Smith and declarations from two polygraph experts that it is their opinion that Smith was telling the truth about being an eyewitness to Shannon's murder. Pet.'s Exs. 56 and 57.

Respondent does not directly address Tennison's arguments. Instead, Respondent claims that the information Smith provided before the trial is not material because it was untrustworthy. Respondent points out that, before the trial, Smith never said she had been involved in the chase or that she was a witness to Shannon's murder; she merely claimed to have heard that certain individuals were involved in the chase and the murder and she offered nothing further to corroborate her claim. Respondent describes Smith's pre-trial contact with the police as a short phone conversation in which "she simply provided a list of names of individuals who might have been involved in the Roderick Shannon murder. Chief Sanders described the phone conversation as 'kind of mysterious.' At that time she did not give her last name or address, only providing a contact number—a number the police could call to get a message to her so she could call back later."

*41 Citing Sanders' deposition, Respondent points out that after Smith's 1992 statement, Sanders and Hendrix reviewed Tennison's case file and tried to find corroboration for Smith's 1992 statement, but they could not do so. *See* Resp.'s Ex. L at 102-03. Respondent notes that Sanders determined that Smith's statement, although superficially detailed, was in reality far too vague, particularly for someone who claimed to have been present at a traumatic event. *Id.* at 105-06. Respondent continues that Sanders described Smith's information as of the quality and depth one could have gleaned from reading newspaper accounts of the murder and trial or from listening to talk on the streets. *Id.* at 182-84. Sanders also testified that Smith's body language added to his doubts about Smith's credibility. *Id.* at 92. Sanders concluded that Smith was "trying to put information into a case that was not only inaccurate, [but] that had some other motive behind it." *Id.*

As evidence of Smith's untrustworthiness, Respondent lists the inconsistencies in Smith's 1992 statement and the inconsistencies between her statement and Ricard's 1990 confession. Respondent theorizes, without any evidence, that Smith and Ricard conspired together to present just enough evidence to cast reasonable doubt on Tennison's guilt, but not to implicate themselves.

Respondent's description of Smith's pretrial contact with the police is only partially correct. Sanders talked to Smith again before the trial. Resp.'s Ex. L (Sanders Depo.) at 146-50. After Smith's initial January 3, 1990 phone contact with Sanders, he and Hendrix went out to Smith's residence and spoke with her in the parking lot. Pet.'s Ex. 22 at 61-62. During one of her pre-trial conversations with Sanders and Hendrix, Smith told them that Ricard was the person who shot Shannon. *Id.* Smith also described the pick-up truck to Sanders and Hendrix, and they had three GTF officers interview Smith at her house and show her photos of the truck to see if she could recognize it. *Id.* at 62. At the 1992 Smith interview, Sanders acknowledged that he had spoken to Smith before the trial and that she had told him that Ricard was the shooter. *Id.* at 61. At his deposition, Sanders disclosed that after he spoke to Smith, he and Hendrix followed up by interviewing several of the people she had named as being at the scene of Shannon's murder. Resp.'s Ex. L at 46, 149, *see also*, Pet.'s Exs. 39 (February 8, 1990 interview with Ricard) and 23 (February 9, 1990 interview with Blue).

Furthermore, during the interviews of Blue and Ricard, Sanders and Hendrix stated that they considered the source of the information that Blue and Ricard were involved in the Shannon homicide to be reliable. Because Sanders and Hendrix interviewed Blue and Ricard immediately after Sanders spoke to Smith, it can be inferred that Sanders and Hendrix were referring to Smith as the reliable source of the information. The actions of Sanders and Hendrix indicate that they felt Smith's information about the crime was relevant and trustworthy enough to follow up on. Furthermore, Sanders assumed that the information Smith had given to him, including Smith's identity, had been turned over to the district attorney and that the district attorney had given this information to Adachi. Resp.'s Ex. L at 122-23. This also indicates Sanders thought the information material to Tennison's defense. Although there are inconsistencies in Smith's statement and between her statement and Ricard's confession, there are fewer inconsistencies in Smith's story than in the statements of Masina and Pauline, as discussed above.

*42 Most importantly, Sanders' view of the credibility of Smith's 1992 statement is not relevant to whether Smith's pre-trial statement and identity were material to Tennison's defense under *Brady*. The issue under *Brady* is not whether Smith's statement was true, but whether there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. Under *Brady*, the prosecution should have turned over Smith's 1990 statement to Adachi.

Furthermore, as discussed below in regard to Ricard's confession, if Smith's information had been disclosed, she could have testified at the motion for new trial, and important parts of Ricard's confession would have been corroborated, which would have been a significant factor in the trial judge's analysis of whether Ricard's confession was trustworthy. It is reasonable to assume that after Ricard confessed, Smith would have no reason to fear retaliation from Ricard or Blue if she testified that she had been an eyewitness to Shannon's shooting. A discussion of the effect of Smith's statement on the motion for new trial is addressed below.

2. Availability of Smith Information to Defense

Respondent also argues that the failure to disclose Smith's pretrial statement to the defense does not constitute a *Brady* violation because the information was readily available to Tennison's counsel through the exercise of due diligence.

“Since suppression by the Government is a necessary element of a *Brady* claim, if the means of obtaining the exculpatory evidence has been provided to the defense, the *Brady* claim fails.” *United States v. Dupuy*, 760 F.2d 1492, 1501 n. 5 (9th Cir.1985) (citations omitted). A defendant cannot claim a *Brady* violation if his counsel was “aware of the essential facts enabling him to take advantage of any exculpatory evidence.” *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir.1986); see, e.g., *United States v. Bracy*, 67 F.3d 1421, 1428-29 (9th Cir.1995) (where government discloses all information necessary for defense to discover alleged *Brady* material on its own, government is not guilty of suppressing evidence). However, the availability of particular statements through the defendant himself does not negate the government's duty to disclose. *United States v. Howell*, 231 F.3d 615, 625 (9th Cir.2000). “Defendants often mistrust their counsel, and even defendants who cooperate with counsel cannot always remember all of the relevant facts or realize the legal importance of certain occurrences.” *Id.* Consequently, defense counsel is entitled to plan his trial strategy on the basis of full disclosure by the government, regardless of the defendant's knowledge or memory of the disclosed statements. *Id.*

Respondent argues that Tennison could have discovered the pretrial information Smith gave to the police because this “information was a matter of general knowledge on the streets shortly after the shooting occurred.” Opp. at 27. Citing Smith's 1992 statement, Respondent argues that (1) Ricard told people what he had done; (2) about a week after the incident, Ricard told Goff, Tennison's co-defendant, that Ricard had shot Shannon and the names of the people who were at the scene of the shooting including Smith; (3) Smith said she was getting messages from Goff and Tennison through their friends to come down and talk to them before trial; (4) Smith spoke to Tennison by happenstance while she was working as an operator for Pacific Bell and Tennison placed a collect call from the jail and he asked Smith why she had not said anything about the murder.

*43 Citing Resp.'s Ex. L at 92 (Sanders' Depo), Respondent argues that Smith was a gang associate and thus known to Goff and Tennison. Respondent argues that if Goff knew that Ricard was the shooter, “it strains credulity ... to think that Goff would have failed to provide this information to his attorney, who was sharing information with Adachi.”

Respondent's argument that Adachi could have discovered or did discover Smith's information from Goff's attorney or “from the street” is unpersuasive. The record of the motion for new trial indicates that Tennison diligently searched for witnesses to the Shannon murder, that he did not know Goff personally and that it was only after he was convicted that he heard from Luther Blue of a person named Chauntey White, whom his brother and Adachi could not locate. See RT at 173, 228 (Motion for New Trial). It was only after he had been convicted that he heard that a person named Lavinsky or Lavista Ricard had knowledge about the Shannon murder. *Id.* at 158. Furthermore, even if Goff knew about Ricard's involvement and told his attorney about it, Respondent points to no evidence that indicates that Adachi and Goff's attorneys communicated with each other about exculpatory evidence they had gathered.¹³ Respondent also fails to point to any evidence that Goff or his attorney knew of Ricard's identity or involvement in the Shannon murder. Further, in *Shaffer*, 789 F.2d at 690, the Ninth Circuit advised

that “because the trial strategies of co-defendants often conflict ..., we do not think it prudent to allow the government to satisfy its due process requirements to each of several defendants by merely giving exculpatory evidence to one defendant.” Here, Respondent did not provide Smith's statement to Tennison's co-defendant; he may not rely on mere argument that Goff discovered the information and provided it to Tennison.

- 13 Respondent cites RT 44, 65-66 (Sentencing Hearing) as evidence that Adachi and Goff's attorney shared defense information. However, on these pages Adachi only states that he advised Tennison not to put on an alibi defense because Goff's attorney indicated that if he did, Goff would also put on an alibi defense. Further, Adachi states that he did not learn of Goff's alibi defense from talking to Goff or to his attorney, but from a taped statement. This does not establish that the two attorneys shared information with each other.

Finally, Smith's statement in 1992, that she coincidentally was the operator when Tennison placed a telephone call from jail and she spoke to him briefly, only establishes that Tennison did not have her phone number or address and did not know how to get in touch with her. Pet.'s Ex. 22 at 45, 48. Smith's statement does not indicate whether this conversation occurred before or after Tennison's conviction. At the time of the motion for new trial, the only information known to Tennison was that a person named Chauntey White may have been involved with the Shannon murder, but after searching for her, he had been unable to locate her.

In sum, the record establishes that Tennison had some vague information about Smith, that he did diligently search for her, but his diligent search was unsuccessful.

Respondent cites two cases from other circuits for the proposition that material known and available to the defendant cannot said to have been suppressed by the government. See *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir.1998) and *United States v. McMahon*, 715 F.2d 498, 501 (11th Cir.1983). These cases are distinguishable.

*44 In *Coe*, the court noted that several of the items of evidence that Coe claimed had been withheld by the prosecution were actually not under the sole control of the government or improperly kept from Coe. *Coe*, 161 F.3d at 344. The court noted that it was not clear whether the government deprived Coe of any information because much of the evidence about which he complained was used by the defense at trial. *Id.* Further, the court stated that even if Coe had met his burden of proving the government failed to disclose information it should have provided to Coe, that evidence was not material. *Id.* at 345.

Here, the evidence at issue was not available to Tennison, he did not use the evidence at trial, and, as discussed above, the evidence is material.

In *McMahon*, the evidence at issue was two psychiatric reports that defense counsel “knew, or should have known, about ... long before the day of trial because the existence of the reports was revealed at the trial of appellants' co-defendant.” *McMahon*, 715 F.2d at 501. Furthermore, the court found that the psychiatric reports were not material under *Brady*. *Id.* Here, the evidence was not similarly revealed and the evidence is material under *Brady*.

The evidence shows that Tennison did not know of Smith or of the evidence she had. However, the prosecution would not be excused from providing Smith's statement to Adachi even if Tennison had known of her identity.

D. Suppression of Videotaped Luther Blue Interview

Tennison points out that during the February 9, 1990 interview of Blue, Sanders revealed that he had information that contradicted the testimony of Masina and Pauline on which the prosecution relied at trial. Specifically, Sanders told Blue that he knew the car chase began at a 7-11¹⁴ and that Blue was present during the car chase and murder. See Pet.'s Ex. 23 at 19, 27. Tennison argues that this is exculpatory and impeachment evidence that should have been turned over under *Brady* and *Giglio*. Tennison believes that it would have led Adachi to interview Blue and to subpoena him to testify at trial. Citing Blue's 2000 declaration that he was a witness to the murder, see Pet.'s Ex. 26, Tennison claims “that there is a reasonable probability that, had Blue been interviewed and subpoenaed, he would have offered evidence to exculpate Tennison .” Tennison also argues that Sanders' statements that the chase started at the 7-11 suggested evidence that could have been used to impeach Masina and Pauline. Tennison also claims that the prosecution furnished Adachi with misleading information about Blue because the

prosecution gave him a copy only of the second interview with Blue, the short interview in which Blue merely indicated he had nothing to say about the murder. Hendrix and Sanders listed only the second interview of Blue in their investigation log, which was turned over to Adachi. *See* Pet.'s Ex. 20. Tennison argues that by giving Adachi the tape of the second interview and not listing the first interview on the investigation log, the prosecution conveyed the false message that Blue was a dead end as a witness. Further, according to Tennison, it also covered up the fact that police had other witnesses and another theory of the case.

14 Sanders said “the 7-11 on Third Street,” which is where, according to Smith, she, Blue, Ricard and Mark Anthony first met the cars and pick-up truck from Lakeview. According to Smith, the car chase began at the Bayshore 7-11.

*45 Respondent counters that even if Adachi had a copy of the first Blue interview, it would not have helped the defense because when Adachi approached Blue after the trial at the request of Tennison, Blue denied any involvement. Respondent argues that Blue's 2000 declaration that he was a witness does not change the fact that, in 1990, he was steadfastly denying that he had been at the scene of the murder. Respondent claims that even if the police had information and believed that the chase started at the 7-11, the Blue interview is not material because the police could have believed that the chase started at the 7-11 and passed by Lovers' Lane and then down Visitacion as described by Masina and Pauline. Thus, Respondent concludes that nothing in the first interview of Blue discredited the testimony of Pauline and Masina. Finally, Respondent argues the fact that Blue was given his *Miranda* rights in his interview had put Adachi on notice that the police suspected that Blue was not being truthful.

Nonetheless, the videotape of the interview would have informed Adachi that the police had credible information that the car chase did not occur as portrayed by Masina and Pauline, which could have led to further information enabling Adachi to impeach them at trial. Respondent's new theory that the chase could have started at the 7-11, and then gone by Lovers' Lane and back down Visitacion contradicts Masina and Pauline's testimony that the pick-up and three cars were parked behind them at Lovers' Lane for some time before the chase started.

Pursuant to *Brady* and *Giglio*, the prosecution should have disclosed to the defense the first Blue interview.

E. Ricard's November 7, 1990 Confession

Tennison argues that Ricard's statement confessing to Shannon's murder and corroborating that Tennison and Goff were not at the scene of the murder was strong evidence of Tennison's innocence and the fact that the prosecution turned it over to Grim only on the last day of testimony on the hearing on the motion for new trial is a *Brady* violation. One of the reasons given by the judge for not admitting Ricard's confession at the motion for new trial was that there had been no showing of Ricard's unavailability as a witness. Tennison argues that had the prosecution turned over the confession as soon as it was made, some six months earlier, Adachi would have had time to subpoena Ricard to the hearing or to establish his unavailability.¹⁵

15 Tennison also argues that if the confession had been turned over to Adachi when he was still Tennison's attorney in November, 1990, Adachi would have known that Tennison's legal interests were adverse to Ricard's and the public defender's office would not have been appointed to represent Ricard on another charge. According to Tennison, because the confession was not disclosed, the public defender agreed to represent Ricard, thus creating a conflict with Tennison which was resolved by Adachi's withdrawal as Tennison's counsel. This may well be true. Tennison argues that he was prejudiced by the appointment of new counsel because Grim's representation was ineffective as demonstrated by his failure to ensure that the confession was admissible by establishing Ricard's unavailability. Because the Court does not address Tennison's claim of Grim's ineffective assistance, the Court does not address Tennison's argument here that the late disclosure of Ricard's confession was prejudicial because it was one of the factors that caused Adachi to withdraw as Tennison's defense counsel and Grim to be appointed as Adachi's replacement. The Court notes, however, that had Adachi timely received Ricard's confession in November, the entire proceeding on the motion for new trial would have been different because Adachi would have premised his motion on Ricard's November confession to the police, not on Ricard's later confession to Adachi in which he appeared with a hood over his face.

Respondent concedes that the confession “should have been provided to Tennison's counsel seasonably after it was made,” but argues that Tennison cannot establish that he was prejudiced as a result of the delay. Respondent claims that even without disclosure of the confession, Tennison knew that Ricard was involved with Shannon's shooting. To support this theory, Respondent cites the testimony of Tennison and Adachi at the motion for new trial that Tennison had told Adachi that Ricard

was claiming to have been involved in the murder and that Adachi was searching for Ricard. Further, Respondent points out that Adachi had found Ricard and made his own tape of Ricard's confession. Respondent also argues that the trial court found both of Ricard's taped confessions to be untrustworthy, and the appellate court affirmed.

*46 Due process requires the disclosure of exculpatory material in sufficient time to permit the defendant to make effective use of the material. *LaMere v. Risley*, 827 F.2d 622, 625 (9th Cir.1987). In determining whether the timeliness of the disclosure satisfied due process, a court considers the prosecution's reasons for late disclosure and whether the defendant had an opportunity to make use of the disclosed material. *Id.* (citing *United States v. Davenport*, 753 F.2d 1460, 1462 (9th Cir.1985) and *United States v. Alderdyce*, 787 F.2d 1365, 1369-70 (9th Cir.1986) (no due process violation where evidence turned over to defendant before trial and as soon as prosecution learned of it)).

Respondent fails to provide a reason for turning over the Ricard confession six months after it was obtained by the police. Under *Alderdyce*, the prosecution's egregiously long withholding of vital evidence without reason or excuse rises to the level of a due process violation.

Moreover, Respondent's arguments that there was no prejudice as a result of the late disclosure are unpersuasive. The primary focus of the motion for new trial was the unauthenticated and therefore inadmissible videotape of a hooded, unidentified person confessing to the shooting.

It must be kept in mind that at the time of the new trial motion, the prosecution still had not disclosed the *Brady* evidence of Smith's statements to the police and Sanders' reliance on her information in the Blue interview. Ricard's statement would have been corroborated by Smith's statement and Sanders' reliance on it, making it apparent that important testimony had been excluded from the trial. In ruling on the motion for new trial, the judge found Ricard's testimony inconsistent and uncorroborated, but Pauline and Masina's testimony was inconsistent too, and the judge did not know unfolded at the motion for new trial, the trial court and the appellate court compared Ricard's statement that the car chase started at the 7-11 with Pauline and Masina's trial testimony that the car chase started at Lovers' Lane. Without the withheld *Brady* evidence, the trial testimony was uncontroverted, and Ricard's statement that the chase started at 7-11 was suspect. The evidence from Smith, which Sanders found reliable, that the car chase started at the 7-11 and not at Lovers' Lane would have changed the calculus. Smith and Ricard's version was more consistent with the physical evidence and neighbor testimony. Furthermore, had Blue and Anthony known that Ricard had already confessed to the police, they may have come forward earlier. Had all of the *Brady* evidence been available in time for Tennison to make use of it, the outcome of the new trial motion would probably have been different.

In its opposition to Tennison's motion for new trial, the prosecution argued, *inter alia*, that the events as described by Ricard in his confession were "completely incapable of being corroborated." See Pet.'s Ex. 47 at 19. One of the reasons proffered by the prosecution for its inability to corroborate the confession was Ricard's refusal to identify any other people who were witnesses to Shannon's shooting, even those individuals Ricard stated were uninvolved with any wrongdoing. *Id.* At that time, the prosecution knew or should have known that Smith had made a statement indicating that Ricard was involved with the shooting and that the car chase started at the 7-11, thus partially corroborating the events as described by Ricard. Therefore, the prosecution's statement that the events described by Ricard were "completely incapable of being corroborated," was incorrect. The fact that the prosecution misled the court while delaying the disclosure of Ricard's confession and continuing to suppress the Smith and Blue interviews further supports the Court's conclusion that a *Brady* violation occurred.

IV. Cumulative Effect of Suppressed Evidence

*47 The materiality of suppressed evidence is to be considered collectively, not item by item. *Kyles*, 514 U.S. at 436. Given the weakness of the prosecution's case against Tennison, the Court finds that there is a reasonable probability that any one of the five items of withheld *Brady* evidence discussed above could have caused the result of Tennison's new trial motion and of his trial to have been different. It follows that had the prosecution timely turned over to Adachi all the withheld evidence, there is a stronger reasonable probability of a different result. The Court's confidence in the outcome of this trial is undermined.

CONCLUSION

Because the Court's confidence in the outcome of the Tennison's trial has been undermined by the *Brady* violations, the Court need not reach Tennison's claims of actual innocence, ineffective assistance of Grim, and due process violations based on failure of the police to investigate and the prosecution's reliance on perjured testimony. For the reasons set forth above, Tennison's petition for writ of habeas corpus is granted and his motion for an evidentiary hearing is denied as moot. Tennison's conviction is VACATED and Respondent is ordered to release Tennison from custody within sixty (60) days of the date of this order unless the State of California reinstitutes criminal proceedings against him.

IT IS SO ORDERED.

End of Document

© 2010 Thomson Reuters. No claim to original U.S. Government Works.