



1 by law enforcement into not providing an alibi” (Objs. at 7). Petitioner also argues that he raises  
2 “actual innocence claims, combined with several attendant constitutional violations, all of which  
3 contributed [to] his wrongful conviction.” (Objs. at 7). The Court, however, notes that, to the  
4 extent a substantive “actual innocence” claim may be cognizable in any guise in a non-capital  
5 habeas case, petitioner has fallen far short of making the “extraordinarily high” showing required  
6 to establish such a claim. See, e.g., Carriger v. Stewart, 132 F.3d 463, 476-77 (9th Cir. 1997)  
7 (deciding en banc in a capital case that a stand-alone substantive actual innocence claim, if  
8 cognizable, requires an “extraordinarily high” showing, stronger than that required to establish  
9 insufficiency of the evidence to convict).

10 Further, the Court rejects petitioner’s contentions both that the case against him was weak  
11 and that the weakness of the case renders unreasonable the state court’s finding that the error  
12 in the admission of a hearsay statement was harmless. As noted in the Report and  
13 Recommendation, the erroneously admitted statement of a nontestifying co-defendant was neither  
14 a confession nor facially incriminating toward petitioner. And as found by the California Court of  
15 Appeal, the codefendant’s statement alone was insufficient to link petitioner to the crime or to the  
16 black truck. Apart from this statement, other evidence was introduced that petitioner was “Go-Go,”  
17 was a member of Ford Maravilla, was identified by Jessica Huezo, and that the black truck linked  
18 to the shooting was found parked on the street where petitioner was living at the time of his arrest.  
19 Accordingly, the Court cannot find that the California Court of Appeal’s determination that the  
20 admission of the hearsay statement was harmless was an objectively unreasonable application  
21 of harmless error review.

22 The Court additionally rejects petitioner’s contention that the “weakness of the case is  
23 evidenced by the fact that the jury deliberated for four days and asked so many questions directed  
24 to Jessica’s identification.” (Objs. at 3). The record reflects that during the four days of jury  
25 deliberations, which began at noon on January 14, 2002, and concluded at approximately noon  
26 on January 18, 2002, the jury made the following requests:

- 27 (1) “the admonishment Jessica Huezo signed when she looked at the six pack in July 2000”  
28 (CT 113-14; request signed January 14, 2002);

- 1 (2) “Dora’s statement re: Michael Moreno (what Michael said); Ricardo’s statement re: Michael  
2 Moreno (what Michael said)[;] ... Jessica’s testimony re: the description of the driver[;]  
3 Lugo’s ... testimony re: his interview w/ Jessica” (CT 116-17; request signed January 15,  
4 2002);
- 5 (3) readback of: “Mr. Finley’s testimony re: Madrigal [and] time of his presence at work [and]  
6 Finley’s ability to determine when Madrigal was there”; and “any testimony [re:] Ricardo A.’s  
7 identification of Madrigal as shooter” (CT 119-20; request signed January 16, 2002);
- 8 (4) readback from Mr. Finley regarding the timeline “re: how long someone can be gone before  
9 being noticed” (CT 122, 124; request signed January 17, 2002);
- 10 (5) the “testimony on Finley by the prosecutor after the statement/description of how long  
11 before you would notice someone is gone[;] any testimony (cross or redirect) regarding the  
12 ‘30-60 mins. before I would notice’ statement[;] how many pages of photos were shown to  
13 Carlos Moreno in 7/2000?[;] description of the shooter by Carlos Moreno by Carlos [and]  
14 by the detectives” (CT 123, 125; signed January 17, 2002).

15 Petitioner was tried together with codefendant Rafael Madrigal, and Madrigal presented  
16 evidence in support of a defense that he was working at the time of the incident. According to the  
17 evidence requested by the jury, it appears to the Court that the jury raised more requests  
18 pertaining to Madrigal’s alibi and the identification of Madrigal by Carlos Moreno (see 3 RT 393-96)  
19 than requests pertaining to Jessica’s identification of petitioner. In light of the fact that the jury  
20 made numerous requests concerning the case against Madrigal despite what even petitioner  
21 concedes was “overwhelming” evidence against Madrigal (Objs. at 1), the Court rejects petitioner’s  
22 contention that the jury’s four days of deliberation on the charges against the two codefendants  
23 somehow reflects the “weakness of the case” against petitioner (Objs. at 2).

24 Moreover, the Magistrate Judge already has rejected petitioner’s argument regarding the  
25 weakness of Jessica’s identification cast in a different light in the Petition. As found in the Report  
26 and Recommendation, petitioner has failed to show that any alleged errors of trial counsel  
27 somehow undermined the strength of Jessica’s positive identification of petitioner at trial.  
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1 With respect to petitioner's continuing request for an evidentiary hearing, the Magistrate  
2 Judge already has found that petitioner has failed to show that any further investigation into the  
3 ownership of the truck at the time of the shooting, or regarding the other occupants of the house  
4 in which petitioner was residing at that time, would potentially give rise to a colorable claim to  
5 relief, or that, even in the absence of any threat or intimidation, petitioner's employer was willing  
6 to testify and, had petitioner's employer testified, that his testimony would have created a plausible  
7 alibi for petitioner.

8 Accordingly, after full consideration of the arguments raised in petitioner's Objections, the  
9 Court concludes that petitioner's request for an evidentiary hearing be denied and that his Petition  
10 be denied.

11  
12 **CONCLUSION**

13 Pursuant to 28 U.S.C. § 636, the Court has reviewed the entire file de novo, including the  
14 Magistrate Judge's Report and Recommendation, and petitioner's Objections thereto. The Court  
15 agrees with the recommendations of the Magistrate Judge.

16 ACCORDINGLY, IT IS ORDERED:

- 17 1. The Report and Recommendation is adopted.  
18 2. Judgment shall be entered consistent with this order.  
19 3. The clerk shall serve this order and the judgment on all counsel or parties of record.

20  
21 DATED: September 7, 2011



22 HONORABLE DEAN D. PREGERSON  
23 UNITED STATES DISTRICT JUDGE  
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