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13 UNITED STATES DISTRICT COURT
14 FOR THE EASTERN DISTRICT OF CALIFORNIA
15
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17 JELANI KITWANA HOWARD,) No.
18 v.)
19 Petitioner,)
20)
21 MATTHEW CATE, Head of the)
22 California Department of Corrections,)
23 Respondent.)
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29 PETITION FOR WRIT OF HABEAS CORPUS AND
30
31 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JELANI KITWANNA HOWARD,) No.
Petitioner,)
v.)
MATTHEW CATE, Head of the)
California Department of Corrections.)

Petitioner Jelani Howard, through his counsel, files this Petition for Writ of Habeas Corpus. By this verified petition petitioner alleges as follows:

1.

Petitioner is unlawfully confined by the California Department of Corrections pursuant to a judgment of the Superior Court for Sacramento in *People v. Howard*, No. 99F10330.

II.

Petitioner was convicted of murder, attempted murder, two counts of battery of a co-habitant, assault with a deadly weapon and a prior conviction allegation. Allegations that he personally fired a weapon with respect to the murder and attempted murder

1 offenses were found true. In connection with the count one charge, the trial court
2 sentenced petitioner to a 25 year to life term and then doubled it pursuant to California's
3 "two-strikes law" based on the prior conviction which had been found true. The court
4 added a 25 year-to-life term for the firearm enhancement found true in connection with
5 count one and a 25 year-to-life term for the firearm use allegation found true in
6 connection with count two. The court imposed an upper term of nine years on the count
7 two attempted murder, then doubled it under the two strikes law for a total of 18 years.
8 The court added a one-third the middle term of one year (doubled to two years) for each
9 of the charges in counts four and five. The court stayed sentence on the count three
10 charge, and added a five year term for the serious felony prior conviction. The total term
11 imposed was 27 years in determinate sentencing time, plus four consecutive 25 year-to-
12 life terms.

13
14 III.

15 Petitioner pled not guilty. He was tried by jury.
16
17 IV.

18 Petitioner appealed his conviction to the California Court of Appeal, Third
19 Appellate District. The appellate court affirmed the convictions, but found the state had
20 presented insufficient evidence of the prior conviction allegation. *People v. Howard*,
21 2003 WL 361247, *11-12 (2003). The case was remanded back to the Superior Court for
22 re-sentencing. Mr. Howard's Petition for Review to the state supreme court was denied
23 on April 30, 2003. *People v. Howard*, S114565, Order of April 30, 2003, attached as
24 Exhibit A.
25
26 V.

27 The trial court re-sentenced Mr. Howard without resort to the two-strikes law on
28 December 19, 2003. CT II 5. Mr. Howard appealed. The appellate court vacated the
Petition for Writ of Habeas Corpus
and Memorandum In Support Thereof

1 sentence and remanded the case for re-sentencing again. *People v. Howard*, 2005 WL
2 40034, *2 (2005). Mr. Howard's Petition for Review to the state supreme court was
3 denied on March 23, 2005. *People v. Howard*, S131464, Order of March 23, 2005,
4 attached as Exhibit B.

5
6 VI.

7 The trial court imposed sentence a third time on August 12, 2005. The court
8 imposed a 25 year-to-life term for the murder. RT III 14. The court added a 25 year-to-
9 life term for the firearm enhancement found true in connection with count one, and a 25
10 year-to-life term for the firearm use allegation found true in connection with count two.
11 RT III 14-15. The court imposed a consecutive upper term of nine years on the count two
12 attempted murder, added consecutive one-third the middle terms of one year for each of
13 the charges in counts for and five and imposed a concurrent three-year term on the count
14 three charge. RT III 15. The total term imposed was 11 years in determinate sentencing
15 time, plus three consecutive 25 year-to-life terms. RT III 15-16.

16
17 VII.

18 Mr. Howard timely filed a Notice of Appeal. 1 CT III 57. The appellate court
19 affirmed the sentence on October 11, 2006 and the state supreme court denied review on
20 December 20, 2006. *People v. Howard*, 2006 WL 2912544 (2006); *People v. Howard*,
21 S147895, Order of December 20, 2006, attached as Exhibit C. The time within which to
22 seek certiorari expired 90 days later, on March 19, 2007.

23
24 **TIMELINESS ALLEGATIONS**

25
26 VIII.

27 This petition is timely pursuant to 28 U.S.C. § 2244(d). The following facts now
28 known to petitioner support this claim:

- 1 a. The state appellate court remanded the case twice for resentencing.
2 The case did not become final until (and the one-year statute began
3 to run on) March 19, 2007.
- 4
- 5 b. Mr. Howard had a “properly filed application for State
6 post-conviction . . . review” pursuant to 28 U.S.C. § 2244(d)(2)
7 pending in the state superior, appellate and supreme courts from
8 April 10, 2007 through February 13, 2008. His one-year statute ran
9 for 22 days (from March 19, 2007 until April 10, 2007) until it was
10 tolled by operation of 28 U.S.C. § 2244(d)(2).
- 11
- 12 c. The statute began to run again on February 13, 2008 -- when the
13 state supreme court denied the state petition Mr. Howard had
14 pending there. At that point, he had 343 days left in his one-year
15 period (365 - 22 = 343).
- 16
- 17 d. On February 13, 2008, Mr. Howard had 343 days within which to
18 file his federal habeas petition -- or until January 22, 2009.

20 **EXHAUSTED CLAIMS**

21 IX.

22 As to the matters raised in paragraph X-XII of this petition, no other petitions for
23 writ of habeas corpus have been filed. Petitioner has no adequate remedy at law.

24 X.

25 Petitioner’s judgment of conviction has been unlawfully and unconstitutionally
26 imposed in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth
27 and Fourteenth Amendments to the United States Constitution. The trial court violated
28

1 Due Process when it allowed the state to introduce prior bad acts evidence and instructed
2 the jury it could use that evidence to determine whether petitioner honestly and
3 reasonably believed in the need for self-defense. The following facts now known to
4 petitioner support this claim:

- 5 a. Petitioner Jelani Howard was charged with the murder of Lamonte
6 Hammond and the attempted murder of Chico Stokes arising out of a
7 February 19, 2000 shooting. CT 184-185. Mr. Howard admitted the
8 shooting, but claimed he fired in self-defense.
- 10 b. In order to rebut this defense, and over objection, the state
11 introduced evidence of two uncharged acts of violence involving Mr.
12 Howard, both occurring years earlier. Neither of these uncharged
13 offenses involved a claim of self-defense at all.
- 15 c. At the time, of the February 19, 2000 shooting, Mr. Howard was
16 living in San Francisco, California and attending San Francisco City
17 College. RT 976. He was dating Aretha Armstrong who lived in
18 Sacramento, California. RT 976.
- 20 d. On February 18, 2000, after finishing math class, Mr. Howard took
21 the bus to Sacramento to see Aretha. RT 976. Although Mr.
22 Howard owned a car his grandmother had bought him, he was taking
23 the bus because Aretha had crashed the car several weeks earlier.
24 RT 977. Aretha was going to use her tax return money to pay for the
25 repairs. RT 980. Aretha told Mr. Howard that the tax return check
26 had arrived. RT 982. When he arrived in Sacramento, they went to
27 a bank to cash the check and then watched movies together at

1 Aretha's apartment. RT 984.

2

3 e. The next morning, Aretha asked if she could have some of the

4 money back she had given Mr. Howard for the car repairs because it

5 was her son's birthday and she wanted to buy him something. RT

6 985. Ultimately, they got into an argument, Mr. Howard slapped

7 Aretha and she went to a friend's house. RT 985-987.

8

9 f. About 11 p.m. that night, Mr. Howard went to find Aretha at her

10 friend Kelly Clark's apartment. RT 993. He was planning on

11 heading back to San Francisco and wanted to give Aretha the money

12 she had asked for. RT 992-993. Outside the apartment, Mr. Howard

13 heard loud music. RT 1003.

14

15 g. Mr. Howard knocked on the door. RT 1003. Kelly opened the door

16 and said Aretha was not there. RT 1003. Mr. Howard asked where

17 she was. RT 1003. Kelly walked away from the open door; Mr.

18 Howard walked inside because he wanted to find Aretha, give her

19 the money and then go. RT 1004, 1006.

20

21 h. Kelly's boyfriend Lamonte Hammond was inside the apartment

22 sitting at the dining room table. RT 1004. As Mr. Howard came

23 into the apartment, Mr. Hammond said "What's up? She's not here."

24 RT 1004. Hammond seemed "confrontational" and was wearing the

25 color blue which was a Crip color. RT 1005, 1012. Mr. Howard

26 admitted that in the early 1990's he belonged to the Bloods gang or

27 East Side Piru. RT 1041. At the time of trial, however, he had not

28 been a gang member for several years. RT 1041.

1 I. Mr. Howard also saw Larry Holliman or C-Crazy sitting in the
2 livingroom. RT 1007. He was looking at Mr. Howard in a menacing
3 way or “mad-dogging” him. RT 1007-1008.

4
5 j. Hammond got up from the table and said “what’s up motherfucker,
6 she’s not here.” RT 1011. His tone of voice told Mr. Howard “there
7 was going to be a problem.” RT 1011. Another man, Chico Stokes,
8 was standing to Mr. Howard’s right. RT 1012.

9
10 k. Hammond walked towards Mr. Howard with Kelly standing between
11 them, pushed Kelly aside and lifted his shirt, revealing a gun in his
12 waistband. RT 1016. Believing that Hammond was going to shoot,
13 Mr. Howard grabbed the gun from him. RT 1017. Hammond asked
14 what Mr. Howard was “gonna do” and moved towards him. RT
15 1017. Mr. Howard pulled the trigger but nothing happened, he
16 pulled it several more times and the gun went off. RT 1018.

17
18 l. Hammond fell to the floor. RT 1018. Mr. Howard did not shoot
19 Hammond again after he fell to the ground. RT 1082. Hammond
20 died at the scene. RT 561.

21
22 m. Mr. Howard saw Stokes coming towards. RT 1018. Stokes grabbed
23 Mr. Howard’s arm and Mr. Howard shot him once. RT 1019.

24
25 n. Prosecution witness Orlando Johnson confirmed that Stokes grabbed
26 Mr. Howard’s arm before he was shot. RT 636. Sacramento
27 sheriff’s deputy Will Bayles also confirmed that Stokes later told him
28 in the hospital that he “tried to fight the guy who had the gun.” RT

1 967.
2
3

4 o. Mr. Howard could not “believe” what just happened. RT 1022. He
5 did not feel like he had an opportunity to escape once he grabbed the
6 gun from Hammond and Hammond continued moving toward him.
7 RT 1144. Because he did not consider himself a “killer,” Mr.
8 Howard then put the gun in his own mouth and pulled the trigger.
RT 1023. The gun did not go off. RT 1023.

9
10 p. Ron Wilson lived across the street from where the shooting occurred.
11 RT 1146. After hearing several gunshots that night, he saw a man
12 outside the complex place gun in his mouth and pull the trigger. RT
13 1146. The gun did not go off. RT 1146.

14
15 q. The state’s theory was that the shooting was not in self-defense, but
16 was a premeditated killing.

17
18 r. In light of the two theories presented, and Mr. Howard’s admission
19 that he did the shooting, the trial court recognized the only issue in
20 the case was petitioner’s intent. RT 98-99. “[Did] defendant . . .
21 have the actual belief in the necessity to defend?” RT 98. The
22 prosecution proposed to use other crimes evidence -- drive-by
23 shootings from 1992 and 1995 -- on the issue of intent and to rebut
24 Mr. Howard’s claim of self-defense or imperfect self-defense by
25 showing “he’s been violent in the past, the aggressor in the past.”
26 RT 69; CT 145-146. Defense counsel argued that the 1992 and 1995
27 drive-by shootings were so dissimilar that the evidence “has
28 absolutely no relevance to his state of mind” in the February 2000

shootings. CT 175.

s. Prior to the state's presentation of the prior bad acts evidence, the court instructed the jury:

“You are about to hear evidence that the defendant may have committed crimes other than that for which he is on trial. This evidence, if believed, . . . may be considered by you . . . if it tends to show the existence of the specific intent which is a necessary element of the crimes charged in Counts One and Two, whether the defendant had an actual belief in the necessity to defend himself, or whether the defendant had an actual and reasonable belief in the necessity to defend himself.” RT 1154.

t. With respect to the 1992 gang-related drive-by shooting, the state presented evidence showing that in 1992, Mr. Howard fired three shots at a Crips gang member in another car and later pled guilty to assault with a deadly weapon. RT 1029, 1156-1166.

u. With respect to the 1995 gang-related drive-by shooting, the state presented evidence that in 1995 Mr. Howard fired several shots from a car, wounding Karamel Haynes. RT 1259-1274, 1302, 1309.

v. The trial court permitted the state to introduce this evidence over objection and instructed the jury it could rely on these prior violent acts in assessing whether Mr. Howard was acting in self-defense on the night of February 19, 2000. RT 98-100; 1154.

w. On appeal, petitioner contended the trial court's actions violated his federal constitutional rights to Due Process and a fair trial.

Petitioner raised this claim on appeal in state court and presented it

1 to the state supreme court as well.
2
3

4 XI.
5
6

7 Petitioner's judgment of conviction has been unlawfully and unconstitutionally
8 imposed in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth
9 and Fourteenth Amendments to the United States Constitution. The trial court's joinder
10 of counts violated the federal constitution because it prejudiced petitioner's right to a fair
11 trial. The following facts now known to petitioner support this claim:
12
13

14 a. Petitioner incorporates by reference all factual allegations set forth
15 above.
16
17 b. On January 14, 2002, Mr. Howard was charged with two separate
18 sets of crimes. The state alleged that on October 6, 1999, Mr.
19 Howard committed the crimes of assault with a deadly weapon
20 (count four) and battery on a co-habitant (count five). CT 185. The
21 state also alleged that on February 19, 2000, Mr. Howard committed
22 the crimes of murder (count 1), attempted murder (count 2) and
23 battery on a co-habitant (count 3). CT 184.
24
25 c. Prior to trial, the defense moved to sever the two distinct sets of
26 crimes. CT 132. The trial court denied the motion. RT 79-81.
27
28 d. On appeal, in state court petitioner contended that the trial court's
refusal to sever counts violated his federal constitutional rights to
Due Process and a fair trial. He raised this claim on appeal in state
court and presented it to the state supreme court as well.

1 **UNEXHAUSTED CLAIMS**
2

3 XII.
4

5 Petitioner's judgment of conviction has been unlawfully and unconstitutionally
6 imposed in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth
7 and Fourteenth Amendments to the United States Constitution. Based on information and
8 belief, petitioner alleges:

9

10 a. The state failed to properly disclose, and trial counsel independently
11 failed to discover and present, any and all evidence which would
12 have impeached the testimony of numerous prosecution witnesses at
13 trial, including Kelly Clark, Sherry Clark, Orlando Johnson and
14 Larry Holliman, as well as the witnesses who testified to the prior
15 uncharged acts of violence, including information which would show
16 a bias on the part of these witnesses toward the prosecution. This
17 evidence includes pending criminal charges and other impeachment
18 evidence. Such evidence was both favorable and material, and the
19 state's failure to disclose this evidence, and defense counsel's failure
20 to discover and present it, violated petitioner's rights as set forth in
21 *Brady v. Maryland*, 373 U.S. 83 (1963) and *Strickland v.*
22 *Washington* 466 U.S. 668 (1984).

23

24 b. New evidence supports petitioner's claim of self-defense and
25 undercuts the state's theory of first degree murder, including the
26 evidence described above, and evidence showing petitioner did not
27 bring a gun to the apartment on the night of the shooting.

28 WHEREFORE, petitioner prays that this Court:

1. Take judicial notice of the transcripts and court records in *People v. Howard*, C041099, *People v. Howard*, C045844, and *People v. Howard*, C050579;

2. Hold this case in abeyance pursuant to petitioner’s contemporaneously filed “Application to Hold Pending Federal Habeas Petition in Abeyance,” to permit petitioner to exhaust in state court potentially dispositive claims;

3. Should relief not be provided in state court, permit petitioner to amend his federal petition and order respondent to file and serve a certified copy of the record on appeal and show cause why petitioner is not entitled to the relief sought;

4. After full consideration of the issues raised in the petition, vacate the judgment and sentence imposed upon petitioner or, in the alternative,

5. Permit discovery and an evidentiary hearing at which petitioner may offer proof concerning the allegations in this petition; and

6. Grant such other and further relief as may be appropriate.

DATED: 1/15/09 Respectfully submitted,

CLIFF GARDNER LAZULI WHITT

/s/ Cliff Gardner
By Cliff Gardner
Attorney for Petitioner

1 VERIFICATION
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7

I, Cliff Gardner, declare that I am an attorney for petitioner Jelani Howard. I make this verification for petitioner because of his absence from the county where I have my office. I have read the attached petition and, except for those matters alleged in information and belief, I believe the matters stated therein to be true. On that basis, I allege they are true.

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

Executed this 15th day of January, 2009 at Oakland, California.

12
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14 /s/ Cliff Gardner
15 Cliff Gardner
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5 Attorneys for Petitioner

7 UNITED STATES DISTRICT COURT
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10 JELANI KITWANNA HOWARD,) No.
11 Petitioner,)
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13 MATTHEW CATE, Head of the)
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14 Respondent.)
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19 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
20 OF PETITION FOR WRIT OF HABEAS CORPUS
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1 STATEMENT OF THE CASE
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3 January 14, 2002, the Sacramento County district attorney filed a six count
4 information against defendant Jelani Howard. CT 184.¹ The information charged as
5 follows:

6 1) Count one charged Mr. Howard with a February 19, 2000 murder in
7 violation of section 187. CT 184. This count added an allegation that Mr.
8 Howard personally used a firearm in violation of section 12022.53(d). CT
184.

9 25) Count two charged Mr. Howard with a February 19, 2000 attempted
10 murder in violation of sections 187 and 664. CT 184. This count also
11 added a firearm use allegation in violation of section 12022.53(d). CT 185.

12 3) Count three charged Mr. Howard with a February 19, 2000, battery on a
13 co-habitant in violation of section 273.5. CT 185.

14 4) Count four charged Mr. Howard with an October 6, 1999 assault with a
15 deadly weapon in violation of Penal Code section 245(a)(1). CT 185.

16 5) Count five charged Mr. Howard with an October 6, 1999 battery on a co-
17 habitant in violation of section 273.5. CT 185.

18 The information added an allegation that Mr. Howard had suffered a prior strike
19 conviction; specifically, a 1993 assault in violation of section 245(a)(2). CT 186. Mr.
Howard pled not guilty. CT 182.

20 The parties made their opening statements on January 17, 2002. CT 194. The
21 state rested its case on January 24, 2002. CT 204. The jury began deliberations on
22 January 31, 2002. CT 211. Before the jury returned its verdict, Mr. Howard waived his
23 right to a jury trial on the prior conviction allegation, and requested a court trial on that
24 allegation. CT 207. On February 4, 2002, the jury found Mr. Howard guilty as charged.

25
26
27 ¹ Citations to "CT" denote the Clerk's Transcript prepared in connection with
28 the state court appeal, followed by the page reference. Citations to the Reporter's
Transcript on Appeal are denoted "RT."

1 CT 257.

2
3 After advisements, Mr. Howard waived jury trial on the prior conviction. RT 1514.
4 The trial court found the prior true. RT 1517.

5
6 The court imposed sentence on March 29, 2002. The court imposed a 25 year-to-
7 life term for the count one murder, and then doubled it pursuant to California's "two-
8 strikes law" based on the prior conviction which had been found true. CT 329. The court
9 added a 25 year-to-life term for the firearm enhancement found true in connection with
10 count one, and a 25 year-to-life term for the firearm use allegation found true in
11 connection with count two. CT 329. The court imposed an upper term of nine years on
12 the count two attempted murder, then doubled it under the two strikes law for a total of 18
13 years. CT 327. The court added a one-third the middle term of one year (doubled to two
14 years) for each of the charges in counts four and five. CT 327. The court stayed sentence
15 on the count three charge, and added a five year term for the serious felony prior
16 conviction. CT 327. The total term imposed was 27 years in determinate sentencing
17 time, plus four consecutive 25 year-to-life terms. CT 330.

18
19 Mr. Howard timely filed a Notice of Appeal. CT 331. On February 20, 2003, the
20 appellate court affirmed the convictions in their entirety, but found the state had presented
21 insufficient evidence of the prior conviction allegation. *People v. Howard*, 2003 WL
22 361247, *11-12 (2003). Accordingly, the case was remanded back to the Superior Court
23 for re-sentencing. Mr. Howard filed a Petition for Review to the state supreme court
24 which was denied on April 30, 2003. *People v. Howard*, S114565, Order of April 30,
25 2003, attached as Exhibit A.

26
27 On remand, the trial court re-sentenced Mr. Howard without resort to the two-
28 strikes law. This occurred on December 19, 2003. CT II 5. But because of serious errors
Petition for Writ of Habeas Corpus
and Memorandum In Support Thereof

1 in the court's sentence, the appellate court ultimately vacated the sentence imposed at this
2 hearing in its entirety and remanded the case for re-sentencing yet again. *People v.*
3 *Howard*, 2005 WL 40034, *2 (2005). Mr. Howard filed a Petition for review to the state
4 supreme court which was denied on March 23, 2005. *People v. Howard*, S131464, Order
5 of March 23, 2005, attached as Exhibit B.

6
7 The trial court imposed sentence a third time on August 12, 2005. The court
8 imposed a 25 year-to-life term for the murder. RT III 14. The court added a 25 year-to-
9 life term for the firearm enhancement found true in connection with count one, and a 25
10 year-to-life term for the firearm use allegation found true in connection with count two.
11 RT III 14-15. The court imposed a consecutive upper term of nine years on the count two
12 attempted murder, added consecutive one-third the middle terms of one year for each of
13 the charges in counts four and five and imposed a concurrent three-year term on the count
14 three charge. RT III 15. The total term imposed was 11 years in determinate sentencing
15 time, plus three consecutive 25 year-to-life terms. RT III 15-16.

16
17 Mr. Howard timely filed a Notice of Appeal. 1 CT III 57. This time, the appellate
18 court affirmed the sentence in an opinion dated October 11, 2006 and the state supreme
19 court denied review on December 20, 2006. *People v. Howard*, 2006 WL 2912544
20 (2006); *People v. Howard*, S147895, Order of December 20, 2006, attached as Exhibit C.
21 The time within which to seek certiorari expired 90 days later, on March 19, 2007.

22
23 Mr. Howard immediately sought state habeas review. He filed a Petition for Writ
24 of Habeas Corpus in the Sacramento superior court on April 10, 2007. *In re Howard*,
25 07F03688, Petition for Writ of Habeas Corpus, attached as Exhibit D. This petition was
26 denied on the merits by the Superior Court on May 9, 2007 in a four-page opinion. *In re*
27 *Howard*, 07F03688, Order of May 9, 2007, attached as Exhibit E.

1 Less than a month later, on June 4, 2007, Mr. Howard filed a Petition for Writ of
2 Habeas Corpus in the state court of appeal in case C055852. *In re Howard*, C055852,
3 California Court of Appeals Docket Sheet, attached as Exhibit F. The court denied this
4 petition on July 5, 2007. *In re Howard*, C055852, Order of July 5, 2007, attached as
5 Exhibit G.

6
7 One month later, on August 6, 2007, Mr. Howard filed a habeas petition in the
8 state supreme court in case S155133. *In re Howard*, S155133, California Supreme Court
9 Docket Sheet, attached as Exhibit H. The state court denied this petition on February 13,
10 2008. *In re Howard*, S155133, Order of February 13, 2008, attached as Exhibit I.

1 STATEMENT OF FACTS
2

3 Petitioner Jelani Howard was charged with the February 19, 2000 murder of
4 Lamonte Hammond and the attempted murder of Chico Stokes. CT 184-185. At no point
5 did Mr. Howard deny the shooting. Instead, as Mr. Howard explained at trial, this was a
6 self-defense case; he fired at Hammond and Stokes only because he feared for his own
7 life.

8 In order to rebut this defense, and over objection, the state introduced evidence of
9 two uncharged acts of violence involving Mr. Howard, both occurring years earlier. As
10 more fully discussed below, although both of these uncharged acts involved acts of
11 violence -- and so could prejudice a jury trying to assess Mr. Howard's self-defense claim
12 here -- neither of these offenses involved a claim of self-defense at all.

14
15 A. Mr. Howard's Testimony.

16
17 Mr. Howard explained the events leading up to February 19, 2000. At the time,
18 Mr. Howard was living in San Francisco, California and attending San Francisco City
19 College. RT 976. He was dating Aretha Armstrong who lived in Sacramento, California.
20 RT 976.

21
22 On February 18, 2000, after finishing math class, Mr. Howard took the bus to
23 Sacramento to see Aretha. RT 976. Although Mr. Howard owned a car his grandmother
24 had bought him, he was taking the bus because Aretha had crashed the car several weeks
25 earlier. RT 977. Aretha was going to use her tax return money to pay for the repairs. RT
26 980. Aretha told Mr. Howard that the tax return check had arrived. RT 982. When he
27 arrived in Sacramento, they went to a bank to cash the check and then watched movies
28 together at Aretha's apartment. RT 984.

1 The next morning, Aretha asked if she could have some of the money back she had
2 given Mr. Howard for the car repairs because it was her son's birthday and she wanted to
3 buy him something. RT 985. Mr. Howard explained to Aretha that his grandmother had
4 already paid to have the car fixed and he needed to reimburse her. RT 981. Aretha got
5 upset and walked to the corner market. RT 985. Mr. Howard decided he would give
6 Aretha \$200. RT 986.

7
8 While Aretha was gone, Mr. Howard spoke with some men standing outside her
9 apartment. RT 985. They told him Aretha had been talking to another man who lived in
10 the same apartment complex. RT 985. Hearing this made Mr. Howard angry. RT 986.

11
12 When Aretha returned, Mr. Howard told her he wanted to talk and they walked to
13 Sonny's Market. RT 986. Aretha bought a bottle of Brandy. RT 987. On the walk back,
14 when Mr. Howard asked her about the man she was talking with at the apartment
15 complex, Aretha got angry and started to scream. RT 987. Although Mr. Howard
16 admitted it was not the right thing to do, he slapped Aretha several times. RT
17 987. Aretha then left and went to a friend's house. RT 988.²

18
19 About 11 p.m. that night, Mr. Howard went to find Aretha at her friend Kelly
20 Clark's apartment. RT 993. He was planning on heading back to San Francisco and
21 wanted to give Aretha the money she had asked for. RT 992-993. Outside the apartment,
22 Mr. Howard heard loud music. RT 1003. He knocked on the door. RT 1003. Kelly
23 opened the door and before Mr. Howard could say anything, she told him that Aretha was
24 not there. RT 1003. Believing that Aretha was inside, Mr. Howard asked where she was.
25 RT 1003. Kelly said "whatever" and walked away from the open door. RT 1004. Mr.

27 ² The state also charged Mr. Howard with a February 19, 2000 battery of a
28 co-habitant. CT 184. In addition to the testimony Mr. Howard gave on this point, Aretha
testified that Mr. Howard assaulted her. RT 409-411.

1 Howard walked inside because he wanted to find Aretha, give her the money and then go.
2 RT 1006.

3
4 Kelly's boyfriend Lamonte Hammond was inside the apartment sitting at the
5 dining room table. RT 1004. As Mr. Howard came into the apartment, Mr. Hammond
6 said "What's up? She's not here." RT 1004. Hammond seemed "confrontational" and
7 was wearing the color blue which was a Crip color. RT 1005, 1012.³ Mr. Howard also
8 saw Larry Holliman or C-Crazy sitting in the livingroom. RT 1007. He was looking at
9 Mr. Howard in a menacing way or "mad-dogging" him. RT 1007-1008.

10
11 Hammond got up from the table and said "what's up motherfucker, she's not
12 here." RT 1011. His tone of voice told Mr. Howard "there was going to be a problem."
13 RT 1011. Another man, Chico Stokes, was standing to Mr. Howard's right. RT 1012.
14 Hammond walked towards Mr. Howard with Kelly standing between them, pushed Kelly
15 aside and lifted his shirt, revealing a gun in his waistband. RT 1016. Believing that
16 Hammond was going to shoot, Mr. Howard grabbed the gun from him. RT 1017.
17 Hammond asked what Mr. Howard was "gonna do" and moved towards him. RT 1017.
18 Mr. Howard pulled the trigger but nothing happened, he pulled it several more times and
19 the gun went off. RT 1018.

20
21 Hammond fell to the floor. RT 1018. Mr. Howard did not shoot Hammond again
22 after he fell to the ground. RT 1082. Hammond died at the scene. RT 561.

23
24 Mr. Howard was going to leave when he saw Stokes coming towards him with a
25 "blank" look on his face. RT 1018. Mr. Howard asked him what he was doing but

26
27 ³ Mr. Howard admitted that in the early 1990's he belonged to the Bloods
28 gang or East Side Piru. RT 1041. At the time of trial, however, he had not been a gang
member for several years. RT 1041.

1 Stokes kept walking towards him. RT 1019. Stokes grabbed Mr. Howard's arm and Mr.
2 Howard shot him once. RT 1019. Prosecution witness Orlando Johnson confirmed that
3 Stokes grabbed Mr. Howard's arm before he was shot. RT 636. Sacramento sheriff's
4 deputy Will Bayles also confirmed that Stokes later told him in the hospital that he "tried
5 to fight the guy who had the gun." RT 967.⁴

6
7 Mr. Howard and Stokes continued to wrestle for the gun. RT 1019. It went off
8 another time. RT 1019. Because Stokes would not let go of the gun, Mr. Howard
9 dragged Stokes towards the door. RT 1021. Stokes finally let go of the gun when he was
10 half-way in the apartment and half-way outside. RT 1022. Stokes was injured but alive.
11 RT 746.

12
13 Mr. Howard could not "believe" what just happened. RT 1022. He did not feel
14 like he had an opportunity to escape once he grabbed the gun from Hammond and
15 Hammond continued moving toward him. RT 1144. Because he did not consider himself
16 a "killer," Mr. Howard then put the gun in his own mouth and pulled the trigger. RT
17 1023. The gun did not go off. RT 1023.

18
19 Ron Wilson confirmed this testimony. Wilson lived across the street from where
20 the shooting occurred. RT 1146. Wilson told police that after hearing several gunshots
21 he saw a man outside the complex place gun in his mouth and pull the trigger. RT 1146.
22 The gun did not go off. RT 1146.

23
24 Mr. Howard did not wait at the scene for police because he was afraid police

25
26 On re-direct, deputy Bayles, however, now claimed that Stokes struggled
27 with Mr. Howard for the gun *after* Mr. Howard shot Stokes once. RT 971. His report
28 confirmed his initial testimony that Stokes said he struggled for the gun *before* he was
shot by Mr. Howard. RT 971-972.

1 would shoot him. RT 1024. Mr. Howard then called a friend to pick him up. RT 1024.
2 On the on-ramp to Highway 50, Mr. Howard threw the gun out the window. RT 1032.
3 The gun was later found there by police. RT 532-533. The state introduced no evidence
4 suggesting Mr. Howard owned this gun. RT 532-538.⁵

5

6 B. The State's Witnesses To The Shooting.

7

8 Kelly Clark and Aretha Armstrong were friends and co-workers. RT 172-173.
9 Around 9:30 p.m. on February 19, 2000, Aretha came to Kelly's apartment. RT 178. She
10 had a bloody nose and lip and asked if she could stay because she was afraid of Mr.
11 Howard. RT 180. Aretha went upstairs to lie down and go to sleep. RT 184.

12

13 Kelly was dating Lamonte Hammond. RT 171. Hammond lived in San Jose and
14 would come to Sacramento to visit Kelly on the weekends. RT 171. On that night,
15 Hammond arrived at Kelly's apartment around 10 p.m.. RT 171. He came with four
16 other men; Chico Stokes, Stokes's brother Larry Holliman Jr., Stokes's cousin Orlando
17 Johnson and someone who everyone only knew by the name of "Fats." RT 216, 218, 272,
18 462, 468, 576.⁶

19

20 Hammond and his friends belonged to the Crips gang. RT 216, 463, 468, 574. In
21 addition to Hammond and his friends, Sherry Clark, Kelly's sister was also there. RT
22 190. They were drinking, playing cards, listening to music, playing video games and

23

24 ⁵ On rebuttal, Aretha Armstrong testified that about a week before the
25 shooting Mr. Howard told her that he had borrowed a gun from his friend "Shawn." RT
26 1238. He also told her that he was returning it to Shawn. RT 1244. Aretha never saw the
gun nor did she know what type of gun it was. RT 1239. The state never called Shawn to
support this testimony.

27

28 ⁶ Although not entirely clear from the record, "Fats" real name may have
been Edwin Beloney. RT 950-951.

1 smoking marijuana. RT 191. There was also methamphetamine in the back bedroom that
2 Hammond planned to sell that night. RT 215.

3
4 Sometime later, Mr. Howard knocked on the door and asked if Aretha was there.
5 RT 192. Mr. Howard was calm and polite. RT 224. Kelly said no. RT 195. Hammond
6 walked up behind Kelly and said “no she’s not here.” RT 225. Hammond then went back
7 to playing cards at the diningroom table. RT 227. Mr. Howard then asked if he could
8 check. RT 195. Kelly said no again. RT 195. Mr. Howard walked inside. RT 195.
9 Kelly did not notice anything in his hands. RT 192.

10
11 Kelly asked what Mr. Howard was doing and put her hand on his chest. RT 195.
12 Kelly was walking backward and Mr. Howard was walking forward. RT 196. Hammond
13 then stood up from the dining room table walked towards Kelly and Mr. Howard. RT
14 202. He said “what you gonna do shoot her or me?” RT 202. Hammond then pushed
15 Kelly towards the front door. RT 203. Kelly heard a loud “pop” and when she looked
16 back she saw a red mark on Hammond’s shirt. RT 203. Hammond grabbed his chest.
17 RT 204. As Kelly ran to another apartment to call 911, she heard 4 more shots. RT 204.

18
19 Sherry, Kelly’s sister, also saw the shooting. According to Sherry, moments
20 before Hammond pushed Kelly towards the door, Mr. Howard pulled a gun from behind
21 his leg. RT 284, 287. He then shot Hammond once in the chest. RT 287. Hammond fell
22 to the ground and Mr. Howard shot him two more times. RT 289. Between the second
23 and third shots, Hammond said “please don’t take my life.” RT 289.⁷

24
25 After Mr. Howard shot Hammond for the third time, Chico Stokes stood up from

26
27 ⁷ Prosecution witness Larry Holliman, Jr. testified that Mr. Howard shot
28 Hammond twice before Hammond fell to the ground. RT 488. Mr. Howard then shot
Hammond a third time while he was on the ground. RT 488.

1 the table and said "you took my homeboy's life." RT 291. Mr. Howard then shot Stokes.
2 RT 291. Stokes moved toward Mr. Howard and grabbed him, holding Mr. Howard's
3 arms at his sides. RT 292, 316. The gun was pointing towards Stokes's legs. RT 316.
4 Sherry ran and hid in the bathroom. RT 292. She heard two more gunshots. RT 293.
5 She also heard Mr. Howard saying "don't ever run your mouth at me." RT 294-295.

6
7 Kelly testified that she did not see Hammond or any of his friends with a gun that
8 night. RT 259. Nor had she ever seen Hammond with a gun before. RT 264.
9 Prosecution witness Orlando Johnson testified that Mr. Howard was holding the gun by
10 his side when he entered the apartment. RT 645. Mr. Johnson admitted, however, that he
11 was hoping to receive leniency from the state at an upcoming sentencing hearing on drug
12 possession charges in exchange for his testimony in Mr. Howard's case. RT 573, 635.

13
14 C. The Forensic Evidence Undercuts The State's Theory.

15
16 Forensic pathologist Gregory Reiber testified that Mr. Hammond died of multiple
17 gunshot wounds. RT 731-734. He had two gunshot wounds to his torso and one to his
18 left buttock. RT 725, 731-734. Mr. Stokes had six gunshot wounds; two in the left side
19 of his chest, one in his back, one in his right hand, and one in each thigh. RT 746-748.
20 Dr. Reiber was not sure, however, how many bullets caused those wounds. RT 751. It
21 was possible that one bullet caused more than one wound. RT 751.

22
23 As noted above, Sherry Clark and Larry Holliman testified that Mr. Howard shot
24 Hammond while he was on the ground. RT 289, 488. Dr. Reiber, however, testified that
25 if Hammond had been shot on the ground, he would expect to see a bullet underneath or
26 to the side of his body. RT 785-786. No such bullet was found. RT 700.

1 D. Prior Bad Acts Evidence.
23 Because Mr. Howard did not dispute that he fired the gun, the only issue for the
4 jury to decide was Mr. Howard's mental state at the time of the shooting: did he have a
5 honest and reasonable belief in the need to defend himself when he shot Hammond and
6 Stokes? In making this determination, however, the jury was allowed to consider not only
7 Mr. Howard's testimony and that of the state's witnesses but it was also allowed to
8 consider Mr. Howard's involvement in 1992 and 1995 gang-related drive-by shootings.
9 Thus, prior to the state's presentation of this evidence, the court instructed the jury:10 “You are about to hear evidence that the defendant may have committed
11 crimes other than that for which he is on trial. This evidence, if believed, . . .
12 . may be considered by you . . . if it tends to show the existence of the
13 specific intent which is a necessary element of the crimes charged in Counts
14 One and Two, whether the defendant had an actual belief in the necessity to
15 defend himself, or whether the defendant had an actual and reasonable
16 belief in the necessity to defend himself.” RT 1154.17 With respect to the 1992 drive-by shooting, the state called Carnell Thompson to
18 testify. Thompson explained that he has known Mr. Howard for 10 years. RT 1156. On
19 August 18, 1992, Thompson was driving in a car with Mr. Howard, Thompson's cousin
20 Kevin Cottle, and Tyrone Dyson in Sacramento. RT 1158. Cottle was driving, Mr.
21 Howard was in the front passenger seat, and Dyson and himself were in the back seat.
22 RT 1159. They were stopped at a stop light when another car pulled up beside them. RT
23 1160. A man in the other car flashed Crip gang signs at them. RT 1160. He then heard
24 three gunshots fired from the car he was in. RT 1158, 1165. Thompson denied telling
25 police that Mr. Howard was the only person in his car with a gun. RT 1166, 1180-1181.26 Shortly after the shooting, Sacramento sheriff's deputy Cliff Lunetta stopped Mr.
27 Howard's car. Inside he found a .22 caliber gun and a box of .22 rounds. RT 1198. Mr.
28 Howard denied being the shooter. RT 1197.

1 At trial, Mr. Howard again denied being the shooter. RT 1027. Instead, it was
2 Cottle. RT 1029. Cottle reached over Mr. Howard and shot out Mr. Howard's open
3 window. RT 1029. Cottle then dropped the gun in Mr. Howard's lap. RT 1029. Shortly
4 after, police stopped their car and Mr. Howard was arrested. RT 1029. He was told that
5 if he pled guilty to assault with a deadly weapon he would be allowed to go home. RT
6 1029. Because his mother was in the hospital and he wanted to go see her, he plead guilty
7 and was allowed to go. RT 1029.

8
9 With respect to the 1995 gang-related drive-by shooting, the state called Carter
10 Haynes to testify. RT 1258. Haynes explained that in September 1995 he had an
11 argument with a man named Larry. RT 1259. During this argument, Larry told Haynes
12 that he (Larry) was a member of the Crips gang. RT 1265. About two weeks after this
13 argument, he was outside his home with his sister Karamel Haynes when a suburban
14 drove up. RT 1263. There were two men inside. RT 1268. He believed that Larry was
15 driving. RT 1266. The passenger pulled out a gun and fired several rounds. RT 1273-
16 1274. One bullet hit his sister in the leg. RT 1274. The suburban then drove away. RT
17 1274.

18
19 Haynes called police. RT 1274. Haynes told police the driver's name was
20 "Larry." RT 1299. He also told police that he saw the shooter and spoke with him just
21 before the shooting. RT 1303.

22
23 Later that evening, police located a suburban at a nearby house matching the
24 description given by Haynes. RT 1280. Sacramento sheriff's deputy Scott Swain
25 testified that when they searched the residence they found two men inside; Lawrence
26 Lanchaster and petitioner Jelani Howard. RT 1300. Lanchaster and Mr. Howard were
27 placed inside a patrol car and Haynes was brought for an identification. RT 1302.
28 Haynes identified Lanchaster as the driver and Mr. Howard as the shooter. RT 1309.

1 Both were arrested but the charges were later dropped. RT 1031.

2
3 At trial, Haynes was sure that Mr. Howard was not the shooter. RT 1287, 1293.
4 He was sure the shooter was lighter skinned than Mr. Howard. RT 1287. Instead, he only
5 identified Mr. Howard because he was the only other person with Lanchaster when the
6 identification took place. RT 1291.

7
8 Mr. Howard also testified that he was not the shooter. RT 1031. According to Mr.
9 Howard, the shooter was a family member and that is why he may have been
10 misidentified by Haynes. RT 1031.⁸

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22
23 As noted above, Mr. Howard was also on trial for an October 6, 1999
24 battery of a co-habitant and assault with a deadly weapon charges. CT 185. At trial, Mr.
25 Howard admitted these charges, conceding that after his girlfriend Sandra Smith told him
26 she did not want to see him anymore, he came over to her apartment. RT 997. She was
27 there with her brother Adolphus Smith. RT 977. Mr. Howard believed Mr. Smith had
28 stolen a radio from him; in a confrontation over the radio, he hit Mr. Smith with a bat and
then pushed Ms. Smith into an entertainment center when she tried to intervene. RT 997-
1000. Ms. Smith confirmed she was hit and pushed into the entertainment center. RT
880.

1 ARGUMENT
2
34 I. THE CURRENT PETITION IS TIMELY.
5
67 A. Introduction And Statutory Background.
8
910 28 U.S.C. § 2244(d) provides a one year time period within which a state
11 defendant may seek habeas relief in federal court. Subdivision (d)(1)(A) provides that the
12 one-year period begins to run on “the date on which the judgment became final by the
13 conclusion of direct review or the expiration of the time for seeking such review . . .”
14 When a case is remanded for resentencing, the judgement does not become final -- and
15 the one-year period does not begin to run -- until the new sentence is final. *See Burton v.*
16 *Stewart*, 549 U.S. 147, 156-157 (2007). A sentence is final on the date certiorari is
17 denied or, if certiorari is not sought, the last date certiorari could have been sought.
18 *Bowen v. Roe*, 188 F.3d 1157 (9th Cir. 1999). Once a case is final, and the one-year
19 period has begun to run, 28 U.S.C. § 2244(d)(2) provides that the one-year period may be
20 tolled for any period “during which a properly filed application for State post-conviction
21 or other collateral review with respect to the pertinent judgment or claim is pending . . .”
22
2324 Here, as discussed below, because the state appellate court remanded the case
25 twice for resentencing, the case did not become final until (and the one-year statute began
26 to run on) March 19, 2007. Because Mr. Howard had a “properly filed application for
27 State post-conviction . . . review” pending from April 10, 2007 through February 13,
28 2008, his one year statute ran for 22 days (from March 19, 2007 until April 10, 2007)
until it was tolled by operation of 28 U.S.C. § 2244(d)(2). The statute began to run again
on February 13, 2008 -- when Mr. Howard no longer had a state petition pending in state
court. At that point, he had 343 days left in his one-year period (365 - 22 = 343).
Accordingly, on February 13, 2008, Mr. Howard had 343 days within which to file his
Petition for Writ of Habeas Corpus
and Memorandum In Support Thereof

1 federal habeas petition -- or until January 22, 2009. This petition is therefore timely.
2

3 B. The Case Was Final On Appeal On March 19, 2007.
4

5 On January 14, 2002, the Sacramento County district attorney filed a six count
6 information against defendant Jelani Howard. 1 CT 184.⁹ In addition to these six
7 substantive charges, the information alleged that Mr. Howard had been convicted of a
8 serious prior felony. Mr. Howard was found guilty on all charges, as well as the prior
9 felony allegation, and was sentenced on March 29, 2002. 2 CT 327-330.

10 Mr. Howard timely filed a Notice of Appeal. 2 CT 331. As noted above, on
11 February 20, 2003, the state appellate court affirmed the convictions, but found there was
12 insufficient evidence of the prior conviction allegation. *People v. Howard*, 2003 WL
13 361247 at * 11-12. Accordingly, the case was remanded back to the trial court for re-
14 sentencing. Mr. Howard's subsequent Petition for Review to the state supreme court was
15 denied on April 30, 2003. Exhibit A.

16 On remand, the trial court re-sentenced Mr. Howard without relying on the prior
17 conviction allegation. This occurred on December 19, 2003. 1 CT II 5.¹⁰ Mr. Howard
18 timely filed a Notice of Appeal. 1 CT II 9. On January 10, 2005, the state appellate court
19 again affirmed the conviction but found sentencing errors and remanded for resentencing.
20 *People v. Howard*, 2005 WL 40034 at * 2. The state supreme court denied review on
21

22
23
24 ⁹ Citations to "CT" denote the Clerk's Transcript prepared in connection with
25 the state court appeal, followed by the page reference. Citations to the Reporter's
26 Transcript on Appeal are denoted "RT." Unless otherwise noted, all statutory references
27 are to the California Penal Code.

28 ¹⁰ "CT II" and "RT II" are references to the transcripts from the first re-sentencing
in the case.

1 March 23, 2005. Exhibit B.

2
3 The trial court sentenced Mr. Howard for a third time on August 12, 2005. 1 CT
4 III 1.¹¹ The total term imposed in this third sentencing was 11 years in determinate
5 sentencing time plus three consecutive 25 year-to-life terms. RT III 14-16.

6
7 Mr. Howard again filed a timely Notice of Appeal. CT III 57. The appellate court
8 added one day additional credit for time served, but otherwise affirmed the conviction and
9 sentence in an opinion dated October 11, 2006. *People v. Howard*, 2006 WL 2912544.
10 The state supreme court denied review on December 20, 2006. Exhibit C. The time
11 within which to seek certiorari expired 90 days later, on March 19, 2007. This was the
12 day the case became final on direct appeal and the one-year statute started to run. *See*
13 *Burton v. Stewart*, 549 U.S. at 156-157.

14
15 C. Because Mr. Howard Tolled The One-Year Period From April 10, 2007
16 Through February 13, 2008, His One-Year Period Expires On January 22,
17 2009.

18 As noted above, once the one-year period has begun to run, 28 U.S.C. § 2244(d)(2)
19 provides that this period may be tolled for any period “during which a properly filed
20 application for State post-conviction or other collateral review with respect to the
21 pertinent judgment or claim is pending” Here, Mr. Howard’s one-year period began
22 to run on March 19, 2007.

23
24 Acting in pro per, Mr. Howard properly filed a Petition for Writ of Habeas Corpus
25 in the Sacramento superior court on April 10, 2007. Exhibit D. This petition was denied
26

27
28 ¹¹ “CT III” and “RT III” are references to the transcripts from the second re-
sentencing in the case.

1 on the merits by the Superior Court on May 9, 2007 in a four-page opinion. Exhibit E.
2

3 Less than a month later, on June 4, 2007, Mr. Howard -- still acting in pro per --
4 filed a Petition for Writ of Habeas Corpus in the state court of appeal in case C055852.
5 Exhibit F. The court denied this petition was on July 5, 2007. Exhibit G.
6

7 One month later, on August 6, 2007, Mr. Howard -- again still acting in pro per --
8 filed a habeas petition in the state supreme court in case S155133. Exhibit H. The state
9 court denied this petition on February 13, 2008. Exhibit I.
10

11 Accordingly, while petitioner's one-year time period within which to seek federal
12 review began running on March 19, 2007, it ran only for 22 days, until April 10, 2007.
13 This is when petitioner began state habeas proceedings by properly filing an application
14 for state post-conviction review with the state superior court. *See* 28 U.S.C. § 2244(d)(2).
15 Petitioner had a state habeas petition pending from that date through February 13, 2008.
16

17 At that point (February 13, 2008), the one-year statute began running again. But
18 petitioner had 343 days left in his one-year period within which to file in federal court, or
19 until January 22, 2009. This petition is, therefore, timely.
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1 II. THE TRIAL COURT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS
2 AND A FAIR TRIAL BY ADMITTING IRRELEVANT AND PREJUDICIAL
3 OTHER CRIMES EVIDENCE.

4
5 A. The Relevant Facts.
6
7

8 The state's theory of the case was simple: Mr. Howard brought a gun into Kelly
9 Clark's apartment and shot Lamonte Hammond and Chico Stokes when they tried to stop
10 him from searching for his girlfriend Aretha Armstrong. RT 1337-1338. The defense
11 theory of the case was equally simple: Mr. Howard shot in self-defense. He did not bring
12 a gun into the apartment, but instead grabbed a gun from Hammond's waistband after he
13 was threatened by Hammond, and shot both Hammond and Stokes in self-defense. RT
14 1389-1393.

15 In support of its case, the state sought to introduce evidence of two drive-by
16 shootings which Mr. Howard had been involved in years earlier. Thus, the state sought to
17 introduce the facts surrounding a 1992 drive-by shooting.

18 Gregory Anderson belonged to the North Highland Crips gang. CT 143. On
19 August 18, 1992, he was shot while in his car at a stoplight in Sacramento, California.
20 CT 143. He identified one person in the shooter's car, Kevin Cottle. CT 143. Cottle
21 belonged to a rival gang, the Citrus Height Bloods. CT 143. An anonymous witness
22 revealed the names of Cottle's companions, one of whom was Mr. Howard. CT 143. It
23 was Mr. Howard's mother's car which was involved in the shooting. CT 144. When
24 police searched the car, they found the same caliber gun used in the shooting. CT 144.
25 Carnell Thompson was also in the car with Mr. Howard and Cottle at the time of the
26 shooting. CT 144. He told police that Mr. Howard was the only person in the car with a
27 gun. CT 144. Mr. Howard later pled guilty to assault with a deadly weapon. CT 144.
28

1 The state also sought to introduce facts surrounding a 1995 drive-by shooting. On
2 September 10, 1995, Carter Haynes had an argument and exchanged gang signs with two
3 young men at a Sacramento mall. CT 142. Later that day, Haynes and his sister Karamel
4 were outside their home when a gray sport utility vehicle drove by with the two men
5 inside. CT 142. The passenger -- who Haynes later identified as Mr. Howard -- pulled
6 out a gun and fired four or five times. CT 142. Karamel Haynes was shot in the leg. CT
7 142. Although Mr. Howard was initially charged with assault with a deadly weapon, all
8 charges were later dismissed. CT 143.

9
10 The prosecution proposed to use this other crimes evidence on the issue of intent
11 and to rebut Mr. Howard's claim of self-defense or imperfect self-defense by showing
12 "he's been violent in the past, the aggressor in the past." RT 69; CT 145-146. Defense
13 counsel argued that the 1992 and 1995 drive-by shootings were so dissimilar that the
14 evidence "has absolutely no relevance to his state of mind" in the February 2000
15 shootings. CT 175.

16
17 The trial court recognized that the only issue in the case was petitioner's intent.
18 RT 98-99. "[Did] defendant . . . have the actual belief in the necessity to defend?" RT
19 98. As to this question, the trial court ruled the other acts evidence admissible
20 concluding:

21
22 "If the Defendant was the aggressor in similar violent acts, it would
23 perpetrate a fraud upon the jury to withhold this information from them.
24 This is relevant information the jury should be allowed to consider in
determining the believability of the Defendant's assertions that he was
acting in self-defense in this case." RT 99.

25
26 At trial, Mr. Howard testified that he was in fear for his life when he shot
27 Hammond and Stokes. RT 1016-1019. He also testified that he believed that based on
28 what Hammond was wearing that he was a member of the Crip's gang. RT 1012-1014.

1 Knowing that the state was going to introduce the 1992 and 1995 shootings in rebuttal,
2 Mr. Howard testified to each, including that he pled guilty to assault with a deadly
3 weapon in connection with the 1992 drive-by shooting. RT 1028, 1031. The state cross-
4 examined Mr. Howard on both prior shootings. RT 1041-1048.

5
6 Before the state's rebuttal case, the trial court instructed the jury:

7
8 "You are about to hear evidence that the defendant may have committed
9 crimes other than that for which he is on trial. This evidence, if believed, . . .
10 . may be considered by you . . . if it tends to show the existence of the
11 specific intent which is a necessary element of the crimes charged in Counts
12 One and Two, whether the defendant had an actual belief in the necessity to
13 defend himself, or whether the defendant had an actual and reasonable
14 belief in the necessity to defend himself." RT 1154.

15 In its rebuttal case, the state introduced the testimony from the investigating officers in
16 both the 1992 and 1995 incidents. RT 1194-1202, 1296-1307. The state also introduced
17 the testimony of one of the victims to the 1995 shooting. RT 1258-1295. And then,
18 during closing arguments, the prosecutor relied on the prior shootings to show petitioner
19 was the type of person who was an aggressor not someone acting in self-defense. RT
20 1334.

21 As more fully discussed below, the trial court violated Due Process in admitting
22 the other crimes evidence. The evidence failed to make any fact of consequence more or
23 less probable. Because there were no permissible inferences to be drawn from the
24 evidence, and given the prosecutor's reliance on the evidence and the weakness of the
25 state's case on the question of intent, the trial court's admission of this evidence violated
26 petitioner's federal Due Process right to a fair trial.

1 B. Admission Of The Other Acts Evidence Violated Due Process And
2 Requires That The Writ Be Granted.

3 The Supreme Court has long held that “[a]n important element of a fair trial is that
4 [the trier of fact] consider only relevant and competent evidence bearing on the issue of
5 guilt or innocence.” *Bruton v. United States*, 391 U.S. 123, 131, n.6 (1968). Evidence is
6 irrelevant if “it fails to make any fact of consequence more or less probable.” *McKinney*
7 *v. Rees*, 993 F.2d 1378, 1380 (9th Cir. 1993); *Henry v. Estelle*, 993 F.2d 1423, 1427 (9th
8 Cir. 1993), *reversed on other grounds sub nom, Duncan v. Henry*, 513 U.S. 364 (1994).

9
10 To be sure, not every admission of irrelevant evidence will violate due process.
11 Yet courts have long recognized that irrelevant evidence of uncharged criminal conduct is
12 often relied on *not* to prove a disputed fact of consequence to an action, but to prove a
13 defendant's propensity for criminal conduct. *See Brinegar v. United States*, 338 U.S. 160,
14 174 (1949); *Boyd v. United States*, 142 U.S. 450, 458 (1892). The ultimate test is whether
15 the improperly introduced evidence is "of such quality as necessarily prevents a fair trial."
16 *Lisenba v. California*, 314 U.S. 219, 236 (1991); *McKinney v. Rees*, 993 F.2d at 1383.

17
18 *McKinney* provides a useful example. There, defendant was charged in the 1984
19 stabbing death of his mother. A pair of the defendant's camouflage pants -- soaked with
20 blood of his mother's type -- was found in defendant's room. Over objection, the state
21 was permitted to introduce other acts evidence that (1) in 1983, defendant had a knife
22 which was confiscated by police prior to the homicide and (2) defendant occasionally
23 strapped a knife to his body while wearing camouflage pants. The state argued that both
24 pieces of evidence were relevant to show (1) that defendant was not “knife free” at the
25 time of the murder and (2) he wore camouflage pants with a knife, just like the murderer
26 apparently did. 993 F.2d at 1383.

1 The Ninth Circuit rejected these proffered justifications, holding instead that the
2 most plausible inference from the evidence was of criminal propensity. Because the 1983
3 knife was no longer in defendant's possession, the evidence did not prove a "fact of
4 consequence" and, instead, permitted an inference of propensity "that [defendant] was the
5 type of man who would own a knife." *Id.* at 1383. Similarly, the camouflage pants
6 evidence simply showed that defendant may have been "wearing [camouflage pants] with
7 a knife the night of the murder." *Id.* at 1383. This inference "is an impermissible
8 propensity inference based on other acts offered to prove character. . . ." *Id.* The court
9 found the error prejudicial because (1) the prosecutor raised this evidence in his cross-
10 examination of defendant, (2) the prosecutor relied on it during closing argument, and (3)
11 the case against defendant was a close one. *Id.* at 1384-1386.

12
13 *McKinney* is similar to this case. Here too the other acts evidence did not prove a
14 fact of consequence. As the trial court itself recognized, the only factual issue of
15 consequence in the case was petitioner's mental state at the time of the shootings; did he
16 honestly and reasonably (or unreasonably) believe that his life was in danger when he
17 shot Hammond and Stokes? RT 98-99. Of course, if the other crimes evidence of the
18 1992 and 1995 shootings shed light on this query, admission of the evidence would be
19 entirely proper. *Cf. McKinney v. Rees*, 993 F.2d at 1380; *Henry v. Estelle*, 993 F.2d at
20 1427. Yet an examination of the inferences required to support the state's relevancy
21 argument establishes that petitioner's involvement in a 1992 and 1995 shooting of people
22 completely unconnected to the current charges was irrelevant to whether he shot in self-
23 defense more than eight years after the 1992 shooting and five years after the 1995
24 shooting.

25
26 The trial court admitted the prior shootings because they were gang-related
27 shooting offenses like the charged offenses of murder and attempted murder (and where
28 petitioner noted the victim's gang membership). RT 99. The prosecution's theory was

1 that petitioner had already been twice involved in gang-related drive-by shootings as the
2 aggressor. RT 69; CT 145-146. According to the prosecution, evidence showing
3 petitioner was involved in two prior gang related drive-by shootings was admissible to
4 prove that years later, petitioner was not in fear for his life when he shot Hammond (a
5 suspected gang member) and Stokes in an apartment building after a confrontation with
6 them over his girlfriend. RT 69; CT 145-146.

7
8 Significantly, the state conceded that unlike the 192 and 1995 incidents, its theory
9 here was *not* that this was a gang-related shooting. Instead, the state's theory here was
10 that Mr. Howard was angry with Hammond and Stokes because they would not let him
11 see his girlfriend. RT 1350-1361. Given the stark dissimilarities between the prior and
12 current offenses, and like *McKinney*, the only way a factfinder could infer criminal intent
13 is to find that based on the 1992 and 1995 shootings, defendant was a cold blooded killer
14 and his contrary testimony that he was in fear for his life should not be believed. This is
15 the precise type of propensity evidence *McKinney* condemns. Constitutional error has
16 occurred.

17
18 In this situation, the writ must be granted unless the error did not have a
19 "substantial and injurious effect" upon the verdict. *Brecht v. Abrahamson*, 507 U.S. 619,
20 638-639 (1993)(plurality), and 641 (Stevens, J., concurring)(under *Brecht* "the burden of
21 sustaining a verdict by demonstrating that the error was harmless rests on the
22 prosecution.") Under *Brecht*, when the evidence is in equipoise as to whether a particular
23 error is harmless, relief must be granted. *O'Neil v. McAnnich*, 513 U.S. 432 (1995).

24
25 For the same reasons identified in *McKinney*, the writ must be granted here as
26 well. Like *McKinney*, the uncharged acts evidence permeated this case. It formed the
27 basis for almost the state's entire rebuttal case and was relied upon in the prosecutor's
28 closing argument. RT 1156-1207, 1258-1307, 1334. And given that petitioner admitted

1 the shooting, a mental state defense was his only defense to the charges. The uncharged
2 acts evidence here went directly to this critical issue.

3
4 Moreover, like *McKinney*, this was an extremely close case on the question of
5 whether Mr. Howard was honestly and reasonably (or unreasonably) in fear for his life
6 when he shot Hammond and Stokes. Mr. Howard admitted the shooting but testified that
7 he (1) did not bring a gun into the apartment, (2) took Hammond's gun from him when he
8 (Hammond) threatened Mr. Howard with it, and (3) only shot Hammond and Stokes
9 because he feared for his life. RT 1016-1019. After the shooting occurred, Mr. Howard
10 was so distraught that he tried to kill himself and would have succeeded except that the
11 gun jammed. RT 1022-1023. Moreover, no witnesses testified that he owned a gun of
12 the same caliber used in the shooting, nor did the state present any evidence tying him to
13 the ammunition used in the shooting. The only evidence negating self-defense came from
14 the victims' family and friends. RT 170, 202-203, 286, 296, 462, 487, 595. And the
15 state's own forensic expert contradicted the version of events testified to by several of the
16 state's eyewitnesses. RT 700, 785-786. On this record, the erroneous admission of other
17 crimes evidence requires relief.

18
19 C. Section 2254(d) Does Not Bar Relief Because The State Court Refused To
20 Consider Facts Which Were Plainly Relevant To The Constitutional Issue.

21 On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act
22 ("AEDPA") became law. Because petitioner's habeas petition was filed after that date,
23 AEDPA applies. *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). AEDPA amended 28
24 U.S.C. § 2254(d) to read as follows:

25
26 "An application for a writ of habeas corpus on behalf of a person in custody
27 pursuant to a judgment of a State court shall not be granted with respect to
28 any claim that was adjudicated on the merits in State court proceedings
unless the 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.”

In applying this section, the Supreme Court has made clear that relief is required whenever a state decision is “objectively unreasonable.” *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). When a state court issues a decision which addresses a constitutional issue, the process of determining if that decision is “objectively unreasonable” is relatively easy. Thus, where the state court decision fails to consider facts it should consider in deciding a constitutional claim, that decision is “objectively” unreasonable and section 2254(d) will not bar relief. *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000). *Accord Id.* at 416 (O’Connor, J. concurring); *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004)(defendant argued that state court’s admission of confession violated Due Process, state court rejected the argument; held, the state court decision was “objectively unreasonable” within the meaning of § 2254(d)(1) where the state court “overlooked [and] ignored evidence . . . highly probative . . . to petitioner’s claim.”) *Bradley v. Duncan*, 315 F.3d 1091, 1101 (9th Cir. 2002)(defendant argued that state court’s failure to give an entrapment instruction violated Due Process, state court rejected the argument; held, the state court decision was unreasonable within the meaning of § 2254(d)(1) where the state court “failed to consider the facts relevant to the due process prejudice prong”).

Similarly, where a state court relies on facts which have no logical relevance to the constitutional claim being litigated, that decision is objectively unreasonable and § 2254(d) will not bar relief. *See, e.g., Penry v. Johnson*, 532 U.S. 782 (2001)(state court’s conclusion that jury’s raw power to nullify satisfied Eighth Amendment requirement that jury be permitted to consider mitigating evidence was “illogical” and relief was not barred by AEDPA); *Greene v. Lambert*, 288 F.3d 1081, 1092 (9th Cir. 2002)(AEDPA no barrier

1 to relief where state court rejected petitioner's constitutional claim by relying on facts
2 which "did not bear" on the claim); *Accord Lancaster v. Adams*, 324 F.3d 423 (6th Cir.
3 2003)(in denying defendant's *Batson* motion, trial court relied on the fact that *after* the
4 motion had been brought, the prosecutor did not challenge a black juror who was called;
5 held, reliance on this fact was objectively unreasonable because the presence of a black
6 juror does not logically or legally justify the discriminatory striking of others); *Schultz v.*
7 *Page*, 313 F.3d 1010 (7th Cir. 2002).

8
9 Here, the state court failed to consider critical facts in rejecting petitioner's due
10 process claim. *See People v. Howard*, 2003 WL 361247. Indeed, in denying petitioner's
11 claim, the state court concluded that "[e]vidence that defendant, not acting in self-
12 defense, committed two earlier gang-related shootings had . . . *some* tendency . . . to
13 disprove defendant's claim of self-defense in this case." 2003 WL at *6. In reaching this
14 conclusion, however, the state court failed to consider -- or even mention -- that (1) the
15 prior shootings were drive-by shootings and gang-related, (2) the current shootings were
16 *neither* drive-by shootings or gang-related and (3) *the state's own theory was that this*
17 *was not gang case but rather Mr. Howard was angry at the victims because they would*
18 *not let him see his girlfriend who was staying at the apartment.* RT 1337-1338. As
19 Judge Kozinski has concluded in this precise context "[a] rational fact finder might
20 discount [these facts] or, conceivably, find [them] incredible, but no rational fact-finder
21 would simply ignore [them]." *Taylor v. Maddox*, 366 F.3d at 1006. Because that is
22 exactly what the state court in this case did, the state decision is objectively unreasonable
23 and section 2254(d) is no bar to relief.

1 III. THE TRIAL COURT'S REFUSAL TO SEVER COUNTS DENIED MR.
2 HOWARD HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS
3 AND A FAIR TRIAL AND TO A TRIAL BY AN UNBIASED JURY.

4 A. The Relevant Facts.

5
6 On January 14, 2002, Mr. Howard was charged with two separate sets of crimes.
7 The state alleged that on October 6, 1999, Mr. Howard committed the crimes of assault
8 with a deadly weapon (count four) and battery on a co-habitant (count five). CT 185.
9 The state also alleged that on February 19, 2000, Mr. Howard committed the crimes of
10 murder (count 1), attempted murder (count 2) and battery on a co-habitant (count 3). CT
11 184.

12
13 Prior to trial, the defense moved to sever the two distinct sets of crimes. CT 132.
14 The trial court denied the motion. RT 79-81. As more fully discussed below, the trial
15 court's failure to sever the October 1999 counts from the February 2000 counts denied
16 Mr. Howard his federal rights to due process and a fair trial and to a trial by an unbiased
17 jury. The writ must be granted.

18
19 B. The October 1999 Assault And Battery Charges Were Not Properly Joined
20 With The February 2000 Charges.

21 Joinder of counts violates the federal constitution when it prejudices a defendant's
22 right to a fair trial. *See, e.g., United States v. Lane*, 474 U.S. 438, 446 n.8 (1985); *Park*
23 *v. California*, 202 F.3d 1073, 1084 (9th Cir. 2000); *People v. Musselwhite*, 17 Cal.4th
24 1216, 1243-1244 (1998). In making this determination, the most important factor is
25 whether joinder of counts allows otherwise inadmissible other-crimes evidence to be
26 introduced. *See, e.g., Bean v. Calderon*, 163 F.3d 1073, 1084 (9th Cir. 1998); *United*
27 *States v. Lewis*, 787 F.2d 1318, 1322 (9th Cir. 1986).

1 Where joinder does permit such evidence to be introduced, a reviewing court must
2 look to see (1) if the jurors were given instructions which specifically advised them “not
3 [to] consider evidence of one set of offenses as evidence establishing the other” and (2)
4 when such instructions were given. *Bean v. Calderon*, 163 F.3d at 1084; *United States v.*
5 *Lewis*, 787 F.2d at 1323. Moreover, even if otherwise inadmissible evidence was
6 introduced, there will be no due process violation where the evidence of each crime is
7 “simple and distinct” so that a properly instructed jury could compartmentalize the
8 evidence. *Bean v. Calderon*, 163 F.3d at 1085; *Drew v. United States*, 331 F.2d 85, 91
9 (D.C.Cir. 1964). An acquittal on one of the charged crimes is strong evidence that -- in
10 fact -- the other crimes evidence *was* “simple and distinct” such that the jury successfully
11 compartmentalized the evidence. *Bean v. Calderon*, 163 F.3d at 1085; *Featherstone v.*
12 *Estelle*, 948 F.2d 1497, 1503-1504 (9th Cir. 1991). Because the inquiry into the
13 constitutional violation itself requires a showing of prejudice, there is no separate
14 prejudice inquiry. *See Bean v. Calderon, supra*, 163 F.3d at 1084.

15 Application of these factors here shows the trial court’s ruling violated the
16 constitution. As discussed below, evidence of the October 1999 charges would not have
17 been cross-admissible with the February 2000 charges. Moreover, the trial court failed to
18 instruct the jury “not [to] consider evidence of one set of offenses as evidence
19 establishing the other.” Finally, evidence of each crime was not “simple and distinct”
20 such that a properly instructed jury could compartmentalize the evidence.

1. Evidence of the separate crimes was not cross-admissible.

a. The October 1999 assault with a deadly weapon evidence would not have been admissible at trial on the February 2000 murder, attempted murder and battery of a co-habitant charges.

With respect to the October 1999 assault with a deadly weapon charge, the starting point for the analysis is whether the evidence was cross-admissible under California Evidence Code section 1101, subdivision (b) ("section 1101(b).") Section 1101(b) allows evidence of other crimes to prove intent, identity or motive. California Evidence Code section 1101(b). Relevant to admissibility under section 1101(b) is whether the separate conduct shared common features, or established a motive for one another, or were part of a common plan or design. *People v. McDermott*, 28 Cal.4th 946, 999, (2002) *citing* Evid. Code, § 1101, subd. (b); *People v. Ewoldt*, 7 Cal.4th 380, 393-394, 402-403 (1994).

As discussed in the statement of facts, Mr. Howard readily acknowledged he shot Lamonti Hammond and Chico Stokes. RT 1018-1021. He testified, however, that after exchanging words with Hammond, he (Hammond) moved towards Mr. Howard in an aggressive way. RT 1016. When he did so, Mr. Howard saw that Hammond had a gun in his waistband. RT 1016. Believing that Hammond was just about to grab it and fearing for his life, Mr. Howard grabbed the gun first and shot Hammond. RT 1016-1017.

Mr. Howard also testified that Chico Stokes then moved toward him and grabbed his hand which was holding the gun. RT 1018-1019. Afraid that Stokes was trying to take the gun away from him, Mr. Howard shot Stokes. RT 1019. They continue wrestling for the gun and the gun went off a second time, shooting Stokes again. RT

1 1019.

2

3 Thus, the only real issue for the jury to decide was Mr. Howard's mental state or
4 intent when he shot Hammond and Stokes: Did Mr. Howard honestly and either
5 reasonably (perfect self-defense) or unreasonably (imperfect self-defense) believe in the
6 need to defend himself?

7

8 The problem here, however, is that evidence of the October 1999 assault with a
9 deadly weapon charge -- which involved the completely unrelated assault of Aldolphus
10 Smith -- shed no light on Mr. Howard's mental state at the time of the February 2000
11 offenses, i.e. whether he honestly and reasonably (or unreasonably) believed in the need
12 to defend himself. Moreover, the separate charges in no way shared common features, or
13 established a motive for one another, or were part of a common plan or design. *People v.*
14 *McDermott*, 28 Cal.4th at 999, *citing* Evid. Code, § 1101, subd. (b); *People v. Ewoldt*, 7
15 Cal.4th at 393-394, 402-403. Evidence of one would not have been cross-admissible in a
16 separate trial of the other because there was no connection whatsoever between these
17 crimes from which it could logically be inferred that if appellant committed one, he must
18 have committed the other. *See People v. Haston*, 69 Cal.2d 233, 246 (1968). For these
19 reasons, the October 1999 assault would not be admissible in a separate trial of the
20 February 2000 offenses.¹²

21

22

23

24

25

26 ¹² The converse is also true. The February 2000 offenses would not have been
27 admissible under section 1101(b) in a trial for the October 1999 assault. Mr. Howard
28 admitted assaulting Mr. Smith. RT 999-1000. Thus, intent, identity or motive was not at
issue.

b. The October 1999 battery of a co-habitant evidence would have had limited admissibility at trial on the February 2000 murder, attempted murder and battery of a co-habitant charges.

A similar conclusion is warranted with respect to the October 1999 battery charges. Under California Evidence Code section 1109 ("section 1109"), evidence of prior acts of domestic violence are admissible in a domestic violence case provided the evidence meets the requirements of Evidence Code section 352. Under state law, battery of a co-habitant is generally considered an act of domestic violence. *See People v. Barrios*, 163 Cal.App.4th 270, 272 (2008).

To be sure, Mr. Howard recognizes that the October 1999 battery of a co-habitant and the February 2000 battery of a co-habitant may have been cross-admissible under section 1109. Under this circumstance, however, while the jurors would have been permitted to consider the October 1999 charges in determining the February 2000 charges (*see CALCRIM 852*), they would then have been told “[d]o not consider this evidence for any other purpose” CALCRIM 852. This, of course, did not occur here.

Moreover, this evidence was not cross-admissible with the February 2000 murder and attempted murder charges. Because murder and attempted murder are not crimes of domestic violence, the October 1999 battery would not have been admissible under section 1109. And with respect to section 1101(b), as noted above, the only issue with respect the murder and attempted murder charges was Mr. Howard's mental state at the time of the shootings. Like the October 1999 assault, evidence of the October 1999 battery of Sandra Smith had nothing to do with the February 2000 charges and shed no light on Mr. Howard's mental state at the time of the February 2000 shootings. Nor did the charges share common features, or established a motive for one another, or were part of a common plan or design. *People v. McDermott*, 28 Cal.4th at 999; *People v. Ewoldt*,

1 7 Cal.4th at 393-394, 402-403. Because there was no connection between these crimes
 2 from which it could logically be inferred that if appellant committed one, he must have
 3 committed the other, the evidence would not have been cross-admissible in separate
 4 trials. *See People v. Haston*, 69 Cal.2d at 246.¹³

5

6 2. The trial court never provided a cautionary instruction to the jury
 7 telling them not to consider evidence of one set of the offenses as
 8 evidence establishing the other set of offenses.

9 As noted above, where joinder permits evidence which is otherwise not cross-
 10 admissible to be introduced, a reviewing court must look to see (1) if the jurors were
 11 given instructions which specifically advised them “not [to] consider evidence of one set
 12 of offenses as evidence establishing the other” and (2) when such instructions were
 13 given. *Bean v. Calderon*, 163 F.3d at 1084; *United States v. Lewis*, 787 F.2d at 1323.
 14 Here, the trial court *never* pre-instructed the jury of the need to consider each count

15 ¹³ To be sure, Mr. Howard recognizes that to the extent the 1999 domestic
 16 violence count was cross- admissible under section 1109 because of the February 2000
 17 domestic violence charge, the jury would necessarily have heard some of the evidence
 18 relating to the 1999 assault of Aldolphus Smith because it was part of the same incident.
 19 But while the domestic violence incident involving Sandra Smith may have been allowed
 20 to come in during separate trials, this would not justify any significant amount of
 21 evidence detailing the assault on Mr. Smith that was allowed in a joint trial. *See, e.g.*,
 22 *United States v. Bronco*, 597 F.2d 1300, 1303 (9th Cir. 1979)(defendant prejudiced by a
 23 trial of joint charges because “if at a separate trial on the substantive counts the court
 24 would have admitted some evidence of the [other crime], it would not have permitted the
 25 extensive testimony that was introduced at the joint trial on the [two charges].”).

26 And the converse is also true. While the February 2000 battery evidence
 27 may have been admissible under section 1109 at a trial on the October 1999 charges, the
 28 murder and attempted murder offenses would *not* have been admissible under section
 1101(b). Evidence of the 2000 murder and attempted murder would not have been cross-
 admissible in a separate trial of the 1999 offenses because there was no connection
 whatsoever between these crimes from which it could logically be inferred that if
 appellant committed one, he must have committed the other. *See People v. Haston*, 69
 Cal.2d at 246.

1 separately without regard to evidence presented on other counts. *See* RT 110-116.
2 Instead, the lone remotely-related instruction came at the very end of the guilt trial, when
3 the court simply instructed the jury that each count was distinct and “[y]ou must decide
4 each count separately.” CT 243.

5
6 This brief instruction did nothing to ameliorate the prejudice inherent in joinder.
7 Instructing jurors to ignore other crimes evidence when deciding a particular count “is to
8 ask human beings to act with a measure of dispassion and exactitude well beyond mortal
9 capacities.” *Bean v. Calderon*, 163 F.3d at 1084.

10
11 Moreover, “[a]part from the intrinsic shortcomings of such instructions” in
12 general *Bean v. Calderon*, 163 F.3d at 1084, the specific instruction here merely told the
13 jurors to decide each count separately. CT 243. It did not tell the jurors they should not
14 consider evidence of one offense as evidence establishing the others. And any impact
15 this instruction could possibly have had was diminished by the fact it was given “in the
16 waning moments of the trial.” *Bean*, 163 F.3d at 1084. Any remaining utility of this
17 simple instruction was eliminated by the prosecutor’s argument, which specifically
18 encouraged the jury to consider evidence on one count when considering another. (See,
19 e.g., RT 1320-1322; *Bean*, 163 F.3d at p. 1084 [jurors could not reasonably be expected
20 to compartmentalize evidence where the prosecution encouraged them to consider
21 charges in concert].)

22
23 As discussed in the statement of facts, Mr. Howard basically admitted the October
24 1999 offenses as well as the February 2000 battery of a co-habitant. RT 987, 999-1000.
25 Mr. Howard also readily acknowledged he shot Lamonti Hammond and Chico Stokes.
26 RT 1018-1021. He testified, however, that both shootings were in self-defense. Thus,
27 Mr. Howard only shot Hammond after he (Hammond) moved towards him in an
28 aggressive way and showed his gun. RT 1016-1017. And Mr. Howard only shot Stokes

1 after Stokes tried to grab the gun away from him (Mr. Howard). RT 1019.
2

3 Based on Mr. Howard's testimony, the only real issue for the jury to decide was
4 his mental state when he shot Hammond and Stokes: did Mr. Howard honestly and either
5 reasonably (perfect self-defense) or unreasonably (imperfect self-defense) believe in the
6 need to defend himself? Joining the charges made it difficult, if not impossible, for the
7 jurors to view these cases separately, especially in light of the lack of adequate
8 instructions and prosecutor's insistence they view the evidence in concert.
9

10 Finally, evidence of each crime was not "simple and distinct" such that even a
11 properly instructed jury could compartmentalize the evidence. Indeed, the very fact that
12 the jury convicted of all charges shows this. *See Bean v. Calderon*, 163 F.3d at 1085;
13 *Featherstone v. Estelle*, 948 F.2d at 1503-1504.
14

15 In sum, joinder of the charges prejudiced Mr. Howard's chances for acquittal, and
16 for convictions on lesser offenses. It permitted evidence to be introduced at the joint trial
17 which was not cross-admissible. And the court did not provide any instructions which
18 minimized the risk that jurors would use this evidence improperly. The trial court's
19 refusal to sever counts violated the Fifth, Sixth and Fourteenth Amendment rights to due
20 process, a fair trial and to be tried by an unbiased jury. The writ must be granted.
21

22 C. Section 2254(d) Does Not Bar Relief Because The State Court Refused To
23 Consider Facts Which Were Plainly Relevant To The Constitutional Issue.
24

25 As noted above in Argument I-C, because this petition has been filed after April
26 24, 1996, the provisions of AEDPA apply. *Lindh v. Murphy*, 521 U.S. at 327.
27 As also noted above, in applying 28 U.S.C. § 2254(d), the United States Supreme Court
28 has made clear that relief is required whenever a state decision is "objectively

1 unreasonable.” *Lockyer v. Andrade*, 538 U.S. at 75.

2

3 A state court’s decision is unreasonable where the state court decision fails to
4 consider facts it should consider in deciding a constitutional claim, that decision is
5 “objectively” unreasonable and section 2254(d) will not bar relief. *Williams v. Taylor*,
6 529 U.S. at 397-398; *Taylor v. Maddox*, 366 F.3d at 1001; *Bradley v. Duncan*, 315 F.3d at
7 1101. That is just what happened here; in denying relief, the state appellate court failed to
8 consider facts which are critical to resolving this claim.

9

10 In this regard, the state appellate court found that any error in the trial court’s
11 joinder of charges was harmless. *People v. Howard*, 2003 WL 361247 at * 3-4. The state
12 appellate court found that even if the “evidence of [Mr. Howard’s] crimes against Smith
13 and her brother [Aldolphus] was not cross-admissible with evidence of the shootings of
14 Hammond and Stokes[,]. . . we find neither actual nor potential prejudice such as to
15 render the trial grossly unfair and thus deny due process.” *Id.* at * 5. In concluding that
16 there was no “actual nor potential prejudice,” the court noted that the 2000 shootings
17 were “not overly inflammatory relative to the alleged use of a baseball bat in the October
18 1999 [assault] charge,” and Mr. Howard was not “prejudiced simply by the joint trial of
19 multiple violent offenses” *Id.* at * 2.

20

21 As to this holding, however, the state court ignored critical facts. Thus, the court
22 did not discuss that: (1) with respect to the 2000 shootings the only question for the jury
23 to resolve was Mr. Howard’s mental state at the time of the shootings, RT 987, 999-1000,
24 1016-1019, (2) the trial court failed to instruct the jury that it could not consider one set
25 of charged offenses in establishing the other set of charged offenses, RT110-116, 1437-
26 1497, (3) or that the prosecutor encouraged the jury to view the evidence together, RT
27 1320-1322. Indeed, not a single one of these facts was even mentioned. Yet again, “[a]
28 rational fact finder might discount [these facts] or, conceivably, find [them] incredible,

Petition for Writ of Habeas Corpus
and Memorandum In Support Thereof

1 but no rational fact-finder would simply ignore [them].” *Taylor v. Maddox*, 366 F.3d at
2 1006. Because the state court failed to consider important facts in its prejudice calculus,
3 section 2254(d) does not bar relief.

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1 CONCLUSION
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3 For all these reasons, the writ should be granted. But because there are still claims
4 which have not yet been exhausted in state court, and as discussed more fully in the
5 Application for Abeyance filed contemporaneously with the Petition for Writ of Habeas
6 Corpus, the court should grant abeyance in the case.¹⁴

7
8 DATED: 1/15/09

Respectfully submitted,

9
10 CLIFF GARDNER
LAZULI WHITT

11
12 /s/ Cliff Gardner
By Cliff Gardner
13 Attorney for Petitioner

14 Petitioner has only briefed in this memorandum the claims of the Petition
which have already been exhausted in state court. The claims of the Petition which have
not yet been exhausted will be briefed in an Amended Petition should the state courts
deny relief on those claims.

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 19 Embarcadero Cove, Oakland, California, 94606. I am not a party to this action.

On January 15, 2009 I served the within

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

upon the parties named below by depositing a true copy in a United States mailbox in San Francisco, California, in a sealed envelope, postage prepaid, and addressed as follows:

Attorney General
1300 I Street
1101
P. O. Box 944255
Sacramento, CA 94244

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

Executed on January 15, 2009, in San Francisco, California.

/s/ Lazuli Whitt
Declarant

1 CLIFF GARDNER
2 State Bar No. 93782
3 LAZULI WHITT
4 State Bar No. 221353
19 Embarcadero Cove
Oakland, CA 94606
Tel: (510) 534-9404
Fax: (510) 534-9414

Attorneys for Petitioner

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

12 JELANI KITWANA HOWARD, } No.
13 Petitioner,
14 v.
15 MATTHEW CATE, Head of the }
16 California Department of Corrections,
17 Respondent. }

EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

1 TABLE OF CONTENTS

2 Exhibit Description	3 Exhibit
4 <i>People v. Howard</i> , S114565, Order of April 30, 2003	A
5 <i>People v. Howard</i> , S131464, Order of March 23, 2005	B
6 <i>People v. Howard</i> , S147895, Order of December 20, 2006	C
7 <i>In re Howard</i> , 07F03688, Petition for Writ of Habeas Corpus	D
8 <i>In re Howard</i> , 07F03688, Order of May 9, 2007	E
9 <i>In re Howard</i> , C055852, California Court of Appeals Docket Sheet	F
10 <i>In re Howard</i> , C055852, Order of July 5, 2007	G
11 <i>In re Howard</i> , S155133, California Supreme Court Docket Sheet	H
12 <i>In re Howard</i> , S155133, Order of February 13, 2008	I
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Exhibit A

Court of Appeal, Third Appellate District - No. C041099
S114565

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JELANI KITWANNA HOWARD, Defendant and Appellant.

Petition for review DENIED.

**SUPREME COURT
FILED**

APR 30 2003

Frederick K. Ohlrich Clerk

DEPUTY

GEORGE

Chief Justice

Exhibit B

Court of Appeal, Third Appellate District - No. C045844
S131464

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JELANI KITWANNA HOWARD, Defendant and Appellant.

Petition for review DENIED.

**SUPREME COURT
FILED**

MAR 23 2005

Frederick K. Ghirich Clerk

DEPUTY

GEORGE

Chief Justice

Exhibit C

Court of Appeal, Third Appellate District - No. C050579
S147895

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JELANI KITWANNA HOWARD, Defendant and Appellant.

Petition for review denied without prejudice to any relief to which defendant might be entitled after the United States Supreme Court determines in *Cunningham v. California*, No. 05-6551, the effect of *Blakely v. Washington* (2004) 542 U.S. 296 and *United States v. Booker* (2005) 543 U.S. 220, on California law.

SUPREME COURT
FILED

DEC 20 2006

Frederick K. Ohlrich Clerk

DEPUTY

GEORGE,

Chief Justice

Exhibit D

MC-275

Name Jelani K. HowardAddress P.O. Box 3030 B5-144 WSusanville, CA
96127-3030CDC or ID Number T-52268

Superior Court of the State of California
Sacramento County
 (Court)

JELANI KITWANKA HOWARD
 Petitioner
 vs.
WARDEN, HIGH DESERT STATE PRISON (Case # 99F10330)
 Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. 07 Fo 36 88*(To be supplied by the Clerk of the Court)***Evidentiary Hearing Requested*

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.

- Read the entire form before answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

MSA

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court (as amended effective January 1, 2005). Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Page one of six

Form Approved by the
 Judicial Council of California
 MC-275 (Rev. July 1, 2005)

PETITION FOR WRIT OF HABEAS CORPUS

Penal Code, § 1475 et seq.;
 Cal. Rules of Court, rule 60(a)

American LegalNet, Inc.
www.USCourtForms.com

From: April 10, 2007 Case 2:09-cv-00149-JFM Document 1-2 Filed 01/15/2009 Page 11 of 29

This petition concerns:

 A conviction Parole A sentence Credits Jail or prison conditions Prison discipline Other (specify): _____1. Your name: Jelani Kitwanna Howard2. Where are you incarcerated? California State Prison - High Desert State Prison3. Why are you in custody? Criminal Conviction Civil Commitment

Answer subdivisions a. through l. to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

First Degree Murder, Attempted Murder, two counts of spousal abuse, felony assault, & two gun enhancements.b. Penal or other code sections: 187(a), 12022, 53(d), & two counts of 273.5, 245(a)(1), 664/187c. Name and location of sentencing or committing court: Sacramento County Superior Court ¹²⁰²²⁵
of California, Dept. 10d. Case number: #99F10330e. Date convicted or committed: 2/4/2002f. Date sentenced: 8/12/05g. Length of sentence: 86 years to lifeh. When do you expect to be released? 2086i. Were you represented by counsel in the trial court? Yes. No. If yes, state the attorney's name and address:Michael G. Bowman, Attorney SB#139385; 1001 Sixth Street
No. 400 Sacramento, CA 95814

4. What was the LAST plea you entered? (check one)

 Not guilty Guilty Nolo Contendere Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

 Jury Judge without a jury Submitted on transcript Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

The trial court violated my fifth, sixth and fourteenth amendment Rights by imposing an upper term on the attempted murder charge and ~~then~~ imposing consecutively running sentences on Counts one through five.

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

On 8/12/05 the judge imposed an upper term on count 2 (attempted murder, 9 years) and ran counts 3 and 4 consecutively to count 2 with count 1 also running consecutively to the determinate terms in counts 2 through 5. In case C045844 (Howard 2) which was pending at the time the U.S. Supreme Court decided *Blakely v. Washington* (2004) 542 U.S. 296, explaining that the Sixth Amendment right to a jury trial applies to facts which are required to impose a higher term than normal term, the petitioner argued California's upper term and consecutive sentencing met the criteria for the Constitutional requirement. The objection was also expressly made in trial court on the remand for Howard (R). The judge ^{overruled} ~~denied~~ that objection and based her sentencing reasons on petitioner's record of prior convictions and sustained petitions as being "numerous" (rule 4.421(b)(2) and that petitioner had served a prior prison term (rule 4.421(b)(3). (RT 15) For consecutive terms she invoked the fact that the crime involved separate acts of violence, on separate victims or occurred ~~occurred~~ on different dates. (Section 6. a. continued on page 1. a.)

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

(2007)

Cunningham v. California, No. 05-6554; *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Ring v. Arizona*, 536 U.S. 584, 12 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 732, 160 L. Ed. 2d 621 (2005).

- 1) Petitioner submitted a timely appeal to the Third Appellate
- 2) District Court of Appeal in the State of California (Appeal No.
- 3) C050579) and had the judgement modified to add one day
- 4) of custody credit and affirmed as modified. (See Exhibit A)
- 5) The petitioner then filed a timely Petition for Review
- 6) with the Supreme Court of California (No. S147895) and
- 7) was denied without prejudice to any relief to which
- 8) defendant might be entitled after the United States
- 9) Supreme Court determines in Cunningham v. California; No.
- 10) 05-6551, the effect of Blakely v. Washington (2004) 542
- 11) U.S. 296 . . . ". (See Exhibit B).
- 12)
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Case 2:09-cv-00149-JFM Document 1-2 Filed 01/15/2009 Page 14 of 29

8. Did you appeal from the conviction, sentence, or commitment? Yes. No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

Third Appellate District, In The Court of Appeal of The State of California

b. Result Modified to add (1) day & affirmed c. Date of decision: Oct. 11, 2006

d. Case number or citation of opinion, if known: C050579

e. Issues raised: (1) Custody Credit Modification

(2) Fifth, Sixth and Fourteenth Amendment Rights Violation

(3) Previously raised and resolved issues

f. Were you represented by counsel on appeal? Yes. No. If yes, state the attorney's name and address, if known:

Mark L. Christiansen State Bar No. 41291
44489 Town Center Way, Palm Desert, CA 92260

9. Did you seek review in the California Supreme Court? Yes No. If yes, give the following information:

a. Result Denied without prejudice b. Date of decision: Dec. 20, 2006

c. Case number or citation of opinion, if known: S147895

d. Issues raised: (1) Fifth, Sixth, Eighth, and Fourteenth Amendment rights violation

(2) Reconsider denial of review and grant review on issues, particularly federal issues, raised in previous petitions for review in this case.

(3) _____

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

Issues were presented on direct appeal.

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

N/A

Did you seek the highest level of administrative review available? Yes. No.
Attach documents that show you have exhausted your administrative remedies.

Case 2:09-cv-00149-JFM Document 1-2 Filed 01/15/2009 Page 15 of 29

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? Yes. If yes, continue with number 13. No, if no, skip to number 15.

13. a. (1) Name of court: Superior Court In the State of California

(2) Nature of proceeding (for example, "habeas corpus petition"): Habeas Corpus Petition

(3) Issues raised: (a) Abuse of Discretion in its "Penalty Phase."

(b) _____

(4) Result (Attach order or explain why unavailable): Dismissed because of lack of Evidence,
Decision was lost.

(5) Date of decision: Unknown

b. (1) Name of court: _____

(2) Nature of proceeding: _____

(3) Issues raised: (a) _____

(b) _____

(4) Result (Attach order or explain why unavailable): _____

(5) Date of decision: _____

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

No hearing held.

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

Controlling Case concerning claim had not yet been decided.

16. Are you presently represented by counsel? Yes. No. If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? Yes. No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

N/A

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:



(SIGNATURE OF PETITIONER)

Exhibit E

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Received decision 5-14-07

DATE/TIME : May 9, 2007
JUDGE : ALLEN SUMNER
REPORTER : NONEDEPT. NO : 36
CLERK : A. RAMOS
BAILIFF : J. TRAVIS

PRESENT:

JELANI KITWANNA HOWARD,
Petitioner,

VS. Case No.: 07F03688

WARDEN, HIGH DESERT STATE PRISON,
Respondent.

Nature of Proceedings: PETITION FOR WRIT OF HABEAS CORPUS

The petition for writ of habeas corpus, having been filed and considered, is DENIED.

Petitioner, an inmate with the California Department of Corrections and Rehabilitation, High Desert State Prison, Susanville, seeks relief from the upper term and consecutive sentencing imposed in Sacramento County Superior Court case 99F10330, based upon the United States Supreme Court's decision earlier this year in *Cunningham v. California* (2007) 549 U.S. __; 166 L.Ed.2d 856; 127 S.Ct. 856.¹

Although Petitioner's case was pending when *Cunningham* was decided and thus subject to the Court's holding, the sentences imposed do not violate *Blakely-Cunningham*.

Background

On February 4, 2002, a jury convicted Petitioner of corporal injury on a former cohabitant and assault with a deadly weapon in one incident in 1999, and first degree murder with use of a firearm, attempted murder with use of a firearm, and corporal injury on a cohabitant in a second incident in February 2000. For reasons unrelated to this petition, the case was reviewed and remanded twice by the Court of Appeal for resentencing.²

¹ In *Cunningham*, the Court held *Blakely v. Washington* (2004) 542 U.S. 296 applied to California's former Penal Code section 1170(b), requiring the jury to find any fact, other than a prior conviction, used as an aggravating factor to impose the upper term.

² A petition for review with the California Supreme Court was denied on December 20, 2006, "without prejudice to any relief to which [petitioner] might be entitled after the United States Supreme Court determines in [Cunningham] the effect of [Blakely] and *United States v. Booker* (2005) 543 U.S. 200, on California law."

BOOK : DEPARTMENT 36
PAGE :
DATE : May 9, 2007
CASE NO. : 07F03688
CASE TITLE : HOWARD VS. HIGH DESERT STATE
PRISON

Superior Court of California,
County of SacramentoBY: A. RAMOS
Deputy Clerk

CASE TITLE: HOWARD VS. HIGH DESERT STATE PRISON
PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS

On August 12, 2005, the court imposed the sentence here at issue: on Count Two, attempted murder (Pen. Code §§ 664 & 187), the court imposed the upper term of nine years, to run consecutive to the life terms imposed on other counts. The court stated it was imposing the upper term based upon two aggravating factors: (1) Petitioner's numerous prior convictions as an adult and sustained petitions in juvenile delinquency proceedings, and (2) he had served a prior prison term. (Reporter's Transcript, Aug. 12, 2005, 16:4-10.)

The remittitur issued December 29, 2006, rendering judgment final. (C050579.).

Discussion

1. *Blakely-Cunningham* Applies to Petitioner's Case

As discussed above, Petitioner's case was still pending on appeal when the *Blakely* decision was issued. Therefore, because *Cunningham* applied *Blakely* to California's prior sentencing scheme, *Blakely* applies to Petitioner's case. (See *United States v. Booker* (2005) 543 U.S. 220, 268, and *In re Consiglio* (2005) 128 Cal.App.4th 511, 514.)

2. Imposition of the Upper Term did not Violate *Blakely-Cunningham*

Blakely requires the jury to determine any fact used to increase the penalty beyond the maximum which the court may impose based solely upon the jury's verdict – other than the fact of a prior conviction. (*Blakely, supra*, 542 U.S. at 301-303). Known as the "Almendarez-Torres" exception to *Blakely* (*Almendarez-Torres v. United States* (1998) 523 US 224), courts may still increase a sentence based upon the defendant's prior conviction. (*Cunningham, supra*, 127 S. Ct. at 860) This extends beyond the mere fact of a prior conviction, to include facts related to the more broadly framed issue of defendant's "recidivism," including prior prison terms and the fact defendant was on probation or parole at the time. (*People v. Scott* (2007) Cal.App.4th [2007 Cal.App. LEXIS 358]; See *People v. Megee* (2006) 38 Cal.4th 682, 700-702.)

Here the court stated it was imposing the upper term based upon Petitioner's numerous prior convictions as an adult and sustained juvenile delinquency petitions, and his prior prison term. Specifically, the probation report stated Petitioner had prior convictions for assault with a firearm (Pen. Code § 245(a)(2)), possession of cocaine base for sale

BOOK : DEPARTMENT 36 Superior Court of California,
PAGE : County of Sacramento
DATE : May 9, 2007
CASE NO. : 07F03688
CASE TITLE : HOWARD VS. HIGH DESERT STATE PRISON BY: A. RAMOS
BY: Deputy Clerk

CASE TITLE: HOWARD VS. HIGH DESERT STATE PRISON
PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS

(Health & Saf. Code § 11351.5) and hit-and-run. (Veh. Code § 20001.) The court correctly noted that, even under *Blakely*, it could impose the upper term based upon Petitioner's adjudicated record. (RT 14: 22-28.)

Accordingly, imposition of the upper term based upon Petitioner's prior convictions and prior prison term did not violate *Blakely-Cunningham*.³

3. *Blakely-Cunningham* does not Apply to Imposition of Consecutive Sentences.

Petitioner has no right under *Blakely-Cunningham* to a jury determination of facts used to impose a consecutive sentence. (*People v. Hernandez* (2007) 147 Cal.App.4th 1266, 1271.)

Any other challenge to imposition of consecutive sentences is barred as having been previously raised and rejected on appeal. Habeas corpus does not serve as a second appeal. (*In re Waltreus* (1965) 62 Cal.2d 218, 225.) Therefore, if Petitioner raises an issue previously rejected on direct appeal, the claim is summarily denied (*Id.* at 218) absent a showing there was a violation of a "fundamental constitutional right." (*In re Harris* (1993) 5 Cal.4th 813, 830.) No such violation is alleged here.

For the foregoing reasons, the petition is DENIED.

Dated: May 9, 2007

Honorable ALLEN SUMNER,
Judge of the Superior Court of California,
County of Sacramento

³ Assuming, arguendo, there was *Blakely-Cunningham* error, any such error is reviewed under the harmless-beyond-a-reasonable-doubt standard. (*Washington v. Recuenco* (2006) 548 U.S. [126 S. Ct. 2546].) Given the court's thorough review of all factors in aggravation and mitigation (RT 14-15), the record indicates any error was harmless beyond a reasonable doubt. (See, e.g., *People v. Waymire* (2007) CA4th [2007 Cal. App Lexis 617].)

BOOK : DEPARTMENT 36 Superior Court of California,
PAGE : County of Sacramento
DATE : May 9, 2007
CASE NO. : 07F03688
CASE TITLE : HOWARD VS. HIGH DESERT STATE
PRISON BY: A. RAMOS
Deputy Clerk

CASE TITLE: HOWARD VS. HIGH DESERT STATE PRISON

PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled notice in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

Jelani K. Howard (ID# T-52268)
High Desert State Prison
Ppo. Box 3030, B5-144UP
Susanville, Ca. 96127-3030

Deputy District Attorney
906 G Street, Ste. 620
Sacramento, Ca. 95814

Dated: May 9, 2007

Superior Court of California,
County of SacramentoBy: A. RAMOS,
Deputy Clerk

BOOK : DEPARTMENT 36
PAGE :
DATE : May 9, 2007
CASE NO. : 07F03688
CASE TITLE : HOWARD VS. HIGH DESERT STATE
PRISON

Superior Court of California,
County of Sacramento

BY: A. RAMOS
Deputy Clerk

Exhibit F

CALIFORNIA APPELLATE COURTS

Case Information

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Court data last updated: 10/16/2008 02:05 PM

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home

Docket (Register of Actions)

In re Jelani Kitwanna Howard on Habeas Corpus**Case Number C055852**

Date	Description	Notes
06/04/2007	Petition for a writ of habeas corpus filed.	(ms)
07/05/2007	Order denying petition filed.	RAYE, Acting P.J. (MBu)
07/05/2007	Case complete.	

[Click here to request automatic e-mail notifications about this case.](#)

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Exhibit G

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

F I L E D

JUL - 5 2007

COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT
BY _____ Deputy

In re JELANI KITWANNA HOWARD on Habeas Corpus.

C055852

BY THE COURT:

The petition for writ of habeas corpus is denied.

Dated: July 05, 2007

RAYE, Acting P.J.

cc: See Mailing List

Exhibit H

CALIFORNIA APPELLATE COURTS

Case Information

Supreme
Court

Supreme Court

Change court

Welcome

Court data last updated: 10/16/2008 02:53 PM

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Docket (Register of Actions)

Calendar

HOWARD (JELANI K.) ON H.C.

Help

Case Number S155133

Opinions

Date	Description	Notes
08/06/2007	Petition for writ of habeas corpus filed	Jelani K. Howard, Petitioner in Pro Per
02/13/2008	Petition for writ of habeas corpus denied	

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Exhibit I

S155133

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JELANI K. HOWARD on Habeas Corpus

The petition for writ of habeas corpus is denied.

**SUPREME COURT
FILED**

FEB 18 2008

Frederick K. Ohlrich Clerk

Deputy

GEORGE
Chief Justice

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 19 Embarcadero Cove, Oakland, California, 94606. I am not a party to this action.

On 1/15/2009 I served the within

EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

9 upon the parties named below by depositing a true copy in a
10 United States mailbox in San Francisco, California, in a sealed
envelope, postage prepaid, and addressed as follows:

Attorney General
1300 I Street
1101
P. O. Box 944255
Sacramento, CA 94244

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

Executed on 1/15 /09, in Oakland, California.

/s/ Karen Gardner
Declarant