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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CARL LIVINGSTON ROUSE,
Petitioner,
v.
A.W. PEREZ, WARDEN,
Respondent.

Case No.: 14-cv-01953-H (DHB)

ORDER:

- (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS; AND**
- (2) DENYING CERTIFICATE OF APPEALABILITY**

Petitioner Carl Livingston Rouse, a state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus on August 18, 2014, pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) Petitioner seeks relief from his September 2009 conviction in San Diego County Superior Court, consolidated case numbers SCD192975 and SCD206291. In that case, a jury: (1) found Petitioner guilty of four counts of conspiracy to commit robbery, one count of robbery, one count of attempted robbery, and possession of a firearm by a felon; and (2) found true the allegations that Petitioner committed the offenses for the benefit of a criminal street gang, and that a principal was personally armed with a handgun. (Id.; Doc.

1 No. 20-2 at 181-86, Lod. 1 at 384-89; Doc. No. 20-3 at 83-90, Lod. 1 at 472-79.)¹ Petitioner
2 was sentenced on September 1, 2009 to a term of thirty-five years. (Doc. No. 20-2 at 181-
3 81, Lod. 1 at 384-85.)

4 Respondent filed an answer to the petition on July 15, 2015, arguing that (1) the
5 petition is barred by the applicable statute of limitations, and (2) all of Petitioner's claims
6 fail on the merits. (Doc. No. 19.) Petitioner filed a Traverse on October 19, 2015. (DOC.
7 No. 25.) On June 29, 2017, the Court submitted the petition on the briefing. (Doc. No. 33.)
8 As discussed below, the petition fails on the merits and it is also untimely. Accordingly,
9 the Court denies the petition for writ of habeas corpus and denies a certificate of
10 appealability.

11 **Background**

12 **I. Factual History**

13 The following facts are taken from the unpublished opinion of the California Court
14 of Appeal in People v. Rouse, Case No. D055804 (Cal. Ct. App. Jan. 5, 2012). (Doc. No.
15 27-1, Lod. 16.) The Court presumes these factual determinations are correct pursuant to 28
16 U.S.C. § 2254(e)(1). See Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (“Factual
17 determinations by state courts are presumed correct absent clear and convincing evidence
18 to the contrary.”). As the California Court of Appeal stated:

19 The charges in this case arose out of a wiretap investigation of a San
20 Diego street gang, the Lincoln Park Bloods, by a multi-agency gang task
21 force. FBI Special Agent Gregory Houska spent all of his time addressing the
22 Lincoln Park gang and the problems this gang created in the community. The
23 wiretaps targeted a number of members, including [Petitioner], ZZ Jabbar and
24 codefendant Travis Montgomery. The wiretap investigation uncovered crimes
25 committed by these men with fellow gang members, Richard Wright and
26 codefendant Matthew Henderson. Montgomery and Henderson were low-
27 ranking members of the gang, and [Petitioner] and Wright held an equal
28 higher-ranking status.

¹ Lodgment Nos. 1-15 are located at Doc. No. 20; Lodgment No. 16 is at Doc. No. 27; and Lodgment
Nos. 17-19 are at Doc. No. 31.

1 Specifically, investigators learned of a plan by [Petitioner] and Wright
2 to rob purported drug dealers, Laday and Clayborne. Ultimately, both plans
3 fell through. They also learned about a conspiracy by [Petitioner] and Wright
4 to rob Eastridge Liquor using Montgomery and Henderson as the robbers.

5 On February 16, 2005, the evening of the planned Eastridge Liquor
6 robbery, task force members followed cars driven by [Petitioner] and Wright,
7 with Montgomery and Henderson as passengers. (All further dates are in
8 2005.) After several telephone calls and a meeting, the men abandoned the
9 plan because they believed they were being watched. Task force members
10 stopped the car containing [Petitioner] and Wright, and arrested the men. The
11 task force also followed a Cadillac carrying Montgomery and Henderson.
12 They arrested Henderson, but Montgomery escaped. Police recovered a black
13 and red sports bag from the front seat of the Cadillac that contained robbery
14 materials, including: a ski mask, gloves, duct tape, and two guns.

15 Finally, through further investigation, the task force learned about an
16 earlier robbery at Skyline Farms on February 12, involving Wright,
17 [Petitioner], Montgomery and Henderson. Wright testified at trial that he and
18 [Petitioner] planned to rob Skyline Farms themselves, but that they ultimately
19 recruited Montgomery and Henderson to do the job. On February 12, Wright
20 picked up Henderson and then met Montgomery at a specified location about
21 50 yards from the store. Wright gave the men a black and red sports bag
22 containing a ski mask, gloves, duct tape and two guns. Wright then parked his
23 car where he could watch the storefront. Wright observed the men go inside
24 and jog out a couple of minutes later. Wright followed the men as they drove
25 away. Eventually, Wright called Montgomery or Henderson telling them
26 where to meet. At the meeting, Henderson and Montgomery returned the
27 sports bag that now contained about \$1,200 in cash, and described how one
28 of the men had hit the store clerk with a pistol.

(Doc. No. 27-1 at 2-4, Lod. 16.)

23 **II. Procedural History**

24 **A. Trial Court Proceedings**

25 On September 11, 2007, Petitioner was charged in a criminal Complaint in Superior
26 Court for the County of San Diego, along with co-defendants Matthew Henderson and
27 Travis Montgomery, in Case No. SCD206291, with conspiracy to commit robbery and
28

1 robbery, in violation of California Penal Code §§ 182(a)(1) and 211.² (Doc. No. 20-1 at 9-
2 14, Lod. 1 at 1-6.) The charges were based on allegations that, between January 20, 2005
3 and February 12, 2005, Petitioner, Henderson, and Montgomery conspired to rob and did
4 rob the Skyline Farms Market. (Id.) The Complaint also charged that the defendants
5 committed the offenses for the benefit of a criminal street gang, within the meaning of
6 Penal Code § 186.22(b)(1), and that a principal personally used a handgun during the
7 robbery, within the meaning of Penal Code § 12022.53(b) and (e)(1). (Id.)

8 On September 11, 2007, the People of the State of California also filed a motion to
9 consolidate Case No. SCD206291 with Case No. SCD192975. (Doc. No. 20-1 at 34-46,
10 Lod. 1 at 25-37.) Despite Petitioner’s opposition (see id. at 47-50, Lod. 1 at 38-41), the
11 trial court granted the motion to consolidate on November 9, 2007. (Doc. No. 20-3 at 10,
12 Lod. 1 at 399.)

13 On November 19, 2007, Petitioner was charged in a Consolidated Amended
14 Information with seven counts. (Doc. No. 20-1 at 15-25, Lod. 1 at 7-17.) In counts 1 and
15 2, Petitioner was charged with conspiracy to rob Ramona “Moo Moo” Laday and Tyrece
16 Claibourne, in violation of Penal Code § 182(a)(1). (Id.) In counts 3 and 4, Petitioner,
17 Henderson, and Montgomery were charged with conspiracy to commit robbery and
18 robbery of the Skyline Farms Market, in violation of Penal Code §§ 182(a)(1), 211. (Id.)
19 In count 5, Petitioner and Montgomery were charged with conspiracy to rob the Eastridge
20 Liquor Store, in violation of Penal Code § 182(a)(1). (Id.) In count 6, Petitioner and
21 Montgomery were charged with attempted robbery of John Doe, in violation of Penal Code
22 §§ 211 and 664. (Id.) Finally, in count 7, Petitioner and Montgomery were charged with
23 possession of a firearm by a felon, in violation of Penal Code § 12021(a)(1). (Id.)

24 The Consolidated Amended Information further alleged the following: (a) each of
25 the crimes alleged in counts 1 through 6 were committed for the benefit of a criminal street
26 gang, in violation of Penal Code § 186.22(b)(1); (b) Petitioner committed the crimes
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28 ² All further references to the “Penal Code” refer to the California Penal Code.

1 alleged in counts 1 and 2 in an inhabited dwelling house, making it robbery in the first
2 degree within the meaning of Penal Code § 213(a)(1)(A); (c) as to counts 3 and 4, a
3 principal personally used a firearm, within the meaning of Penal Code § 12022.53(b) and
4 (e)(1); (d) as to counts 5 and 6, a principal was armed within the meaning of Penal Code
5 § 12022(a)(1); and (e) Petitioner had previously been convicted of and served a prison term
6 for a violent and serious felony within the meaning of Penal Code §§ 667(a)(1), 667(b)-(i),
7 667.5(a), 668, 1170.12, and 1192.7(c). (Id.)

8 **B. Direct Appeal**

9 Petitioner appealed his conviction to the California Court of Appeal, which affirmed
10 the judgment on January 5, 2012. (Doc. No. 27-1, Lod. 16.) On March 28, 2012, the
11 California Supreme Court denied Petitioner’s petition for review without comment. (Doc.
12 No. 20-25, Lod. 7.)

13 **C. Collateral Review**

14 On June 10, 2013, Petitioner constructively filed a petition for writ of habeas corpus
15 in the San Diego Superior Court (“First Habeas Petition”).³ (Doc. No. 20-26, Lod. 8.) On
16 August 12, 2013, the San Diego Superior Court denied the petition in a reasoned order.
17 (Doc. No. 20-27, Lod. 9.)

18 On September 6, 2013, Petitioner constructively filed a petition for writ of habeas
19 corpus in the California Court of Appeal (“Second Habeas Petition”). (Doc. No. 31-3, Lod.
20 19.) On October 7, 2013, the Court of Appeal denied the petition in a reasoned decision.
21 (Doc. No. 20-29, Lod. 11.)

22 On January 21, 2014, Petitioner constructively filed another petition for writ of
23 habeas corpus, again in the California Court of Appeal (“Third Habeas Petition”). (Doc.
24 No. 20-30, Lod. 12.) Petitioner stated ineffective assistance of trial counsel as the only
25 ground for relief. (Id.) Petitioner included a signed Declaration of Former Counsel from
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27
28 ³ Although the petition was filed on the docket on June 17, 2013, Petitioner is entitled to the benefit of the
prison “mailbox rule” with respect to his filings. See Houston v. Lack, 487 U.S. 266, 270-72 (1988).

1 Petitioner’s appellate counsel Nancy J. King dated November 7, 2013, and he described it
2 as newly discovered evidence. (Id. at 6, 87.) On March 27, 2014, the Court of Appeal
3 denied the petition, explaining that Petitioner could not restate his ineffective assistance of
4 counsel claim in the same court absent a change in the applicable law or facts, citing In re
5 Martinez, 46 Cal. 4th 945, 956 (2009). (Doc. No. 20-32 at 21, Lod. 14.) The court also
6 explained that new issues could not be raised in a piecemeal fashion, citing In re Clark, 5
7 Cal. 4th 750, 768 (1993). (Id.)

8 On April 21, 2014, Petitioner constructively filed a petition for writ of habeas corpus
9 in the California Supreme Court (“Fourth Habeas Petition”). (Doc. No. 20-32, Lod. 14.)
10 On July 9, 2014, the California Supreme Court denied the petition without comment. (Doc.
11 No. 20-33, Lod. 15.)

12 On August 18, 2014, Petitioner filed the instant federal petition pursuant to 28 U.S.C.
13 § 2254. (Doc. No. 1.) The petition, which is a copy of the Fourth Habeas Petition with
14 additional exhibits, raises the following grounds for relief: (1) ineffective assistance of trial
15 counsel; (2) prosecutorial misconduct; (3) insufficient evidence to support his convictions
16 on counts 3 and 4, regarding the robbery of Skyline Market; (4) insufficient corroboration
17 of accomplice testimony to support his convictions on counts 5 and 6, regarding the robbery
18 of Eastridge Liquor; (5) ineffective assistance of appellate counsel; (6) insufficient
19 evidence to support the gang enhancements; (7) the amended information did not conform
20 to the evidence offered at the preliminary hearing in violation of Petitioner’s due process
21 rights; and (8) abuses of discretion by the trial court. (Doc. No. 1.) Respondent filed an
22 Answer on July 15, 2015. (Doc. No. 19.) Petitioner constructively filed a Traverse on
23 October 15, 2015. (Doc. No. 25.)

24 Discussion

25 **I. Legal Standards**

26 A federal court may review a petition for writ of habeas corpus by a person in
27 custody pursuant to a state court judgment “only on the ground that he is in custody in
28 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a);

1 accord Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (“[F]ederal habeas corpus relief does
2 not lie for errors of state law.” (quoting Estelle v. McGuire, 502 U.S. 62, 67 (1991))
3 (internal quotation marks omitted)). “Habeas corpus is an ‘extraordinary remedy’ available
4 only to those ‘persons whom society has grievously wronged.’” Juan H. v. Allen, 408 F.3d
5 1262, 1270 (9th Cir. 2005) (quoting Brecht v. Abrahamson, 507 U.S. 619, 633-34 (1993)).

6 Because Petitioner filed the present petition after April 24, 1996, the Anti-Terrorism
7 and Effective Death Penalty Act of 1996 (“AEDPA”) governs the petition. See Lindh v.
8 Murphy, 521 U.S. 320, 322–23 (1997); Chein v. Shumsky, 373 F.3d 978, 983 (9th Cir.
9 2004) (en banc). Under AEDPA, a petition for writ of habeas corpus on behalf of a person
10 in custody pursuant to a state court judgment “shall not be granted with respect to any claim
11 that was adjudicated on the merits in State court proceedings unless the adjudication of the
12 claim:

13 (1) resulted in a decision that was contrary to, or involved an unreasonable
14 application of, clearly established Federal law, as determined by the Supreme
15 Court of the United States; or

16 (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.

17 28 U.S.C. § 2254(d); Cullen v. Pinholster, 563 U.S. 170, 181 (2011). “This is a ‘difficult
18 to meet,’ and ‘highly deferential standard for evaluating state-court rulings, which demands
19 that state-court decisions be given the benefit of the doubt.” Pinholster, 563 U.S. at 181
20 (citations omitted). “Section 2254(d) thus demands an inquiry into whether a prisoner’s
21 ‘claim’ has been ‘adjudicated on the merits’ in state court; if it has, AEDPA’s highly
22 deferential standards kick in.” Davis v. Ayala, 135 S. Ct. 2187, 2198 (2015). “The
23 petitioner carries the burden of proof.” Pinholster, 563 U.S. at 181.

24 Under Section 2254(d)(1), a federal court may grant habeas relief only if the state
25 court’s decision was “was contrary to, or involved an unreasonable application of, clearly
26 established Federal law, as determined by the Supreme Court of the United States.” 28
27 U.S.C. § 2254(d)(1). The Supreme Court has explained that the “‘contrary to’ and
28 ‘unreasonable application’ clauses have independent meaning.” Bell v. Cone, 535 U.S.

1 685, 694 (2002). “A state-court decision is ‘contrary to’ [the Supreme Court’s] clearly
2 established precedents if it ‘applies a rule that contradicts the governing law set forth in
3 [Supreme Court] cases’ or if it ‘confronts a set of facts that are materially indistinguishable
4 from a decision of [the Supreme Court] and nevertheless arrives at a result different from
5 [Supreme Court] precedent.” Early v. Packer, 537 U.S. 3, 8 (2002) (quoting Williams v.
6 Taylor, 529 U.S. 362, 405-06 (2000)). A state court decision is “an unreasonable
7 application” of the Supreme Court’s clearly established precedent if “the state court
8 identifies the correct governing legal rule from [the Supreme] Court’s cases but
9 unreasonably applies it to the facts of the particular state prisoner’s case” or “if the state
10 court either unreasonably extends a legal principle from [Supreme Court] precedent to a
11 new context where it should not apply or unreasonably refuses to extend that principle to a
12 new context where it should apply.” Williams, 529 U.S. at 407. Under the “unreasonable
13 application” prong, “the state court’s decision must have been more than incorrect or
14 erroneous.” Wiggins v. Smith, 539 U.S. 510, 520 (2003). The state court’s application of
15 the relevant precedent must have been objectively unreasonable. Id.; Lockyer v. Andrade,
16 538 U.S. 63, 76 (2003).

17 “Section 2254(d)(1)’s ‘clearly established’ phrase ‘refers to the holdings, as opposed
18 to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-court
19 decision.” Lockyer, 538 U.S. at 71; see also Parker v. Matthews, 132 S. Ct. 2148, 2155
20 (2012) (“[C]ircuit precedent does not constitute ‘clearly established Federal law, as
21 determined by the Supreme Court.’”). Further, “review under 28 U.S.C. § 2254(d)(1) is
22 limited to the record that was before the state court that adjudicated the claim on the
23 merits.” Pinholster, 131 S. Ct. at 1398.

24 Under Section 2254(d)(2), a federal court may grant habeas relief only if the state
25 court’s decision “resulted in a decision that was based on an unreasonable determination
26 of the facts in light of the evidence presented in the State court proceeding.” Under this
27 provision, “a state-court factual determination is not unreasonable merely because the
28 federal habeas court would have reached a different conclusion in the first instance.” Wood

1 v. Allen, 558 U.S. 290, 301 (2010) (“[E]ven if ‘[r]easonable minds reviewing the record
2 might disagree’ about the finding in question, ‘on habeas review that does not suffice to
3 supersede the trial court’s . . . determination.’”). “Instead, § 2254(d)(2) requires that [the
4 federal habeas court] accord the state trial court substantial deference.” Brumfield v. Cain,
5 135 S. Ct. 2269, 2277 (2015).

6 In conducting an analysis under AEDPA, the federal habeas court looks to the last
7 reasoned state-court decision. Castellanos v. Small, 766 F.3d 1137, 1145 (9th Cir. 2014).
8 Where there is an unexplained decision from the state’s highest court, the federal habeas
9 court “looks through” to the last reasoned state court decision and presumes that the
10 unexplained opinion rests upon the same ground. Ylst v. Nunnemaker, 501 U.S. 797, 801-
11 06 (1991). Where no state-court decision furnishes a basis for the state court’s underlying
12 reasoning, the court must engage in an independent review of the record and ascertain
13 whether the state court’s decision was objectively unreasonable. Castellanos, 766 F.3d at
14 1145; see also Harrington v. Richter, 562 U.S. 86, 98 (2011).

15 In addition, even if a federal habeas petitioner has established that a constitutional
16 error occurred, the petitioner is not entitled to habeas relief based on a trial error unless the
17 petitioner can establish that the error “resulted in ‘actual prejudice.’” Brecht, 507 U.S. at
18 637. “Under that standard, an error is harmless unless it had substantial and injurious effect
19 or influence in determining the jury’s verdict.” Fry v. Pliler, 551 U.S. 112, 116 (2007)
20 (internal quotation marks and citation omitted). Further, “[t]here must be more than a
21 ‘reasonable possibility’ that the error was harmful.” Ayala, 135 S. Ct. at 2198.

22 **II. The Merits**

23 The habeas petition before this Court is a copy of the petition filed with the Supreme
24 Court of California. (See Doc. No. 1 and Doc. No. 20-32, Lod. 14.) Accordingly, Petitioner
25 raised all of his current habeas claims in his state habeas petition. The Supreme Court of
26 California denied the petition without comment. (Doc. No. 20-33, Lod. 15.) The Court
27 therefore “looks through” to the last reasoned state court decision to evaluate each habeas
28 claim. Ylst, 501 U.S. at 801-06.

1 **A. Ineffective Assistance of Counsel**

2 Petitioner argues that his counsel was ineffective. (Doc. No. 1 at 3, 22-23.) The Sixth
3 Amendment entitles criminal defendants to the effective assistance of counsel at all critical
4 stages of a criminal proceeding. Lafler v. Cooper, 132 S. Ct. 1376, 1385-86 (2012). In
5 order to prove a Sixth Amendment ineffective assistance of counsel claim, the petitioner
6 must establish (1) that counsel’s performance was deficient, and (2) that he was prejudiced
7 by counsel’s deficient performance. Strickland v. Washington, 466 U.S. 668, 688, 692
8 (1984); Knowles v. Mirzayance, 556 U.S. 111, 122 (2009).

9 In order to satisfy the first prong of the test, the petitioner must show his counsel’s
10 performance “fell below an objective standard of reasonableness.” Strickland, 466 U.S. at
11 688. “The proper measure of attorney performance remains simply reasonableness under
12 prevailing professional norms.” Id. “Judicial scrutiny of counsel’s performance must be
13 highly deferential,” and “a court must indulge a strong presumption that counsel’s conduct
14 falls within the wide range of reasonable professional assistance.” Id. at 689; see also
15 Padilla v. Kentucky, 559 U.S. 356, 371 (2010) (“Surmounting Strickland’s high bar is
16 never an easy task.”).

17 In order to satisfy the prejudice prong of the test, the petitioner “must show that there
18 is a reasonable probability that, but for counsel’s unprofessional errors, the result of the
19 proceeding would have been different. A reasonable probability is a probability sufficient
20 to undermine confidence in the outcome.” Strickland, 466 U.S. at 694.

21 In evaluating an ineffective assistance of counsel claim raised in a Section 2254
22 petition, a federal habeas court “must take a ‘highly deferential’ look at counsel’s
23 performance through the ‘deferential lens of § 2254(d).”” Pinholster, 563 U.S. at 190
24 (citations omitted); see also Richter, 562 U.S. at 105 (“The standards created by Strickland
25 and § 2254(d) are both ‘highly deferential.’”). Thus, a federal habeas court’s review of an
26 ineffective assistance of counsel claim in a Section 2254 petition is “doubly deferential.”
27 Pinholster, 563 U.S. at 190. The reviewing court must determine “whether there is any
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1 reasonable argument that counsel satisfied Strickland's deferential standard." Richter, 562
2 U.S. at 105.

3 Petitioner argues that his attorney failed to properly investigate issues pertaining to
4 Petitioner's defense. (Doc. No. 1 at 3.) Petitioner attaches a declaration from an investigator
5 and declarations from four individuals who state that they were not asked to testify
6 although they were purportedly willing to testify on Petitioner's behalf. (Id. at 32, 34-38,
7 42.) The declarations were written by Petitioner's ex-girlfriend, brother, family friend, and
8 a person that appears to be a former drug-dealing associate. (Id.) Petitioner further claims
9 that his attorney failed to listen to wiretap evidence prior to trial. (Id. at 23.) Finally,
10 Petitioner claims that his attorney gave him incorrect legal advice by instructing him that
11 it was unnecessary to stipulate to a gang enhancement. (Id. at 23.)

12 The California Court of Appeal determined that Petitioner failed to establish that his
13 trial counsel was ineffective. (Lod. 11, Doc. No. 20-29.) The court explained that Petitioner
14 failed to provide evidence of deficient performance or demonstrate that he was prejudiced
15 by the purported errors. (Id.) The Court of Appeal's decision reasonably applied the
16 Supreme Court's precedent, clearly established in Strickland, governing ineffective
17 assistance of counsel claims under the Sixth Amendment. In order to satisfy the prejudice
18 prong of the Strickland test, Petitioner "must show that there is a reasonable probability
19 that, but for counsel's unprofessional errors, the result of the proceeding would have been
20 different. A reasonable probability is a probability sufficient to undermine confidence in
21 the outcome." Strickland, 466 U.S. at 694. With regards to the individuals who were not
22 asked to testify, Petitioner has not demonstrated how their testimony would have affected
23 the outcome of the trial. None of the declarants state that they would have testified to
24 Petitioner's innocence or even have provided Petitioner an alibi. (Doc. No. 1 at 34-38, 42.)
25 Instead, three declarants would have testified that Petitioner sold drugs on the night of the
26 robbery, and the fourth declarant would have testified that Richard Wright was upset
27 because the declarant had an affair with Wright's wife. (Id.) There is no reasonable
28 probability that such testimony would change the outcome of the trial, given that the

1 prosecution had wiretap evidence, accomplice testimony given by Wright, and had
2 recovered robbery materials including a ski mask, gloves, duct tape, and two guns.

3 The investigator's declaration similarly does not show ineffective assistance of
4 counsel. The investigator was representing Petitioner before the attorney was assigned to
5 the case, and the investigator was taking his instructions from Petitioner, not the attorney.
6 (Doc. No. 32-1 at 16.) Furthermore, the investigator does not claim to have been at the
7 trial. (Id. at 32.) Accordingly, he cannot provide an opinion on the attorney's level of
8 preparation by the time the trial actually occurred. Finally, Petitioner has not stated any
9 facts that the investigator would have purportedly uncovered. Thus, Petitioner has not
10 demonstrated that the result of the proceeding would have been different had the
11 investigator conducted an investigation.

12 The wiretap evidence does not add to Petitioner's claim. Petitioner admits that his
13 attorney read the transcripts of the wiretaps. (Id. at 23.) Petitioner has not explained how
14 the outcome of the proceeding could have been different had his attorney listened to the
15 wiretaps instead of read the transcripts.⁴ And finally, with regards to the legal advice
16 pertaining to the gang enhancement, Petitioner states that his attorney counseled against
17 stipulating to a gang enhancement. (Id. at 23.) Petitioner has not explained how the
18 outcome would have been different if he had stipulated to the gang enhancement. Indeed,
19 by stipulating to the enhancement, the prosecution's job would have been easier. Petitioner
20 has not pointed to any evidence that he would have benefited from stipulating to the
21 enhancement.

22 The Court of Appeal reasonably determined that Petitioner failed to establish
23 ineffective assistance of counsel under Strickland. There is no reasonable probability that
24 the attorney's purported errors would have changed the outcome of the trial, especially
25 given that Petitioner was convicted on the basis of wiretap evidence, accomplice testimony,
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27 ⁴ At a hearing to substitute counsel, Petitioner claimed that the transcripts were different than the
28 recordings. (Doc. No. 32-1 at 8.) But Petitioner has not provide a single example of a discrepancy,
either at that hearing or in the instant petition.

1 and recovered robbery materials that included a ski mask, gloves, duct tape, and two guns.
2 Accordingly, the state court’s denial of the ineffective assistance of counsel claims was not
3 contrary to or an unreasonable application of clearly established federal law. The Court
4 therefore denies the ineffective assistance of counsel claims in the petition.

5 **B. Prosecutorial Misconduct**

6 Petitioner asserts that he was denied a fair trial due to a number of instances of
7 purported prosecutorial misconduct. First, he claims that, while he was out on bail, the
8 prosecution induced another gang member to purchase cocaine from Petitioner’s wife.
9 (Doc. No. 1 at 4, 26-27.) Petitioner claims that he was arrested for transportation and sale
10 of cocaine less than 30 days before his trial. (Id. at 4.) He argues that he was unable to
11 mount an effective defense because his incarceration blocked his access to the evidence.
12 (Id. at 4, 26.) Petitioner also contends that the prosecution knew or should have known that
13 the co-defendant witness, Richard Wright, would give false testimony. (Id. at 26-27.)
14 Likewise, Petitioner claims that prosecution asserted that “Jabbar” was involved in “Count
15 2,” while knowing that to be false. (Id. at 26-27.)

16 “On a petition for writ of habeas corpus, the standard of review for a claim of
17 prosecutorial misconduct is ‘the narrow one of due process, and not the broad exercise of
18 supervisory power.’” Renderos v. Ryan, 469 F.3d 788, 799 (9th Cir.2006), cert. denied,
19 551 U.S. 1159 (2007) (citations omitted). Prosecutorial misconduct merits habeas relief
20 only where the misconduct “so infec[ted] the trial with unfairness as to make the resulting
21 conviction a denial of due process.” Greer v. Miller, 483 U.S. 756, 765 (1987) (citation
22 omitted); Bonin v. Calderon, 59 F.3d 815, 843 (9th Cir.1995) (“To constitute a due process
23 violation, the prosecutorial misconduct must be so severe as to result in the denial of [the
24 petitioner’s] right to a fair trial.”), cert. denied, 516 U.S. 1051 (1996). In other words,
25 prosecutorial misconduct requires reversal of a conviction only when “it appears more
26 probable than not that the alleged misconduct affected the jury’s verdict.” United States v.
27 McChristian, 47 F.3d 1499, 1508 (9th Cir. 1995) (citation omitted).

1 The Supreme Court of California summarily denied Petitioner’s current habeas
2 claims, and the Court of Appeal did not address the merits of the prosecutorial misconduct
3 claims. (Doc. No. 20-29 at 2, Lod. 11.) Accordingly, the Court looks through to the
4 reasoned decision of the California Superior Court denying Petitioner’s habeas petition.
5 (Doc. No. 20-27 at 3-4, Lod. 9.) The court explained that Petitioner failed to provide
6 evidence to support his claims and that any petitioner could make similar self-serving
7 statements. (Id.) The court also explained that Petitioner failed to offer proof that the
8 purported misconduct would have affected the outcome of the trial. (Id.)

9 The Superior Court’s analysis was not contrary to or an unreasonable application of
10 clearly established federal law. Petitioner offers no evidence that his drug arrest was
11 illegitimate. Furthermore, many defendants are incarcerated prior to trial, so his pre-trial
12 detention is not, by itself, a due process violation. And Petitioner has offered no evidence
13 that the prosecution knew of any false testimony concerning Count 2. As a result, the Court
14 denies his due process claims of prosecutorial misconduct.

15 **C. Sufficiency of the Evidence Regarding Skyline Farms Markets**

16 Petitioner argues that a portion of his direct appeal was denied in error because his
17 co-defendant’s conviction was overturned on purportedly the same evidence. (Doc. No. 1
18 at 5, 28.) In a separate opinion, the California Court of Appeal overturned Travis
19 Montgomery’s conviction for conspiracy to rob and robbery of Skyline Farms because the
20 prosecution had not sufficiently corroborated Wright’s accomplice testimony as required
21 by Section 1111 of the California Penal Code. (Doc. No. 1 at 136-139.)

22 While California law requires corroboration of accomplice testimony, federal law
23 does not. See Laboa v. Calderon, 224 F.3d 972, 979 (9th Cir. 2000). “[I]t is not the province
24 of a federal habeas court to reexamine state court determinations on state law questions.”
25 Estelle, 502 U.S. at 67-68. Federal habeas review of a state court’s finding is limited to
26 determining whether the finding was “so arbitrary or capricious as to constitute an
27 independent due process . . . violation.” Lewis v. Jeffers, 497 U.S. 764, 780 (1990).

28

1 Petitioner implicitly argues that there was identical evidence presented against
2 Petitioner and Montgomery. That is incorrect. In Montgomery’s case, the prosecution
3 attempted to corroborate the accomplice testimony with wiretap recordings, but the Court
4 of Appeal found the recordings to be too vague. (Doc. No. 1 at 136-139.) In Petitioner’s
5 case, the prosecution provided different recordings that were solely between Wright (the
6 testifying accomplice) and Petitioner. (Doc. No. 27-1 at 17-21, Lod. 16.) In those
7 recordings, Wright stated that “there really ain’t no loot,” and told Petitioner they collected
8 about \$1,200. (Id.) In another call, Wright proposed to give some of the robbery proceeds
9 to Petitioner, telling him that “I got yours in [my] pocket.” (Id.) The court also found it
10 important that Petitioner called either Montgomery or Wright about 47 times the day before
11 the robbery. (Id.) As a result, the court did not act arbitrarily or capriciously in relying on
12 this evidence to corroborate Wright’s testimony. See Lewis, 497 U.S. at 780. Thus, the
13 Court denies the sufficiency of the evidence claim regarding the robbery of Skyline Farms.

14 **D. Sufficiency of the Evidence Regarding Eastridge Liquor Store**

15 Petitioner argues that there was insufficient corroboration of Wright’s testimony
16 regarding [Petitioner’s] participation in the conspiracy to rob and attempted robbery of
17 Eastridge Liquor Store. (Doc. No. 1 at 6.) The Court disagrees. Police learned of the plan
18 to rob Eastridge Liquor via a wiretap. (Doc. No. 27-1 at 2, Lod. 16.) Task force members
19 followed cars containing the four co-conspirators. (Id.) After the men abandoned the plan,
20 task force members stopped the cars. Petitioner and Wright were in the same car. (Id. at 3.)
21 Police recovered robbery materials from the other car, including a ski mask, duct tape, and
22 two guns. (Id.) The court did not act arbitrarily or capriciously in relying on this evidence
23 to corroborate Wright’s testimony. See Lewis, 497 U.S. at 780 (Federal habeas review of
24 a state court’s finding on a matter of state law is limited to determining whether the finding
25 was “so arbitrary or capricious as to constitute an independent due process . . . violation.”).
26 Accordingly, this Court denies this claim of the petition.

1 **E. Sufficiency of the Evidence Regarding the Gang Enhancement**

2 Petitioner challenges the sufficiency of the evidence that he acted with the specific
3 intent to promote, further, or assist in criminal conduct by gang members to support the
4 gang enhancements. (Doc. No. 1 at 8.) In order to subject a defendant to a gang
5 enhancement under California Penal Code Section 186.22(b)(1), “the prosecution must
6 prove that the crime for which the defendant was convicted had been ‘committed for the
7 benefit of, at the direction of, or in association with any criminal street gang, with the
8 specific intent to promote, further, or assist in any criminal conduct by gang members.’”
9 People v. Gardeley, 14 Cal. 4th 605, 616-17 (1996). In order to prove specific intent at
10 trial, the prosecution provided its gang expert with a hypothetical describing the facts in
11 Petitioner’s case. (Doc. No. 20-14 at 161-62, Lod. 2-12.) The expert opined that the
12 offenses would be intended to benefit the Lincoln Park gang by affording the younger gang
13 members who actually committed the robberies an opportunity to “put in work” for the
14 gang and by increasing the stature of the gang in the community when word of the robberies
15 got out. (Id. at 162-63.)

16 Petitioner’s specific intent to promote, further, or assist criminal conduct by gang
17 members could be inferred from the expert’s testimony. See United States v. Jackson, 72
18 F.3d 1370, 1381 (9th Cir. 1995) (“Circumstantial evidence and inferences drawn from it
19 may be sufficient to sustain a conviction.”) Thus, the trial court did not act arbitrarily or
20 capriciously in permitting the gang enhancement. See Lewis, 497 U.S. at 780 (Federal
21 habeas review of a state court’s finding on a matter of state law is limited to determining
22 whether the finding was “so arbitrary or capricious as to constitute an independent due
23 process . . . violation.”). Accordingly, this Court denies this claim of the petition.

24 **F. Right to be Informed of Charges and to Confront Witnesses**

25 Petitioner argues that his due process rights were violated because new charges were
26 added after his preliminary hearing. (Doc. No. 1 at 9.) According to Petitioner, he was
27 initially charged with conspiracy to rob and attempt to rob Bob Scooter. (Id.) Later, after
28 co-defendant Wright began cooperating with the prosecution, Petitioner was charged with

1 conspiracy and attempt to rob Eastridge Liquor Store. (Id.) Petitioner argues that his due
2 process rights were violated because, thinking that the charges were focused on the attempt
3 to rob Bob Scooter, Petitioner made a strategic choice not to “cross examine the primary
4 objective.” (Id.) Petitioner seems to be invoking two rights arising under the Sixth
5 Amendment—the right to fair notice of the charges against him and the right to confront
6 adverse witnesses.

7 For “purposes of AEDPA’s ‘clearly established Federal law’ requirement, it is
8 ‘clearly established’ that a criminal defendant has a right, guaranteed by the Sixth
9 Amendment and applied against the states through the Fourteenth Amendment, to be
10 informed of any charges against him, and that a charging document, such as an information,
11 is the means by which such notice is provided.” Gault v. Lewis, 489 F.3d 993, 1004 (9th
12 Cir. 2007). Here, the amended information clearly lays out the charges that the prosecution
13 pursued against Petitioner at trial. (See Doc. No. 20-1 at 15-25, Lod. 1-1.) Accordingly,
14 Petitioner had clear notice of the charges, and there was no violation of his right to be
15 informed of those charges.

16 Regarding Petitioner’s right to confront witnesses, there is no constitutional
17 violation because Petitioner had the opportunity to cross examine witnesses at trial. And
18 even if somehow there was error at the preliminary hearing stage, that error would be
19 harmless. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (Confrontation Clause
20 violations subject to harmless error analysis). To obtain habeas corpus relief, Petitioner
21 must demonstrate that the error “had substantial and injurious effect or influence in
22 determining the jury’s verdict.” Brecht, 507 U.S. at 631 (quoting Kotteakos v. United
23 States, 328 U.S. 750, 776 (1946)). Petitioner has failed to explain how any proposed cross-
24 examination at the preliminary hearing would have had a substantial effect or influence on
25 the outcome of the trial. See United States v. Berry, 814 F.2d 1406, 1409 (9th Cir.1987)
26 (stating petitioner must show what testimony would have been elicited and how it would
27 have changed the outcome). Habeas relief is available only if the record demonstrates the
28 jury’s decision was substantially influenced by an error or there is “grave doubt” about

1 whether an error was harmless. O’Neal v. McAninch, 513 U.S. 432, 434 (1995). The record
2 establishes neither. Petitioner has not demonstrated that his opportunity to cross examine
3 witnesses at the preliminary hearing had any effect on the jury’s verdict, let alone a
4 substantial and injurious one. Consequently, the Court denies habeas relief on this ground.

5 **G. Purported Abuses of Discretion**

6 Petitioner claims that the trial court erred by ruling against Petitioner on an objection
7 and a number of motions. (Doc. No. 1 at 10, 29.)

8 **1. The Trial Court’s Ruling on an Evidentiary Objection**

9 Petitioner argues that the trial court erred by prohibiting Petitioner’s attorney from
10 asking Wright, the prosecution’s primary witness, whether Wright had shot at someone
11 known as Scooter. (Doc. No. 1 at 10.) At trial, Petitioner’s attorney cross-examined Wright
12 and attempted to ask about the purported shooting. (Doc. No. 20-16 at 119-122, Lod. 2-
13 14.) The prosecution objected. (Id. at 119-120.) At sidebar, Petitioner’s attorney argued
14 that the shooting established a conflict between Wright and Scooter. (Id. at 120-121.)
15 According to Petitioner’s attorney, he planned to argue that Wright and Petitioner were
16 together on the night they were arrested to organize a fight with Scooter, not to commit
17 robbery. (Id.) The trial court permitted questions regarding why Wright and Petitioner were
18 at the location where they were arrested, but the court prohibited inquiry into whether
19 Wright had shot at Scooter on the grounds that such inquiry would be highly prejudicial.

20 “[T]he Constitution guarantees criminal defendants ‘a meaningful opportunity to
21 present a complete defense.’” Crane v. Kentucky, 476 U.S. 683, 690 (1986). However, “[a]
22 defendant’s right to present relevant evidence is not unlimited, but rather is subject to
23 reasonable restrictions.” United States v. Scheffer, 523 U.S. 303, 308 (1998). “[W]ell-
24 established rules of evidence permit trial judges to exclude evidence if its probative value
25 is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or
26 potential to mislead the jury.” Holmes v. South Carolina, 547 U.S. 319, 326 (2006).
27 Exclusion of evidence under such well-established rules will only violate the right to
28

1 present a defense where it significantly undermines fundamental elements of the defense.
2 Scheffer, 523 U.S. at 315.

3 Here, the trial court prohibited questions regarding whether Wright tried to shoot
4 Scooter under California Evidence Code section 352. That section provides that a “court
5 in its discretion may exclude evidence if its probative value is substantially outweighed by
6 the probability that its admission will . . . create substantial danger of undue prejudice, of
7 confusing the issues, or of misleading the jury.” CAL. EVID. CODE § 352.

8 Petitioner has not established that the trial court significantly undermined his defense
9 by prohibiting testimony regarding the purported shooting. See Scheffer, 523 U.S. at 315.
10 Petitioner’s attorney argued that he wanted to establish conflict between Wright and
11 Scooter in order to provide an alternative reason for Wright and Petitioner to be at the
12 location where they were arrested. The Court permitted questions regarding why they were
13 at the location. Thus, Petitioner’s case was not undermined by the exclusion. Petitioner
14 now argues that the questioning should have been allowed in order to attack Wright’s
15 credibility. (Doc. No. 1 at 10.) But that argument was not raised at trial, and the defense
16 was not significantly undermined by the exclusion of testimony regarding the purported
17 shooting. The Court therefore denies this claim of the petition.

18 **2. The Trial Court’s Rulings on Petitioner’s Motions**

19 Petitioner argues that the trial court abused its discretion by denying Petitioner’s
20 motion to substitute counsel made pursuant to People v. Marsden, 2 Cal. 3d 118 (1970).
21 Under Marsden, California trial courts must allow defendants an opportunity to provide
22 specific examples of inadequate representation when moving to substitute court-appointed
23 counsel. But Marsden creates a state law requirement. “[I]t is not the province of a federal
24 habeas court to reexamine state court determinations on state law questions.” Estelle, 502
25 U.S. at 67-68. Federal habeas review of a state court’s finding is limited to determining
26 whether the finding was “so arbitrary or capricious as to constitute an independent due
27 process . . . violation.” Lewis, 497 U.S. at 780.

28

1 Petitioner complains of the Marsden hearing held on August 22, 2008. (Doc. No. 1
2 at 10, 29.) At that hearing, Petitioner’s attorney stated that he had, up to that point, met
3 with his client about 12 times, spent 120 hours on the case, and was still working on it.
4 (Doc. No. 32-1 at 16.) The Court explained to Petitioner that the attorney was very
5 experienced, was known to the court, and had impressed the court with his arguments in
6 motions. (Id. at 17.) The court was convinced that the attorney was doing his best to prepare
7 himself for trial. (Id. at 18.) A trial court’s findings are entitled to deference and can be
8 overcome only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Petitioner has
9 not produced clear and convincing evidence to overcome the state court findings. In
10 particular, Petitioner has not produced evidence that it was unreasonable for the trial court
11 to conclude that the attorney would be prepared in time for trial. Accordingly, based on the
12 trial court’s findings at the Marsden hearing, the trial court was not arbitrary or capricious
13 in denying the motion. See Lewis, 497 U.S. at 780.

14 Petitioner also argues that the trial court abused its discretion by denying a Marsden
15 motion to replace post-trial counsel. (Doc. No. 1 at 29.) According to Petitioner, he sought
16 to replace post-trial counsel because that counsel was a close friend of Petitioner’s trial
17 attorney, and Petitioner felt that the new attorney would not effectively argue that his trial
18 attorney had committed errors. (Id.) But the transcript of the hearing does not support
19 Petitioner’s claim. At the hearing, Petitioner did not accuse his post-trial attorney of being
20 too close to his trial attorney. (See Doc. No. 32-2.) Instead, Petitioner argued that his post-
21 trial attorney did not have enough time to incorporate all of Petitioner’s requested
22 arguments into the motion for a new trial. (Id.) The trial court denied the Marsden motion
23 because it was really a request for a continuance. (Id. at 11-12.) Petitioner has not shown
24 that this was an unreasonable determination. Accordingly, the court was not arbitrary or
25 capricious in denying the motion.

26 Petitioner also argues that the trial court abused its discretion by denying his motion
27 for a new trial. (Doc. No. 1 at 29.) However, Petitioner’s three-sentence argument is
28 conclusory and vague. “Conclusory allegations which are not supported by a statement of

1 specific facts do not warrant habeas relief.” James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994);
2 Greenway v. Schriro, 653 F.3d 790, 804 (9th Cir. 2011) (“[Petitioner’s] cursory and vague
3 claim cannot support habeas relief.”).

4 **H. Ineffective Assistance of Appellate Counsel**

5 Petitioner argues that his appellate counsel provided ineffective assistance on his
6 direct appeal. (Doc. No. 1 at 7.) Petitioner contends that his appellate counsel should have
7 raised issues of ineffective assistance of trial counsel, prosecutorial misconduct,
8 insufficient gang evidence, the filing of an amended information after the preliminary
9 hearing, denial of cross examination, and failure to inform Petitioner of the overt acts relied
10 on for a conviction to rob Tyrece Claibourne. (Id.) The Court of Appeal rejected these
11 claims, explaining that Petitioner’s arguments were speculative and not supported by any
12 evidence that would have demonstrated error. (Doc. No. 20-29 at 2, Lod. 11.) This Court
13 agrees. The Constitution does not require appellate counsel to raise every colorable or non-
14 frivolous claim. Jones v. Barnes, 463 U.S. 745, 753-54 (1983).

15 None of Petitioner’s specific claims rise to the level of a constitutional violation. In
16 this order, the Court has addressed each issue that Petitioner claims should have been
17 asserted, and none of those claims are tenable. See Turner v. Calderon, 281 F.3d 851, 872
18 (9th Cir. 2002) (“A failure to raise untenable issues on appeal does not fall below the
19 Strickland standard.”). Petitioner has not demonstrated ineffective assistance of trial
20 counsel or prosecutorial misconduct. Nor has he demonstrated insufficient gang evidence
21 given that a gang expert testified in the trial. He has not shown that any of his rights were
22 violated when the prosecution filed an amended information after the preliminary hearing,
23 given that the amended information provided notice of the charges and he had the
24 opportunity to cross examine witnesses at trial. Regarding the purported denial of cross
25 examination, Petitioner has not provided a compelling argument challenging the
26 prejudicial nature of testimony regarding an unrelated shooting. And regarding notice of
27 the overt acts relied on for a conviction to rob Tyrece Claibourne, the amended information
28 lists six overt acts asserted against Petitioner. (Doc. No. 20-1 at 18, Lod. 1 at 10.)

1 Accordingly, Petitioner has failed to establish ineffective assistance of appellate
2 counsel under Strickland. Petitioner has failed to articulate any errors committed by his
3 appellate counsel. And if the appellate counsel did err, there is no reasonable probability
4 that the purported errors would have changed the outcome of the appeal, especially given
5 that Petitioner has not provided any evidence that his appellate counsel missed an
6 opportunity to challenge the wiretap evidence, accomplice testimony, or recovered robbery
7 materials. Thus, the state court’s denial of the ineffective assistance of counsel claims was
8 not contrary to or an unreasonable application of clearly established federal law. The Court
9 therefore denies these claims of the petition.

10 **III. The Statute of Limitations**

11 In addition to failing on the merits, the Petition is also untimely. Pursuant to AEDPA,
12 a one-year statute of limitations applies to a petition for writ of habeas corpus. The
13 limitation period begins to run on “the date on which the judgment became final by the
14 conclusion of direct review or the expiration of the time for seeking such review.” 28
15 U.S.C. § 2244(d)(1)(A). The period of direct review includes the ninety days after the state
16 court enters its judgment within which Petitioner could have filed a petition for a writ of
17 certiorari from the United States Supreme Court. Bowen v. Roe, 188 F.3d 1157, 1158-59
18 (9th Cir. 1999).

19 In this case, the California Supreme Court entered its judgment on March 28, 2012
20 when it denied the petition for direct review. (Doc. No. 20-25, Lod. 7.) Petitioner then had
21 ninety days from March 28, 2012 to file a petition for a writ of certiorari. Petitioner did not
22 file a petition for a writ of certiorari, so his conviction became final when the ninety days
23 expired on June 27, 2012. The statute of limitations begins to run on the day after judgment
24 becomes final and terminates on the last day of the limitations period. FED. R. CIV. P.
25 6(a)(1).

26 AEDPA’s one-year limitations period is subject to statutory tolling during the period
27 of time a petitioner seeks habeas relief in state court. 28 U.S.C. § 2244(d)(2). Pursuant to
28 the prison mailbox rule, Petitioner constructively filed the First Habeas Petition on June

1 10, 2013. (Doc. No. 20-26 at 61, Lod. 8.) Petitioner is therefore entitled to statutory tolling
2 as of June 10, 2013. Thus, Petitioner paused the clock on the statute of limitations at 348
3 days (from and including the day after the judgment became final, June 28, 2012, and to
4 and including June 10, 2013).

5 “AEDPA’s one-year limitations period is tolled both for the days during which
6 California’s courts actually consider[a] habeas petitions as well as for the time between
7 such petitions, provided that the petitions were timely filed.” Velasquez v. Kirkland, 639
8 F.3d 964, 967 (9th Cir. 2011). In California, a post-conviction petition is considered timely
9 filed if it is filed within a “reasonable time.” Evans v. Chavis, 546 U.S. 189, 192 (2006)
10 (citing In re Harris, 5 Cal. 4th 813, 828 n.7 (1993)). Unless the California Supreme Court
11 or the California legislature states otherwise, federal courts must assume that California’s
12 “reasonable time” standard between habeas filings must not substantially exceed those of
13 other states that use 30- to 60-day rules for untimeliness. Id. at 192-93, 199-201. The
14 Superior Court denied the First Habeas Petition on August 12, 2013. (Doc. No. 20-27,
15 Lod. 9.) Petitioner constructively filed the Second Habeas Petition in the California Court
16 of Appeal 25 days later on September 6. (Doc. No. 31-3 at 68, Lod. 19.) Because 25 days
17 is less than the 30 to 60 days, the Second Habeas Petition was filed in a reasonable time.
18 See Chavis, 546 U.S. at 192-93, 199-201. Therefore, Petitioner is entitled to statutory
19 tolling through the denial of the Second Habeas Petition.

20 On October 7, 2013 the Court of Appeal denied the Second Habeas Petition. (Doc.
21 No. 20-29, Lod. 11.) Petitioner constructively filed his Third Habeas Petition with the
22 Court of Appeal on January 21, 2014, which is 106 days after the same court denied the
23 Second Habeas Petition. (Doc. No. 20-30 at 88, Lod. 12.) This 106-day gap is substantially
24 longer than the typical 30- to 60-day reasonable time standard. See Velasquez, 639 F.3d at
25 967-68 (concluding that the petitioner’s unjustified filing gaps of 91 days and 81 days in
26 California are unreasonable and therefore untimely and not eligible for statutory tolling).
27 Petitioner argues that the Third Habeas Petition was a continuation of the Second Habeas
28 Petition because it was filed in the same court. (Doc. No. 25 at 1-2.) According to

1 Petitioner, he is therefore entitled to statutory tolling. (Id.) However, a continuation petition
2 is not entitled to statutory tolling if it is untimely. Banjo v. Ayers, 614 F.3d 964, 969 (9th
3 Cir. 2010). Because 106 days is substantially longer than the typical 30- to 60-day
4 reasonable time standard, Petitioner is not entitled to statutory tolling for the Third Habeas
5 Petition.

6 Petitioner argues in his Traverse that the 106-day delay in filing his Third Habeas
7 Petition is justified because of newly discovered evidence. (Doc. No. 25 at 2.) Petitioner
8 claims the newly discovered evidence was a declaration by his former appellate counsel in
9 which she stated that Petitioner had asked her to argue ineffective assistance of trial
10 counsel. (Id.; See Doc. No. 20-30 at 87, Lod. 12.) But the declaration is not newly
11 discovered evidence. Petitioner already knew the facts stated in the declaration when he
12 filed his First Habeas Petition. Petitioner could have asked his appellate counsel to write a
13 declaration earlier. Furthermore, even if the appellate counsel's declaration could be
14 considered new evidence, Petitioner has not shown good cause for the 69-day gap between
15 the signing of the declaration on November 13, 2013 and the habeas filing on January 21,
16 2014. See In re Clark, 5 Cal. 4th 750, 775 (1993) (petitioners are expected "to demonstrate
17 due diligence in pursuing potential claims"). Because the Third Habeas Petition is not
18 entitled to statutory tolling, the statute of limitations period ran from the denial of the
19 Second Habeas Petition on October 7, 2013 to the filing of the Fourth Habeas Petition with
20 the California Supreme Court on April 21, 2014. (Doc. No. 20-32 at 117, Lod. 14.) This is
21 a period of 196 days.

22 The California Supreme Court denied the Fourth Habeas Petition without comment
23 on July 9, 2014. (Doc. No. 20-33, Lod. 15.) Petitioner constructively filed the instant
24 petition 33 days later on August 11, 2014. (Doc. No. 1-1 at 137.) Petitioner is not entitled
25 to statutory tolling for these 33 days because there was no case pending during that interval.
26 See Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). Accordingly, Petitioner used 348
27 days to file the First Habeas Petition, 196 days between the Second and Fourth Habeas
28 Petitions, and 33 days between the Fourth Petition and the instant petition. Thus, Petitioner

1 used a total of 577 days—well over the one-year statute of limitations. Indeed, even if the
2 Court credits Petitioner for the 196 days between the Second and Fourth Petitions, the
3 instant petition is still untimely at 381 days.

4 Petitioner argues that he is entitled to equitable tolling if not statutory tolling.
5 Equitable tolling is appropriate when the petitioner can show ““(1) that he has been
6 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
7 way’ and prevented timely filing.” Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting
8 Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

9 Petitioner claims that his lack of education warrants equitable tolling. (Doc. No. 25
10 at 2.) A pro se petitioner’s lack of education and legal sophistication is, by itself, not an
11 extraordinary circumstance warranting equitable tolling. See Rasberry v. Garcia, 448 F.3d
12 1150, 1154 (9th Cir. 2006).

13 Petitioner also claims that he had limited access to the law library because of
14 lockdowns and that the copy machine was temporarily broken. (Doc. No. 25 at 2-3.)
15 Petitioner fails to explain how the limited access and broken copier made it impossible for
16 Petitioner to timely file any of his post-conviction petitions. Petitioner merely asserts that
17 his research was slowed down. Without more, the limited library access and the temporarily
18 broken copier are ordinary prison limitations that do not automatically warrant equitable
19 tolling. See Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir. 2009).

20 Petitioner additionally claims that when he was being transferred between prisons,
21 he had to send a box of his legal records to his brother because the box was too big. (Doc.
22 No. 25 at 3.) Petitioner requests equitable tolling for the ninety days between the seizure
23 of the box on October 23, 2012 and Petitioner’s receipt of the first installment of records
24 from the box on January 21, 2013. (Id. at 4.) Even with 90 days of equitable tolling,
25 Petitioner still used 505 days, and the instant Petition is still untimely. Moreover, the 90
26 days of equitable tolling would overlap with the 196 days between the Second and Fourth
27 Habeas Petitions. Thus, even if the Court were to grant this 90 days of equitable tolling and
28 grant statutory tolling for the time period between the Second and Fourth Habeas Petitions,

1 the instant petition would still be untimely.

2 Finally, Petitioner argues that equitable tolling is warranted because he is actually
3 innocent of the underlying charges. (Doc. No. 25 at 5.) “[T]enable actual-innocence
4 gateway pleas are rare.” McQuiggen v. Perkins, 133 S. Ct. 1924, 1928 (2013). “[A]
5 petitioner does not meet the threshold requirement unless he persuades the district court
6 that, in light of the new evidence, no juror, acting reasonably, would have voted to find
7 him guilty beyond a reasonable doubt.” Schlup v. Delo, 513 U.S. 298, 329 (1995). In order
8 to make a credible claim of actual innocence, a petitioner must “support his allegations of
9 constitutional error with new reliable evidence—whether it be exculpatory scientific
10 evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not
11 presented at trial.” Id. at 324.

12 In support of his claim of actual innocence, Petitioner directs the Court to the
13 ineffective assistance of counsel argument. (Doc. No. 25 at 5.) In that argument, Petitioner
14 cites a wiretap recording in which he told his co-defendants his location on the night of the
15 Eastridge Liquire robbery. (Id. at 11.) Petitioner claims he was mistaken while describing
16 his location as recorded by the wiretap. (Id.) Based on that purported mistake, Petitioner
17 asserts that he was not at the location of the robbery. (Id.) But there is no new evidence in
18 this assertion. See Schlup, 513 U.S. at 324 (requiring new evidence that was not presented
19 at trial). Furthermore, even if Petitioner’s attorney had argued that Petitioner was mistaken
20 on the recording, the jury may still have chosen to believe the recording instead of
21 Petitioner’s post-arrest story. Thus, Petitioner has not demonstrated that no reasonable juror
22 would find him guilty, especially given the other evidence provided against Petitioner. See
23 Schlup, 513 U.S. at 329.

24 Petitioner also submits a declaration from a person identified as Scooter. (Doc. No.
25 25 at 97.) In that declaration, Scooter claims that he had been shot at by Wright on a
26 previous occasion. (Id.) Petitioner asserts that this declaration establishes that Wright
27 brought the guns that were seized by the police because Wright intended to shoot Scooter.
28 (Id. at 8.) But Petitioner points to no other evidence that the guns were brought to shoot at

1 Scooter instead of to commit robbery. Given the wiretaps, accomplice testimony, totality
2 of the evidence, and materials including a ski mask, gloves, and duct tape,⁵ the Court is not
3 convinced that no reasonable juror would have found Petitioner guilty.

4 Petitioner also points, again, to the declarations from his associates. (Id. at 7-10.)
5 But Petitioner must establish that no reasonable juror would find him guilty beyond a
6 reasonable doubt. See Schlup, 513 U.S. at 329. Petitioner has failed to do so. None of the
7 declarations provide an alibi for Petitioner. And Petitioner certainly could have sold drugs
8 and conspired to commit robbery on the same day. Accordingly, Petitioner has failed to
9 establish actual innocence, and he is ineligible for equitable tolling on that basis.

10 In sum, Petitioner exceeded the AEDPA one-year statute of limitations by an extra
11 212 days. He has not established sufficient statutory or equitable tolling to rectify the
12 untimeliness of the instant petition.

13 **III. Certificate of Appealability**

14 A certificate of appealability may issue only if the petitioner “has made a substantial
15 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a district
16 court has denied the petitioner’s constitutional claims on the merits, the petitioner satisfies
17 the above requirement by demonstrating “that reasonable jurists would find the district
18 court’s assessment of the constitutional claims debatable or wrong.” Slack v. McDaniel,
19 529 U.S. 473, 484 (2000). The Court concludes that reasonable jurists would not find the
20 Court’s assessment of Petitioner’s claims debatable or wrong. Accordingly, the Court
21 declines to issue a certificate of appealability.

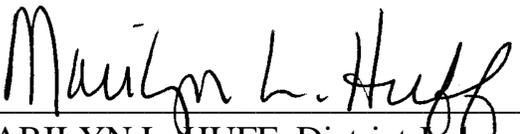
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27 ⁵ Given this other evidence, Petitioner also fails to establish ineffective assistance of counsel based on
28 the potential argument that Wright brought the guns to shoot at Scooter. Without any direct evidence,
Petitioner has not established a reasonable probability that the outcome of the trial would have been
different had his attorney made this argument. See Strickland, 466 U.S. at 694.

1 Conclusion

2 For the foregoing reasons, the Court denies Petitioner's petition for a writ of
3 habeas corpus and denies Petitioner a certificate of appealability.

4 **IT IS SO ORDERED.**

5 DATED: July 25, 2017

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8 MARILYN L. HUFF, District Judge
9 UNITED STATES DISTRICT COURT
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