



<b>SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES</b>		Reserved for Clerk's File Stamp <b>CONFORMED COPY ORIGINAL FILED</b> Superior Court of California County of Los Angeles
COURTHOUSE ADDRESS: Clara Shortridge Foltz Criminal Justice Center 210 West Temple Street Los Angeles, CA 90012		<b>JUL 16 2021</b>
PLAINTIFF/PETITIONER:  <b>IN RE: KENJI HOWARD</b>	Sherri R. Carter, Executive Officer/Clerk of Court By: Sheryl R. Humber, Deputy	
<b>CLERK'S CERTIFICATE OF MAILING</b> CCP, § 1013(a) Cal. Rules of Court, rule 2(a)(1)		CASE NUMBER: <b>YA026865</b>

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served:

- |  |   |
|--|---|
| <input type="checkbox"/> Order Extending Time            | <input checked="" type="checkbox"/> Memorandum of Decision  |
| <input type="checkbox"/> Order to Show Cause             | <input type="checkbox"/> Order re: Eligibility  |
| <input type="checkbox"/> Order for Informal Response     | <input type="checkbox"/> Order re: Appointment of Counsel   |
| <input type="checkbox"/> Order for Supplemental Pleading | <input type="checkbox"/> Copy of Petition for Writ of Habeas Corpus /Suitability<br>Hearing Transcript for the Attorney General |

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to the cause. I served this document by placing true copies in envelopes addressed as shown below and then by sealing and placing them for collection; stamping or metering with first-class, prepaid postage; and mailing on the date stated below, in the United States mail at Los Angeles County, California, following standard court practices.

7/16/21  
DATED AND DEPOSITED

SHERRI R. CARTER, Executive Officer/Clerk

By: S. HUMBER, CLERK

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Attn: Erika Jerez, Deputy District Attorney

JUL 16 2021

Sherri R. Carter, Executive Officer/Clerk of Court  
By: Sheryl R. Humber Deputy  
Sheryl R. Humber

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES  
CLARA SHORTRIDGE FOLTZ CRIMINAL JUSTICE CENTER  
CRIMINAL WRITS CENTER**

In re  
KENJI HOWARD,  
Petitioner,  
On Habeas Corpus

) Case No.: YA026865  
) (Ct. of Appeal Case No.: B301757)  
) (Cal. Supreme Ct. Case No.: S259489)

MEMORANDUM OF DECISION  
(PETITION FOR WRIT OF HABEAS  
CORPUS)

AFTER AN EVIDENTIARY HEARING

Petition for Writ of Habeas Corpus by Kenji A. Howard ("Petitioner"), represented by Carol A. Watson, Esq. Respondent, the People of the State of California, represented by Deputy District Attorney Erika Jerez. Granted.

PROCEDURAL BACKGROUND

On October 10, 1997, a jury found Petitioner guilty of one count of first-degree murder, three counts of attempted murder, and one count of shooting at an occupied vehicle.<sup>1</sup> (Pen. Code,<sup>2</sup> §§ 187, subd. (a); 664/187, subd. (a); 246; § 12101.). The jury also found true that the

<sup>1</sup> This was Petitioner's second trial. At his first trial, which commenced on January 21, 1997, the jury found Petitioner guilty of one count of possession of a firearm by a minor, pursuant to Penal Code section 12101. The jury, however, was deadlocked on all other counts, and the trial court consequently declared a mistrial. (Petitioner's Exh. 21, pp. 6-7.)

<sup>2</sup> All further undesignated statutory references are to the Penal Code unless otherwise specified.

1 allegations that as to the murder, attempted murder, and shooting at an occupied vehicle counts,  
2 Petitioner discharged a firearm at an occupied motor vehicle, and that as to the attempted  
3 murder, Petitioner inflicted great bodily injury upon victim Travon Johnson, causing him to  
4 become comatose and suffer paralysis. (§§ 12022.6, subd. (b)(1); 12022.7, subd. (b)(2); §  
5 12022.9, subd. (b)(2).) (Petn., at p. 14; Petitioner's Exh. 52.)

6 On November 7, 1997, the trial court sentenced Petitioner to a term of 25 years to life as  
7 to the murder count, plus 10 years for the firearm enhancement. As to the attempted murder  
8 counts, Petitioner was sentenced to life imprisonment and as to the special allegations, Petitioner  
9 received an additional seven years in state prison. (Petn., at pp. 15-16.) Sentences imposed on  
10 the other counts but were either stayed pursuant to section 654, or were to run concurrently. The  
11 total aggregate term was 35 years to life, plus life, plus seven years in state prison.

12 On November 21, 1997, Petitioner filed a Notice of Appeal, alleging that Petitioner was  
13 coerced into a confession and that trial counsel was ineffective in providing a full and complete  
14 defense in his re-trial by failing to call key witnesses. (Petn., at p. 16.) On June 8, 1999, the  
15 Court of Appeal rejected the claims, and affirmed the judgment and sentence. (Petitioner's Exh.  
16 21.)

17 Four years later, the California Appellate Project intervened with a Motion to Recall  
18 Remittitur and Reissue the Opinion to permit the filing of a Petition for Review.<sup>3</sup> (Petitioner's  
19 Exh. 22.) On August 26, 2003, the Court of Appeal granted the motion, recalled the remittitur,  
20 filed Appellant's Opening Brief, vacated the opinion filed on June 8, 1999, and refiled the same  
21 opinion.

22 On September 26, 2003, Petitioner filed a *pro per* Petition for Review in the California  
23 Supreme Court. (Petitioner's Exh. 23.) On October 29, 2003, the California Supreme Court  
24 denied review. (Petitioner's Exh. 24.)

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27 <sup>3</sup> The basis for this request was that Petitioner's trial counsel had agreed to represent Petitioner throughout  
28 the appellate process. However, despite receiving approximately \$10,000 from Petitioner's family, counsel failed to  
file a petition for writ of habeas corpus or a petition for review in the California Supreme Court following the denial  
of Petitioner's appeal. (Petitioner's Exh. 22, at pp. 4-6.)

1 On December 13, 2004, Petitioner, through counsel, filed a petition for writ of habeas  
2 corpus in the United States District Court for the Central District of California. (Petitioner's  
3 Exh. 26.) On March 22, 2005, Petitioner filed a First Amended petition for writ of habeas  
4 corpus, asserting that his confession was coerced. (Petitioner's Exh. 25.) On February 23, 2005,  
5 Respondent, the Office of the Attorney General, filed a Return to the First Amended Petition for  
6 Habeas Corpus. (Petitioner's Exhs. 27-28.) On April 11, 2005, the Magistrate Judge filed the  
7 Report and Recommendation, adopting the opinion and conclusions of the 1999 Court of Appeal  
8 decision, and denied the petition. The order adopting the Report and Recommendation was  
9 entered on July 21, 2005. (Petitioner's Exh. 30.) On September 6, 2005, Petitioner filed a  
10 Motion for Certificate of Appealability, which was denied by the Ninth Circuit on January 24,  
11 2006. (Petitioner's Exhs. 31-32.)

12 On July 26, 2007, Petitioner filed a petition for writ of habeas corpus in the Los Angeles  
13 County Superior Court based on newly discovered evidence, namely that Petitioner's  
14 codefendant, Edward Powell, had confessed that he was the actual shooter.<sup>4</sup> (Petitioner's Exh.  
15 33.) After briefing, the court denied the petition as untimely and found that the petition  
16 presented "no timely new exculpable evidence, and [did] not refute the bulk of the incriminating  
17 evidence against the defendant." (Petn., at pp. 18-19; Petitioner's Exhs. 35-37.) On December  
18 4, 2007, Petitioner filed a Motion for Reconsideration in the Los Angeles County Superior Court,  
19 in which he argued that the petition was timely and that his claims were not procedurally barred.  
20 (Petitioner's Exh. 39.) On December 6, 2007, the court denied the motion, finding "no new facts  
21 stated for reconsideration." (Exh. 40, attached to Petn.) On January 11, 2008, Petitioner filed a  
22 Notice of Appeal regarding the denied petition and denied motion for reconsideration.<sup>5</sup>  
23 (Petitioner's Exh. 41.)

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26 <sup>4</sup> Powell was tried on an aider and abettor theory of accomplice liability and was convicted of one count of  
27 murder and three counts of attempted murder. (Petn., at p. 15.)

28 <sup>5</sup> It is unclear what came of this appeal. This court notes, however, that a denial of a petition for writ of  
habeas corpus is not an appealable order. (See *Jackson v. Superior Court* (2010) 189 Cal.App.4th 1051, 1064, fn.  
5; *In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.)

1 On September 1, 2011, Petitioner filed a *pro per* petition for writ of habeas corpus in the  
2 Los Angeles County Superior Court, claiming actual innocence based on Powell’s signed  
3 confession. (Petitioner’s Exh. 42.) On September 12, 2011, the court denied the petition.  
4 (Petitioner’s Exh. 43.) On October 21, 2011, Petitioner filed a *pro per* petition for writ of habeas  
5 corpus in the Court of Appeal, which was denied on October 27, 2011. (Petitioner’s Exh. 44.)

6 On September 14, 2018, Petitioner filed a new petition for writ of habeas corpus in the  
7 Los Angeles County Superior Court, asserting actual innocence, a coerced confession,  
8 unconstitutional waiver of his *Miranda* rights, unconstitutional interrogations, and ineffective  
9 assistance of counsel. (Petitioner’s Exh. 69.) On August 8, 2019, after briefing, the petition was  
10 denied as successive. (Petitioner’s Exh. 72.)

11 On October 25, 2019, Petitioner, through counsel, filed the instant petition for writ of  
12 habeas corpus in the Court of Appeal. Petitioner raised the same grounds, in addition to “facts of  
13 actual innocence, showing why the petition should not be barred as successive.” (Petn. for  
14 Review, at p. 14.) On November 26, 2019, the Court of Appeal denied the petition.

15 On December 6, 2019, Petitioner, through counsel, filed a Petition for Review in the  
16 California Supreme Court. Petitioner argued that the courts below improperly failed to consider  
17 his actual innocence claims. (Petitioner’s Exh. 75.) On December 26, 2019, Respondent filed an  
18 Answer, and, on January 6, 2020, Petitioner filed a Reply. (Petitioner’s Exhs. 76-77.)

19 On February 2, 2020, the Petition for Review was granted, and the matter was transferred  
20 to the Court of Appeal. The California Supreme Court ordered the Court of Appeal to vacate its  
21 summary denial of the October 25, 2019 petition and issue an order to show cause, returnable  
22 before the Los Angeles County Superior Court. On February 28, 2020, the Court of Appeal  
23 issued the order to show cause why the relief should not be granted “based on newly discovered  
24 evidence casting fundamental doubt on the prosecution’s case. (See Pen. Code, § 1473, subds.  
25 (a) & (b); see, e.g., Petn., Exhs. 1 & 34.)” (Petitioner’s Exhs. 78-79.) On April 27, 2020,  
26 Respondent filed a Return, and, on May 19, 2020, Petitioner filed a Traverse.

1 On March 17, 2021, March 18, 2021, and March 24, 2021, this court held an evidentiary  
2 hearing. All pleadings and exhibits were received into evidence. On April 29, 2021, the parties  
3 presented argument and the matter was taken under submission.

4 FACTUAL SUMMARY<sup>6</sup>

5 Sometime in March 1995, Petitioner's co-defendant Edward Powell received a gun in  
6 exchange for cocaine. Powell and Petitioner, who was 16 years old at the time, were both  
7 members<sup>7</sup> of the "Blood" Limehood Piru street gang.

8 On the evening of March 17, 1995, Powell drove to Dockweiler Beach in his 1977  
9 Oldsmobile Cutlass. Also in the vehicle were LaKeyna Martin, Anthony Munoz, Sheletha  
10 Taylor, and Petitioner. While at the beach, Powell shot at several airplanes landing at or  
11 departing from Los Angeles International Airport. Two other couples, Landon Martinez, Gail  
12 Lewis, Travon Johnson, and Arkett Mejia, were also at the beach, arriving in a different car.  
13 (Petn., at p. 12.)

14 At approximately 10:00 p.m., police officers arrived at the beach and ordered everyone to  
15 leave. While walking back to his car, Martinez heard a voice inside Powell's Cutlass say, "give  
16 me the strap," which he interpreted to mean that someone was asking for a gun. (*Howard*,  
17 attached to Petn., dated Oct. 25, 2019, as Exh. 21.) Powell drove away with Martin in the front  
18 passenger seat, Munoz in the rear driver's side seat, Taylor in the rear middle seat, and Petitioner  
19 in the rear passenger seat. (Petn., p. 12.) Martinez drove away with Lewis in the front passenger  
20 seat, and Johnson and Mejia in the backseat.

21 As Powell entered the 105 freeway on-ramp, he saw Martinez's car ahead of them.  
22 Powell pulled up next to Martinez's car. Martin and Powell flashed gang signs directed at  
23 Martinez's car. Someone from inside the Cutlass then fired approximately 10 shots at Martinez  
24 and his passengers. Mejia was killed and Johnson was paralyzed from the neck down as a result  
25

26 \_\_\_\_\_  
27 <sup>6</sup> The following facts and procedural history are adopted from the petition and the Court of Appeal opinion,  
*People v. Howard* (Jun. 8, 1999, case no. B118552) [nonpub. opn.] ("*Howard*").

28 <sup>7</sup> It is unclear whether Petitioner was a member of the gang or whether he just associated with members of  
the gang.

1 of the gunshot wounds he sustained. Powell then drove back to the neighborhood, and gave  
2 Petitioner the gun to hold onto. (Petn., at pp. 12-13; Petitioner's Exh. 21, at p. 2.)

3 The following day, on March 18, 1995, Petitioner was returning the gun to Powell when  
4 Los Angeles County Sheriff's Department ("LASD") deputies apprehended Petitioner for  
5 possession of the gun. Petitioner was released that day. On March 27, 1995, LASD detectives  
6 received a "We Tip" report identifying Powell as the shooter in the March 17<sup>th</sup> incident. The tip  
7 also mentioned Petitioner, and claimed that the Limehood Piru gang was involved in the  
8 shooting. When LASD officers tested the gun that they had confiscated from Petitioner, they  
9 discovered that it was the murder weapon. (Petn., at p. 13; Petitioner's Exh. 21, at p. 3.)

## 10 I. Pre-Conviction Proceedings and Testimony

### 11 a. Petitioner's First Interview and Statements to Law Enforcement

12 On March 27, 1995, Petitioner was brought in for questioning. After waiving his  
13 *Miranda*<sup>8</sup> rights, Petitioner told detectives that he was in the back seat of the Cutlass when the  
14 shooting occurred; that he was sleeping off the effects of marijuana and alcohol, and woke up  
15 when he heard gunshots; and that he saw Powell "firing seven or eight shots through the open  
16 front passenger window at a car next to them." (Petitioner's Exh. 21, at p. 3; Petn., at p. 32.)  
17 Petitioner also falsely claimed that he had bought the gun from Powell the day after the shooting.  
18 Petitioner was released after promising to return the next day;<sup>9</sup> however, he fled to Seattle and  
19 was not apprehended until May 2, 1995. (Petitioner's Exh. 21, at p. 3; Petn., at p. 33.)

### 20 b. Petitioner's Second Interview and Confession

21 On May 10, 1995, Petitioner was interviewed a second time. After again waiving his  
22 *Miranda* rights, he agreed to take a polygraph test. The test lasted for approximately 3 hours and  
23 15 minutes. When the test was completed, polygraph operator and Deputy Sheriff Linda  
24 Quinonez told Petitioner that he had failed the examination. Petitioner consistently denied being  
25 the shooter and maintained that Powell was the shooter.

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26 <sup>8</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

27 <sup>9</sup> Powell was also arrested on March 27, 1995. Officers impounded Powell's vehicle and noted that the rear  
28 windows did not roll down. (Petn., at p. 32.) Unlike Petitioner, however, Powell was not released from custody  
following his arrest.

1 After three hours of interrogation, Petitioner finally told Quinonez that Powell made him  
2 shoot the gun, stating that he “had not meant to hurt anyone, had not paid attention to where  
3 exactly he was ‘capping’ the rounds and had just shot out the window; [and] didn’t find out until  
4 a couple of days later that he had actually killed someone.” (Petn., at pp. 33-34; Petitioner’s  
5 Exh. 21, at pp. 4-5.) In Petitioner’s confession, he explained, “he rested his wrist on the top of  
6 the open window in the door, he pointed the gun downward, and he fired several shots.” (RT,  
7 dated Mar. 17, 2021, at p. 26; Petn., at p. 39.)

8 Following his confession, Petitioner spoke with LASD investigators Neumann and  
9 Tauson and again admitted to the shooting. He explained that Powell handed him the gun and  
10 threatened to hurt him if he did not shoot at Martinez’s car. (Petitioner’s Exh. 21, at p. 6.) Other  
11 than this confession, no one has identified Petitioner as the shooter; in fact, numerous witnesses,  
12 including Powell himself, have identified Powell as the shooter. (Petn., at p. 14.)

## 13 **II. Trial Testimony**

### 14 **a. Petitioner’s Trial Testimony**

15 At trial, Petitioner testified in his own defense. Petitioner stated that he dozed off when  
16 the car entered the freeway, that he was awakened by gunshots, and that he saw Powell “reach  
17 over Martin, who was bent forward in the front passenger seat, and shoot through the open front  
18 passenger window. Powell’s gun was completely inside the car.” (Petn., at pp. 34-35;  
19 Petitioner’s Exh. 56, at pp. 3083-3084.) Petitioner testified that Powell fired six to nine shots,  
20 and stated that shells were “popping all over the inside of the car.” (Petn., at p. 35; Petitioner’s  
21 Exh. 56, at pp. 3055, 3085.)

### 22 **b. Richard Catalani’s Trial Testimony**

23 Richard Catalani was the LASD firearms examiner who examined both vehicles involved  
24 in the shooting in 1995. (RT, dated Mar. 17, 2021, at p. 17.) He testified for the People at  
25 Petitioner’s trials. “At the time [Catalani] performed the requested scientific tests and testified in  
26 the three trials, he had no knowledge of the facts as to guilt or innocence or the claims of the  
27 parties, [including Petitioner’s confession].” (Petn., at p. 39; RT, dated Mar. 17, 2021, at p. 24.)  
28



1 Catalani testified that gunshot residue (“GSR”) was found “on the inside of Powell’s passenger  
2 door,” and that GSR was consistent with the gun being fired inside the car. (Petn., at p. 31.)

3 Catalani also examined the vehicles in order to discern the trajectory of the bullets.

4 Catalani generally observed the bullet holes and concluded that they went into the victim’s car  
5 “front to back.”<sup>10</sup> (RT, dated Mar. 17, 2021, at p. 84.) Catalani did not prepare any reports about  
6 the trajectory of the bullets in anticipation of trial, nor did he use any additional materials such as  
7 string, laser pointers, or protractors to aid in determining the trajectory of the bullets. (RT, dated  
8 Mar. 17, 2021, at pp. 28, 45.) However, Catalani explained that one need not use a protractor or  
9 trigonometric measurement in order to determine that the bullets went into the victim’s car front  
10 to back. (RT, dated Mar. 17, 2021, at p. 84.)

### 11 **III. Post-Conviction Proceedings and Testimony**

#### 12 **a. Eric Lessard’s 2021 Examination on Commission**

13 On December 4, 2006, Eric Vincent Lessard, a licensed private investigator, interviewed  
14 Powell at Kern Valley State Prison, located in Delano, California. (Reporter’s Transcript  
15 (“RT”), dated Jan. 25, 2021, at p. 6, attached as Petitioner’s Exh. 3.) During the interview,  
16 Powell admitted that he was the shooter, that he handed the gun off to Petitioner after the  
17 shooting, and that Petitioner was innocent. (Petn., at p. 44; Petitioner’s Exh. 3, at pp. 8-9.)

18 In anticipation of the evidentiary hearing, on January 25, 2021, Lessard was examined on  
19 commission in Gainesville, Florida regarding Powell’s confession and declaration. Lessard  
20 explained that after the interview, he prepared a handwritten declaration based on Powell’s  
21 statements. According to Lessard, “sentence by sentence I wrote out the statements he had told  
22 me and read that to him, and he would approve/disapprove, [and] make a change. We did that  
23 sentence by sentence until the entire declaration was written out. And then I read the entire thing  
24 to him again, and he approved, and he signed it.” (Petitioner’s Exh. 3, at pp. 14-15.)

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28 <sup>10</sup> By “front to back,” Catalani means “the exterior bullet hole was farther forward than the interior exit from the door.” (RT, dated Mar. 17, 2021, at p. 30.)

1                   **b. Powell's 2006 Confession to Badia Hill**

2                   In 2006, Badia Hill, a woman who grew up in the same neighborhood as Petitioner and  
3 Powell, began communicating with Powell while he was in prison. (RT, dated Mar. 24, 2021, at  
4 p. 162.) Powell admitted to Hill that he was the shooter, that Petitioner was innocent, and that he  
5 handed the gun off to Petitioner when they returned to the neighborhood. (Petn., at p. 44.)

6                   **c. Powell's 2006 Confession to Eric Lessard**

7                   As stated, *ante*, during the December 4, 2006 interview with Lessard, Powell admitted  
8 that he was the shooter, that he handed the gun off to Petitioner after the shooting, and that  
9 Petitioner was innocent. (Petn., at p. 44; Petitioner's Exh. 3, at pp. 8-9.) In his declaration,  
10 Powell explained the following: on March 14, 1995, his friend came to his home to purchase  
11 crack cocaine. She did not have any money to pay for the drugs, so she offered him a 9  
12 millimeter handgun as collateral. Once Powell gave her the cocaine, they agreed that she would  
13 return in a few days with the money and at that point he would return her gun. (Petitioner's Exh.  
14 4, at p. 1.) Three days later, on March 17, 1995, Powell drove his friends<sup>11</sup> to the beach his 1977  
15 Oldsmobile Cutlass.

16                   The group arrived at the beach at around 10:00 pm and stayed for about one hour. At the  
17 beach, they had a "verbal confrontation ... with a large group of what appeared to be Mexicans."  
18 (Petitioner's Exh. 4, at p. 2.) Powell admitted that he had the gun tucked into his waistband,  
19 concealed completely by his shirt. Powell stated, "up to that time, I had never drawn or exposed  
20 the gun that evening. I had never mentioned the gun, and no one I was with knew I had it. There  
21 is no way that Kenji Howard could have known that I had a gun." (*Ibid.*) Before the  
22 confrontation escalated, the police arrived and "announced on the loudspeaker that the beach was  
23 closed, and that everyone had 5 minutes to leave the beach, or their cars would be impounded."  
24 (*Id.*, at p. 3.)

25                   Thereafter, Powell drove off in his car with LaKeyna Martin "in the front passenger seat,  
26 Kenji in the right back seat, Lakina's [*sic*] cousin [Sheletha Taylor] in the middle of the back

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28                   <sup>11</sup> According to Powell, the people in the vehicle included Anthony Munos, LaKeyna Martin, and Martin's  
cousin, Sheletha Taylor. Powell was uncertain whether Petitioner was in the car on the trip to the beach. (*Id.*, at p.  
2.)

1 seat, and Anthony Munos directly behind me.” (Petitioner’s Exh. 4, at p. 3.) It took  
2 approximately 10 minutes to get out of the parking lot and to reach the freeway onramp. Powell  
3 indicated that he had been drinking alcohol and smoking marijuana that evening, but that he had  
4 not personally seen Kenji smoke or drink that evening.

5 Powell stated that when he entered the 105 freeway heading eastbound, he looked back  
6 and saw “Kenji asleep in the back seat. It was roughly 11:00 p.m.” (Petitioner’s Exh. 4, at p. 3.)  
7 According to Powell, about 10 minutes after they had gotten on the freeway, “we saw a car  
8 driving in the right-hand lane. Lakina [*sic*] told me that the people inside [that car] had offended  
9 some women from our group at the beach when they went to the bathroom. I slowed my car to  
10 get side-by-side with that car. Lakina [*sic*] and I displayed Piru Blood gang signs at the people  
11 in that car.” (*Id.*, at pp. 3-4.) Powell explained that his car had “2 doors and only 2 windows that  
12 roll down. The back seat had only a small, rectangular window that does not roll down.” (*Id.*, at  
13 p. 4.)

14 When the members of the other car did not react to Powell and Lakeyna’s overtures,  
15 LaKeyna and Powell again displayed gang signs, and there still was no response. At this point,  
16 Powell “told Lakina [*sic*] to bend down low, and she did so. I removed the gun from my  
17 waistband, pointed it with my right hand out the passenger window, and fired approximately 4  
18 shots at the other car.” (Petitioner’s Exh. 4, at p. 4.) Powell then admitted that he “waited a  
19 second or two, then fired 3-4 more shots. Then I accelerated, sped off, and drove back to  
20 Compton Blvd. By the time we arrived at the apartments, Kenji had dozed off again.” (*Id.*, at  
21 pp. 4-5.)

22 Regarding the time leading up to and during the actual shooting, Powell stated that  
23 Petitioner “was asleep in my back seat when I did the shooting ... where there are no windows  
24 that can go up or down. I am 100% positive that he did not and could not have shot a gun from  
25 where he was sitting.” (Petitioner’s Exh. 3, at pp. 5-6.) Powell continued, “Kenji was not  
26 involved in any way in the shooting, nor was he involved in the gang sign throwing that  
27 preceded [*sic*] the shooting. Kenji was asleep, at least until the shooting started, and the  
28 shooting ended a few seconds after it began.” (*Id.*, at p. 6.)

1           When they returned to their neighborhood, Powell handed the gun to Kenji “and told him  
2 to put it in the apartment where he stayed. At that point I still did not know anyone had been  
3 shot.” (Petitioner’s Exh. 4, at p. 5.) A few days later, Powell went to Petitioner’s apartment to  
4 get the gun and told Petitioner to bring the gun down to him. When Petitioner was returning  
5 with the gun, police officers showed up.<sup>12</sup> When Petitioner, who still had the gun in his  
6 possession, and Powell saw the police, they both ran. (*Ibid.*)

7           Powell later learned that his charges had been amended to aiding and abetting a murder  
8 “because Kenji had confessed to being the actual shooter. I was surprised to hear this, because I  
9 was the only shooter and Kenji was not included in any way.” (Petitioner’s Exh. 3, at pp. 6-7.)

10           Powell stated, “I was angry at Kenji for years after. His confession made it easier for me  
11 to be convicted. My only thought was that his talking got me in trouble.” (Petitioner’s Exh. 3, at  
12 p. 7.) However, “more than 10 years have gone by, my feelings have changed. ... Kenji does not  
13 deserve to be in prison for this. I am responsible for this whole situation. Kenji is only  
14 responsible for confessing to something he did not do.” (*Ibid.*)

15           According to Lessard, Powell waited 12 years to come forward with his statements  
16 because “in his heart he had been blaming Kenji for his own – Powell’s own conviction because  
17 Kenji had, I believe, spoken freely and carelessly to law enforcement, and Powell told me that he  
18 thought that’s why he, Powell, had wound up getting in trouble.” (Petitioner’s Exh. 3, at p. 21.)

19           Edward Powell also authored a typewritten declaration on June 5, 2007. (Edward Powell  
20 Declaration, dated Jun. 5, 2007, attached as Petitioner’s Exh. 5.) Lessard denied helping Powell  
21 author the June 5, 2007 declaration. (Exh. 3, at pp. 20-21.)

#### 22           **d. Catalani’s Post-Conviction Testimony and Conclusions**

23           Following Powell’s confession, Petitioner’s counsel reached out to Catalani while  
24 preparing to file the instant petition. (RT, dated Mar. 17, 2021, at p. 25.) For the first time,  
25 Catalani reviewed Petitioner’s police interview, polygraph examination, and confession. (*Ibid.*)  
26 He then reviewed the reports that he authored prior to Petitioner’s trial. Catalani concluded that  
27

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28           <sup>12</sup> Powell explained that the area in which the apartment was located is a known drug area, and it is  
common for police to detain and question individuals.

1 the GSR that he found in Powell's car could not have been deposited in the manner in which  
2 Petitioner confessed. In other words, Petitioner's confession contradicted the GSR evidence.  
3 Catalani explained, "to deposit the GSR on the inside of the passenger door, a person 'would  
4 have to hold the muzzle of the gun in roughly the same position as the driver shooter, that is,  
5 approximately twelve inches away and roughly perpendicular to the door.'" (Petn., at p. 39.)  
6 Catalani elaborated, "it would be impossible for a shooter, positioned anywhere inside the  
7 vehicle, holding the gun outside the vehicle, to deposit the GSR." (*Ibid.*) Catalani concluded  
8 that the placement of the GSR "inside the vehicle would be impossible according to Petitioner's  
9 confession, *i.e.*, he put the gun out the window, rested his wrist on the edge of the open window  
10 and fired in a downward direction." (*Ibid.*)

11 Furthermore, Catalani reviewed both his trial testimony regarding the bullet trajectory  
12 and photographs of the victim's vehicle. (RT, dated Mar. 17, 2021, at pp. 29, 47-48; Petitioner's  
13 Exh. 12.) Catalani now opines that, assuming Petitioner was sitting in the right rear seat with  
14 two people to his left, and assuming he is right-handed,<sup>13</sup> "Petitioner could not have fired that  
15 shot because the bullet holes went from front to back and level." (Petn., at p. 40.)

#### 16 **Catalani's Evidentiary Hearing Testimony**

17 Catalani testified at the evidentiary hearing on March 17, 2021, and explained that GSR  
18 "is comprised of several components of gun powder, burned gun powder, particulate lead from  
19 bullets, and lead smoke from various sources including the base of a lead bullet that may be  
20 vaporizing." (RT, dated Mar. 17, 2021, at p. 18.) It is expelled from a firearm "in the shape of a  
21 cone starting with the size of the muzzle of the firearm, and it expands out in a cone shape until it  
22 either dissipates or is deposited." (*Id.*, at pp. 18-19.) The lead residue is not visible to the naked  
23 eye. (*Id.*, at p. 22.) Furthermore, guns distribute the GSR within an arm's length from the  
24 muzzle of the gun, but that the distance between the muzzle of a gun and the GSR is specific "to  
25 the particular firearm and ammunition that are being used." (*Id.*, at p. 23.)

26 Catalani also described exactly how he inspected Powell's vehicle and tested for GSR  
27 inside of the car. He explained that he took one filter paper, dabbed it from one end of the door  
28

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<sup>13</sup> Badia Hill testified that Petitioner is right-handed. (RT, dated Mar. 24, 2021, at p. 160.)

1 in a one-inch section, tested it, noted whether the test results came back positive for GSR,<sup>14</sup> and  
2 then moved along the door. (RT, dated Mar. 17, 2021, at pp. 60-61; Petitioner's Exh. 10.)  
3 Catalani found GSR "on the inside of Powell's passenger door." (Petn., at p. 31.) Specifically,  
4 GSR was found "along the mid-section of [the right passenger door] along the top of it from  
5 front to back ... generally towards the center." (RT, dated Mar. 17, 2021, at p. 21; Petitioner's  
6 Exh. 10.) Catalani tested each spot individually, and when he found a spot that was positive, he  
7 went back and retested it to confirm that it was positive. (RT, dated Mar. 17, 2021, at p. 61;  
8 Petitioner's Exh. 10.)

9 Catalani reiterated that Petitioner's confession is inconsistent with the GSR that he found  
10 in Powell's vehicle. Catalani explained, "if the gun were indeed placed outside of the car [in the  
11 way Petitioner confessed] and even if it was going as slow as 40 miles an hour, that's a 40 mile  
12 an hour wind that's blowing that smoke away from the area that I found positive for lead  
13 smoke." (RT, dated Mar. 17, 2021, at p. 26.) Catalani testified that in order for the GSR he  
14 observed and Petitioner's confession to not contradict, the GSR "would have had to have  
15 performed, in my opinion, an impossible mission of first coming back into the car and second not  
16 depositing right where he held his wrist or right there where the gun was." (*Id.*, at p. 27.)  
17 Catalani concluded, "I can't really picture a manner in which he described holding the gun  
18 outside and pointed down leaving gunshot residue on the inside of that door at all." (*Id.*, at p.  
19 36.)

20 Catalani further testified that there was nothing on the frame of the right passenger door  
21 "that would suggest that there was any gunshot residue on the frame." (RT, dated Mar. 17, 2021,  
22 at p. 57.) Additionally, Catalani noted that the GSR was relatively uniformly distributed across  
23 the passenger door, and that "there were no standout spots that were more dense [*sic*], a lot more  
24 dense than others." (*Id.*, at p. 85.)

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25  
26 <sup>14</sup> Specifically, Catalani explained that in this test he had "three reagents. The first is 15 percent acidic acid  
27 ... that's the solution that dissolves a little bit of the test material of the lead smoke, and it transfers to the filter  
28 paper. Then you add a drop of sodium rhodizonate which causes a pretty bright pink color, and then the  
confirmation is you add 5 percent solution of hydrochloric acid, one drop of each in sequence for each test." (RT,  
dated Mar. 17, 2021, at pp. 61-62.) Catalani then recorded the color change. (*Id.*, at p. 62.) Catalani continued, "if  
the edge of that door was closer to the gun, you'd expect to get more of the lead smoke on it and you'd get a brighter  
test." (*Id.*, at p. 63.)

1           Ultimately, Catalani concluded that, “in order for a backseat shooter to hold the firearm  
2 in the similar position to a driver shooter would be awkward, if not impossible.” (RT, dated  
3 Mar. 17, 2021, at p. 78.) Catalani posited that if Petitioner were able to deposit the GSR from  
4 the backseat, he would have had to have either moved to his left where the two other passengers  
5 were seated, “or reach over with a long reach perhaps to get that gun in the same position either  
6 stand up over them, slide them over, again reach pretty far into the front in order to maintain that  
7 gunshot residue.” (*Id.*, at p. 86.)

8                           **e. Robert Keil’s Evidentiary Hearing Testimony**

9           The People called Robert Keil, the Supervisor of the Firearms Identification Section of  
10 the LASD Scientific Services Bureau. (RT, dated Mar. 18, 2021, at p. 97.) Keil took issue with  
11 Catalani’s method of testing the GSR, but ultimately concluded that there was no basis to  
12 eliminate the rear passenger as the shooter. He did state, however, that the GSR is also  
13 consistent with the driver being the shooter. (*Id.*, at pp. 121-122.)

14           The People argued that the front to back trajectory of the bullets “could be accounted for  
15 if the shooter’s vehicle was stationed ahead of the victim’s vehicle at the time the shots were  
16 fired.” (RT, dated Mar. 17, 2021, at p. 83.) Regarding the bullet trajectory, Keil admitted, “from  
17 what I can tell in the photo, it does seem to be a slight front to rear path.” (RT, dated Mar. 18,  
18 2021, at p. 106.) After viewing the photograph of the victim’s vehicle, Keil acknowledged that  
19 the entry point of the bullet was “roughly parallel to the door handle.” (*Id.*, at p. 126.) However,  
20 Keil stated that there would be other aspects he would need to analyze in order to make that  
21 determination, such as whether the bullet “hit any structure, deflected, and then caused additional  
22 damage or exited.” (*Id.*, at pp. 106-107.)

23                           **f. Badia Hill’s Evidentiary Hearing Testimony**

24           Petitioner called Badia Hill at the evidentiary hearing. Hill explained that she knew both  
25 Powell and Petitioner from growing up in the same neighborhood. (RT, dated Mar. 24, 2021, at  
26 p. 158.) For purposes of the claims raised by Petitioner, Hill explained that she and Powell  
27 began communicating while Powell was incarcerated, and that he said Petitioner was innocent.  
28 (*Id.*, at p. 162.) She clarified that she and Powell did not fully discuss the details surrounding the

1 shooting. (*Id.*, at p. 164.) Rather, she explains that the information she gleaned regarding the  
2 shooting came from her communications with Petitioner. (*Id.*, at p. 167.)

### 3 **APPLICABLE LEGAL PRINCIPLES**

4 “Habeas corpus will lie to vindicate a claim that newly discovered evidence demonstrates  
5 a prisoner is actually innocent.” (*In re Hardy* (2007) 41 Cal.4th 977, 1016.) “[A] criminal  
6 judgment may be collaterally attacked on habeas corpus on the basis of newly discovered  
7 evidence if such evidence casts fundamental doubt on the accuracy and reliability of the  
8 proceedings.” (*In re Lawley* (2008) 42 Cal.4th 1231, 1239 (“*Lawley*”), internal citations and  
9 quotation marks omitted.)

10 Penal Code section 1473, a new version of which became effective on January 1, 2017,  
11 was amended to allow a writ of habeas corpus to be prosecuted on the basis of new evidence.  
12 Specifically, section 1473, subdivision (b)(3)(A) states that a writ of habeas corpus may be  
13 prosecuted if “[n]ew evidence exists that is credible, material, presented without substantial  
14 delay, and of such decisive force and value that it would have more likely than not changed the  
15 outcome at trial.” (§ 1473, subd. (b)(3)(A).) Section 1473 defines new evidence as “evidence  
16 that has been discovered after trial, that could not have been discovered prior to trial by the  
17 exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral,  
18 or impeaching.” (§ 1473, subd. (b)(3)(B).)

### 19 DISCUSSION

#### 20 **I. Newly Discovered Evidence**

21 This court must first decide whether the evidence Petitioner presents constitutes as  
22 “newly discovered evidence” within the confines of section 1473, subdivision (3)(B). The  
23 People assert that Powell’s confessions do not constitute newly discovered evidence, arguing,  
24 “Powell’s statements are not new. ... this is the fifth time Petitioner has referred to Powell’s  
25 declaration as the evidentiary support for [a] claim of actual innocence.” (RT, dated Apr. 29,  
26 2021, at p. 10.)

27 The People also claim that Catalani’s testimony does not constitute newly discovered  
28 evidence. The People argued, “Catalani’s augmented opinions are not new. ... The information



1 that he based his opinions on in the hearing was available to both parties at the time of trial.”  
2 (*Id.*, at pp. 10-11.)

3 During a status conference held on October 8, 2020, this court held, “the operative order  
4 to show cause is the one issued by the Court of Appeal, which says I’m to consider his claim of  
5 factual innocence based on newly discovered evidence [and] I believe they’re entitled to put on  
6 anything the Petitioner thinks is within the ambit of newly discovered evidence showing factual  
7 innocence.” (RT, dated Oct. 8, 2020, at p. 4.) Indeed, the Court of Appeal’s order to show cause  
8 directed this court to evaluate why the relief should not be granted based on newly discovered  
9 evidence casting fundamental doubt on the prosecution’s case and cited Powell’s confession as  
10 an example of an exhibit upon which this court could rely. Accordingly, this court finds that  
11 Powell’s confession constitutes newly discovered evidence for purposes of section 1473,  
12 subdivision (b)(3)(A).

13 Regarding Catalani’s findings, Catalani explained that he was not provided with  
14 Petitioner’s confession prior to testifying at his trial. This court finds that Catalani’s discovery of  
15 Petitioner’s confession after trial could not have been discovered prior to trial by the exercise of  
16 due diligence: as a prosecution witness tasked with explaining the GSR and bullet trajectory  
17 analysis, Catalani would not have been made privy to the details of Petitioner’s confession.  
18 Furthermore, this court finds that Catalani’s testimony is both admissible under the rules of  
19 evidence and is neither cumulative nor impeaching. Rather, the combination of Petitioner’s  
20 confession and Catalani’s testimony provides an entirely different version of events than were  
21 argued at Petitioner’s trial. Accordingly, this court finds that Catalani’s testimony constitutes as  
22 newly discovered evidence.

## 23 **II. Evidence Presented Without Substantial Delay**

24 Petitioner also must establish that the evidence was presented “without substantial delay.”  
25 (§ 1473, subd. (b)(3)(A).) Regarding Powell’s confession, the People argue that it has been 10  
26 years since his declaration, which constitutes a substantial delay. (RT, dated Apr. 29, 2021, at p.  
27 10.) However, as stated, *ante*, the procedural history of this case indicates that the prior petitions  
28 filed based on Powell’s confession were erroneously denied as successive. Furthermore,

1 regarding Catalani's testimony, he did not reevaluate the evidence until after Petitioner's counsel  
2 contacted him in anticipation of filing the instant petition in 2018. Therefore, Petitioner has also  
3 satisfied this requirement of section 1473.

### 4 **III. Evidence of Such Decisive Force and Value**

5 Here, Petitioner has the burden of proving that, by the preponderance of the evidence, the  
6 newly discovered evidence is of "such decisive force and value that it would have more likely  
7 than not changed the outcome at trial." (§ 1473, subd. (b)(3)(A).)

#### 8 **a. Powell's Confession**

9 The court, having had the opportunity to review Powell's multiple sworn confessions and  
10 Lessard's examination on commission, finds Powell's confessions to be credible. Powell  
11 explained that he was angry with Petitioner because Petitioner's confession implicated him in the  
12 shooting; however, after 10 years, Powell realized that Petitioner "does not deserve to be in  
13 prison for ... confessing to something he did not do." (Petitioner's Exh. 3, at p. 7.) Furthermore,  
14 Powell has little to gain from confessing to being the actual shooter: he is already serving a  
15 prison sentence for murder and attempted murder, and was not provided anything in return for  
16 this confession.

17 Additionally, Powell's confession is corroborated by the physical evidence: both firearm  
18 examiners during the evidentiary hearing admitted that the position of the GSR did not foreclose  
19 the possibility that the driver of the vehicle was the actual shooter. The events leading up to the  
20 shooting also indicate that Powell's confession is accurate: Powell confessed that nobody else  
21 knew he came to the beach with a gun until he brandished it, and he was the only person who  
22 used the gun while at the beach. (Petitioner's Exh. 4, at p. 2.)

23 Most notably, Powell explains that the window next to Petitioner did not go up or down,  
24 and he asserts that he is "100% positive that he did not and could not have shot a gun from where  
25 he was sitting." (Petitioner's Exh. 3, at pp. 5-6.) This particular fact was persuasive to this  
26 court: in order for Petitioner's confession to be true, Petitioner would have had to lean towards  
27 Martin in the front passenger seat, rotate his seat clockwise to a 45 degree angle while jammed in  
28 by two other rear passengers, then cock his wrist awkwardly, place his arm outstretched with his

1 wrist at a right angle resting on the window, and fire a 9 millimeter pistol out the window. The  
2 court notes that this position would be all but impossible to accomplish, given the type of firearm  
3 and the force of the recoil.

4 Ultimately, had Powell's confession been available at the time of Petitioner's trial, it  
5 would have cast doubt on Petitioner's confession or, at the very least, provided an alternate  
6 version of the shooting for the jury to consider. Powell's confession is supported by the  
7 evidence adduced at trial. The only piece of evidence that contradicts Powell's confession is  
8 Petitioner's own confession. Accordingly, this court finds that Petitioner has met his burden of  
9 proving that more likely than not Powell's confession would have changed the outcome at trial.

10 **b. GSR Evidence**

11 This court also finds that the GSR evidence supports Petitioner's argument. Catalani  
12 concluded that if Petitioner's confession were true and if the vehicle were traveling at a speed of  
13 approximately 40 miles per hour, the GSR would have been deposited differently. (RT, dated  
14 Mar. 17, 2021, at p. 26.) Furthermore, both experts agreed that the GSR could have been  
15 deposited as a result of the gun being held by the driver shooting through the open passenger  
16 window. Catalani found that the GSR indicated that the gun was fired approximately "a foot  
17 plus or minus from [the front passenger] door." (*Id.*, at p. 24.)

18 Catalani also found that the lead smoke contradicted Petitioner's confession. As stated,  
19 *ante*, Catalani explained that that in order for the lead smoke that he found to have occurred in  
20 the manner in which Petitioner confessed, it "would have had to have performed, in my opinion,  
21 an impossible mission of first coming back into the car and second not depositing right where he  
22 held his wrist or right where the gun was." (RT, dated Mar. 17, 2021, at p. 27.)


23 Ultimately, Petitioner's confession and the physical evidence do not align. Had Catalani  
24 been aware of Petitioner's confession, he would have testified that it would have been "awkward,  
25 if not impossible" for Petitioner to have shot the gun and deposited the GSR found on the  
26 passenger door frame. Accordingly, this court finds that Petitioner has met his burden of proving  
27 that more likely than not that the newly discovered GSR testimony would have changed the  
28 outcome at trial.

1 **DISPOSITION**

2 For all the foregoing reasons, the petition for writ of habeas corpus is GRANTED.  
3 Petitioner's sentence as to all counts is recalled, and the conviction is vacated and set aside. The  
4 People have 60 days to re-try or enter into a disposition in this case.

5 The Clerk is ordered to serve a copy of this order upon Carol A. Watson, Esq., as counsel  
6 for Petitioner, and upon Deputy District Attorney Erica Jerez, as counsel for Respondent, the  
7 People of the State of California. A courtesy copy is to be served on Supervising Deputy  
8 Attorney General Julie Malone, as counsel for Petitioner's custodian, the Secretary of the  
9 Department of Corrections and Rehabilitation.

10  
11  
12 Dated: 7-16-21

13   
14 \_\_\_\_\_  
15 WILLIAM C. RYAN  
16 Judge of the Superior Court



1 **Send a copy of this order to:**

2 **Respondent's Counsel**

3 Los Angeles County District Attorney's Office  
4 Post-Conviction Litigation and Discovery Division  
5 Habeas Corpus Litigation Team  
6 275 Magnolia Ave., Suite 3175  
7 Long Beach, CA 90802  
8 Attn: Erika Jerez, Deputy District Attorney

9 **Petitioner's Counsel**

10 Carol A. Watson, Esq.  
11 3435 Wilshire Blvd., Suite 2910  
12 Los Angeles, CA 90010  
13 Attn: Carol A. Watson, Esq.

14 **Counsel for the Secretary of the Department of Corrections and Rehabilitation**

15 Department of Justice – State of California  
16 Office of the Attorney General  
17 300 South Spring Street, Suite 1702  
18 Los Angeles, CA 90013  
19 Attn: Julie Malone, Supervising Deputy Attorney General  
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