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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re

EDWARD CHARLES WILLIAMS et al.,

on

Habeas Corpus.

B247801

(Los Angeles County
Super. Ct. No. A080152)

APPEAL from an order of the Superior Court of Los Angeles County, Cynthia Rayvis, Judge. Reversed and remanded with directions.

Jackie Lacey, District Attorney, Roberta Schwartz and Joann Lach, Deputy District Attorneys for Appellant.

Marc Jonathan Zilversmit, under appointment by the Court of Appeal, for Respondent Edward Charles Williams.

Orrick, Herrington & Sutcliffe, Mark Mermelstein, Robert Loeb, Mary Kelly Persyn, Sharon E. Frase and Katherine K. Ikeda, under appointment by the Court of Appeal, for Respondent Terrence Edwin Prince.

The People appeal from an order granting petitions for writs of habeas corpus of respondents Edward Williams and Terrence Prince, following Williams's conviction on count 1 – first degree murder (Pen. Code, § 187) and count 2 – attempted robbery (Pen. Code, §§ 664, 211) each with a finding he was armed with a firearm (Pen. Code, § 12022, subd. (a)), and following Prince's convictions on count 1 – first degree murder (Pen. Code, § 187) with firearm use (Pen. Code, § 12022.5) and an attempted robbery special circumstance (former Pen. Code, § 190.2, subd. (a)(17)(i)) and count 2 – possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)).¹

The court sentenced Williams to prison for 25 years to life for the murder, plus one year for the armed enhancement, with a concurrent term of two years on count 2, and sentenced Prince to prison for life without the possibility of parole for the murder, plus two years for the firearm use enhancement, with a consecutive term of eight months on count 2. We reverse the order granting the petitions and remand the matter with directions.

FACTUAL SUMMARY

1. Evidence Presented at the Trials.

a. Prince's Trial.

(1) People's Evidence.

The People's evidence at Prince's 1982 trial established the following. On February 16, 1980, Carol Croce and Bruce Horton (the decedent) operated a take-out restaurant and check cashing business at 10831 Venice on the northwest corner of Venice and Westwood in Los Angeles. Horton, a retired Los Angeles police officer, was also Croce's boyfriend.

The restaurant's front door was on Venice, i.e., on the south side of the building. The restaurant took up much of the area inside the building except for a small rectangular booth (booth) inside the building. The check cashing business operated from the booth.

¹ Prince stipulated to the predicate felony conviction as to count 2.

One of the long sides of the booth, i.e., the east side, constituted part of, and was near the middle of, the east side of the building. The door accessing the booth was on its south side and inside the building, i.e., one entered the booth after entering the restaurant. The booth door's hinges were on the west side of the door. Customers of both businesses were served only through windows on the east side of the building.

About 11 a.m., Horton asked Keith Sarazinski,² an employee, to wipe the counter outside the booth because of rain. It rained very heavily that day. Sarazinski left, and later entered the restaurant's front door. As he walked back to the door to lock it, Prince shattered the front door glass, forced open the front door, and entered.

Sarazinski testified as follows. Prince was "pretty much" directly facing Sarazinski. Prince was an African-American male about five feet eleven inches tall, and 175 to 185 pounds. Sarazinski told police that Prince was wearing a very dark jacket that was a little longer than waist length and made of simulated leather or vinyl. At trial, Sarazinski identified a black jacket (People's exh. No. 5C at trial) (People's exhibit No. 5C)³ as the one Prince had been wearing. Prince was holding in his hand a .45-caliber semiautomatic handgun. Sarazinski hid behind a freezer, remained there, and saw nothing until the incident was over. However, Sarazinski heard a voice, coming from inside the restaurant, of a man other than Horton or Prince. Sarazinski heard scuffling, voices, then three shots.

On March 21, 1980, Sarazinski identified Prince from a photographic lineup as the man who entered through the door. Sarazinski positively identified Prince at trial as the gunman who forced open the restaurant door, caused it to strike Sarazinski, and then

² Sarazinski changed his name to Zarin by the time of the evidentiary hearing on respondents' petitions. Subsequent references to the hearing are to that evidentiary hearing.

³ Unless otherwise indicated, exhibits were admitted into evidence at trial or at the hearing.

entered. Sarazinski testified the gun depicted in a photograph, People's exhibit No. 17 at trial (People's exhibit No. 17), was the one he saw when the man came through the door.

Croce testified as follows. Croce was inside the booth with Horton when Prince hit the front door glass, shattering it and forcing his way inside the restaurant. Prince approached the booth and pointed a large black handgun directly at Horton's head. Croce testified, "when I gave my description they said it was either a .357 or a .45." Prince had a dark complexion, sideburns, and was six feet tall or perhaps taller. He was wearing a black watch cap, or stocking cap with no bill, and the cap was pulled halfway down his forehead. He was also wearing a dark, very shiny, waist-length zip-up jacket made of simulated leather, and was wearing dark gloves, black pants, and black shoes with heels. At trial, Croce identified the black jacket (People's exhibit No. 5C) as the one Prince wore. Croce initially told police that Prince appeared to be 33 to 35 years old, but later told police that he was about 28 years old.

Prince pointed his gun into the booth and ordered Croce and Horton to exit the booth and give Prince the money. Croce and Horton exited the booth and entered the restaurant with their hands up. Prince entered the booth and reached for a window shade.

Croce looked back towards Horton and saw a person later identified as Williams enter the restaurant. Williams was wearing gloves, a black, wet, approximate knee-length raincoat, and a black knitted hat similar to the one Prince was wearing. Williams had one hand on top of, and the other hand inside, Horton's jacket. Williams began to get rough with Horton. Horton said, " 'Now don't hurt anybody. Just be cool.' " Williams was pushing Horton down and the two struggled.

Horton had a .38-caliber revolver in a shoulder holster under his jacket. Williams shouted, " 'He's got a piece.' " Williams's hand was on Horton's revolver or close to it. Horton brought his arm over his chest where the gun was. Williams repeatedly struck Horton.

Horton and Williams began falling with Horton's back against a refrigerator door. Petitioner's exhibit QQ at the hearing (exhibit QQ) (a sketch on a continuation sheet of a

Los Angeles Police Department (LAPD) police report) and a photograph (petitioner's exhibit RR-5 at the hearing) reflect the back of the refrigerator was against the south portion of the west wall, and the refrigerator was southwest of the booth. Croce testified Horton was sliding down the refrigerator door, his body was slightly turned, and he was supporting himself with his right leg while "kicking and kind of helping" with his left leg. Horton's left leg was up and crossed in front of him, his left foot was off the ground, he was squatting, and Williams was holding him. (Horton was thus oriented (*from head to feet*) somewhat eastward.)

While Horton was in the above position, Prince exited the booth, hesitated for a second, then shot Horton in his left thigh. Prince was five or six feet east of Horton. Croce was facing Horton and was right next to Prince, north of him and to his right. Croce tried to go between Prince and Horton, tried to grab Prince's hand or gun, and repeatedly pleaded with Prince not to shoot Horton, but Prince pushed her away. Croce went behind Prince and ultimately wound up on his left side, in front of the center of the refrigerator and facing Horton. Prince and Croce took a few steps forward.

The struggle between Horton and Williams moved a short distance south and in front of the center of the refrigerator. Croce testified Horton and Williams were "pretty much" on the floor. Horton was lying on the floor with just his head and upper back leaning against the refrigerator. Williams was on top of Horton, lying on Horton's right side. Williams was between Horton and the south wall of the building. Horton's gun was pushed into Williams's left side near Williams's waist. Prince took two small steps forward and shot at Horton. Croce did not see that shot hit Horton.

Horton fired a shot. Croce was facing Horton and the bullet flew past her right side and broke a window in the east wall behind her. Prince lowered his gun, said " 'Let's get out of here,' " and left. Williams, leaving, rose off Horton. Horton was still lying on the floor when he fired a second shot that went through a table and ultimately through a window in the south wall. Respondents took nothing from the location.

Croce testified the gun depicted in People's exhibit No. 17 was the same color and size as the one Prince used during the crimes. She also testified three caps (People's exhibit No. 5A at trial) had the same shape as the ones respondents were wearing at the time of the crimes.

Croce testified it was noon at the time of the shooting and the lighting was good. Sarazinski testified about five seconds passed from the first shot to the last, and about a minute passed from the time Prince entered the restaurant to the time of the last shot. Croce testified respondents were gone a few seconds after the last shot was fired. A paramedic arrived at the scene at 11:37 a.m. and, at 11:39 a.m., pronounced Horton dead.

On February 20, 1980, Croce identified Williams from a photographic lineup as the robber who struggled with Horton. On March 17, 1980, Croce identified Prince from a photographic lineup. When Croce selected the above photographs, the crimes were fresh in her mind and she was certain of her identifications.⁴

Croce positively identified Prince as the shooter at his June 1980 preliminary hearing. She identified Prince at the preliminary hearing based on her observation of him during the shooting. Croce also positively identified Prince as the shooter at trial. She testified she "absolutely" got a good look at the faces of the persons who committed the crimes at the time they were committed. Both during the preliminary hearing and at trial, Croce identified Prince based on his facial features.

We are discussing here Croce's testimony at trial. Later in this opinion we discuss the hearing testimony of Anthony Paul, respondents' firearm expert. Briefly, Paul testified at the hearing to the effect that, based on Croce's trial testimony, the front doorway of the building was further east than that doorway was depicted on various

⁴ Croce testified concerning her selection of Prince's photograph that she looked at all the photographs very carefully. She testified she did this because, inter alia, she wanted "to pick the person that [she] knew was the person and not the picture that looked like the person."

exhibits. Paul opined the shooter was inside, or at, the front doorway, and Paul's opinion was based in part on the front doorway thus repositioned.

Moreover, as we discuss later, at one point during Paul's hearing testimony he suggested Croce testified the front door and booth door were in alignment; at another point he indicated he was not testifying those doors were actually aligned. Paul also testified the front door was on the *southeast section* of the south wall of the building.

Because Croce's testimony concerning the alignment issue, and other evidence as to the location of the front doorway, are pertinent to this appeal, we note the following. Croce testified People's exhibit No. 6 at trial depicted the relationship of the booth to the restaurant. (Prince concedes said exhibit No. 6 is exhibit QQ). According to Croce, the restaurant's front door and the booth door were "*more* on a direct line than [exhibit QQ] would indicate." (Italics added.) Croce was referring to a north/south axis. Croce testified the front door should have been depicted more to the east, and the booth door slightly more to the west.

We note that nothing in Croce's above testimony indicates exhibit QQ should have depicted the front doorway directly in front, and south, of the booth doorway. Moreover, Croce's testimony reasonably may be construed as indicating simply that that exhibit should have depicted the east edge of the front doorway "*more*" aligned (on a north/south axis) with the west edge of the booth doorway. Prince cites no testimony from Croce that the east edge of the front doorway was directly or exactly aligned with the west edge of the booth doorway. We also note exhibit QQ states it is "not to scale." (Capitalization omitted.)

Moreover, significantly, a photograph, People's exhibit No. 2A at the hearing (People's ex. No. 2A), depicts the front doorway, from all appearances, essentially in the *middle* of the south wall (not in or on the southeast section of the south wall). People's exhibit Nos. 2B and 2D at the hearing reflect (1) the front doorway is not directly in front of the booth doorway, and (2) the east edge of the front doorway is offset to the west with respect to the west edge of the booth doorway.

John McCarty, who worked in a realty company just west of the restaurant, testified as follows. On February 16, 1980, one of the company's owners was talking to McCarty, heard shots, and told McCarty there was a shooting next door and for McCarty to get a license plate number. McCarty ran to the front porch, and, as he glanced out a window, saw two men in their final steps before entering a car.

One of the two men entered the driver's side. He was "very powerfully built" and wearing a watchman's cap, i.e., a knit cap without a bill, and a dark leather jacket that was waist-length or a little longer. The other man entered the passenger side. He was wearing a light tan raincoat or trench coat, and might have been injured. It looked like the second man was carrying a gun, but McCarty was not certain. As the car hurriedly left, both men were looking directly at McCarty from about 25 feet away. McCarty saw the car's license plate number and provided it to the police.

The car was a Mercury Montego stolen two days earlier. Shortly after the crime, the Mercury was abandoned at a nearby apartment building. The Mercury's ignition had been punched.

On February 16, 1980, Rita Tanner was an emergency room clerk at Daniel Freeman Hospital in Inglewood. She testified as follows. Shortly before noon, a woman ran into the hospital, approached Tanner, and said a man who had been shot was in a car. Shortly thereafter, Prince and the woman entered the lobby. Prince was carrying a man, later identified as Williams. Williams had been shot.

Tanner testified Prince was tall, "sturdy built," in his late 20's, and had sideburns. He was wearing a dark jacket with an open, front zipper, and the jacket was about waist-length. Tanner testified the black jacket (People's exh. No. 5C) looked identical to the one Prince was wearing. Prince was also wearing blue jeans. Williams was wearing a white T-shirt and jeans, and the words "Fast Eddie" were on the back of the T-shirt.

Tanner identified Prince at trial as the man who carried Williams inside the hospital. She also testified the man who carried Williams was three or four inches taller than Prince was at trial and seemed to have had a bigger build. Prince's eyes seemed

exactly the same as the eyes of the man who carried Williams. Respondents and the woman frightened Tanner.

After Tanner retrieved a wheelchair, it seemed Prince threw Williams into it. As a result, Williams's head hung over one wheelchair arm and his legs hung over the other. According to Tanner, Prince was nervous and paranoid. He wanted to move quickly and would not stand still.

Tanner asked Prince to provide Williams's name, but Prince replied he did not "have time for all of that." Tanner denied that when she asked Prince for Williams's name, Tanner had anything in her hand or paperwork she wanted completed. After Williams was received for treatment, Tanner approached Prince and the woman and asked if they could provide Williams's name. Prince again replied he did not "have time for all of that." The woman repeatedly told Prince they should go, and he indicated he was trying. As Prince and the woman were leaving, Tanner asked the woman if she would stop at the front desk to fill out a patient chart, and the woman agreed to do so. Shortly thereafter, however, Prince and the woman ran out the door. Neither Prince nor the woman ever identified Williams to Tanner.

Tanner saw a large dark car outside the hospital. An African-American man was outside the car, resting his chin and arms on the car's roof and looking towards the lobby. When Prince and the woman ran out of the hospital, the man was looking at them. The man sat in the driver's seat, Prince sat in the front passenger seat, the woman sat in the back, and the man drove away, spinning the car's wheels. Prince and the woman had been at the hospital perhaps five to seven minutes.

Prince and the woman left about noon. Williams told Tanner his name was Edward Tate. The surgeon who operated on Williams determined he was 25 years old and had a gunshot wound to his abdomen. The bullet entered the far left side of his torso and lower chest, traveled downward, and lodged near his spine.

Los Angeles Police Detective Charles Worthen, a homicide detective, was the primary investigator in this case and testified as follows. Between 12:30 p.m. and

1:00 p.m. on February 16, 1980, he arrived at the crime scene and observed a bullet had gone through a table and out the southwest corner of the south window of the building. A second bullet struck the upper portion of the east wall between the booth and southeast corner of the building.

Worthen found a .45-caliber slug about waist-level under Horton's body. The slug fell out of Horton's clothing when his body was turned. Worthen also saw two .45-caliber casings "adjacent to in the area of the entrance to the check cashing booth." (*Sic.*) A photograph depicted the casings, circled, where he first saw them.⁵ Worthen recovered Horton's .38-caliber six-shot revolver from the location. The revolver contained three live rounds and three spent casings.

Later that day, Worthen went to Daniel Freeman Hospital and saw Williams, whom he was told was Edward Tate. Worthen obtained Williams's clothing. This included a T-shirt that said "Fast Eddie," "a portion of his shirt, apparently blood stained, a blue T-shirt with straps [*sic*], somewhat transparent," "another shirt with some blood on it, striped blue shirt," and beige pants. The shirts were soaked with blood. The upper portion of the pants were dry to a point a couple of inches below the knee, but below that point the pants were soaked with water.

Dr. Joseph Cogan, the medical examiner who conducted Horton's autopsy, testified as follows. Horton died as a result of two gunshot wounds. One was a gunshot wound to his left leg. The bullet entered the left thigh, traveled upwards and back, and came to rest inside Horton's back. Cogan recovered that bullet. Horton was not standing when he was shot in the left leg. He was probably on his back at the time and may have been falling. His left leg was raised, possibly in a defensive posture to ward off a bullet. The entrance wound did not appear to be from a close range shot. Cogan saw "no significant gunshot residue . . . in the clothing [and this indicated] that the bullet had been fired at some distance from the body."

⁵ The People assert People's exhibit No. 2G is the photograph.

Another bullet entered Horton's upper left abdomen and exited the right side of his back. The exit wound was shored, meaning "there may have been a hard surface against which the bullet exited." Shoring would have resulted if Horton's body had been against the refrigerator, freezer, or floor.

Los Angeles Police Detective Arleigh McCree, a firearms and ballistics expert, testified as follows. The .45-caliber bullet recovered under Horton's body and the bullet recovered during Horton's autopsy were fired from the same .45-caliber automatic weapon. The two .45-caliber casings found at the crime scene were certainly fired from the same .45-caliber automatic weapon. It was logical to assume the same weapon, an automatic Colt pistol, fired said bullets and casings.⁶

On March 20, 1980, Worthen searched Prince's residence while Prince and his wife Sheila Prince (Sheila) were inside. Worthen found in the living room closet a black jacket (People's exhibit No. 5C). He also found five pairs of shoes with higher than normal heels. Worthen saw in Prince's garage a slide-hammer, i.e., a device used to punch a car's ignition. On March 20, 1980, police impounded a silver Cadillac registered to Prince.

Police also recovered from Prince's residence two photographs, People's exhibit No. 17, and People's exhibit No. 17B at trial (People's exhibit No. 17B). McCree testified People's exhibit No. 17 appeared to show Prince holding a handgun with a ".45 frame" most commonly used with a .45-caliber handgun. People's exhibit No. 17B depicted the muzzle end of a gun. Worthen recovered People's exhibit No. 17B from a photo album in Prince's residence. McCree testified both photographs may have depicted the same gun and, if they did, the gun was a .45-caliber gun. The muzzle was too large for a .38-super, nine-millimeter, or .22-caliber, gun.

⁶ See footnote 17, *post*.

(2) *Defense Evidence.*

Prince, who was born in June 1954, presented an alibi defense, explained the circumstances in which he took Williams to the hospital, and presented other testimony, as follows. On February 16, 1980, Prince got up at 8:00 a.m. and remained home that morning. Sheila returned home near the afternoon. About 20 minutes later, a man whom Prince had never seen before came to his front door. The man was slim, tall, dark-complected, and had a mustache. The man was also in his 30's, about six feet tall, and about 200 pounds. He was wearing a dark blue "pea coat," not a leather jacket, and he was not wearing a hat. The man was taller than respondents. Prince was about five feet nine inches tall.

The man said he was a friend of Eddie's and asked Prince if he knew Terry. Prince replied he was Terry, and the man said Eddie had been hurt and was downstairs in a car. Eddie was Williams, one of Prince's best friends. Prince went downstairs and asked the man what happened, and he replied Williams had been shot. Prince asked how, the man did not answer, and, although Prince was curious, he did not ask again.

Prince saw Williams sitting in a car that Prince had never seen before. Williams was wearing a T-shirt and pants and, although it was raining, he was not wearing a coat.⁷ Williams, in pain and crying, told Prince to take him to the hospital. Prince asked the man why the man did not take Williams to the hospital and the man said he could not. Prince was suspicious but asked the man to help move Williams to Prince's car. Prince had no further conversation with the man that day, and the man never identified himself.

After Prince put Williams in the front passenger seat of Prince's car, he told Sheila to come with him to take Williams to the hospital. Prince took his brown suede jacket and they left. Prince denied he wore his black leather jacket (People's exhibit No. 5C) to

⁷ Prince testified the T-shirt that said "Fast Eddie" belonged to Williams. The prosecutor asked Prince at trial whether Williams was wearing it that day, and Prince replied, "He might have been wearing a bundle of clothes, but what I seen a blue striped velour-like material shirt." (*Sic.*)

the hospital. Despite the rain, Prince wore slippers to the hospital. He did not wear high-heeled shoes. Prince admitted the black jacket, high-heeled shoes, watch caps, and slide-hammer recovered during the search of his residence belonged to him. As Sheila went outside to accompany Prince to the hospital, the man who had knocked on Prince's door was driving away. Prince, Sheila, and Williams went to the hospital. Prince drove them in his silver Cadillac Brougham.

En route to the hospital, Prince asked Williams about his condition and Williams said his left side was burning and he could not see. Prince did not ask Williams what happened because Williams could not talk. Prince did not ask Williams how many times he had been shot or where he had been shot.⁸

Prince carried Williams inside the hospital and told Tanner that Williams had been shot. Tanner tried to have Prince complete a form, and Prince told her that he did not have time and Williams was dying. Prince then kicked open the emergency ward door and properly put Williams in a wheelchair. Prince denied anyone at the hospital ever asked him for Williams's name. Prince walked quickly out of the hospital. He was hurrying to get Williams's wife, Gayla Williams (Gayla), so she could fill out papers. Prince had Williams's phone number but did not call Gayla. Prince did not know what to do so he felt it was better to communicate in person with Gayla, who lived perhaps three miles from the hospital.

Prince denied he ran from the emergency room with Sheila and jumped into a four-door car, and denied the car sped away with someone else driving it. A puddle of Williams's blood was on the front passenger seat of the Cadillac. Prince later cleaned the blood from the seat.

After Prince left Williams at the hospital, Prince decided the shooting of Williams was related to an incident that had happened three weeks earlier. During that incident,

⁸ A couple months later Prince asked Williams what was the name of the man who had brought Williams to Prince's house, but Williams replied he would rather not say. Williams also said he did not want to talk about how he got shot. Prince said nothing.

someone shot out the windshield of Williams's car. Prince concluded whoever shot the windshield shot Williams on February 16, 1980.

Prince and Sheila went from the hospital to Gayla's home. Prince told Gayla that Williams had been shot and she had to go to the hospital to fill out papers.⁹ Although Prince was worried about Williams, Prince did not return to the hospital but instead went home. Prince testified he then "just lounged around the house" all afternoon. Prince returned to the hospital that night but Williams could not have visitors. Prince never returned to the hospital to visit Williams and never visited him in the medical ward of the county hospital. The next time Prince saw Williams, Prince was in jail.

Prince denied he had a gun in February 1980. A photograph (People's exhibit No. 17) depicted him posing with a handgun but the handgun belonged to Raymond Lawdell, not Prince. The photograph was taken in front of Lawdell's house at 62nd and Western. Lawdell was present when the photograph was taken, and Lawdell developed the photograph and gave it to Prince. Although Lawdell visited Prince in jail, Prince no longer knew where Lawdell lived. Another photograph found in Prince's photo album depicted him posing with the same handgun. The handgun in both photographs was a .22-caliber handgun.

Prince did not report to police that Williams had been shot. Prince figured after Williams was "fixed . . . up," Williams could tell the police more than Prince could. That would not have been true if Williams was not "fixed . . . up," but Prince was not thinking about that.

Prince was upset he had been arrested, but he never told police or anyone that he had not been involved in "any of this" because he never thought about it. Prince shaved his sideburns a week before he was arrested in March 1980. In about April 1980,

⁹ Gayla testified for the People that on February 16, 1980, someone told her by phone that Williams had been shot and was in the hospital. She did not remember who called her. The court, noting it would have been very dramatic for someone to call Gayla and tell her that her husband had been shot, asked if she remembered who told her. Gayla replied she could not. After Gayla received the call, she went to the hospital.

respondents were in jail and Prince asked Williams how Williams was doing. Williams replied only that he was all right. Prince was curious about what had happened before Williams arrived at Prince's house on February 16, 1980, but Prince said nothing more to Williams.

Richard Berg, Williams's defense investigator, testified that on June 27, 1980, during an arraignment or preliminary hearing at the West Los Angeles courthouse, Sarazinski told Berg that Sarazinski had been hiding behind the refrigerator and saw no one involved in the crime.

(3) *Rebuttal Evidence.*

In rebuttal, Raymond Lauderdale testified as follows. Lauderdale was known in high school as Raymond Lawdell. Lauderdale knew respondents from high school and visited Prince in the county jail. The gun depicted in People's exhibit No. 17 did not belong to Lauderdale and he had never owned one like it. Lauderdale denied taking the photograph, being present when it was taken, or giving the photograph to Prince. He also denied he had ever lived on 66th or 67th near Western. Lauderdale knew where the area from 60th and Western to 70th and Western was, having passed through the area.

Sarazinski testified that when he went to a June 1982 hearing in West Los Angeles, someone approached and talked with him. However, Sarazinski denied he ever told anyone outside the courtroom that Sarazinski could not identify anyone, denied he ever told anyone that he could not identify the first person in this case, and denied he had ever claimed he could identify the second person.¹⁰

¹⁰ Prince appealed his convictions in this case. The judgment was modified based on sentencing error but otherwise affirmed. (*People v. Prince* (Jan. 13, 1984, 43503) [nonpub. opn.] (*Prince I*.) We note *Prince I* held, inter alia, any trial court error in admitting evidence Horton was a retired police officer was nonprejudicial under the standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) "in view of the *strong evidence* of defendant's guilt." (*Prince I, supra*, 43503, at p. 9, italics added.) *Prince I* also held any trial court error in permitting Prince to appear at trial in jail clothing was nonprejudicial, stating, "[b]ased on our review of the record, we are convinced that under either [the *Watson* or *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]] test, the error, if any, was harmless." (*Prince I*, at p. 11.) Each of the

b. *Williams's Trial.*

(1) *People's Evidence.*

There is no real dispute the People's evidence presented at Prince's 1982 trial and at Williams's 1990 trial concerning what happened inside the restaurant was materially the same, including the positions of respondents and Horton at the times Prince shot him.¹¹ Moreover, Sarazinski testified at Williams's trial that during a photographic lineup, and in a prior court proceeding, Sarazinski identified Prince as the man who smashed the front door and entered the restaurant. Sarazinski also so identified Prince at Williams's trial.

Croce testified at Williams's trial that during photographic lineups, at Williams's June 27, 1980 preliminary hearing, and at Prince's 1982 trial, Croce positively identified Williams as the man who struggled with Horton inside the restaurant, and Prince as the person who, inside the restaurant, shot Horton. Croce also, at Williams's trial, positively identified Williams as the man who struggled with Horton, and Prince as the shooter.

Timothy Brown testified as follows. On February 16, 1980, Brown was an Inglewood Police Officer and interviewed Williams at the hospital. Williams was in pain and partially conscious. He said he had been shot and robbed, but could not say when, where, or how. Brown tried to jog Williams's memory, but Williams simply kept

three cases cited by *Prince I* in support of the latter holding considered the *evidence presented at trial* when considering the issue of prejudice. Normally, evidence of a defendant's guilt must be overwhelming before federal constitutional error in the admission of evidence may be held harmless based on the strength of the evidence of the defendant's guilt. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 821.) Accordingly, fairly read, *Prince I* held the evidence of Prince's guilt of the present offenses was strong, if not overwhelming. We express no opinion as to whether this holding is the law of the case for purposes of this appeal.

¹¹ Croce testified at Williams's trial that when Prince shot Horton in his left leg, Williams was wrestling with Horton and Williams had pinned him to the refrigerator. She also testified Williams "was kind of twisted across him. He was standing. His feet were to Mr. Horton's right, and [Williams] was across [Horton's] chest to . . . Mr. Horton's left." According to Croce, when Prince fired the second shot, Horton and Williams were almost completely lying on the floor.

screaming he had been robbed. Williams did not have the attitude of a victim, was not forthcoming, and seemed to have a bad attitude, “almost like ‘get out of my face. I’ve been robbed, leave me alone.’ ”

(2) *Defense Evidence.*

In defense, after the People presented their case-in-chief at Williams’s trial, Williams, during his opening statement, conceded Prince tried to rob Horton and killed him, Williams fought with Horton in the restaurant, and Williams was shot with Horton’s gun. However, Williams asserted Prince entered the restaurant before Williams and, when Williams entered, Williams did not know what Prince’s intentions were. Williams’s counsel also said, “we do not contest all the physical evidence we have seen about the bullets, the ballistics.”

Williams testified, inter alia, as follows. Respondents were close associates. Williams had nothing to do with the attempted robbery of Horton or the killing of Horton. On February 16, 1980, Prince drove Williams to the restaurant in the Mercury with the punched ignition, but Williams did not look at the ignition. Prince parked the car, exited, and said he would be right back. Williams had no idea what Prince was going to do. Shortly thereafter, Williams heard glass breaking. He exited the car and saw broken glass at the restaurant’s front door. He did not look inside the restaurant from the doorway or as he began entering the restaurant. As he entered, he did not know where he was looking or what he was thinking.

Williams did not see anyone until he entered the restaurant and saw Horton. Horton was standing and may have had his hands up. Williams denied saying anything inside the restaurant. Horton immediately attacked Williams. The two struggled, eventually fell, and Williams was on top of Horton when Williams was shot. Williams got up, walked to the car, and entered it. He remembered nothing else until he awakened a few days later in the jail ward of the county hospital.

2. *Petitions for Writs of Habeas Corpus.*

a. *The Petitions' Allegations.*

The jury convicted Prince on June 24, 1982, and convicted Williams on April 19, 1990. Almost twenty-five years after Prince's conviction, Prince, on March 27, 2007, filed his petition for a writ of habeas corpus on grounds not pertinent here. On September 20, 2007, Williams filed his petition for a writ of habeas corpus.¹²

In June 2009, the court ordered it would conduct an evidentiary hearing on both petitions. During the lengthy ensuing proceedings, the People gave to Prince an undated LAPD police report continuation sheet containing a statement Nelida Walsh gave to Los Angeles Police Officer Peloquin on an unspecified date. The report reflects Walsh gave the statement when Peloquin interviewed Walsh at 1:00 p.m. at her home at 10864 Vanier Boulevard, apartment No. 3. The report reflects Walsh was born in July 1938 and, in the report, Peloquin designated Walsh as "W-3."

In the report, Peloquin recites Walsh's statement as follows: "W-3 was walking up the front stairs of the apt build, (loc one E. of 10864 [sic] Venice Blvd). W-1 [sic] heard three [gunshots] she turned and obs'd a male Neg . . . susp (6-0 200 lbs brn hair approx 25 years . . . wearing a red horizontal stripped [sic] shirt) standing at the front [doorway] of the hamburger stand (10831 W. Venice). Susp was facing away from her but she could see that the susp was pointing what appeared to be either a rifle or shotgun inside the loc. Susp the [sic] moved the weapon into a port arms^[13] position. Susp was holding pistol grip in his rt hand and his lt hand was on the stock near the barrel. W-3

¹² Both petitions initially alleged as grounds, inter alia, (1) the trial court erroneously admitted testimony from Croce and Sarazinski in violation of the post-hypnotic exclusionary rule in violation of *People v. Shirley* (1982) 31 Cal.3d 18 (*Shirley*), and (2) the People, in violation of *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215] (*Brady*) and the Confrontation Clause, suppressed evidence Croce and Sarazinski were hypnotized.

¹³ Port arms is "a position in the manual of arms in which the rifle is held diagonally in front of the body with the muzzle pointing upward to the left." (Merriam-Webster's Collegiate Dict. (10th ed. 1995) p. 907.)

turned . . . and continued up the stairs. W-3's loc was across the street and slightly W. of 10831 Venice." We refer to Pelonquin's recitation of Walsh's statement as the Walsh statement.

On July 6, 2010, Prince filed a third amended habeas petition and, on July 16, 2010, Williams filed an amended petition.¹⁴ Each petition was based on, inter alia, the ground the People first gave the Walsh statement to respondents on February 9, 2010.

b. *The Hearing on the Petitions.*

(1) *The Testimony of Nelida Walsh.*

Respondents' evidence at the hearing included testimony from Walsh. She testified on October 24, 2011, as follows. After Walsh heard the first "boom," she looked to her left and saw a man. Walsh was afraid, running upstairs to her home, and not looking at the man when she heard the second "boom." She heard the third "boom" when she was inside her apartment. Walsh saw the back of the man, not his face. Walsh could not see the shirt the man was wearing, but he was wearing a red jacket. The last time she saw the man, he was "[i]n the sidewalk" facing the restaurant door. Walsh identified a photograph (People's 2A at the hearing)¹⁵ as depicting the building, i.e., the hamburger stand near her house.¹⁶

¹⁴ In his amended petition, Williams alleged he was released on parole in October 2007.

¹⁵ The photograph appears to be in volume 4 of the second supplemental clerk's transcript at page 919.

¹⁶ On November 9, 2011, Worthen testified at the hearing he spoke with Walsh on the day of the crime. He had a copy of the Walsh statement and what she told Worthen was substantially the same. Walsh described the weapon she saw in the hands of the person outside the hamburger stand, after she heard three gunshots, as a rifle and "the stock was cut off and/or it was [a] pistol grip." Worthen also testified, "I had more reasons to believe that there was possibly a third suspect than just the Nelida Walsh statement. My experience as a robbery detective for multiple years on how suspects commit robberies and what they do, plus the witness at the hospital that saw a male black in a car, plus the Melinda [*sic*] Walsh statement." The Walsh statement, among other

Walsh did not remember how far the man was from the door, but she believed he was close. Walsh also testified, “It’s hard for me to identify [how he was pointing the gun] because it was too far from the area where I was standing, . . .”

(2) *The Testimony of Anthony Paul.*

Anthony Paul, respondents’ firearm expert, testified as follows. Exhibit QQ reflected two .45-caliber casings found at locations designated 4 and 5, respectively, on the exhibit. (Exhibit QQ reflects the casings were just south of the booth. The casings are also depicted in a photograph (People’s 2G at the hearing). Based on the position of the casings, if the shooter was using a .45-caliber weapon,¹⁷ the shooter would have been “somewhere along that wall in the area of the front door, but to the east of that because that door is not located in the correct position [on exhibit QQ].” Paul also testified “somebody standing inside the doorway could have fired in a northwest direction and hit Mr. Horton.”

Paul testified that according to Croce’s testimony, Horton was shot in the left leg when he was sliding down the refrigerator and his left leg crossed in front of him. Paul opined that, at that time, a person at the front doorway would have been ideally located to shoot Horton in the left leg. Paul maintained Horton was shot the second time (when the bullet entered the left side of his chest and exited his right back) when, in an effort to escape, Horton “twisted to the left.” (*Sic.*) The court noted when Paul so testified, he made a very slight twisting motion to his right.

According to Paul, if the shooter was at the front door, Horton’s body would have to have been oriented to the front door twice. The prosecutor asked Paul if there was any other evidence in this case that Horton’s body was ever oriented to a shooter at the front

things, suggested to Worthen there may have been a third participant in the crime and a second car at the scene of the crime.

¹⁷ Paul testified at the hearing he had no reason to doubt the conclusions to which McCree testified at trial.

door, and Paul replied, “Not that I can recall.” Paul conceded there was no evidence Horton was twisting at the time of the second shot.

During cross-examination by the People on October 26, 2011, Paul testified he had offered an opinion that Horton’s wounds were consistent with the shooter standing in the doorway and, at the time Paul had offered that opinion, *he did not have information regarding where Horton was positioned* at the time of the shooting. Paul also testified that before he opined Horton’s wounds were consistent with the shooter standing at the door, *Paul had reviewed Croce’s testimony* regarding her standing next to the shooter and her seeing where Horton was at the time of the shooting.

However, Paul also acknowledged during cross-examination on October 26, 2011, that on or before October 14, 2011, Paul had opined that “*depending* on the orientation of Mr. Horton at the moment of being struck by the bullets, the position of entry and exit wounds in his body are consistent with Mr. Horton’s shooter standing at the door.” (Italics added.) Paul then testified he did not *remember* whether, at the time he gave that opinion, he had Croce’s testimony regarding where Horton was when he was shot, but Paul “thought [he] had everything.”

The prosecutor showed to Paul a set of materials, and Paul testified they appeared to be everything Paul had possessed before he had rendered his opinions on October 11, 2011. Paul acknowledged Croce’s testimony was not among the materials, then he testified, “But I had testimony.” The following then occurred: “Q Isn’t it true that you only had the testimony *after* you’d already rendered your opinions in this case, when it was forwarded to you *along with* the rebuttal testimony of Mr. Trahin? Because Mr. Trahin had reviewed Carol Croce’s testimony. [¶] A Yeah. I think I had it.” (Italics added.) The People and Prince then stipulated the materials given to Paul prior to, or on, October 14, 2011, did not include Croce’s testimony regarding the position of Horton.

Paul testified the ejection pattern from a .45-caliber weapon was typically two to 14 feet to the right and slightly to the rear, depending upon how the firearm was held.

Based on the positions of the casings in this case, the shooter would have been in the area of the front doorway, facing and shooting westerly, and the casings would have ejected in a northeasterly direction. The location of the two casings was inconsistent with Croce's testimony regarding the location of the shooter and, if what Croce testified had been true, the casings would have wound up in the back in the kitchen area.

Paul conceded a shooter's position generally cannot be determined by reference only to general ejection patterns because expended cartridges can be deflected or moved. Moreover, one could not determine based on ejection patterns how far a casing would travel or how it would land. Paul conceded if the two casings had been moved, they would not have been, as he suggested they were, eight inches apart.

Paul testified the front door was not properly depicted on exhibit QQ and, "according to the sketch, it would have been on that south wall" and the "[s]outheast section of the wall." (Italics added.) (Prince's opening brief asserts "the door to the establishment was in the *southeast corner* of the building." (Italics added.)) In concluding the front door was not properly depicted on exhibit QQ, Paul relied on Croce's testimony that, on that exhibit, the front door should have been moved east, and the booth door should have been moved west, but "not by a whole lot." He also relied on her testimony the doors were "in very close proximity, in alignment with each other."

Paul also testified as follows. Paul was also relying on petitioner's exhibit I4 (exhibit I4) "from 1985." (Prince indicates this exhibit was marked as an exhibit at Williams's trial).¹⁸ Exhibit I4, which was drawn to scale, did not have the front door and booth door aligned in any way. The depictions of the doors in exhibits QQ and I4 were similar, but the doors as depicted in exhibit I4 were closer. Paul was not testifying the doors were "actually aligned" but that they were "more aligned," and neither exhibit QQ nor exhibit I4 properly depicted the alignment. Paul did not know whether Croce's

¹⁸ The record does not reflect exhibit I4 was admitted into evidence at Williams's trial.

testimony about whether the “doors were aligned” was correct, or whether exhibit I4 was correct.

According to Paul, three long-barreled (or long) guns (i.e., a MAC 10, an Uzi, and a Fox carbine) fired bullets having the same rifling markings as those found on the bullets recovered in this case. Each of these guns was available in 1980. However, the MAC 10 and Uzi were large handguns, and did not look like rifles, unless they were equipped with barrel extensions and shoulder stocks. Paul knew of no rifles that fired .45-caliber bullets. Paul claimed Cogan’s testimony there was no significant gunshot residue on Horton’s clothing was consistent with a shooter at the front doorway and inconsistent with Croce’s testimony.

Paul conceded (1) he never observed the crime scene but relied in part on various exhibits admitted at respondents’ trials, (2) he did not personally analyze any ballistics evidence in this case, (3) none of the trial testimony evidenced the shooter was at the doorway, and (4) his conclusions were based on documents that were 32 years old.

(3) *The Testimony of Jimmy Trahin.*

Jimmy Trahin, the People’s firearm, ballistics, and trajectory expert, testified as follows. Trahin, working in the firearms unit of LAPD, was involved in the original analysis of the ballistics evidence recovered in this case in 1980. McCree was Trahin’s supervisor. As Trahin understood Croce’s testimony at Prince’s trial, at the time Prince fired his first shot, he was in the area just south of the booth and labeled “food area” on exhibit QQ. Horton was falling, his back was against the refrigerator, and the refrigerator, on said exhibit, was located east of the phrase “parking lot” and south of the word “slug” on the exhibit. The two casings were numbered 4 and 5 on exhibit QQ. Prince took two steps toward Horton and shot him again. The ejection pattern was consistent with the two casings located just south of the booth as depicted in People’s 2G, a photograph.

Trahin testified the first bullet entered the lateral portion of Horton’s left leg and traveled left to right and upward to Horton’s back. The second shot entered the left side

of Horton's torso and traveled from left to right. If the shooter had fired these shots from the front door, Horton's body would have to have been turned completely over and oriented (from head to feet) southward,¹⁹ and Horton's left leg would have to have been above his buttocks. This was problematic in light of Croce's testimony Williams had been on top of Horton. It would have been extremely difficult for the shooter to have been anywhere other than where Croce located the shooter, i.e., between letters I and J on exhibit I4. Trahin saw nothing in Croce's testimony indicating Horton's body was oriented as it would have to have been oriented if his gunshot wounds had been caused by a shooter at the front door. The shooter could not have shot Horton from the doorway without shooting Williams.

Trahin denied Paul properly could identify the shooter's location based on where the casings came to rest. Firearms examiners typically did not opine regarding ejection patterns of particular casings based merely on their final location without considering witnesses' statements and other evidence. The location of the two casings was consistent with Croce's testimony about Prince's location at the time he fired the shots.

Assuming the shooter was standing at the doorway, Trahin concluded the ejection pattern would have been to the right and rear, including possibly outside the door, and it was highly improbable the casings would have wound up within a foot of each other near the booth. If the gun had passed through the doorway, it would have been highly improbable for the two casings to align themselves at the booth at that distance.

Trahin opined at the hearing to a scientific certainty a Colt-type .45-caliber semiautomatic handgun was used in this case, and not a MAC-10, Uzi, or Fox carbine rifle. The two fired .45-caliber bullets that he examined in this case were fired from the same gun, and a Colt .45 semiautomatic handgun was used to fire the casings in this case. The .45-caliber bullets were probably fired from the .45-caliber casings because they were found at the scene.

¹⁹ We note exhibit QQ depicted Horton's body oriented (*from head to feet*) northward.

Trahin's conclusion the gun used in the present crimes was a Colt .45-caliber semiautomatic gun was based in part on his examination of the firing pin, extractor, and ejector markings on the casings. Trahin did not at the hearing remember what the firing pin looked like but it was his custom and practice in 1980 to look for a drag mark on a fired casing. The drag mark would indicate the casing was fired only from a Colt-type handgun.²⁰ Moreover, the extractor and ejector marks on the casings were at the 3:00 o'clock and 7:00 o'clock positions on the casings, and were therefore made by a Colt .45-type handgun. The use of firing pin, extractor, and ejector marks to determine the gun used in this case was a Colt-type .45-caliber handgun, was a generally accepted method in the scientific community of firearms examiners for determining whether a handgun or long gun had been fired.

Trahin also testified it would have been extremely rare in 1980 for any one of the long guns Paul identified to have the rifling pattern Trahin observed on the bullets fired in this case. A MAC normally had totally different rifling characteristics, an Uzi was normally a nine-millimeter (not a .45-caliber) weapon, and a Fox carbine, having rifling characteristics similar to those on the bullets recovered, was extremely rare in 1980. On the other hand, the Colt .45-caliber semiautomatic handgun was extremely popular in 1980 in Los Angeles.

The location of the bullet hole in the east wall of the business as depicted in exhibit QQ was totally consistent with the trajectory of a bullet fired by Horton at Prince right after Prince fired his second shot at Horton as Croce had testified. Williams's bullet wound was consistent with Croce's testimony about how Horton and Williams were positioned. Trahin concluded all of the physical and ballistics evidence in this case was totally consistent with Croce's testimony concerning how the shootings occurred.

²⁰ Paul conceded during the hearing the drag mark was unique to Colt-type handguns and neither a MAC, Uzi, nor rifle was supposed to provide a drag mark.

(4) *The Court's Ruling.*

On January 14, 2013, oral argument concluded on respondents' petitions. On March 14, 2013, the trial court issued its "memorandum of decision and order granting petition for writ of habeas corpus" (capitalization omitted) (hereafter, order). In the order, the trial court stated, inter alia, "the Court finds that Petitioners have proven a *Brady* violation involving the statement of Nelida Walsh."²¹ The Court therefore grants the Petition for Writ of Habeas Corpus as to both Petitioners."²² (Order, p. 3.) This People's appeal followed.

ISSUE

The People claim the trial court erred by entering an order granting respondents' petitions for writs of habeas corpus on the ground the People committed a *Brady* violation by suppressing the Walsh statement.

DISCUSSION

No Brady Violation Occurred.

1. *Applicable Law.*

"There are three components of a true *Brady* violation: The evidence at issue must be *favorable* to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been *suppressed* by the State, either willfully or inadvertently; and *prejudice* must have ensued.' [Citation.] Prejudice, in this context, focuses on 'the materiality of the evidence to the issue of guilt or innocence.' [Citations.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043 (*Salazar*), italics added.)

²¹ In the order, the trial court concluded that, for purposes of *Brady*, the People suppressed the Walsh statement, but the trial court stated it saw no evidence the Walsh statement "was *intentionally* or *nefariously* concealed by either the police or the People." (Italics added.)

²² The trial court also stated, "The Court finds that the Petitioners have not proven their claims regarding *Shirley*, *Brady* and Confrontation Clause violations resulting from the testimony of witnesses Croce and Zarin." (Order, p. 3) (See fn. 12, *ante*.)

Materiality requires a defendant to show a reasonable probability of a different result (*Salazar, supra*, 35 Cal.4th at p. 1043), i.e., the evidence “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” (*Kyles v. Whitley* (1995) 514 U.S. 419, 435 [131 L.Ed.2d 490, 506] (*Kyles*).)

Materiality for purposes of *Brady* is neither relevance nor admissibility. Nor do we decide materiality for purposes of *Brady* by *considering the undisclosed evidence in isolation, while rejecting consideration of the entire record*, including *trial evidence*, when the entire record demonstrates it was *not reasonably probable* a different result would have occurred had disclosure occurred.

Moreover, “in determining whether evidence was material, ‘the reviewing court may consider directly any adverse effect that the prosecutor’s failure to respond might have had on the preparation or presentation of the defendant’s case.’ [Citation.]” (*In re Steele* (2004) 32 Cal.4th 682, 700-701, quoting [*United States v. Bagley* (1985) 473 U.S. 667,] 682-683.) “In addition, the evidence’s materiality ‘ ‘must be evaluated in the context of the *entire record*.’ ’ [Citation.] In deciding whether asserted *Brady* evidence is material to defendant’s case, it is therefore appropriate to examine the effect of the evidence on the *actual . . . proceeding* in which defendant was tried.” (*People v. Hoyos* (2007) 41 Cal.4th 872, 919-920, italics added.) “If the undisclosed evidence is ‘material,’ the defendant’s conviction must be vacated without a separate harmless error review, because the prejudice determination is subsumed within the definition of the term ‘material.’ [Citation.]” (*In re Brown* (1998) 17 Cal.4th 873, 903.)

In *Salazar*, our Supreme Court stated, “We have not previously addressed the standard of review applicable to *Brady* claims. [Citation.] Conclusions of law or of mixed questions of law and fact, such as the elements of a *Brady* claim [citation] are subject to independent review. [Citation.] Because the referee can observe the demeanor of the witnesses and their manner of testifying, findings of fact, *though not binding*, are entitled to great weight when supported by substantial evidence. (*Ibid.*)” (*Salazar, supra*, 35 Cal.4th at p. 1042, italics added; accord, *People v. Uribe* (2008)

162 Cal.App.4th 1457, 1473 [applying *Salazar*'s independent review standard when reviewing on appeal alleged *Brady* error by a trial court (not a referee)]; see *United States v. Manning* (9th Cir. 1995) 56 F.3d 1188, 1197-1198 [“[a]lleged *Brady* violations are reviewed de novo.”].)

2. *Application of the Law.*

a. *There Is No Need to Decide Whether the People Suppressed the Walsh Statement or Whether It Was Favorable.*

There is no need to decide whether the People suppressed the Walsh statement.²³ The issue is whether the Walsh statement was favorable and material. As to whether the statement was favorable, we note the statement indicated Walsh told Pelonquin that she heard three gunshots, turned, and saw a man in a “red horizontal striped [*sic*] shirt” “standing at the front [doorway]” of the restaurant. She also saw the man pointing what appeared to be a rifle or shotgun inside the location, and saw the man move the weapon into a port arms position. However, there is no need to decide whether this evidence was favorable for purposes of *Brady*.

b. *The Walsh Statement Was Not Material.*

The remaining issue is whether the Walsh statement was material. There is no dispute *someone* shot Horton twice, killing him. The issues are (1) whether the shooter was at the front doorway or inside the restaurant, (2) if the latter, whether the shooter was Prince, and (3) whether Williams was an accomplice. In light of these issues, and for the reasons we discuss below, we conclude the Walsh statement was not material for purposes of *Brady* as to respondents' verdicts and/or sentences.

²³ As mentioned, the trial court concluded the People suppressed Walsh's statement. (See fn. 21, *ante*.) In their opening brief, the People maintain no suppression occurred, but also state “for the purpose of simplifying the issues on appeal, the People appeal only the lower court's findings that the Walsh [s]tatement was both favorable and material evidence.” We express no opinion on the issue of whether, for purposes of *Brady*, the People suppressed the Walsh statement.

(1) *There Was Strong Evidence the Shooter Was Inside the Restaurant.*

We assume without deciding the Walsh statement provided evidence the shooter was at the front doorway. However, that evidence was wholly *circumstantial*. Walsh did not state she saw the man at the front doorway fire any shots. All three shots to which Walsh referred could have been fired by someone inside the restaurant just before she turned and saw the man standing at the front doorway. Walsh testified at the hearing to the effect she was too far from the man to see how he was pointing the gun. Walsh's circumstantial evidence was of diminished probative significance.

On the other hand, whether or not Sarazinski and Croce correctly identified Prince, Sarazinski and Croce *both* testified they observed *someone* with a gun actually *enter* the front doorway after the front door glass was smashed, and Croce testified *that that* gunman ultimately shot Horton. The testimony of Sarazinski and Croce thus provided *direct evidence* a gunman entered the front doorway, and Croce's testimony provided *direct evidence* that that gunman was the shooter.

If a man at the front doorway, and not the gunman concerning whom Sarazinski and Croce testified, was the shooter, this would mean Croce either (1) falsely testified a gunman entered the restaurant at all, (2) falsely testified that, as a result of various detailed maneuvers between her and the gunman, she ultimately wound up on the gunman's left side, (3) falsely testified the gunman then fired his first shot at Horton's left leg, (4) falsely testified she saw the gunman's shot hit Horton's left leg (e.g., the shot in fact missed), and/or (5) falsely testified the gunman shot at Horton a second time. Similarly, Sarazinski either (1) falsely testified a man broke the front door glass and barged inside, knocking Sarazinski back and/or (2) falsely testified the man had a gun.

In contrast to the weak circumstantial evidence of Walsh's statement, the testimony of Sarazinski and Croce, considered together, provided strong, if not overwhelming, direct evidence that at least someone with a gun entered the restaurant and ultimately shot Horton. This included Croce's detailed testimony concerning where she,

the two assailants, and Horton were during the events leading up to and including the shootings, and her detailed testimony about the position of Horton's left leg and body at various times during the incident.

One basis of Paul's opinion the shooter was standing at the front doorway was his testimony the front doorway was on the *southeast* section of the south wall; indeed, Prince here asserts the front door was in the southeast *corner* of the building. Clearly, given the various possible trajectories between an alleged shooter at the doorway and Horton, and given the location of the two casings recovered near the booth, the credibility of Paul's opinion increased or decreased depending in part upon whether the front doorway was near or far from the southeast corner of the south wall. However, as discussed, photographic evidence indicates the front doorway was basically in the *middle* of the south wall, a fact effectively eviscerating the value of Paul's opinion.

Moreover, assuming without deciding that, as suggested by respondents' reliance upon Walsh's statement, a shooter at the front doorway fired three shots into the building and two hit Horton, we note respondents apparently maintain the third shot did not hit Williams, since they maintain Williams was shot by Horton's gun. Respondents cite no evidence as to where the third shot, if fired by a shooter at the front doorway, went. Further, the bullet hole discovered in the east wall is readily explicable as a shot fired by Horton at a gunman inside the restaurant and east of Horton, but difficult to explain if the gunman was at the front doorway.

Another basis for Paul's opinion the shooter was standing at the front doorway pertained to the *trajectory of the bullets that entered Horton* and the position of his body when they did. Croce provided detailed eyewitness testimony, direct evidence, concerning how Horton wound up largely on his back and oriented (from head to feet) somewhat eastward. This contrasted with the comparatively weak circumstantial inference (largely derived from Paul's dubious opinion the front doorway was in the southeast section of the south wall, and from the location of the casings inside the

restaurant) that Horton's body was turned over and oriented (from head to feet) southward.

Moreover, the medical examiner testified the bullet that entered Horton's abdomen and exited his back was shored, consistent with the bullet hitting a hard surface upon exit. The shoring is readily explicable if, as indicated by Croce's testimony, Horton's back was against the floor and/or refrigerator. The shoring is difficult to explain if the gunman was at the front doorway and shot Horton as he was twisting towards the front doorway and/or when he was on top of Williams, with no apparent hard surface to deflect an exiting bullet. Further, if the gunman was in the front doorway it is difficult to explain how the gunman shot at Williams without hitting Horton.

Paul testified to the effect that, other than the fact Horton's left leg crossed in front of him, Paul did not recall any evidence Horton's body was oriented towards a shooter at the front door. Paul conceded there was no evidence Horton was twisting at the time of the second shot, i.e., the shot to the chest.²⁴

²⁴ Williams notes in his opening brief Croce testified at Williams's trial, "Williams came in and confronted Mr. Horton. They began to grapple. (CT Supp 1:31-32.)" However, the above pages of the record Williams cites for the proposition "They began to grapple" reflect Horton was *standing* at the time of the grappling referred to in those pages. Croce also testified (at CT Supp 1:32) that when she first saw Williams and Horton engaged in a struggle, Horton was *standing* with his hands raised, and Williams was reaching towards Horton.

Williams also notes in his opening brief that during Williams's trial, the trial court stated concerning Williams and Horton, "'We can't describe every physical action. They're grappling.'" (CT Supp 1:113.)" However, the trial court's statement on that page of the record followed Croce's testimony (at CT Supp 1:111) concerning how Williams *approached* Horton. Croce later testified (at CT Supp 1:112) that it appeared Horton's hands were raised, Williams "was within a step of [Horton]" and reaching into Horton's jacket, and Williams was *patting down* Horton. At the page of the record cited by Williams (CT Supp 1:113), Croce testified, "He *came up, said 'Get down,'* went over his shoulder like that. Mr. Horton had his hands – he went outside of Mr. Horton's hand, like that. Then he turned, looked back over to the shoulder to the check-cashing booth and said, 'He has a piece.'" (Italics added.) The prosecutor asked if the court "want[ed] to describe *that*," (italics added) and the court replied, "No. We can't describe every

Paul testified he had offered an opinion that Horton's wounds were consistent with the shooter standing in the doorway, *even though Paul did not then have information regarding where Horton was positioned at the time of the shooting*. Paul also had opined at one point that Horton's gunshot wounds were consistent with a shooter standing at the front door, *depending* upon Horton's orientation at the time of the shots. This suggested Horton's orientation *might* have been such that Horton's wounds would *not* have been consistent with a shooter standing at the door. Of course, Croce's testimony indicated Horton was oriented (from head to feet) somewhat eastward. That orientation (as contrasted with an orientation (from head to feet) southward) was less supportive of an opinion there was a shooter at the front doorway.

Paul had not read Croce's testimony on the orientation of Horton's body before Paul gave an earlier opinion that Horton's wounds were consistent with the shooter standing at the door. And Paul conceded a shooter's position generally cannot be determined by reference only to general ejection patterns.

Paul maintained a shooter at the front doorway might have used one of several long guns, but Trahin provided a detailed explanation as to why this was unlikely and employed scientifically accepted methodology to conclude the gun used was a Colt-type .45-caliber handgun. Trahin provided persuasive testimony the locations of the casings were consistent with Croce's testimony. McCarty, who worked next door to the restaurant and was told a shooting had occurred, saw two men running towards a car and the car leave the scene.

Indeed, the Walsh statement is arguably as inculpatory as it is exculpatory, because it is consistent with three criminals, i.e., respondents *and* a man at the front

physical action. They're grappling." In sum, the pages of the record Williams cites for the proposition "They began to grapple" and for the proposition the trial court stated, "They're grappling" do not refer to testimony recounting grappling at the time Horton was falling with his left leg raised, or grappling at the time he was lying on the floor with his back against the refrigerator, that is, the times during which, according to Croce, Horton was shot.

door. We note Croce testified Prince wore a dark waist-length jacket and Williams wore a black, approximate knee-length raincoat, and Walsh, in her statement, said the man whom she saw was wearing a “red horizontal striped [*sic*] shirt.” We also note Tanner testified a third man drove Prince and the woman from the hospital, and Worthen suspected a third person was involved in the crimes.

Moreover, Prince states in his opening brief, “Through Mr. Paul, Mr. Prince *demonstrated* the kinds of inquiry and investigation that his expert would have performed in 1980-82—had the Walsh [s]tatement not been suppressed by the State.” (Italics added.) We now have the benefit of that demonstration.

In sum, whether or not Croce and Sarazinski correctly identified Prince, there was comparatively weak evidence there was a shooter in, or at, the front doorway, but strong, if not overwhelming, evidence Horton was shot by an assailant inside the restaurant.

(2) *The Walsh Statement Was Not Material as to Prince.*

In the present case, there was strong, if not overwhelming, identification evidence that Prince was the person who shot Horton. Croce and Sarazinski similarly described Prince in detailed descriptions, and repeatedly and positively identified him as the gunman who entered the restaurant, and Croce repeatedly and positively identified Prince as the shooter.

Croce suggested Prince was holding a black .357- or .45-caliber handgun, and Sarazinski testified the gun he saw was a .45-caliber semiautomatic handgun. Croce and Sarazinski testified photographs depicted Prince holding a handgun that was the same or similar to the one used during the crimes. McCree testified the depicted handgun had a .45 frame, most commonly used with a .45-caliber handgun, flatly contradicting Prince’s self-serving testimony the depicted gun was a .22-caliber gun. Lauderdale flatly contradicted Prince’s testimony the depicted gun belonged to Lauderdale, Lauderdale was present when the photograph was taken, and Lauderdale gave the photograph to Prince. A jury reasonably could conclude Prince’s testimony on this issue was

fabricated. The ignition of the Mercury getaway car was punched, and Prince had a slide-hammer in his garage.

Tanner identified Prince at the hospital, carrying Williams. She suggested the man carrying Williams at the hospital was taller than Prince, but there was evidence Prince may have been wearing high-heel shoes at the hospital. Croce, Sarazinski, and Tanner identified the black jacket (People's exhibit 5C at trial) belonging to Prince as the one he wore on February 16, 1980.

Tanner's testimony about Prince's hurried and unhelpful conduct at the hospital was evidence of his consciousness of guilt. Moreover, Prince testified Tanner tried to have him complete a form and he told her that he did not have time and Williams was dying. However, Tanner testified she asked Prince to provide Williams's name, she did not then have anything in her hand or paperwork she wanted completed, and Prince replied he did not "have time for all of that." Tanner also testified that, after Williams was received for treatment, she asked Prince and the woman for Williams's name and Prince again replied he did not "have time for all of that."

Prince's testimony, including his explanation of his involvement with the seriously wounded Williams, was frequently self-serving and unreasonable, and a jury reasonably could conclude much of it was fabricated. In light of the previously discussed strong evidence the shooter was inside the restaurant, and the above evidence that Prince was the shooter, we hold as to Prince's petition the Walsh statement was not material for purposes of *Brady*.

(3) *The Walsh Statement Was Not Material as to Williams.*

A similar analysis applies to Williams. Our previous discussion that there was strong, if not overwhelming, evidence that Horton was shot by an assailant inside the restaurant is equally applicable here. Moreover, Croce's testimony provided strong, if not overwhelming, evidence that a gunman--and his accomplice--committed the present offenses. Croce described Williams in detail and repeatedly and positively identified him as the person who struggled with Horton. Croce testified Williams was wearing an

approximate knee-length raincoat, there was evidence it had been raining on the day of the crimes, and Worthen testified Williams's pants were soaked beginning at a point a couple of inches below the knee.

Brown testified that, at the hospital, Williams was screaming that Williams had been robbed, but Williams never told Brown the identity of the alleged robber. Moreover, Brown's testimony about Williams's statement to Brown permitted an inference Williams was being evasive, evidencing consciousness of guilt. Williams testified at trial to the effect Horton attacked him, but Williams does not assert Williams ever testified at trial that he had been robbed. A jury reasonably could conclude much of Williams's testimony was self-serving and fabricated. We hold as to Williams's petition the Walsh statement was not material for purposes of *Brady*.²⁵

²⁵ As mentioned (see fns. 12 and 22, *ante*), the trial court denied respondents' petitions to the extent they were based on the ground the trial court violated *Shirley's* post-hypnotic exclusionary rule. As to this issue, the trial court, making a factual finding, concluded neither Croce nor Sarazinski were actually hypnotized. (Order, p. 5.) Moreover, in its order, the trial court stated, "The Court need not determine whether evidence of Ms. Horton's alleged hypnotic induction was favorable or prejudicial [for purposes of *Brady*]. Petitioners fail to prove that the prosecution withheld, concealed, or suppressed any evidence of the alleged hypnosis or hypnotic procedure." (*Id.* at p. 6.) The trial court observed (1) "Worthen . . . had *no knowledge* of any hypnosis or attempted hypnosis at the time of the investigation" (*ibid.*, italics added), (2) Croce and Zarin "testified that they *never told* anyone from the police or prosecution that Ms. Horton attempted to hypnotize them" (*id.* at pp. 6-7, italics added), and (3) "Mr. Bluth [a security guard for the check-cashing business] also testified that he *never told* anyone about Ms. Horton's attempted hypnosis" (*id.* at p. 7, italics added). The court also observed the prosecutor at respondents' trials "testified at the evidentiary hearing that he had *no knowledge* of the alleged hypnosis." (*Ibid.*, italics added.) The trial court concluded, "Prosecutors cannot withhold, conceal or suppress evidence they did not *know* existed. Petitioners have failed to show by a preponderance of the evidence that the People concealed evidence of the alleged hypnosis attempt." (*Ibid.*, italics added.)

Williams claims in his opening brief, "Here, the state's failure to disclose evidence that Carol Croce and Keith Zarin met with Genevieve Horton [the decedent's wife] after the murder and discussed the facts of the crime with Ms. Horton and that Ms. Croce remembered an additional detail during her meeting with Ms. Horton was itself *Brady* error. The *facts of the meetings* with Ms. Horton and the recall of the additional detail

during Ms. Croce's meeting with Ms. Horton were all undeniably known to the police and the District Attorney's Office, as Judge Rayvis found. . . . [¶] Judge Rayvis, however, did not address Petitioner's argument that the failure to disclose evidence known to the prosecutor and police regarding the *meeting* between Ms. Horton and Ms. Croce and Mr. Zarin in which Ms. Croce discussed the facts of the case with Ms. Horton and remembered least [*sic*] one additional fact, violated Petitioners' *Brady* rights, *whether or not the police or prosecutors had ever specifically been told* that these meetings involved attempts to 'hypnotize' Ms. Croce and Mr. Zarin. Disclosure of the meeting would have permitted counsel to *ask* about that meeting. Any question placed to Mr. Zarin or Ms. Croce would have inevitably led to a description of the attempted hypnosis; both witnesses confirmed that if they had been asked about the meeting with Ms. Horton, they would have described what happened during the attempted hypnosis session." (First, second and third italics added.) We refer to the evidence, in its entirety, alluded to in the preceding quote as the "fact of meeting" evidence. Williams asserts the trial court's order in this case may be upheld on the alternative ground the fact of meeting evidence was *Brady* evidence, whether or not the Walsh statement was *Brady* evidence.

There is no need to decide whether Williams properly alleged, presented evidence on, and/or argued in the trial court the issue of *Brady* error based on the fact of meeting evidence, or whether the trial court considered and/or ruled upon that issue. Nor is there any need to decide whether the issue of *Brady* error based on the fact of meeting evidence is properly raised in this People's appeal from a trial court order granting petitions (Pen. Code, § 1506) on the sole ground the Walsh statement was *Brady* evidence. We note there is authority apparently rejecting the argument that favorable evidence for purposes of *Brady* includes evidence not itself favorable but likely to lead to favorable evidence. (Cf. *Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 384 [". . . Kennedy identifies no legal basis on which a defendant is entitled, at time of trial, to materials that themselves would not be relevant for impeachment purposes, but which would be likely to *lead* to information that could be used for impeachment purposes. The duty of disclosure under *Brady* is limited to information that is favorable and material, . . .".]) Nonetheless, there is no need to decide whether we may consider the issue of *Brady* error in connection with the fact of meeting evidence, or whether that evidence was favorable for purposes of *Brady*. We hold that, even if we may consider the issue of *Brady* error, there was strong, if not overwhelming, evidence of respondents' guilt; therefore, the fact of meeting evidence was not material, i.e., it is not reasonably probable a different result would have occurred as to respondents' verdicts and/or sentences had that evidence been disclosed.

c. *The Trial Court's Order Was Erroneous.*

In its order, the trial court quoted *Kyles* for the proposition that, for purposes of *Brady*, “materiality is a ‘reasonable probability’ of a different result.” In concluding the Walsh statement was material, the trial court stated, “This Court finds it extremely relevant that Petitioner Prince’s ballistics and trajectory expert, Anthony Paul, testified at the evidentiary hearing that the casings evidence and the victim’s wound were consistent with the shooter standing at the doorway. . . . Additionally, Ms. Walsh’s description of the weapon she observed matched available guns at the time of the crime that could have fired .45 caliber bullets. Had the Walsh statement been disclosed, Petitioners *could* have presented ballistics evidence that directly contradicted the *People’s* expert.

“Additionally, during closing argument at Petitioner Prince’s trial, the prosecution argued that the defense presented no witnesses. The People now argue that the Walsh statement is not favorable to the Petitioners, because Ms. Walsh saw a man standing in the front doorway after she heard three gun shots, and that this is consistent with the shooting already having occurred inside the restaurant. The People urge this Court to accept Ms. Walsh’s statement as it was given in 1980. However, Ms. Walsh’s observations are *also* consistent with the shooter standing outside of the restaurant, having shot his weapon and returning it to a port arms position before Ms. Walsh saw him. The defense never had the opportunity to cross-examine Ms. Walsh regarding her observations. Had the Walsh statement been turned over to the defense, both Petitioners would have been able to call witnesses and *could* have presented a credible defense of an alternate shooter.” (Order, pp. 11-12.) (Italic added.)

However, the trial court’s comments pertain to the issue of whether the shooter was inside the restaurant. As previously discussed, we determine materiality based not only on any adverse effect nondisclosure *might* have had on the preparation or presentation of respondents’ cases, but on the *entire record*, including the *trial evidence* and the hearing evidence. We are not reviewing the *Brady* issue in the absence of trial evidence, as we do when we review, prior to trial, a claim of *Brady* error. We are

reviewing the issue based on a record that includes *strong, if not overwhelming*, evidence presented at trial, and at the hearing, that the shooter was inside the restaurant, as against (1) the comparatively weak circumstantial evidence of the Walsh statement, and (2) what was presumably respondents' strongest presentation, through Paul at the hearing, of a ballistics analysis favorable to respondents. There is no need to decide whether there was a shooter at the front doorway, but even if there were, that fact did not negate the strong evidence Prince was a shooter and Williams was his accomplice.

The trial court next stated, "Ms. Walsh's statements also *could* have undermined the credibility of Ms. Croce and Mr. Zarin at Petitioners' trials. Additionally, had the defense known of Walsh's statement at the time of the trials, and had Petitioners had the opportunity to call Ms. Walsh and a firearms expert as witnesses, Petitioners *may* have chosen not to testify at their respective trials, as they both did. [¶] Simply, the Walsh statement would have allowed the defense to explore a myriad of topics and avenues favorable to the guilt determination as to both Petitioners, as well as the special circumstance allegation suffered by Petitioner Prince." (Order, p. 12.)

However, evaluating the trial court's statements in a postconviction, not pretrial, context, we note the following. The trial court's comments fail to distinguish, as we have, between the evidence (presented at respondents' trials and at the hearing) that a shooter was inside the restaurant, the shooter was Prince, and Williams was his accomplice. Moreover, the evidence on all of these issues, including but not limited to the trial testimony of Croce and Sarazinski was, as discussed, strong if not overwhelming, as against the weak evidence of Walsh's statement. Walsh's statement was of limited impeachment value as to Sarazinski's testimony, since he testified he saw Prince enter but saw nothing else afterwards, and Sarazinski never claimed to have seen Williams.

Although respondents may have chosen not to testify at trial if they had possessed the Walsh statement, respondents do not expressly assert they would not have testified if they had possessed it. In any event, the record reflects respondents did testify as well as the content of their testimony, respondents do not assert their testimony would have

changed in any respect if they had possessed Walsh's statement, and a jury reasonably could conclude much of respondents' testimony was fabricated. Finally, the fact, if true, the Walsh statement would have allowed a preconviction exploration of unspecified favorable topics does not negate the strong, if not overwhelming, evidence of respondents' guilt on this postconviction record.

This is not a case in which the trial court's memorandum and order, discussing respondents' evidentiary showing and the issue of materiality for purposes of *Brady* (1) stated the trial court *disbelieved, or rejected as false*, the People's evidence, (2) made factual findings, (3) discussed the Walsh statement in light of the *comparative strength* of the People's evidence, and/or (4) resolved mixed questions of law and fact where the questions were predominantly factual.

As earlier discussed, *Salazar* concluded mixed questions of law and fact, such as elements of a *Brady* claim, are subject to independent review. (*Salazar, supra*, 35 Cal.4th at p. 1042.) Prince suggests *Salazar's* conclusion does not apply when the mixed questions of law and fact are predominantly factual. There is no need to decide the issue because the trial court, when ruling on the issue of whether the Walsh statement was material, resolved no mixed questions of law and fact where the questions were predominantly factual.

DISPOSITION

The trial court's order filed March 14, 2013, granting respondents' petitions for writs of habeas corpus is reversed, and the matter is remanded to the trial court with directions to enter a new order denying said petitions.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.