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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIFTH APPELLATE DISTRICT

DOUGLAS R. STANKEWITZ,

Petitioner,

On Habeas Corpus.

Court of Appeal No. _F081806_____

PETITION FOR WRIT OF HABEAS CORPUS

Related Appeal Pending – LWOP SENTENCE
No. F079560

(Fresno County Superior Court Case # CF78227015)

TO THE HONORABLE BRAD R. HILL, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT:

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Petitioner, Douglas R. Stankewitz, through his counsel, petitions this Court for a writ of habeas corpus and by this verified petition sets forth the following facts and causes for the issuance of the writ:

III. INTRODUCTION

Petitioner's case is one of the most egregious examples of police misconduct in the nation. When Petitioner was framed for this murder, he was a nineteen year old Native American who was born into, and grew up in, a nightmare of poverty and abuse, and who suffered from acute mental health and cognitive disabilities and was in the grips of a crippling heroin addiction. The double tragedy here is that Ms. Graybeal's murder will never be solved because police chose to frame Petitioner rather than investigate the murder.

Petitioner has maintained his innocence for the murder of Ms. Graybeal for over forty years. None of his eighteen court appointed attorneys ever investigated factual innocence, including his trial attorneys. In 2016, a *pro bono* team of lawyers[1] conducted a perfunctory innocence investigation and nearly immediately made the horrendous discovery that the murder weapon was planted, that the evidence was falsified by the lead homicide detective. A 2017 discovery dump by the prosecution confirmed that the lead prosecutor presented perjured testimony and withheld exculpatory forensic reports, and more. The most egregious example is that in 2017, defense discovered for the first time in the history of this case incontrovertible evidence the alleged murder weapon was in the custody of the lead homicide detective five years prior to the murder. This evidence includes dates and initials engraved on the weapon's holster and a weapon tracing report.

[1] This Habeas was prepared at the expense of the legal team and consisted of over a thousand hours of *pro bono* efforts with no Habeas experience because we could not engage a Habeas specialist *pro bono*. Mr. Stankewitz is 62 years old, of high health risk and time is of the essence. To the extent this pleading has irregularities or has technical deficiencies, we ask for lenience in addressing them.

Petitioner is a prisoner of the State of California. He is illegally and unconstitutionally confined at the California State Prison at San Quentin by Acting Warden Ron Bloomfield and Secretary of the California Department of Corrections and Rehabilitation Ralph Diaz, pursuant to convictions and a life without the possibility of parole sentence imposed by the Fresno County Superior Court on May 3, 2019. The purpose of this writ is to identify and expose issues never previously raised on appeal or in previous state or federal habeas writs, that would, overwhelmingly, support an Order to Vacate Petitioner Douglas R. Stankewitz's 1983 convictions, for first-degree murder with the special circumstances of kidnapping, and robbery, in addition to gun enhancements for all charges.

This is an extraordinary case where the system has repeatedly failed Petitioner, starting with his extremely deprived childhood and his years in foster care and group homes. Petitioner, a Native American, who was 19 years old at the time of the crimes, and the youngest of the group of codefendants, except for the primary witness against him, is factually innocent and the prosecution knew that he was innocent of the shooting when they proceeded with their case. The prosecution engaged in a pattern and practice of misconduct and acted in bad faith. This included providing prejudicial information biased against Petitioner, to the local media.[2] All of his defense lawyers assumed that he was guilty and acted in accordance with that belief. At both trials, there were no investigations nor impeachment of prosecution law enforcement witnesses. Petitioner's presumed guilt tainted all of the legal representation that Petitioner received until 2016, when Curtis L. Briggs and J. Tony Serra began

[2] Both TV scripts and Fresno Bee articles consistently state that Petitioner was 21 years old, when he was in fact a teenager of 19 and the second youngest member of the group. This biased the prospective jury pool to belief that it would be justified to give Petitioner the death penalty and hold his behavior to be that of a typical 21-year-old. Even though they knew or should have known that it was false, law enforcement also provided the media with information stating that Petitioner used a .25 caliber gun. Lastly, even though they knew or should have known that it was untrue, law enforcement furthered the story that Petitioner was involved in the Meras crimes which allegedly took place on the night of murder. As explained in this Petition, none of these were true. See Exhibit 1ii.

representing him. Until this representation, the physical evidence was never examined, neither were the statements of the co-Petitioners compared or the police reports reviewed in detail. Once these steps were taken, the systemic misconduct by law enforcement, prosecutor, and trial lawyers became clear.

Starting with his first trial attorney, once his first trial attorney decided to pursue a diminished capacity defense, no investigation was done to determine what the evidence showed[3]. Furthermore, a thorough review of trial counsel's files shows that no investigation was done, no investigators, let alone experts, were hired in preparation of trial. According to memos, his first trial lawyer met with Petitioner's appellate counsel investigators in 1992 and 1993. The first trial lawyer, during those investigations, stated that Petitioner confessed to a doctor, and that the Petitioner had a diminished capacity.[4] Failure of the prosecution and defense to properly investigate the murder, facts and evidence omitted by the prosecution at the preliminary hearing, and falsehoods presented by the prosecution at the first trial, carried over to the second trial. His guilt was only proven by using false reports and false testimony, much of which was referencing the first trial. As documented in Claims 1, 2, 4, 5, 6 and 7, the prosecution misconduct continued during his second trial. This assumption of guilt by Petitioner's first trial attorney influenced the course of his case and approach by all of his subsequent attorneys, for over 40 years, from 1978 – 2017.

This was a highly publicized arrest, prosecution, and trial, in Fresno County. The prosecution's perjurious narrative was echoed consistently in the media through both trials. It

[3] This is an odd detail in the case. Petitioner always maintained his innocence. He physically punched his first trial attorney in the face for presenting a diminished capacity defense. The first conviction was overturned for failing to address Petitioner's competency. A thorough review of the record demonstrates that Petitioner was suffering from substantial mental health impairment throughout both trials.

[4] The record clearly indicates a "diminished capacity" in the lay sense, but the defense was inappropriate here because if a perfunctory investigation would have been performed, including a visual inspection of the alleged murder weapon, Petitioner's potential innocence would likely have been presented at trial.

was widely reported both in print and radio media that the prosecution had found the alleged murder weapon in Petitioner vicinity.

The majority of the issues raised in this Petition were not known to the Petitioner until between 2017 - 2020. In light of the extensive evidence that has been unearthed over the past two and a half years of ongoing investigation, any issues raised in this Petition that have been made in prior appeals or habeas writs demand additional review. The misconduct by the prosecution, including withholding crucial evidence, was so pervasive and unknown until recently, all previous factual assumptions presented in court, so far, are invalid.

First, the gun falsely presented as the murder weapon in this case was not actually the murder weapon, nor was this the weapon used in a kidnapping or robbery. The gun in evidence was actually in the possession for a period of years by one of the lead detectives on the case, Detective T. Lean III. This possession is confirmed by both the Gun Trace Report dated 2-10-1978[5] and by the gun holster, bearing the detective's initials with the date 7-25-73.[6] In addition, during an interview with now retired Detective Lean, he stated that if his initials were on it, he collected the holster at some point confirming that he had possession of the murder weapon five years prior to the time when Petitioner is alleged to have use it to shoot Graybeal.[7] Despite this highly exculpatory evidence, the prosecution never turned this information to Petitioner's defense counsel and still proceeded with the case.

Second, in addition to the misrepresentation of the murder weapon, the prosecution's main witness was not credible. The witness was a 14-year old Native American who had been involved in the incident. The minor was on probation, and, during the interrogation, was

[5] See Exhibit 1a, FSO Lean Serial Number Trace Report
[6] See Exhibit 1c, FSO Lean Photo of holster
[7] See Exhibit 1e, Transcript of Lean Interview

threatened with the charges of first-degree murder, kidnapping, and robbery. The minor was further coerced by being supplied with alcohol during this interrogation. The false details he included were extensive. The minor falsified much of his testimony over the two trials. The witness recanted his testimony in 1993. The minor lied at the Preliminary Hearing, and told the prosecutors he had provided false testimony. The prosecutors still had the minor testify at both trials despite knowing he was going to offer false testimony.

Third, none of the three codefendants, Marlin Lewis, Christina Menchaca or Teena Topping, testified at any of the proceedings. After being granted a change of venue to Alameda County, they all pleaded guilty in 1979.

Fourth, the prosecution used testimony from Jesus Meras to inflame the jury despite the inherent lack of credibility of the testimony. Meras testified at the Preliminary Hearing, and the penalty phases of both trials. He testified that he was a victim of a robbery and attempted murder, which allegedly took place on the night of the Graybeal murder. The court ordered that the Meras charges be severed from the Graybeal charges. The prosecution never took Petitioner to trial on the Meras crimes but instead had Meras testify during the penalty phase of both trials. The prosecution argued at the second trial that they had proved beyond a reasonable doubt that Petitioner was involved in the Meras crimes. To support this argument, the prosecution used witnesses to testify that the same gun was used in both crimes, even though it had forensic and police reports and knew that there were two different caliber guns used. This allowed Meras to convince the jury to vote for the death penalty.

Finally, even the petitioner's diminished capacity defense was undermined due to the withholding and misrepresentation of a report by a psychiatrist of his mental defect. The samples of blood taken, if tested properly, would have shown that he was under the influence

of heroin. The prosecution elicited misleading testimony from police officers about whether he exhibited symptoms of heroin use when he was arrested. Furthermore, the psychiatrist stopped practicing due to an issue of falsifying information on another client.[8]

The original discovery motion by Petitioner's first trial counsel on April 5, 1978 and ordered on April 24, 1978 are still in effect. Petitioner's attorneys filed a Motion to Compel Specified Discovery on May 1, 2017, and a Renewed Motion to Compel Specified Discovery on July 12, 2017. As a result of the Motions, the prosecution turned over documents never previously provided to defense counsel at either the first or second trial, or any time since, which were exculpatory in nature. Defense counsel then reviewed all documents and evidence in the case, starting with the initial police investigation reports. This review included all of the discovery from the prosecution: 3,691 pages provided in 2012 and an additional 367 pages and 80 photos provided on August 8, 2017, including the police files for Case #78-1995 and Case # 78-5819/78-1809 and property card documents.

Given the extensive and pervasive misconduct in this case, the People should have to affirmatively dispel of any doubt as to the over 50 items of missing or lost evidence. Based on the State's own law enforcement and prosecution reports, said evidence should be assumed to have existed and knowingly withheld by the prosecution or law enforcement.

Petitioner has proclaimed his innocence since his arrest[9]. Like many wrongfully accused Petitioners, from the beginning, petitioner assumed that the truth would come out and

[8] James Missett, MD, psychiatrist, testified for the defense. However, no 402 hearing was held nor did Petitioner waive his doctor patient privilege. Dr. Missett is now deceased.

[9] During the first trial in 1978, a defense expert, Dr. Missett, testified that Petitioner had confessed the crime to him. Dr. Missett lost his medical license in 2015, due to his being caught falsifying test data in a criminal case in Sonoma County.

he would be freed[10]. Throughout the years, Petitioner has repeated asked his lawyers to look at the evidence. Had they done so, they would have found the truth of his innocence.

Sadly, a young white woman was murdered but we do not know by whom. This tragedy has been compounded by an innocent man having his life taken from him through incarceration on California's death row for over 42 years. He has had five execution dates. He spent 21 years of his incarceration in solitary confinement, in part because he chose to wear his hair long based on his culture, which was not allowed by prison rules, and in part because he was friends with another inmate who was executed.

Although it is likely too late to determine what actually happened the day and night of the crimes, several of the key prosecution actors are still alive. An evidentiary hearing, with them as witnesses, could finally shed light on all of their misdeeds.

IV. PROCEDURAL HISTORY

Petitioner is unlawfully imprisoned under a judgment of convictions and sentence of Life Without the Possibility of Parole at San Quentin State Prison, San Quentin, California, by Ron Bloomfield, Warden, and Ralph Diaz, Secretary of the California Department of Corrections and Rehabilitation.

The court entering judgment of the convictions and sentences challenged by this Petition is the Superior Court of Fresno County (Fresno County Superior Court Case No. CF78227015).

The dates of the judgments and sentencing challenged by this Writ of Habeas Corpus are November 18, 1983 (2 special circumstances) (JE Vol. 1 RT 873-74, 905.) and May 3, 2019. (VOL XXXV RT 508-510)

[10] Despite his protestations, and the failure of either of his defense trial counsel to object on the basis of attorney-client privilege, writings taken from his cell were introduced at trial to show a consciousness of guilt.

Petitioner has never had an evidentiary hearing. On August 4, 1999, U S District Court Judge Anthony W. Ishii granted an evidentiary hearing to consider whether his second trial attorney, Hugh Goodwin, had investigated Petitioner's mental competency; an Order vacating the evidentiary hearing as 'improvidently granted' was issued by Judge Ishii on September 6, 2000.

The case hopscotched between the U S D C and the Ninth Circuit between 2000 – 2012. Given the history of this case dating back to 1978, the issues raised in Petitioner's appeals and prior habeas petitions are included above. See V. Table of Previous Stankewitz Case Dispositions, hereinabove.

On October 29, 2012, the 9th Circuit affirmed the district court's order granting Stankewitz a writ of habeas corpus directing the State of California to either: (a) vacate and set aside the death sentence in *People v. Douglas Ray Stankewitz*, Fresno County Superior Court Case No. 227015-5, unless the State of California initiates proceedings to retry Stankewitz's sentence within 90 days; or (b) resentence Stankewitz to Life Without the Possibility of Parole.

During the pendency of the case since 2012, Petitioner was represented by several appointed counsel. The appointments were either terminated under *Marsden* or not accepted by the attorneys. On August 10, 2015, Peter Jones, Attorney was appointed to represent Petitioner. On March 17, 2017, J. Tony Serra and Curtis Briggs were approved to represent Petitioner pro bono. During the time that Serra and Briggs represented Petitioner, they began an in-depth investigation, focusing on lingering doubt as to guilt.

On August 24, 2017, and May 26, 2018, defense counsel viewed the physical evidence in the case held at the Fresno County Sheriff's Department and Fresno County Superior Court. No previous defense counsel had done this. Upon review of documents produced by the

Fresno District Attorney's Office, and the viewing of the physical evidence, defense counsel realized that there was a pattern and practice of prosecutorial misconduct which started from the beginning of the case. On December 6, 2018, the defense filed an Amended *Trombetta* Motion to Dismiss, documenting the bad faith actions by the prosecution. The prosecution never replied in writing to the Motion and the Superior Court never ruled on the Motion.

On March 21, 2019, accompanied by experts, defense counsel again viewed the physical evidence in the case held at the Fresno County Sheriff's Department and Fresno County Superior Court. Based on the experts' observations, Petitioner filed a Motion to Compel DNA Testing with the Superior Court on May 1, 2019. Said motion was denied by the court without prejudice on October 24, 2019.

The Fresno District Attorney's Office filed a Request to Sentence Petitioner to Life Without Possibility of Parole on April 19, 2019. The stated grounds for the Request were that mitigation was never presented at the Petitioner's second trial. These grounds lack credibility because the District Attorney's office has known that mitigation was not presented since the time of Petitioner's second trial in 1983. The more likely grounds are the new evidence turned over to the defense starting in August, 2017, which led the defense to dig deeper into all the facts and circumstances of petitioner's case, starting from the beginning.

On November 27, 2019, Petitioner filed an Amended Motion for DNA Testing in Fresno Superior Court. On May 11, 2020, after receiving no response from either the Fresno County District Attorney or the California Attorney General, the court granted Petitioner's Motion for DNA Testing.

Counsel for Petitioner has been working diligently on a part time *pro bono* basis since mid-2019 writing this Petition.

V. TABLE OF PREVIOUS STANKEWITZ CASE DISPOSITIONS

Date of Offense: February 8, 1978

File Date	Court	Cause No.	Plaintiff	Plnt Attorney	Defendant	Deft Attorney	Nature of Suit	Disposition
03/10/1978 First Trial	Fresno County Superior Court Robert L. Martin, Judge	CF78227015	The State of California	Jeff Dupras, Lisa Gamoian, Lynmarc Jenkins	Douglas Ray Stankewitz	Salvatore Sciandra	Criminal: Murder, Robbery, Kidnaping	Guilty – 3 counts Sentence: Death Penalty
10/13/1978	Supreme Court of California	20705 21310 Pub Op.: 32 Cal.3d 80	The People (Plnt/Respondent)	George Deukmejian, AG, Robert H. Philibosian, Arnold O. Overoye, Paul V. Bishop, Edmund D. McMurray, Garrett Beaumont, Robert D. Marshall	Douglas Ray Stankewitz (Deft/Appellant)	Quin Denvir PD, Steven W. Parnes	Appeal Other issues on appeal not addressed due to reversal on other grounds Habeas Corpus	Judgment Reversed on issue of error in failure to address conflict w/ atty. Habeas denied (Jury selection issues Hovey v. Superior Court, 616 P.2d 1301)

11/04/1982 Case Reinstated – Second Trial	Fresno County Superior Court Robert L. Martin, Judge	CF78227015	The State of California	Jeff Dupras, Lisa Gamoian, Lynmarc Jenkins	Douglas Ray Stankewitz	Hugh Goodwin (2nd Trial counsel) 12/20/12 Richard Beshwate J. Tony Serra, Peter M. Jones	Criminal: Murder, Robbery, Kidnaping	Guilty on 3 counts: Death Penalty on Count 1
11/18/1983	Supreme Court of California	S004602 Pub Op.: 51 Cal.3d 72 (793 P.2d 23)	The People	John K. Van de Kamp, AG, Steve White, Richard B. Iglehart, Arnold O. Overoye, Michael T. Garcia, George Hendrickson, Jane Lamborn, Thomas Y. Shegemoto and Robert D. Marshall	Douglas Ray Stankewitz	Robert A. Seligson, John P. Ward	Appeal	Judgment Affirmed in its entirety 7/5/90 US Sup.Ct. Petition for Writ of Certiorari denied, 4/1/91, 111 S.Ct. 1432 ** See Addendum 1

02/02/1990	Supreme Court of California	S014015	Douglas R. Stankewitz on Habeas Corpus				Petition for Writ of Habeas Corpus Petition for Rehearing	Denied w/o hearing or findings 4/19/90 Denied 8/28/90
11/15/1991	USDC E.D.Cal. Judge Anthony Ishii	CV-91-00616-AWI	Douglas Ray Stankewitz		Jeanne S. Woodford, Warden of San Quentin State Prison		Stay of Execution Petition for Writ of Habeas Corpus	Denied 12/22/00 ** See Addendum 2
7/14/1995	Supreme Court of California	S047659	In re Douglas Ray Stantewitz	Robert Bryan			Petition for Writ of Habeas Corpus	Order 3/15/96 ** See Addendum 3

12/28/2001	USCA 9th Cir.	01-99022 Pub Op.: 365 F.3d 706 Unpub Memo Op.: 94 Fed.Appx. 600 – Affirm conviction, reject several grounds for reversing sentence, deny request to broaden cert of appealability, address claims under AEDPA standars	Douglas Ray Stankewitz	Nicholas C. Arguimbau Katherine L. Hart	Jeanne S. Woodford, San Quentin State Prison	John Gerald McLean, Deputy AG	3535 Habeas Corpus: Death Penalty Appeal from CV-91-00616	Decided 4/8/2004 – Affirmed in part; reversed in part; remanded for further proceeds ** See Addendum 4 AEDPA does not apply Abuse of discretion by not allowing evidentiary hearing on ineffective assistance of counsel on failure to investigate and present evidence on mitigation

2/6/2012	USCA 9th Cir. Pub. Op. 698 F.3d 1163	10-99001	Douglas Ray Stankewitz	Daniel J. Broderick, Fed.PD, Harry Simon	Robert K. Wong	Eric Christoffersen and John G. McLean, Deputy AGs	Appeal of USDC ruling on inaffective assistance of counsel during penalty phase and grant of habeas corpus	Affirmed 10/29/12 ** See Addendum 5

ADDENDUM 1
(Table of Previous Stankewitz Case Dispositions)

The People v. Douglas Ray
Supreme Court of California
Case No.: S004602
Pub. Op. 51 Cal.3d 72, 793 P.2d 23

11/18/83 Appeal filed (automatic)
7/5/90 Opinion published – Judgment affirmed in its entirety

Claim No.	Description	Disposition	Notes
II Guilt	Substitution of Counsel/Competence to Stand Trial	Contentions lack merit	
	Accomplice Instructions (Billy Brown as an accomplice)	Trial court proper instructed jury	
	Instruction on Oral Admissions (should be viewed with caution) – Court failed to instruct *sua sponte* on admission	Failure was error but no prejudicial	
	Shackling of Defendant	Lacks merit, no abuse of discretion	
	Admission of Writings Seized from Defendant's Cell	Contention without merit	
	Instruction on Aiding and Abetting Aiding and Abetting related to the special circumstance finding – omission of unanimity instruction	No reversible error No prejudice in omission	
	Sufficiency of the Evidence of Felony Murder (robbery terminated prior to killing)	Contention lacks merit	
	Comment on unavailability of witnesses (co-defendants did not testify at trial – prosecution's comment rebutting defense comment)	Contention lacks merit	

	Denial of Challenges for Cause	No error for denial	
	Death Qualification of the jury – denied constitutional rights due to death-qualifying voir dire	Uphold previous ruling – no denial of rights	
	Intent to Permanently Deprive (and not to steal). Trial court should have instructed Similar instruction (robbery) given in connection with special circumstance	Contention lacks merit No further instruction other than what was given required	
	Alleged Wheeler Error (peremptory challenge of Juror Moreno based on race)	No objection at trial/ no record for review	
III Penalty	Issues Relating to Evidence of Uncharged Criminal Activity		
	1. Admission violated 5th and 8th Amendments	No persuasive reason to depart from prior holdings	
	2. Failure to instruct *sua sponte* jury must unanimously agree offenses proven	Claim rejected per People v. Miranda	
	3. Error in instructing jury on aiding and abetting in unadjudicated offenses (Jesus Miras, George Key)	Omission had no effect	
	4. Officer Reid's testimony inconsistent with report of car chase/shooting	Report not placed in evidence at 2nd trial – no basis to find error	

	Sympathy Instructions – inadequate instruction of mitigating evidence	Contention lacks merit – given instructions and argument adequately advised jury	
	Changes in the Death Penalty Law – jury not instruction per ameliorative change in 1978 statute	Contention is without merit	
	Instruction on Reasonable Doubt (aggravation outweigh mitigation and death is appropriate penalty) – Defendant claim on due process and cruel and unusual	Court previously rejected similar – no reason to reconsider	
	Response to Jury Inquiry – inadequate response to jury question regarding LWOP	Court's response was adequate	
	Victim Impact Evidence – testimony of Reid and Key regarding injuries Prosecution statement regarding victim's family	Neither had appreciable affect on penalty verdict	
	Disproportionate Penalty – Defendant should be given proportionality review on an intercase and intracase basis per People v. Dillon	No similar factors in instant case	
	Ineffective Assistance of Counsel – Several assertions at Guilt and Penalty phases (see 51 Cal.3d at 113, 114) 1. Failure to impeach Billy B's testimony; 2. Failure to request instruction re: oral admissions viewed with distrust; 3. Failure to object to admission of writings seized from prison cell; 4. Failure to establish first car was no stolen; 5. Failure to object to shackles. 6. Failure to call medical witnesses in penalty phase.	Contentions without merit	

ADDENDUM 2
(Table of Previous Stankewitz Case Dispositions)

Douglas Ray Stankewitz v. Jeanne S. Woodford, Warden of San Quentin State Prison, United States District Court, Eastern District of California
Case No.: CIV F-91-616-AWI-P

10/17/94	Habeas Corpus Petition (Proceedings stayed pending exhaustion of claims in California Supreme Court – claims rejected prior to amendment of Habeaus Corpus)
5/20/96	Amended Habeas Corpus Petition
12/30/97	Petitioner's Brief in Support of Petition
6/6/98	Respondent's Response to Petition
12/24/98	Petitioner's Traverse
3/2/99	Petitioner's Motion for Summary Judgment
4/21/99	Order Denying Motion for Summary Judgment
12/23/99	Order Denying 16 claims and 6 sub-claims on the merits and deferring resolution of 2 claims and four sub-claims
5/11/00	Second Order denying 20 claims on the merits
8/4/00	Petitioner's Objections to 5/11/00 Order (Mtn for Reconsideration)
9/6/00	Order vacating evidentiary hearing as improvidently granted
12/22/00	Final Memorandum and Order Denying Petition for Writ of Habeas Corpus
2/22/01	Petitioner's Motion to Reconsider Final Order Denying Petition and Denying Evidentiary Hearing for Five Claims for which Evidentiary hearing had previously been granted
11/7/01	Order Denying Stankewitz's Motion for Reconsideration of Final Order Denying Petition for Habeas Corpus
12/28/01	APPEAL FILED – USCA 9th Cir. 01-99022

Claim No.	Description	Disposition	Notes
15	Petitioner was mentally incompetent to stand trial and the procedures utilized by the trial court to examine the competence issue were prejudicially inadequate	Denied on Merits 12/22/00	Evd Hrg set then vac 9/6/00
16	Petitioner's trial counsel, Hugh Goodwin, failed to investigate, seek a hearing, and present extensive available evidence that Petitioner was mentally incompetent during all relevant 1982-1983 pretrial, guilt phase, and penalty phase of proceedings	Denied on Merits 12/22/00	Evd Hrg set then vac 9/6/00
17	Petitioner's trail counsel, Hugh Goodwin, was prejudicially ineffective throughout all aspects of the proceedings		

17a	Ineffective counsel – Failure to raise mental competency issues	Denied on Merits 12/22/00	Evd Hrg set then vac 9/6/00
17b	Ineffective counsel – Failure to investigate and present evidence at the build and penalty phases as to specific organic mental defects including but not limited to Fetal Alcohol Syndrome	Denied on Merits 12/22/00	Evd Hrg set then vac 9/6/00
17c	Ineffective counsel – Failure to investigate and present evidence at the built and penalty phases as to diminished capacity	Denied on Merits 12/22/00	Evd Hrg set then vac 9/6/00
17d	Ineffective counsel – Failure to investigate and present evidence at the guilt phase as to insanity	Denied on Merits 12/22/00	Evd Hrg set then vac 9/6/00
17e	Ineffective counsel – Failure to investigate and present evidence at the guilt and penalty phases of Petitioner's voluntary intoxication	Denied on Merits 12/22/00	Evd Hrg set then vac 9/6/00
17f	Ineffective counsel – Failure to investigate and present rebuttal to the People's evidence in aggravation at the penalty phase	Denied on Merits 12/22/00	
17g	Ineffective counsel – Failure file a timely motion challenging the prosecutor's improper use of a peremptory challenge against the only Native American in the jury pool	Denied on Merits 12/23/99 Denied on Merits 12/22/00	
17h	Ineffective counsel – Failure to investigate and present evidence as to prosecution star witness Billy Brown's long history as a "snitch."	Denied on Merits 12/23/99 Denied on Merits 12/22/00	
17i	Ineffective counsel – Failure to bring a timely motion under Penal Code §1538.5 to suppress the evidence obtained in a search of Teena Topping's cell.	Denied on Merits 12/23/99 Denied on Merits 12/22/00	

17j	Ineffective counsel – Failure to move to strike "aggravating" evidence presented by the prosecution as lacking sufficient foundation under Penal Code §190.3	Denied on Merits 12/22/00	
17k	Ineffective counsel – Use of a bizarre and irrelevant "power of Jesus" defense at the penalty phase.	Denied on Merits 12/22/00	
17l	Ineffective counsel – Failure to seek suppression of Petitioner's alleged statement to a corrections officer as to why he attacked inmate Hogan	Denied on Merits 12/23/99 Denied on Merits 12/22/00	
17m	Ineffective counsel – Cumulative failure to impeach witnesses, make objections at appropriate times, request appropriate instructions and otherwise aggressively represent Petitioner's interests	Denied on Merits 12/22/00	
17n	Ineffective counsel – Failure to challenge the trial court's repeated violation of state law concerning hardship excuses of jurors	Denied on Merits 12/23/99 Denied for failure to state a claim 12/22/00	
17o	Ineffective counsel – Failure to investigate and present evidence as to Johnny Stankewitz's rather that Petitioner's involvement and the shooter in the shoot-out with the police described at the penalty phase	Denied on Merits 12/23/99 Denied on Merits 12/22/00	
18	The ineffectiveness of trial counsel is apparent on the face of the trial record		
19	Petitioner's trial counsel, Hugh Goodwin, failed to investigate and present at the guilt phase the available mental defenses of diminished capacity and insanity	Denied on Merits 12/22/00	Evd Hrg set then vac 9/6/00
20	Defense counsel failed to investigate and present a motion for change of venue, and	Denied on Merits 12/23/99	

	the trial court failed to pursue the matter on its own motion	Denied on Merits 12/22/00	
21	Ineffective assistance of counsel of a prejudicial nature occurred as a result of trial counsel's failure to present mitigating evidence concerning Petitioner's character and background that was available at time of trial	Fails to state right to relief, denied evidentiary hrg. And denied on Merits 12/22/00	Evd Hrg set then vac 9/6/00
22	Trial counsel, Hugh Goodwin, had a conflict of interest between his religious calling and his duty to Petitioner as an advocate, resulting in the prejudicial deprivation of effective assistance of counsel	Denied on Merits 12/22/00	
23	The trial court improperly granted hardship releases to potential jurors, and defense counsel failed to object	Denied on Merits 12/23/99 Denied for failure to state a claim 12/22/00	
24	Petitioner was improperly shackled at trial	Denied on Merits 12/23/99 Denied on Merits 12/22/00	
25	Petitioner's attorney, Hugh Goodwin, had a prejudicial conflict of interest due to having previously represented other members of the Stankewitz family	Denied on Merits 12/23/99 Denied on Merits 12/22/00	

26	Trial counsel, Hugh Goodwin, failed to investigate and present evidence on prosecution witness Billy Brown's history as a "snitch"	Denied on Merits 12/23/99 Denied on Merits 12/22/00	
27	Trial counsel erroneously failed to object to the admission of Petitioner's statement as to why he attached inmate Hogan	Denied on Merits 12/23/99 Denied on Merits 12/22/00	
28	The trial court improperly refused to instruct that Billy Bob Brown was an accomplice as a matter of law, and that his testimony required corroboration	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
29	Petitioner was deprived of his constitutional right to be tried by an impartial jury as the result of jury death qualification	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
30	The prosecutor discriminatorily used a peremptory challenge to remove the only prospective Native-American Juror from Petitioner's jury. Petitioner's counsel rendered ineffective assistance of counsel because he failed to raise the *Wheeler* objection timely.	Denied on Merits 12/23/99 Denied on Merits 12/22/00	Court did not reach the *Wheeler* timeliness issue or IAC, but held that the prosecution gave race neutral reasons to dismiss the juror – her voir dire answers.
31	Biased jurors were allowed to remain on the jury panel	Denied on Merits 12/23/99 Denied on Merits 12/22/00	

32	Misconduct of a prejudicial nature occurred regarding jurors Venable, Golding and Woodward	Denied on Merits 12/23/99 Denied on Merits 12/22/00	
33	There was juror misconduct relating to the issue of whether "life without possibility of parole" means life without possibility of parole.	Denied on Merits 12/23/99 Denied on Merits 12/22/00	
34	The prosecution knowingly used false testimony and improper argument to secure a conviction and death judgment against Petitioner	Denied on Merits 12/23/99 Denied on Merits 12/22/00	
35	The trial court failed to follow the prior determination that Billy Brown was an accomplice as a matter of law.	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
36	The trail court committed prejudicial error by failing to instruct that evidence of oral admissions of the Petitioner ought to be viewed with caution (a) Failure to Give Cautionary Instruction Regarding Admissions of Stankewitz (b) Failure to Give Cautionary Instruction Regarding Admissions of Stankewitz	Denied on Merits 5/11/00 Denied on Merits 12/22/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
37	Error occurred due to: (1) the admission of seized writings from Petitioner's cell; (2) the instruction that if Petitioner attempted to persuade a witness to testify	Denied on Merits 12/23/99	

	falsely or tried to fabricate evidence to be produced at the trial, such attempt could be considered by the jury as a circumstance tending to show a consciousness of guilt; and (3) Petitioner's lawyer at the second trial failed to renew objections made at the first trial which had never been decided in the first appeal	Denied on Merits 12/22/00	
38	The trial court erred by instructing the jury concerning the factors to be considered in determining whether or not the homicide was committed while the robbery was still in progress	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
39	Instructions on principals and aiding and abetting were erroneous and unconstitutional because they did not advise the jury that conviction as an aider and abettor required not only that Petitioner have knowledge of the criminal purpose of the perpetrator of the offense, but also that Petitioner share that purpose or intent to commit, encourage or facilitate the commission of the crime	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
40	The accomplice instructions given by the trail court were defective	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
41	The trial court failed to instruct on the legal effect of the evidence introduced by the prosecution, that the intent to permanently deprive the victim of her car did not arise until after the killing	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
42	The trial court failed to properly instruct the jury in the response to its question about the likelihood of release pursuant to a sentence of life without parole	Denied on Merits 5/11/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00

		Denied on Merits 12/22/00	
43	The trial court failed to instruct the jury: (1) that it could impose the death penalty only if the jury was convinced beyond a reasonable doubt that death was the appropriate punishment; (b) that the facts underlying any aggravating factor must be found beyond a reasonable doubt; and (c) as to any burden of proof at all in the finding of facts at the penalty phase	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
44	The trial court failed to instruct the jury at the penalty phase that it could not consider any evidence of other criminal activity by Petitioner, unless jurors unanimously agreed that the criminal activity had been proved beyond a reasonable doubt	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
45	Numerous errors were committed in the admission of evidence of unadjudicated criminal activity	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
46	The robbery special circumstance finding was invalid	Denied on Merits 5/11/200 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
47	The trial court failed to instruct the jurors that they had to agree unanimously: (1) on the particular act of taking which constituted robbery; (2) that the defendant was guilty of robbery with respect to that act of taking; and (3) that the murder took place during the commission of the act of taking	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
48	The robbery special circumstance finding was invalid	Denied on Merits 5/11/00	Obj filed> Mtn Reconsideration

		Denied on Merits 12/22/00	8/4/00, denied 12/22/00
49	Petitioner's death sentence was constitutionally disproportionate on its face and the facts of the case, and the California Supreme Court erroneously failed to grant Petitioner's request that it undertake a comparative sentence review to so determine.	Denied on Merits 12/23/99 Denied on Merits 12/22/00	
50	The California capital sentencing scheme, as applied and administered in this case, violated Petitioner's right to due process and equal protection, and to be free from cruel and unusual punishment because the death penalty is sought and imposed in California in an arbitrary, standardless, and discriminatory manner, and the California Supreme Court improperly denied Petitioner an evidentiary hearing with respect to this matter	Denied on Merits 12/22/00	
51	Petitioner was denied the benefits of ameliorative changes in the 1978 death penalty statute	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
52	California's 1977 death penalty statute is invalid on its face and as applied to the facts of this case	Denied on Merits 12/23/99 Denied on Merits 12/22/00	
53	There was no basis for a first-degree murder verdict under the felony murder rule, since the evidence established as a matter of law that the homicide was not committed in the perpetration of a robbery	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00

54	The trial court failed to instruct the jury that it might consider any mitigating factor proffered by Petitioner, including sympathy or compassion for Petitioner	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
55	The trial court improperly ruled during closing argument on objections relating to the prosecution's failure to present the testimony of Teena Topping, Christina Menchaca, and Marlin Lewis, and in regard to the prosecutor's misconduct in related portions of his guilt phase closing argument	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
56	Petitioner's trail counsel, Hugh Goodwin, failed to investigate and present evidence of innocence at the guilt phase	Denied on Merits 12/22/00	
57	The prosecutor's presentation of evidence and argument on victim-impact matters, and the trial court's reliance on that evidence when it denied Petitioner's Penal Code section 190.4(e) motion, were improper	Denied on Merits 5/11/00 Denied on Merits 12/22/00	Obj filed> Mtn Reconsideration 8/4/00, denied 12/22/00
58	Impermissible race considerations including the fact that Petitioner is Native America, prejudicially affected the charging, trial, conviction, and death sentence.	Denied on Merits 12/23/99 Denied on Merits 12/22/00	

ADDENDUM 3
(Table of Previous Stankewitz Case Dispositions)

In re Douglas Ray Stankewitz on Habeas Corpus
In the Supreme Court of California
Case No.: S047659

7/14/95 Petition for Writ of Habeas Corpus
9/29/95 Response Filed
12/15/95 Reply filed
3/14/96 Order Denying Petition (entirety on merits)

Claim No.	Description	Disposition	Notes
1	[? Unknown but order states substantive issue could have been raised on appeal] Related claim of ineffective assistance of counsel	Denied Denied	Could have been raised on appeal Could have been raised in first petition for writ of habeas corpus
2	?	Denied	Untimely
3			
4			
5	?	Denied	Successive

ADDENDUM 4
(Table of Previous Stankewitz Case Dispositions)

Douglas Ray Stankewitz v. Jeanne S. Woodford, Warden, San Quentin State Prison
In the United States Court of Appeals, Ninth Circuit
Published Opinion: 365 F.3d 706 (2004)
Unpublished Opinion: 94 Fed.Appx. 600, 2004 WL 768969 (C.A.9 (Cal.))
Case No.: 01-99022
Appeal from District Court Case No.: CV-91-00616-AWI

	Description	Disposition	Notes
Published	Antiterroism and Effective Death Penalty Act of 1996 (AEDPA) does not apply	Reversed D.C. Ruling on different grounds	Court applied pre-AEDPA standards to Defendant's Claims
	Ineffective assistance of counsel for failure to investigate and present evidence of mitigation during penalty phase, in particular, Defendant's abusive background.	Remanded for evidentiary hearing	
	Conflict of interest between Goodwin's religion and representation of Defendant	Denied.	(Footnote 9) No evidence of conflict
	Ineffective assistance for failure to investigate and present evidence during guilt phase of drug use on day of shooting in support of diminished capacity defense.	Denied.	(Footnote 7) Goodwin chose to attack Brown's credibility – diminished capacity defense would undercut choice and tend to corroborate Brown's version
Unpublished	Goodwin's conflict of interest in previous representation of Johnnie Stankewitz	Denied.	No evidence presented as to actual conflict or negative effect on representation
	Brady violation – failure to disclose Stankewitz's brother in car during 1973 shootout	Denied.	Goodwin possessed information. No objection to mention of brother should

			have been made available to testify.
	Court formulated supplemental instruction re: question regarding whether a person sentenced to LWOP could in fact be paroled.	Denied.	Court cautioned jury not to consider what LWOP meant. Jury presumed to follow instructions. No abuse of discretion.
	Jurors considered extrinsic evidence of family's reputation for violence.	Denied.	No evidence or facts alleged to suggest that knowledge affected decision.
	Expanded Certificate of Appealability (A) Not compentent to stand trial	Decline to Expand COA	Reasonable jurists would not find DC's assessement of experts as debatable or wrong
	Expanded Certificate of Appealability (B) Failure to investigate competence to stand trial	Decline to expand COA	1983 evidence fails to show bona fide doubt re: competence
	Expanded Certificate of Appealability (C) Failure to investigate defense of diminished capacity due to mental illness	Decline to expand COA	No substantial showing that in 1983 Goodwin would have discovered info supporting diminished capacity
	Expanded Certificate of Appealability (D) Failure to investigate and pursue insanity defense	Decline to expand COA	No evidence that Stankewitz was insane at time of crime.
	Expanded Certificate of Appealability (E) Goodwin's failure to move for change of venue.	Decline to expand COA	Reasonable jurist would agree location had no bearing on outcome.
	Expanded Certificate of Appealability (F) Juror lied about material question on voir dire	Decline to expand COA	Juror's strong negative feelings about violence against women did not indicate bias against Stankewitz
	Expanded Certificate of Appealability (G) Incorrect aiding and abetting instruction	Decline to expand COA	Instruction did not comply with ruling in *Beeman*, but error

			could not have affected verdict
	ALL OTHER CLAIMS FOR WHICH DEFENDANT REQUESTS COA	Deny without specifically addressing	Duplicative of other claims for which COA has already been granted or for which court now declines to expand COA

ADDENDUM 5
(Table of Previous Stankewitz Case Dispositions)

Douglas Ray Stankewitz v. Robert K. Wong
In the United States Court of Appeals, Ninth Circuit
Published Opinion: 698 F.3d 1163 (2012)
Case No.: 10-99001
Appeal from District Court Case No.: CV-91-00616-AWI

1. USCA remand to USDC for evidentiary hearing on Defendant's claim if ineffective assistance of counsel for failure to investigate and present evidence of mitigation during penalty phase (noting application of pre-AEDPA standards in review)
2. District Court expanded record to include files from first trial and other documents proffered by Stankewitz.
3. Parties agreed to brief merits based on evidence in the record.
4. Stankewitz argued he was entitled to relief based on documentary evidence, or alternatively, requested hearing.
5. State's position was no hearing necessary and Stankewitz's petition should be denied.
6. District Court granted Petition for Habeas Corpus
7. State appealed.
8. District Court grant of Habeas AFFIRMED.

Raised by State: Goodwin's failures re investigation and presentation of mitigation	**Key Findings**		
District Court's findings, generally	Each of Court's findings adequately supported by the record		
Stankewitz was severely emotionally damaged by his upbringing	Court did not clearly err by concluding Stankewitz was severely damaged by his upbringing. (Extensive discussion on evidence in the record on this issue.)		
Stankewitz's history of substance abuse and consumption of substantial quantities leading up to shooting	State fell well short of establishing error		
Record does not establish deficiency or prejudice – see following breakdown			

Failure to investigate and present mitigating evidence was reasonable because Stankewitz opposed to penalty phase defense	Argument rejected in prior (2004) opinion. State did not introduce evidence on remand nor advance argument that undermines earlier analysis.		
"Dramatic" change to record, i.e. Goodwin in possession of Sciandra files from first trial undermine prior deficiency analysis	Goodwin's possession of file being evidence of investigation defies logic. If anything, further supports finding of deficiency in that, having possession of file, further investigation would have been warranted based on review.		
No prejudice to Stankewitz using analysis in *Wong v. Belmontes*	Analysis of whether mitigation evidence was a judgment based on severity of same being viewed more as aggravating rather than mitigating. Extensive discussion concluding that substantial evidence could have been presented with no risk of further aggravation of negative impression of Defendant given evidence presented by State to demonstrate violent anti-social behavior, the hesitation of some jurors regarding death penalty and potential for different outcome if presented to jury. Failures by Goodwin prejudiced Stankewitz.		

VI. TABLE OF FRESNO SUPERIOR COURT TRANSCRIPTS

Preliminary Hearing February 27, 1798, February 28, 1978
Reporter's Transcript on Appeal (2 Volumes)
PH Vol # RT Pg. #

VOLUME	PAGES	DATES
Vol. I	1 - 222	February 27 and 28, 1978
Vol. II	223 - 476	February 27 and 28, 1978

Pretrial Motions March 17, 1978, April 24, 1978, April 25, 1978, April 28, 1978 and May 3, 1978, June 1, 1978 and June 2, 1978
Reporter's Transcript on Appeal (1 Volume)
PT Vol # RT Pg. #

First Trial August 28, 1978 through October 12, 1978
Reporter's Transcript on Appeal (9 Volumes – Labeled as Volume #s 18-26)
T1 Vol # RT Pg. #

VOLUME	PAGES	DATES
Vol. 18	2880 – 3076	August 28, 1978
Vol. 19	3077 – 3265	August 29, 1978
Vol. 20	3266 – 3440	August 30, 1978
Vol. 21	3441 – 3589	August 31, 1978; September 1, 1978
Vol. 22	3590 – 3807	September 5, 6, 7, 8, 1978
Vol. 23	3808 – 4019	September 11, 12, 1978
Vol. 24	4020 – 4326	September 13, 14, 15, 1978
Vol. 25 (Penalty)	4327 – 4546	September 20, 21, 22, 1978
Vol. 26 (Penalty)	4547 – 4821	September 25, 26, 27, 1978; October 12, 1978

Second Trial September 7, 1983 through November 3, 1983
Reporter's Transcript on Appeal (5 Volumes – Labeled as Volume #s I-V)
T2 Vol # RT Pg. #

VOLUME	PAGES	DATES
Vol. I	1 – 279	September 7, 8, 13, 1983
Vol. II	280 – 564	September 14, 15, 16, 1983
Vol. III	565 – 736	September 16, 21, 22, 1983
Vol. IV (Penalty)	737 – 1032	September 28, 29, 30, 1983
Vol. V (Penalty)	1033 – 1203	October 4, 5, 6, 20, 1983; November 3, 1983

Clerk's Transcript on Appeal (1 Volume – Labeled as Volume #II)
Record of First or Second Trial beginning with Jury Instructions
(T1 or T2) CR Vol # CT Pg. #

R.P.O. & Judgment November 18, 1983
Reporter's Transcript on Appeal (1 Volume)
JE Vol 1 RT Pg. #

Post Reversal Proceedings December 20, 2012 – May 3, 2019
Reporter's Transcript on Appeal (35 Volumes – Labeled as Volume I – XXXV)
PRH Vol # RT Pg. #

VOLUME	PAGES	DATES
Vol. I	1 – 15	December 20, 2012
Vol. II	16-24	January 14, 2013
Vol. III	25-36	April 5, 2013
Vol. IV	37-47	September 20, 2013
Vol. V and V-B	48-84 (53-78)	January 24, 2014
Vol. VI	85-132	June 6, 2014
Vol. VII	133-138	October 3, 2014
Vol. VIII	139-165	October 3, 2014 ** *Marsden* Hearing (not included for confidentiality)
Vol. IX	166-170	October 3, 2014
Vol. X	171-172	December 12, 2014
Vol. XI	173 – 183	December 12, 2014 ** *Marsden* Hearing (not included for confidentiality)
Vol. XII	184-198	December 12, 2014
Vol. XIII	199-201	March 4, 2015
Vol. XIV	202 – 216	March 4, 2015
Vol. XV	217 – 218	March 4, 2015
Vol. XVI	219 – 227	March 5, 2015
Vol. XVII	228 – 232	August 10, 2015
Vol. XVIII	233 – 234	December 14, 2015
Vol. XIX	235 – 237	May 23, 2016
Vol. XX	238 – 244	October 17, 2016
Vol. XXI	245 – 252	December 16, 2016
Vol. XXII	253 – 256	March 17, 2017
Vol. XXIII	257 – 274	April 14, 2017
Vol. XXIV	275 – 312	June 23, 2017
Vol. XXV	313 – 360	August 11, 2017
Vol. XXVI	361 – 402	September 22, 2017
Vol. XXVII	403 – 409	October 12, 2017

Vol. XXVIII	410 – 418	December 8, 2017
Vol. XXVIV	419 – 428	May 25, 2018
Vol. XXVV [sic]	429 – 459	June 22, 2018
Vol. XXVVI [sic]	460 – 464	August 24, 2018
Vol. XXXII	465 – 472	November 30, 2018
Vol. XXXIII	473 – 489	January 4, 2019
Vol. XXXIV	490 – 495	March 22, 2019
Vol XXXV	496 – 512	May 3, 2019

** Transcript not included in folder

(2 ltr description of hearing Vol #, RT Pg.#)

AGENCY DESCRIPTIONS:

FSO	Fresno County Sheriff's Office
FPD	Fresno Police Department
FCDA	Fresno County District Attorney
FCPD	Fresno County Public Defender
FCSC	Fresno County Superior Court

VII. STATEMENT OF FACTS

A. Prosecution Case Presented at Trial[1]

Late in the evening of February 7, 1978, the 19-year-old Stankewitz left Sacramento with his mother and brother, an older man named J. C., and three young companions, Teena Topping, Marlin Lewis and 14-year-old Billy B. Stankewitz was driving and the group's destination was Fresno.

They reached Manteca about 1 a.m. on February 8, and stopped at a 7-Eleven store for oil. Manteca police saw the car "irregularly parked" and ran a check on the license plate. Incorrect information was received that the vehicle had been stolen. Several officers approached the car with drawn guns and frisked several of the occupants. The police officers told the group that they suspected that the car was stolen, and requested that they follow the officers to the Manteca police station. After several hours at the station, during which the police were unable to confirm the status of the vehicle, the group was told it was free to leave, but that the car was being impounded. Stankewitz asked directions to the local bus depot.

The group then went to an all-night doughnut shop near the bus station which was not yet open. After two hours had passed, Stankewitz and J. C. left for about fifteen minutes. When they returned, Billy B. saw appellant give Teena Topping a pistol, and heard him tell her to place it in a bag.

About 8 or 9 a.m., the group went to the bus station. After several hours of waiting, appellant, Billy, Lewis and Topping decided to try to hitchhike. Stankewitz's mother and brother and J. C. remained at the bus station. Stankewitz and his three friends succeeded in hitchhiking as

[1] This summary of the prosecution case is taken directly from the opinion in *People v. Stankewitz*, (1982) 32 Cal. 3d 80, 83-85. Because *People v. Stankewitz* was an appeal, 'Stankewitz' is substituted here for 'appellant' in the original.

far as Modesto, but were unable to obtain a ride any farther. When the weather turned rainy and cold, the four walked to a nearby K-Mart store, where they stayed for several hours. Stankewitz indicated he would hot wire a car so the group could steal it and drive it to Fresno, but a search of the K-Mart parking lot for an unlocked car was apparently unsuccessful. Billy's sister in Fresno was called, but she would not come and pick up the group unless they made it as far as Merced.

A plan was formed to follow a K-Mart shopper to her car and then steal it. About 5 p.m., Theresa Greybeal[2] left the store, followed by Stankewitz, Lewis and Topping. When Ms. Greybeal entered her car, Teena Topping pushed her over and got into the driver's seat. Lewis jumped in the back seat and opened the passenger door for appellant. Stankewitz pulled a pistol on Ms. Greybeal, and Lewis brandished a knife as Billy also got in the car. Topping drove the car to the freeway, where she turned south towards Fresno.

Once on the freeway, appellant told Ms. Greybeal not to worry because they were going to let her out in Fresno. Ms. Greybeal, who had been crying, calmed down somewhat and remarked that this would not have happened if she had her dog with her. Stankewitz displayed the holstered pistol and said, "This would have took care of your dog." Stankewitz then passed the pistol back to Lewis, who thereafter held it against Ms. Greybeal's back. Topping asked for money, and Ms. Greybeal handed $32 to Lewis. She also gave Topping her wristwatch, with the comment that insurance would cover the loss.

After a drive of between one and one-half to two hours, the group arrived in Fresno and drove to a bar known as the "Joy and Joy." Teena Topping went into the bar and returned a few minutes later with a woman named Christine Menchaca. Menchaca got into the car and suggested going to the Olympic Hotel, which was around the corner from the Joy and Joy. Topping and

[2] This summary of the prosecution case is taken directly from the opinion in *People v. Stankewitz*, (1980) 32 Cal. 3d 80, 83-85. Within said opinion, the victim's name is spelled "Greybeal", however, the correct spelling is "Graybeal."

Menchaca went in first, then returned after several minutes to get Stankewitz. Several minutes after the three had reentered the hotel, Stankewitz returned and retrieved the pistol from Lewis. A few minutes later, appellant, Topping and Menchaca returned to the car. Stankewitz then appeared to be moving more slowly, in a generally tired condition, with glassy, droopy eyes.

After their return to the car, appellant and Teena Topping indicated they wanted to go to Calwa to "pick up," a term indicating they would obtain heroin. The car was driven to a street corner in Calwa. There, Topping told the others to get out and wait because she did not want anyone present when they went to "pick up." Stankewitz, Ms. Greybeal, Billy and Lewis got out of the car. Then Topping told Billy to get back in. From inside the car, Billy saw Stankewitz walk toward Ms. Greybeal, who was standing to the rear of the car, looking away. Stankewitz raised the pistol with his left hand, steadied it with his right hand and shot her in the head from a distance of one foot. Ms. Greybeal fell to the ground, fatally wounded.

Stankewitz returned to the car and said to Lewis: "Did I drop her or did I drop her." Lewis replied, "You dropped her," and both laughed. As the car was driven from the scene, Stankewitz cautioned Topping to slow down so they would not get caught. Stankewitz also inquired where the victim's purse was. Someone responded that it was not in the car. Lewis then said: "We made a big mistake."

After returning to Fresno, Christine Menchaca suggested going to the Seven Seas bar where she would try to sell the victim's watch. Appellant told her to try to get $60 for it. While Menchaca and Lewis were in the bar, police officers approached and asked the occupants for their names and identification. After some brief questioning, the officers left. When Menchaca and Lewis returned from the bar, Stankewitz suggested going to a house in Clovis where he was supposed to meet his mother. At the house, Stankewitz tried unsuccessfully to sell the victim's watch. A girl came out

and told 14-year-old Billy that his mother had put out a missing person's report on him. Billy asked to be driven home to Pinedale. When he arrived home, Billy began to cry and told his mother what had happened. She called the police who came and took a statement from Billy. At 11 that evening, police saw Ms. Greybeal's car near the Olympic Hotel and arrested Stankewitz, Topping, and Lewis, who were in possession of the car. The pistol that had been used to kill Ms. Greybeal was found in the car, and her watch was found in the jacket of Christine Menchaca, who was arrested nearby.

B. Facts Presented in this Petition

Despite the 42-year history of this case, no previous statement of facts presented to 21 judges, 30 jurors, 16 attorneys or 8 different courts in this case, was accurate.

This case presents a stunning example of the failure of the judicial fact-finding process. The loosely associated and incomplete web of "facts" presented at the guilt and penalty phases of the trial are as different as night is to day from the solid, well-documented evidence presented in this Petition.

VIII. THIS COURT HAS JURISDICTION TO ADJUDICATE THESE ISSUES.

"The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings." Cal. Const., art. VI, § 10. "The writ of habeas corpus enjoys an extremely important place in the history of this state and this nation. Often termed the 'Great Writ,' it 'has been justifiably lauded as "'the safe-guard and the palladium of our liberties.'"' *People v. Villa*, 45 Cal.4th 1063, 1068 (2009).cause and the grant of relief.

IX. JUDICIAL NOTICE AND INCORPORATION

To avoid duplication of voluminous material already possessed by this Court, the trial court, and respondent, Mr. Stankewitz hereby requests that this Court incorporate by reference the

certified record on appeal and all of the briefs, motions, orders, and other documents and material on file in *People v. Stankewitz*, Fresno Superior Court Case No. CF78227015 and all of the subsequent legal proceedings. For the court's convenience, a list of each appellate and habeas proceeding and the issues raised in each are contained in section V. TABLES OF PREVIOUS STANKEWITZ CASE DISPOSITIONS, hereinabove.

With the exception of Claim 14, The Prosecution Eliminated the Only Native American Juror, the issues raised in this habeas are raised for the first time.

See In re Reno (2012) 55 Cal.4th 428, 444, 484 (holding habeas petitioner need not request judicial notice of all documents from prior proceedings in capital cases because this Court routinely consults prior proceedings irrespective of formal requests).

By this request, Mr. Stankewitz re-alleges the claims made on his behalf in the 5th District Court of Appeal, specifically the appeal of the judgment and sentence, so that they may be considered cumulatively with the claims raised in this Petition in assessing the existence of constitutional error and/or the prejudice flowing from them.

Mr. Stankewitz also requests that this Court take judicial notice of all the records, documents, exhibits, and pleadings filed in the underlying Superior Court case.

X. ALLEGATIONS APPLICABLE TO EACH AND EVERY CLAIM

Petitioner makes the following allegations applicable to every claim and allegation in the petition.

The facts in support of each claim are based on the allegations in the petition, the declarations and other documents contained in the exhibits; the entire record of the proceedings involving petitioner in the trial courts of Fresno County; the documents, exhibits, and pleadings in *People v. Stankewitz*, from 1978 - present. Petitioner hereby incorporates by specific reference the

record in Fresno Superior Court and his California and federal appeals, all judicially noticed facts; and any other documents and facts petitioner may develop.

Petitioner alleges the following facts in support of these claims, among others to be presented after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigation and experts, and a hearing on the merits of the claims.

Legal authorities in support of each claim are identified primarily within the Memo of Points and Authorities included at section XIII of this Petition. Each claim is based on both the state and federal constitutions. Petitioner does not waive any applicable rights or privileges by filing this petition and exhibits, and in particular, does not waive either the attorney-client or the work-product privilege. Petitioner requests that any waiver of privilege occur only after a hearing with notice and the right to be heard on whether a waiver has occurred and the scope of any such waiver.

If the state disputes any material facts alleged below, petitioner requests an evidentiary hearing so that the factual disputes may be resolved.

After petitioner has been afforded (1) disclosure of all material evidence by the state, (2) use of this Court's subpoena power, and (3) funds and opportunity to investigate fully, petitioner requests an opportunity to supplement or amend this petition. Petitioner and his counsel are presently aware of the facts set forth below, establishing a prima facie case for relief.

To the extent the error or deficiency alleged was due to defense counsel's failure to investigate and/or litigate in a reasonably competent manner on petitioner's behalf, petitioner was deprived of the effective assistance of counsel, in violation of the state and federal constitutions. To the extent defense counsel's actions and omissions were the product of purported strategic and/or tactical decisions, such decisions were based upon state interference, prosecutorial

misconduct, inadequate and unreasonable investigation and discovery, and/or inadequate consultation with independent experts, and therefore were not reasonable, rational or informed, in violation of the state and federal constitutions.

Petitioner and his counsel believe additional facts exist which support this claim, but have been unable to adduce those facts because this Court has not provided petitioner with adequate funding for investigation, access to subpoena power, or an evidentiary hearing. To the extent facts set forth below could not reasonably have been uncovered by defense counsel, those facts constitute newly-discovered evidence which casts fundamental doubt on the accuracy and reliability of the proceedings below and undermines the prosecution's case against petitioner such that his rights to due process and a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and cognate provisions of the California Constitution, have been violated. Counsel requests an opportunity to supplement or amend this petition to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing.

But for the misconduct of the state, the trial court's errors and the deficient performance of defense counsel, petitioner would not have been convicted of first-degree murder and special circumstances, kidnapping, robbery and personal use of a firearm, and he would not have been sentenced to death/LWOP.

Defense counsel was ineffective at both the guilt of petitioner's second trial in 1983, in violation of the state and federal constitutions.

Defense counsel was ineffective throughout his appellate proceedings, both state and federal.

Petitioner's convictions and sentences, including the sentence of death and subsequently

LWOP, were obtained in violation of his state and federal constitutional rights, including the right to a fair trial, to an impartial jury, to be given notice and be heard, to effective representation of counsel, erroneous admission of evidence, the erroneous exclusion of evidence, to procedural and substantive due process, and to reliable guilt and penalty convictions in a capital case. (U.S. Const. Amends. V, VI, VIII & XIV; Cal. Const., art., I, §§ 1, 7, 15, 16, 17.) Accordingly, the entire judgment must be reversed and the case dismissed with prejudice.

XI. SCOPE OF CLAIMS AND EVIDENTIARY BASES

Because a reasonable opportunity for full and factual investigation and development through access to this Court's subpoena power and other means of discovery, to interview material witnesses without interference from State actors, and an evidentiary hearing have not been provided to petitioner or his habeas corpus counsel (despite the State's statements to the contrary, which are erroneous), the full evidence in support of the claims which follow is not presently reasonably obtainable. Nonetheless, the evidentiary bases that are reasonably obtainable and set forth below, adequately support each claim and justify issuance of the order to show cause and the grant of relief.

XII. CLAIMS FOR RELIEF

CLAIM 1: THE GUN USED TO CONVICT PETITIONER OF MURDER AND SPECIAL CIRCUMSTANCES IS NOT THE MURDER WEAPON NOR IS IT THE GUN USED IN THE KIDNAPPING OR ROBBERY. THIS FABRICATION BY THE STATE VIOLATED PETITIONER'S RIGHTS UNDER *BRADY V MARYLAND*, HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7; AND HIS RIGHT TO PRESENT A DEFENSE AND RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT.

A. The Gun Could Not Have Been the Murder Weapon Because It Was in the Possession of Law Enforcement from 1973 Through the Time of the Graybeal Murder.

During an in-depth review of documents conducted from 2017 – 2019 located in the 52 boxes pertaining to this case, a 1973 Fresno County Sheriff's Office (FCSO)[1] Recovery Report for the alleged murder weapon was found. This document places the alleged murder weapon in the possession of law enforcement five years before its alleged use as a murder weapon in 1978. Furthermore, for unknown reasons, the 1973 recovery was reported to the Internal Affairs rather than the Detective Bureau.[2]

A Serial Trace Report ordered by Detective T.L. Lean III on February 10, 1978, for a .25-caliber FIE Titan semi-automatic pistol, serial number 146425, shows that the gun was recovered in 1973.[3] From that report in 1973 until the alleged recovery in 1978, there was no chain of custody or indication it was outside the possession of law enforcement. In fact, the chain of custody established by the Serial Trace Report shows that the gun was in Detective Lean's possession through the time of the murder and until 2-10-1978.

The holster in evidence, allegedly recovered from the same area of the victim's car as the gun, contains engraving as follows: "T L III" and "7-25-73".[4] According to Fresno Police

[1] The FSO is also called the Fresno County Sheriff's Department (FCSD) and Fresno County Sheriff's Office (FCSO)]
[2] Exhibit 1a, FSO Lean - Serial Number Trace Report, dated 2-10-78; Exhibit 1b, Declaration of Roger Clark, dated 12-4-2019
[3] Exhibit 1a, *supra*
[4] Exhibit 1c, FSO Lean, Photo of holster in court evidence, dated 7-25-1973

Department Procedure Evidence Handling and Property Standing Order No. 3.8.12, 'Members shall mark all items of property and evidence with their initials and, where space permits, the date the item was booked.'[5] In an interview in March, 2020, retired Detective Lean, confirmed that if some evidence had his initials on it, "he collected it somewhere."[6]

Detective Lean played a central role in the Graybeal investigation by FSO. His signature appears on at least nine police reports;[7] his name appears on at least a dozen property cards;[8] he was present at the interrogations of co-defendants Lewis, Brown, Menchaca and Topping;[9] and he testified at the preliminary hearing and at the second trial. (PH Vol. 2 RT 224- 234) and (T2 Vol. III RT 607 – 611).

B. There Were Conflicting Reports Made by The FCSO as to Description of the Gun.

According to the police reports, the initial investigation of the Graybeal murder was a joint investigation between the Fresno Police Department (FPD) and FCSO. There are more than nine police reports for the Graybeal case which refer to the gun and shell casings. They are as follows:

1. Bonesteel, J., FPD, dated February 9, 1978, in court evidence.[10]
2. Bonesteel, J., FPD, dated February 9, 1978, with notations regarding location of evidence.[11]
3. Bonesteel, J., FPD, dated February 9, 1978, with extensive handwritten notes, which were added after the original report was prepared.[12]

[5] Exhibit 1d, Fresno Police Department Procedure 3.8.12, and Petitioner's counsel made a Public Records Act Request for Fresno County Sheriff's Department procedures but that request was not complied with, so we are unable to document the exact FCSD procedures on Evidence.
[6] Exhibit 1e, Transcript of Detective Lean Interview, dated 2-7-2020, at 4
[7] Examples include Exhibit 1f, FSO Lean Request for Evidence Examination, dated 2-10-1978; Exhibit 1g, FSO Lean Request for Evidence Examination, dated 2-13-78; Exhibit 1h, FSO Lean Crime Report, dated 2-8-78
[8] Examples include Exhibit 1i, FSO Lean Property Card X-rays, dated 3-6-78; Exhibit 1j, FSO Lean Property Card car contents, dated 3-8-78
[9] Exhibit 1k, Lewis Statement, dated 2-11-78, at 1; Exhibit 1l, Brown Statement, dated 2-11-78 at 1; Exhibit 1m, Menchaca Statement, dated 2-11-78, at 1; Exhibit 1n, Topping Statement, dated 2-11-78, at 19
[10] Exhibit 1o, FPD Bonesteel Property Evidence Original, dated 2-9-78
[11] Exhibit 1p, FPD Bonesteel, Property Evidence location notes, dated 2-9-78
[12] Exhibit 1q, FPD Bonesteel, Property Evidence Rpt hand notes, dated 2-9-78

4. Bonesteel, J., & Garnsey, [initial missing], FPD, dated February 9, 1978, follow-up report.[13]

5. Brown, L. W. & Mockalis, E. T., FPD, Weapon Disposition Report, dated February 10, 1978, Automated Firearm System (AFS) shows registered owner as "Unknown," and owner as "in possession Douglas Stankewitz."[14]

6. Lean, T., FCSD Request for Evidence Examination, dated February 10, 1978, 14:54.[15]

7. Boudreau, A.J., Examination Results, dated February 11, 1978.[16]

8. Lean, T., & Christensen, D., FCSD Request for Evidence Examination, dated February 13, 1978.[17]

9. Ardaiz, James, DDA, FCSD Request for Evidence Examination, dated April 12, 1978, 11:45, “one .25-caliber semi-automatic pistol taken from suspect”.[18]

The seven reports dated prior to February 11, 1978, show that the gun had the serial number removed. The four reports dated February 11, 1978, and after, show a serial number of 146425. Reports 3 and 6 are remarkable because they state both "serial number removed" and "serial number 146425." Report 3 has a handwritten note on an otherwise typed report that says, "No. determined to be 146425."

These conflicts between the serial number over a short time indicate that law enforcement did not actually have an accurate serial number of the gun they allegedly recovered.

C. There Was No Forensic Evidence Tying Petitioner to the Gun.

Throughout the investigation, despite an attempt at recovering forensic evidence, no evidence ties Petitioner to the gun.

[13] Exhibit 1r, FPD Bonesteel, FU Report, dated 2-9-78
[14] Exhibit 1s, FSO Lean Weapon Disposition Rpt, dated 2-10-78
[15] Exhibit 1f, *supra*
[16] Exhibit 1t, FSO Boudreau, Examination Results, dated 2-11-78
[17] Exhibit 1g, *supra*
[18] Exhibit 1u, FSO Ardaiz, Request for Evidence Examination, dated 4-12-78

FPD Officer Jack Bonesteel performed the inventory search of the vehicle recovered. (T2 Vol. I RT 123). Bonesteel testified that he was not able to obtain any latent fingerprints from the items in the car. (T1Vol. 20 RT 3418); (T2 Vol. I RT 132).

Furthermore, law enforcement did not attempt to perform further forensic investigations, including blood typing. Thus, there is no forensic evidence linked Petitioner to the gun.

D. Police Reports Have Conflicting Information Regarding Where the Gun Was Recovered.

1. The inventory search of the vehicle placed the gun under a seat in the car.

The Graybeal homicide investigation was started by the FPD, which arrested the defendants. The car involved in the crimes was not inspected at the time of the defendants' arrests.[19] According to an FPD Inventory form and trial testimony, the unlocked car was towed from 1400 Kern, Fresno,[20] to the FPD on February 9, 1978 in the very early hours of the morning. (T2 Vol. I RT 123).

Bonesteel testified at the second trial that he processed the victim's vehicle, and found the firearm under the driver's seat. (T2 Vol. I RT 125). Bonesteel then took pictures of the firearm, and removed it from the vehicle. (T2 Vol. RT 126). He further testified that Trial Exhibit 5A is the .25-caliber pistol that he removed from the vehicle on the night of February 9, 1978. (T2 Vol. RT 126). He also testified that the holster was not on the gun but in the same area of the car as the gun.

Contrary to Bonesteel's testimony, (T2 Vol. I RT 127) the photographs of the car interior do not clearly show a gun, and the part of a gun that is visible does not show the part of the gun where a serial number would be located.

[19] Exhibit 1v, FPD Callahan & Rodriguez Stolen Vehicle Rprt, dated 2-8-78; Exhibit 1w, FPD Callahan & Rodriguez Follow Up Rpt, dated 2-15-78
[20] Exhibit 1x, FPD Rodriguez & Callahan Inventory/Towing Rpt, dated 2-8-78

Based on the initial report by Callahan, J. and Rodriguez, R, the police knew that a possible murder with a gun was involved.[21]

According to the police reports prepared by the arresting officers, the car was not searched for a gun at the time of the defendants' arrest.[22] The FPD Inventory Form dated 2-8-78 does not list any property in the car except for two cartons Camel cigarettes and one carton of Virginia Slim cigarettes.[23] If there was a gun in the car, a possible murder weapon, then it was left unattended when the car was towed unlocked to FPD.

A review of Fresno Police Department procedures does not appear to contain a description of standard police procedure when possible murder weapon involved.[24] In this case, the vehicle was not sealed before it was towed. This casts doubt on whether the alleged murder weapon was in the vehicle.

E. The Deputy District Attorney Offered Unsupported and Conflicting Evidence to Demonstrate the Gun Was the Murder Weapon.

The Deputy District Attorney referred to a Weapon Disposition Report (PH Vol. I RT 54) to show Petitioner's possession of the gun, despite the enormous evidence to the contrary by the prosecution's own witnesses. A Weapon Disposition Report, dated February 10, 1978, states that a gun with serial #146425, was "in possession Douglas Stankewitz."[25] This report describes a request from one Detective Lean to have a gun transferred from the FPD to the FCSO. It appears that this report is the report that Deputy District Attorney James Ardaiz referred to during the Preliminary Hearing. (PH Vol. 1 RT 54).

[21] Exhibit 1v, *supra*
[22] Exhibit 1v, *supra*
[23] Exhibit 1x, *supra*
[24] Petitioner's counsel reviewed FPD procedures regarding collecting evidence but there was no specific procedure for weapons handling when a weapon is found in an unlocked vehicle.
[25] Exhibit 1s, *supra*

None of the arrest reports state that any gun was found in Petitioner's possession, as Detective Lean stated in his report. In fact, the three reports that describe the arrest on February 8, 1978, in Fresno's Chinatown do not make any mention of a gun on Petitioner.[26] FCSO Detective Boudreau testified at the second trial that the first time he saw this gun was on February 10, 1978, two days after the murder. (T2 Vol. I RT 148). Despite the initial arrest report by Callahan, J. and Rodriguez, R., dated February 8, 1978, which does not state that the suspects were patted down, their February 15, 1978 report states that the suspects were searched for weapons.[27]

The police followed Menchaca into the hotel but did not ask her about a gun, or search either her or her room, for a gun.[28] Officer Rodriguez testified that he received a radio report at about 10:30 pm which described the suspects as possibly being involved in a Penal Code 187 ([PH Vol. 2 RT 422); he also testified first that there was one female in the car at the time of the arrests. He then looked at his report and said that Menchaca and Topping (both female), were at the bottom of the stairs of the Olympic Hotel. (PH Vol. 2 RT 422).

F. There Is No Proof That the Gun that Killed the Victim Was a .25 Caliber, the Gun Offered as the Murder Weapon.

1. There Is a Disparity About the Distance of the Cartridge Case Found From the Body.

DDA Ardaiz stated in his opening argument that the shell casing found at Tenth and Vine in Calwa was subsequently found to have been fired from the .25-caliber Titan pistol found in the car. (T1 Vol. 18 RT 2937). Although a shell casing found at the scene matched the test-fired cartridge cases in evidence, it does not mean that the gun with the Serial No. 146425 was the murder weapon.

[26] Exhibit 1v, *supra*; Exhibit 1y, FSO McDaniel Follow-Up Report, dated 2-8-78; Exhibit 1z, FSO McDaniel Rpt, dated 2-10-78
[27] Exhibit 1w, *supra*
[28] *Id.* at 3

There is a disparity between police reports about the distance of shell casing from victim's body: one says it was 18 feet away[29] and another says it was 21.3 feet away.[30] This disparity between the officers' reports casts doubt as to where the casing actually was located. Furthermore, there was no testing or testimony regarding how far a casing from a .25 caliber would travel after being shot.

a. No Bullet Was Recovered nor Is There an Indication the Bullet Was Searched For.

In an interview in 2020, former DDA James Ardaiz stated that a slug was recovered from the crime scene;[31] however, there is no slug or bullet in evidence.[32] There was no documented attempt to recover the bullet and no report states that it was ever recovered. In fact, Detective Boudreau testified at the second trial that "there was no bullet". (T2 Vol. I RT 160).

He also testified that he photographed the test shell casings produced by his testing. (T2 Vol. I RT 160). Those photos are not in evidence.[33] No report stated that the car interior was inspected for a bullet, and the car interior was not dusted. (T2 Vol. I RT 137). Nothing in the record indicates that the interior or the car was examined or tested for blood. The car no longer exists and thus cannot be examined for any physical evidence.[34]

2. No Testing Was Done to Verify That the Victim Was Shot With a .25-Caliber Pistol.

Although the Graybeal death certificate states that she was shot with a .25-caliber pistol, there are no reports stating that any testing was done to verify this.[35] The report written by Elliott,

[29] Exhibit 1aa, FPD Brown, L and Mockalis Report, dated 2-9-78, at 2
[30] Exhibit 1bb, FSO Duty and Preheim Follow Up Report, dated 2-9-78, at 2 (diagram of victim and shell casings)
[31] Exhibit 1gg, Transcript of Ardaiz Interview, dated 3-14-2020, at 6
[32] Exhibit 1hh, Declaration of Chris Coleman, dated 11-20-2019
[33] Exhibit 1cc, Table of Missing Evidence – Stankewitz Habeas, Item #9 at 4
[34] Exhibit 1dd, Declaration of Thomas Edmonds, dated 1-21-2020; Exhibit 1ee, Vehicle Registration Report, dated 11-22-2019
[35] Exhibit 1b, *supra*

G. FCSD, dated 2-9-78, recounts the events on the night of the murder, after the victim's body was found.[36] On page 4, he states that Detective Brown pointed out a spent .22 or .25 caliber casing in the roadway.

In fact, at the Preliminary Hearing, one of the defense attorneys argued that the cause of death had not been proved to be a .25-caliber bullet. (PH Vol. 2 RT 429). DDA Ardaiz concurred, saying that he had no problem in removing the caliber of the weapon from the death certificate. (PH Vol. 2 RT 429). The court then struck the caliber of the gun from that exhibit. (PH Vol. 2 RT 430).

Dr. Thomas C. Nelson, the forensic pathologist who performed the autopsy, testified on cross-examination at the second trial that he did not know the caliber of the gun. (T2 Vol. I RT 70).

G. The Gun Was a Key Part of the Prosecution Story Which Was Provided to the Media to Prejudice Potential Jurors to Find Petitioner Guilty.

1. The Media Stories At the Time of the First Trial Referred to a Gun In the Possession of Petitioner.

At the time of Petitioner's arrest for the murder and through the first trial in 1978, there was extensive media coverage of the case. This was true for many reasons, including the killing of a young woman, this case being the first death penalty case tried after the death penalty was reinstated and an ambitious prosecutor. The media got its information from law enforcement and the District Attorney's office. A sampling of the Fresno news reports and newspaper articles demonstrates the importance of the gun to the prosecution's case. The fifteen reports and articles attached here, all reference Petitioner being the one with the gun.[37]

[36] Exhibit 1ff, FSO Elliott Report, dated 2-9-78
[37] Exhibit 1ii, Fresno TV scripts and Fresno Bee articles from 1978.

H. Conclusion

There is no proof that the gun in evidence was used in the murder, the kidnapping, or the robbery. Therefore, the special circumstances findings are void, and the gun enhancement and the murder, kidnapping, and robbery convictions must be reversed.

CLAIM 2: THE STATE KNEW THAT PETITIONER DID NOT COMMIT THE MURDER AND HAD OVERWHELMING EVIDENCE IN ITS POSSESSION DISPROVING ITS OWN ALLEGATIONS WHICH IT FAILED TO DISCLOSE TO DEFENSE COUNSEL OR THE COURT, AND INSTEAD PRESENTED FALSE AND MISLEADING TESTIMONY TO THE TRIERS OF FACT, FROM THE PRELIMINARY HEARING AND FIRST TRIAL IN 1978 TO THE SECOND TRIAL IN 1983. THIS USE OF FALSE EVIDENCE BY THE STATE VIOLATED PETITIONER'S RIGHTS UNDER *BRADY V. MARYLAND*, HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7; AND HIS RIGHT TO PRESENT A DEFENSE AND RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT.

A. The Prosecution's Physical Evidence Shows That Petitioner Was Not the Murderer.

1. The Physical Evidence Does Not Match the Prosecution Theory of the Case. As a Result, Critical Evidence Was Withheld From the Jury.[1] The Victim's Height and the Bullet Trajectory Make It Highly Unlikely for Petitioner to Have Been the Shooter.

According to the February 9, 1978 Autopsy Report prepared by prosecution witness Dr. T.C. Nelson, forensic pathologist, the victim was 160 cm (5', 2 1/2") tall.[2] According to the prosecution's autopsy reports and photos, the victim was shot in the neck, under her right ear.[3] Dr. Nelson's report states that the angle of the bullet was ten degrees upward.[4]

In his profession, Dr. T. C. Nelson was an expert on analyzing the cause and specifics of death.[5] Dr. Nelson and his brother, Dr. Jerry Nelson, also a forensic pathologist, often performed autopsies together. [6] Dr. Jerry Nelson confirmed that listing the height of the victim on the report is normal autopsy procedure.[7]

[1] Exhibit 2a, Declaration of Roger Clark, dated 12-4-2019
[2] Exhibit 2b, FSO Nelson, Dr. T.C., Graybeal Post Mortem Record, dated 2-9-78, at 1
[3] Exhibit 2b, *supra* at 1, 3, 4; Exhibit 2c, FSO Smith, Autopsy Photos 1 and 2, dated 2-9-78
[4] Exhibit 2b, *supra* at 4
[5] Exhibit 2d, Declaration of Jerry Nelson, dated 3-19-2019 at 1
[6] Exhibit 2d, *supra* at 1
[7] Exhibit 2d, *supra* at 1

The physical evidence therefore shows that the victim was shot by someone approximately the same height as she was because of the angle.[8] According to the police reports, the codefendants were all between 5 foot 1 and 5 foot 6 inches tall, which match the height of the shooter.[9]

Petitioner, by contrast, is 6 feet 1 inch tall. Therefore, it would be highly unlikely that someone as tall as Petitioner could have fired the gun. Had the jury been presented with the correct facts regarding height, angle and trajectory, they would have likely come to the same conclusion.

2. The Blood Type Analysis That Could Have Exonerated Petitioner Has Been Lost or Destroyed.

The prosecution tested a stain on a small piece of Petitioner's shirt, worn on the night of the murder, for blood type.[10] The Request for Evidence Examination report requested "comparative blood tests of victim to Stankewitz's blood and Stankewitz's clothing."[11] Boudreau confirms that he signed the report and followed the customary procedures for storing and testing the blood.[12] The Examination Results in the report stated that the bloodstain on Stankewitz's t-shirt was blood, but that the sample was too small to type.

This lack of ability to test cannot be confirmed because, like so much other evidence in this case that could potentially exonerate Petitioner, the t-shirt cutout piece has been lost or destroyed.[13] Boudreau states "I was not responsible for maintaining the evidence records . . . If it is missing, I do not know what happened to it."[14]

[8] Exhibit 2a, *supra* at 5
[9] Exhibit 2e, FPD, Mora & Webb, Follow Up Rpt, dated 2-9-78, at 1
[10] Exhibit 2f, FSO Lean & Boudreau Request for Evidence Examination - Blood Type Report, dated 2-10-78
[11] Exhibit 2f, *supra*
[12] Exhibit 2g, Declaration of Allen J. Boudreau, dated 3-14-2020, at 3
[13] A thorough review of both court and FSO evidence has not uncovered this physical evidence. *See* Exhibit 2h, Declaration of Alexandra Cock, dated 9-18-2020, at 3
[14] Exhibit 2g, *supra* at 3

As stated in the Motion to Compel DNA Testing and the Amended Motion for DNA Testing,[15] defense experts Roger Clark and Chris Coleman both observed what appeared to be blood stains on the clothing of co-defendants Lewis, Menchaca, and Topping.

According to an FSO property card, the jacket Lewis was wearing both at the time of the murder and when his booking photo[16] was taken, was removed from evidence by Detective Boudreau and never returned.[17] According to Clark, this jacket likely had the victim's blood on it and was therefore additional material evidence which could exonerate Petitioner by showing that Lewis was the shooter.[18]

Petitioner was prejudiced by lost evidence and the failure of counsel to investigate when the evidence was still available.[19]

3. Petitioner's Gunshot Residue (GSR) Test Was Negative.

On the night of the murder, GSR tests were performed on the hands of all four defendants.[20] The tests were submitted to the ATF.[21] All of the tests were negative for GSR, including Petitioner's.[22]

B. The State Agencies Engaged in a Pattern and Practice of Perpetuating a False Theory of the Case and Offering False and Misleading Testimony to Achieve a Conviction in the First Trial.

Throughout the prosecution of the case, the government took many steps to ensure that Petitioner would be found guilty. This pattern and practice was pervasive across the entire

[15] In order to establish that none of the victim's blood was on Petitioner's clothing, the defense filed a Motion to Compel DNA Testing, which the trial court denied without prejudice on October 24, 2019. On November 25, 2019, the defense filed an Amended Motion for DNA Testing, which was granted on May 11, 2020. The results of that testing are explained in Claim 3, *infra*
[16] Exhibit 2i, FSO Marlin Lewis booking photo, taken 2-9-78, Court Exhibit #9
[17] Exhibit 2j, FSO Lean, Property Record: Jacket, dated 2-10-1978
[18] Exhibit 2a, *supra* at 4
[19] See Claims 4 and 13, *infra*
[20] Exhibit 2k, FSO Lean, T Request for Evidence Examination: Neutron kit #291, dated 2-13-78
[21] Exhibit 2l, FSO Lean, T letter to ATF: neutron test kits, dated 3-9-78
[22] Exhibit 2m, ATF Kinard Report of Lab Exam: GSR Test Results, dated 3-24-78

proceedings, from the Preliminary Hearing through both trials.

These practices by the DDA included offering false testimony, such as presenting the gun in evidence as the murder weapon,[23] to failing to keep custody of the interviews of material witnesses,[24] to taking evidence out of the county in an effort to prevent its discovery.[25]

DDA Ardaiz's control over everything about the investigation and prosecution is confirmed by his investigator, James Spradling.[26]

1. Deputy District Attorney Ardaiz Directed Law Enforcement to Change or Add to Their Reports in Order to Support His Theory of the Case.

The DDA directed Officer Mora to prepare an incident report on February 9, 1978, the day after Mora saw one of the defendants at a bar on the night of the murder. (T1 Vol. 20 RT 3312-14). The content of the report was different than the report that he prepared immediately after the events of February 9, 1978.[27] Mora stated under oath that he would not have made the second report except at the direction of DDA Ardaiz. (PH Vol. 2 RT 372).

Another example is a report prepared on July 17, 1978 by FSO Detective Satterberg. In that report, he recalled that he left out a portion of his report dated February 9, 1978. So, per DDA Ardaiz's instruction, he wrote a report five months later to correct his omission.[28]

2. Deputy District Attorney Ardaiz Participated in the Codefendant Interrogations, But Almost All the Evidence That Might Have Been Exculpatory Went Missing or Was Destroyed.

DDA Ardaiz was present for the co-defendant interrogations. These interrogations were taped; however, all but one has gone missing.[29] According to FPD procedure at the time, the

[23] See Claim 1, *supra*, for detailed explanation.
[24] See Exhibit 2n, Table of Missing Evidence, Items #32-43, at 5-7; See also Exhibit 2o Declaration of Garry Snow, dated 2-20-2020
[25] Exhibit 2p, FSO Duty, Technical Service Rpt Follow Up, dated 2-23-79
[26] Exhibit 2q, Declaration of David Schiavon, dated 6-26-2020, at 1
[27] Exhibit 2e, *supra*; Exhibit 2r, FSO Webb & Mora, Follow-Up Report, dated 2-9-78
[28] Exhibit 2s, FSO Satterberg, Follow-Up Report, dated 7-17-78, at 1
[29] Exhibit 2n, *supra*

statements by the codefendants were typed up but were not signed by them.[30] The codefendants' statements disagreed on many points, were inconsistent at best.

On the one tape that remains, however, was that of the primary witness against the Petitioner.[31] In that tape, the officers are heard "correcting" the witness multiple times.[32]

3. Deputy District Attorney Ardaiz Had His Primary Witness Testify Despite Knowing the Testimony Was False.

The Deputy District Attorney's primary witness in the Preliminary Hearing and both trials was a 14-year-old Native American boy, Billy Brown.

However, DDA Ardaiz had physical evidence and reports in his possession that contradicted this testimony. In his re-enactment of the shooting in the presence of DDA Ardaiz and DA Investigator Spradling at the DA's office, Brown held his hands out, pointing a gun to the back of the victim's head.[33] However, as the prosecution knew, the victim was shot in the side of the neck, not in the back of the head.[34]

Brown also told DDA Ardaiz and DA Investigator Spradling that he estimated the distance of the gun from the victim was between ten to fifteen inches.[35] This contradicts the findings of Dr. Nelson, who testified at the second trial that the gun was fired a few inches from the head. (T2 Vol. 1 RT 70).

Furthermore, on the night of the murder, at Billy's direction, police drove Billy Brown to Chinatown to find the victim's body, but he did not know where it was.[36] The victim's body was

[30] Exhibit 2o, *supra* at 1
[31] Exhibit 2t, FSO Lean, Photo of Billy Brown Interrogation Tape, dated 2-11-78
[32] Exhibit 2u, FSO Snow, Lean & Ardaiz Transcript of Billy Brown Interview, dated 2-11-78
[33] Exhibit 2v, FCDA DA Investigator Spradling & Ardaiz report re: Billy Brown, dated 4-27-78
[34] Exhibit 2b, *supra* at 1, 3
[35] Exhibit 2v, *supra*
[36] Exhibit 2w, FSO Complaint History Detail, dated 2-8-78; Exhibit 2x, FSO McDaniel, Follow Up report, dated 2-8-78, at 1

actually in Calwa, where Billy had previously lived.[37] Codefendant Topping subsequently led the police to the location of the victim's body, but Topping was not called as witness.[38]

In addition to knowing the facts provided by the witness contradicted the physical evidence, as documented in a report prepared by DA Investigator, James Spradling, Brown informed DDA Ardaiz and DA Investigator Spradling that he testified falsely at the Preliminary Hearing.[39]

Nonetheless, without informing either defense counsel or the Court about this false testimony, or correcting Billy's false testimony, DDA Ardaiz called Brown as the main prosecution witness at trial. (T1 Vol. 18 and 19 RT 2983 - 3113).

4. The Deputy District Attorneys Offered Expert Testimony at Trial That Directly Contradicted the Autopsy Reports and Police Reports.

The prosecution presented false and misleading testimony about the height of the victim and bullet trajectory.

The angle of the gun was significant to show the relative height of the shooter to the victim. Allen Boudreau, of the Fresno County Sheriff's Investigative Bureau testified regarding the height of the victim and the bullet trajectory at both trials. (T1 Vol. 21RT 3528-32). (T2 Vol. 1 RT 151-4)

Boudreau referred to the existence of the autopsy report, but it was not marked for identification nor admitted into evidence. (T1 Vol. 21 RT 3527). Boudreau confirms this in his declaration.[40] Boudreau then went on to misstate the victim's height as 5 foot 7 inches and testified

[37] Exhibit 2y, FPD Brown, L. W., Follow-Up Rpt, dated 2-9-78, at 2
[38] Exhibit 2z, FPD Snow, Garry Follow-Up Rpt: Topping, dated 2-8-78, at 4
[39] Exhibit 2v, *supra*
[40] Exhibit 2g, *supra* at 2

that the bullet wound on a 5 foot 7 inch person would be at 5 feet 3 from the ground. (T1 Vol. 21 RT 3528-29).

Despite the autopsy report stating that the angle of the bullet was ten degrees, Boudreau testified it was five degrees. (T1 Vol. RT 3528). DDA Ardaiz then characterized that testimony as being a straight trajectory throughout the head, (T1 Vol. 21 RT 3528), not at an angle as the Autopsy Report stated. In his declaration, he states, "Although I testified regarding the trajectory of the bullet that killed the victim, I did not state the victim's height listed in the autopsy report during my trial testimony.[41]

The prosecution also misled the court and jury regarding the distance of the shooter from the victim. Boudreau testified at the first trial that the gun was between six and twelve inches from the victim when she was shot. (T1 Vol. 21 RT 3525, 3527).

He further misstated that the autopsy report gave a distance of 160 centimeters from the sole of the foot to the wound. (T1 Vol. 21 RT 3529). DDA Ardaiz did not ask him any questions regarding the distance of the shooter or ask him to refer to the autopsy report.

5. Deputy District Attorney Ardaiz Presented His Closing Argument Based on the False Testimony of the Main Witness.

Despite the physical evidence and reports in his possession, DDA Ardaiz argued in closing that Petitioner was the leader. (T1 Vol. 24 RT 4223).

However, based on Topping's statements to police,[42] DDA Ardaiz likely knew that she was the actual leader of the kidnapping.

Despite these statements and other evidence, the Deputy District Attorney presented this evidence to the jury in closing.

[41] Exhibit 2g, *supra* at 2

[42] Exhibit 2z, *supra*; Exhibit 2aa, FPD Snow, G., Follow-Up Rpt: Topping Second Interview, dated 2-9-78, 1130 hours; Exhibit 2bb, FPD Snow, G, Continuation Rpt: Topping Third Interview, dated 2-9-78

C. The State Agencies Continued to Engage in a Pattern and Practice of Perpetuating a False Theory of the Case and Offering False and Misleading Testimony in the Second Trial in Order to Achieve a Conviction.

The prosecutor for the second trial was DDA Warren Robinson. DDA Robinson proceeded with the trial in a similar manner as DDA Ardaiz.

1. DDA Robinson Used His Opening Statement to Tie a Gun to Petitioner.

Although he knew or should have known otherwise, DDA Robinson stated in his opening that "Doug Stankewitz had a gun". (T2 Vol. I RT 1-J). He further stated that Billy saw "the defendant with a gun in his hand", and that Billy saw the defendant raise his arm and point the gun at the victim and pull the trigger. (T2 Vol. I RT 1-J). Further that a gun was found in the car with the defendant and others. (T2 Vol. I RT 1-L)

2. DDA Robinson Used the Same Primary Witness, Billy Brown, Despite Issues of Coercion and Credibility in Order to Achieve a Conviction.

In a declaration that he filed with the court, DDA Robinson stated that Brown was the only witness to the shooting.[43]

However, based on physical evidence and reports in his possession, DDA Robinson likely knew that Brown was not a witness to the shooting.[44] Based on the reports in his possession, DDA Robinson knew that Brown was not credible and offered false testimony. Brown told DDA Ardaiz that he lied at the Preliminary Hearing.[45] Brown also admitted to DDA Ardaiz that he did not see the shooting.[46]

[43] Exhibit 2cc, FCDA Affidavit of Warren Robinson, DDA, dated 9-13-1983
[44] See Prior Explanation in this Claim
[45] Exhibit 2v, *supra*
[46] Exhibit 2v, *supra*

Finally, Brown's statements regarding the shooting were contradicted by the physical evidence.[47] With all of these reports and information in his possession, DDA Robinson still offered Brown as the primary witness to the murder.

3. DDA Robinson Elicited False Testimony About the Gun in Evidence in Order to Tie the Gun to Petitioner.

As part of his direct examination of Det. Bonesteel, DDA Robinson questioned Bonesteel about the gun in evidence. Bonesteel first testified that People's Exhibit 8-H for identification, a photo of the interior of the area behind the left passenger seat of the car, showed a .25 caliber automatic gun. (T2 Vol. I RT 125). He next testified that the gun in evidence, People's Exhibit 5A, was the gun that he removed from the vehicle on the night of the murder. (T2 Vol. I RT 126).

As part of his direct examination of Billy Brown, DDA Robinson showed Billy a gun marked as People Exhibit 5-A for identification and asked him if he recognized it. Billy said that he recognized it and that it was the gun that the defendant had. (T2 Vol. II RT 391). DDA Robinson asked a leading question, "When you saw the gun inside the car in the defendant's possession, what was he doing with it." (T2 Vol. II RT 392). To which Billy answered "I can't recall what he did with it". (T2 Vol. II RT 392). Under direct examination, Billy further testified that he saw the defendant lift up the gun and shoot the victim, using the gun that he had been shown before. (T2 Vol II RT 407).

4. DDA Robinson Used the Same Expert Witnesses as the First Trial, and Also Used False or Misleading Testimony By the Experts to Achieve a Conviction.

Dr. T. C. Nelson testified at the second trial. (T2 Vol. 1 RT 60, 67). Although he performed the autopsy and was a forensic pathologist, Nelson's second trial testimony was very limited. He

[47] Exhibit 2a, *supra* at 6

was not asked about his autopsy report or about his measurement of the victim's height. (T2 Vol. 1 RT 60, 67).

Instead, Detective Boudreau was the primary prosecution witness regarding the physical findings as to cause of death and the gun in evidence. His testimony covered the testing that he did of the gun, the shell casing from the crime scene, the distance of the weapon to the victim when she was shot and the angle and trajectory of the bullet. He also testified regarding his measurement of the Petitioner to his shoulders. (T2 Vol. 1 RT 145 - 155) As in the first trial, Boudreau did not state the victim's height as listed in the autopsy report, nor was the autopsy report admitted into evidence.[48] As he states in his declaration, "the purpose in determining the height up to the defendant's shoulder was to provide information that DDA Ardaiz wanted to present as part of his case in chief."[49] This testimony, given at the second trial, was critical because it led the jury to believe that Petitioner was the shooter because it corroborated the false testimony of Billy Brown that Petitioner held the gun at his shoulder height when the fatal shot was fired.

Over objection, DDA Robinson misled the jury by asking Boudreau to assume that the victim was 5 feet 7 inches when he knew that she was actually 5 feet 2½ inches. (T2 Vol. 1 RT 169).[50] In his recent declaration, Boudreau stated that 'when DDA Warren Robinson asked me to assume that the victim was 5'7", I did not correct him despite the actual height of the victim as stated in the autopsy report.'[51]

DDA Robinson further misled the jury by asking whether there was an angle entry of five degrees, to which Boudreau answered yes. (T2 Vol. 1 RT 171). In his second trial testimony, Boudreau did not qualify his answer. However, in his recent declaration, Boudreau stated that

[48] Exhibit 2g, *supra* at 2
[49] Exhibit 2g, *supra* at 4 - 5
[50] Exhibit 2b, *supra* at 1
[51] Exhibit 2g, *supra* at 5

'when you have witnesses or anecdotal evidence regarding a shooting, the trajectory and distance of the shooter to the victim are all estimates.'[52] At the second trial, as in the first trial, the jury heard the noncredible witness testimony of Billy Brown, the only alleged witness, regarding the details of the shooting.[53] Thus, the failure of Boudreau or Robinson to correct the inaccurate testimony was especially critical.

5. Deputy District Attorney Robinson and DA Investigator Martin Focused Their Efforts on Petitioner, Rather Than Any Codefendants.

DDA Warren Robinson knew, or should have known, that codefendant Lewis was the murderer.

Prior to the second trial, as evidenced in an investigation report, DA Investigator William A. Martin and DDA Robinson went to visit codefendant Lewis at prison in Tracy.[54] They allegedly ended the interview when Lewis did not want to discuss the facts of the case.[55]

They did not interview either Petitioner or the other codefendants.

6. DDA Robinson's guilt phase closing argument misstated the facts and evidence.

DDA Robinson stated in his guilt phase closing argument that Petitioner planned the kidnapping of Theresa Graybeal and the taking of her car. (T2 Vol. III RT 594).

However, he knew from the codefendants' statements that Teena Topping admitted that she initiated the kidnapping.[56]

DDA Robinson stated further that the testimony of Bill Brown was uncontradicted. (T2 Vol. III RT 600). He stated that there was no evidence at all to show that his testimony in this case

[52] Exhibit 2g, *supra* at 1
[53] See Claim 6, *infra*
[54] Exhibit 2dd, FCDA Martin Investigation Report: Lewis, dated 6-8-83
[55] Exhibit 2dd, *supra* at 2
[56] Exhibit 2z, *supra*; Exhibit 2aa, *supra*; Exhibit 2bb, *supra*

was not what really happened, (T2 Vol. III RT 600) despite the physical impossibilities of his testimony. DDA Robinson also stated that Brown was there to see everything that happened, (T2 Vol. III RT 600) despite Brown's admission to DDA Ardaiz otherwise.

DDA Robinson further mislead the jury when he made several statements that were not supported by any evidence or testimony.

He stated that the uncontradicted evidence has shown that it was the defendant who fired that shot. (T2 Vol. III RT 609). That Petitioner had the gun that was in the car, aimed the gun at the head of Graybeal, and pulled the trigger. (T2 Vol. III RT 612). Without any evidence to that effect, DDA Robinson stated in his closing argument that Petitioner killed the victim because Petitioner wanted to eliminate a witness. (T2 Vol. III RT 614).

D. From the Time of the Murder on, the Prosecution Was Aided By the Defense Lack of Investigation.

Alibi witnesses would have testified that when the codefendants arrived by car in Clovis, shortly after the murder, Petitioner was not with them.

Neither trial counsel nor the court ever interviewed the alibi witnesses. Petitioner's first trial counsel refused to interview the alibi witnesses. Those witnesses are all now deceased, except for one who is elderly and unavailable.

Based on the Motion for Continuance filed by defense counsel in first trial, the defense theory of the case was diminished capacity.[57]

When the defense attorney did not investigate evidence and witnesses, the DA's office took advantage of that knowledge. Although Petitioner's limited defense at the second trial was to suggest through cross examination (T2 Vol. II RT 547) and during closing argument (T2 Vol. III RT 629) that Marlin Lewis could have been the shooter, the Prosecution knew that Petitioner's

[57] See Clerk's Transcript (T1 CR Vol. I CT 151-159, at 152)

second trial attorney did not hire any investigators or experts to contest the Prosecution's witnesses.[58]

[58] Exhibit 2ee, Declaration of Hugh Goodwin, dated 12-28-89, at 3

CLAIM 3: THERE IS MORE THAN AMPLE NEW EVIDENCE UNDER CALIFORNIA PENAL CODE SECTION 1473 REGARDING PETITIONER'S INNOCENCE SUCH THAT IT WOULD MORE LIKELY THAN NOT HAVE CHANGED THE OUTCOME OF THE TRIAL.

Some of the grounds for prosecuting a writ of habeas corpus are provided in CA Penal Code section 1473(b)(3), which states:

> (A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.
>
> (B) For the purposes of this subsection, "new evidence" means evidence that: (1) was discovered after trial, (2) could not have been discovered prior to trial by the exercise of due diligence, (3) is admissible, and (4) not merely cumulative, corroborative, collateral, or impeaching.[1]

In Petitioner's case, there are three known pieces of new evidence which meet these criteria.

A. The Meras Weapon Reports

New evidence was discovered by Petitioner's counsel which demonstrated that the alleged murder weapon was, in fact, not the gun used in the Meras robbery, and therefore, not the gun used to kill Graybeal, as the prosecution relied on in every stage of the proceeding. Specifically, police documents surfaced in 2017,[2] which would have triggered testimony demonstrating that the three shell casings from the Meras robbery scene were a different caliber than the firearm recovered in the Graybeal murder investigation.

Subdivision (b)(3)(B) was made effective by the legislature as of January 1, 2017. Newly discovered evidence must be credible.[3]

[1] Cal. Penal Code § 1473(b)(3)(A) and (B)
[2] Exhibit 3a, Declaration of Peter Jones, dated 6-15-2020 at 1; Exhibit 3b, Declaration of Jacqui Curry, dated 10-14-2016; Exhibit 3c, FSO Lean Request for Evidence Examination Rpt #292, dated 2-13-78; Exhibit 3d, FSO Sarment & Christensen Technical Service Report, dated 2/13/78
[3] *In re Masters* (2019) 7 Cal. 5th 1054, 1082; *In re Sagin*, (CA 6th Dist. 2019) 39 Cal. App. 5th 570, 578.

1. The Meras Weapon Reports Evidence Has Decisive Force and Value That Would Have More Likely Than Not Changed the Outcome at Trial.

Had the defense been able to present testimony refuting the prosecution's entire theory that Graybeal was killed as a part of Petitioner's alleged crime spree, it would have caused the prosecution to lose all credibility in the eyes of the jurors. The impact of the lack of the potential testimony can be seen as early in the proceedings as the preliminary hearing and throughout the guilt phase of the 1983 trial, because the prosecution argued that Petitioner also robbed and shot at Meras. The Meras robbery and attempted murder was foundational to their prosecution theory.

In Meras' own testimony, he failed to identify Petitioner and he identified a different color suspect vehicle. Standing alone, his testimony would have created a reasonable inference in a juror's mind that it was not Petitioner or his alleged associates who robbed Meras and, given the prosecution's reliance on that theory, likely would have deduced that the prosecution had the wrong person.

Multiple specific examples of such arguments are explained in detail in Claim 7, but here it should briefly be noted both prosecutors made this argument at numerous times which highlights how critical was in their mind to secure a conviction. DDA Ardaiz, in his closing argument in the first trial penalty phase, argued "you know what he did after he committed the murder of this girl. And again, that defendant killed a young girl without mercy . . . that *he went out, and he tried to do it again"* [from Claim 7] (T1 Vol. 26 RT 4748, lines 16 – 19, emphasis added). He was referencing the uncharged Meras robbery and attempted murder and he was relying solely on arguments related to the shell casings matching the Graybeal murder weapon.

With the evidence that the shell casings were not a match out of the court and jury's awareness, the prosecution introduced the same gun evidence through Criminalist Allen J. Boudreau. It then argued at all stages of the proceedings that the shell casings matched both the

caliber and unaccounted bullets as the alleged Graybeal murder weapon, precisely so the jury would believe the same gun was used in both crimes, and so that they would conclude Petitioner committed such crimes.

In his closing at the second trial guilt phase, DDA Robinson used the false same gun theory, stating that later, on the night of the murder, Petitioner was sitting in the same car with others. Further, that in the car was the weapon that had been used to take the life of Theresa Graybeal. He stated that the fact that those persons were in that car with the murder weapon connects or tends to connect all of them with the crime. (T2 Vol. III RT 638) The prosecution fabricated the narrative to frame Petitioner because they lacked genuine inculpatory evidence. Given these drastic fabrications against Petitioner, the new evidence suggests egregious misconduct and points unerringly to innocence.

2. This Evidence Was Discovered After Trial, Notwithstanding the Due Diligence of Trial Counsel

Here, the documents were discovered after trial and were not discovered despite counsel's due diligence. Therefore, counsel could not have reasonably anticipated the inference from the documents.[4] Thus, as it pertains to due diligence, this prong is satisfied because trial counsel was actually duly diligent by securing a motion for discovery (T1 CR Vol. I 26). Specifically, the documents were withheld until 2017, therefore, they were not discovered until after trial.[5] These documents could not have been discovered by due diligence of defense counsel because the prosecution was compelled to turn over the documents as early as 1978 and never did.

[4] Petitioner claims broad IAC, however, the Motion for Discovery secured by Sciandra in 1978, was duly diligent.
[5] It is noteworthy that over eighteen defense attorneys represented Petitioner since 1978 but none of them ever had these reports.

3. Admissibility

The information gleaned from the reports is relevant and, therefore, admissible as they relate to whether the Meras shell casings matched the Graybeal murder weapon. "Relevant evidence" means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. California Code, Evidence Code § 210.

Information contained in police reports are hearsay and are inadmissible. Here, for the purposes of a new evidence claim, the value of the police reports is that they prove the existence of admissible evidence in the form of testimony from Detectives Lean, Sarment, and Christiansen, which would have demonstrated the shell casings did not match.[6] In the lay sense, the new evidence is the reports which only recently surfaced. However, in legal terms, the new evidence can precisely be identified as the facts presentable through Detectives Lean, Christiansen, and Sarment, as well as any potential expert witnesses the defense likely would have engaged had the evidence been discovered prior to trial.

4. Not Merely Cumulative, Corroborative, Collateral, or Impeaching

This evidence was not cumulative because it would have been the only evidence introduced at trial that the Meras shell casings did not match the Graybeal murder weapon. This evidence was not corroborative for the same reasons in that no fact was introduced at trial to corroborate. The evidence was not collateral because the prosecution relied on the theory that the same group of people killed Graybeal as robbed and shot at Meras; therefore, they made it a central issue in the case. The analysis below expands on this argument. Finally, the evidence would have been impeaching, but also had substantive evidentiary value as discussed above.

[6] New evidence *also* would have been impeaching.

5. Credible

The evidence is credible because it is police documentation prepared in the course of the investigation. The documents have signatures and identifies the officers who prepared the reports. The credibility of the documents was confirmed when counsel inspected physical evidence in the possession of the FSO.

B. Fresno Police Department Interview with Petitioner Early on February 9, 1978

Petitioner was interviewed in the hours after the Graybeal murder by Fresno Police Department Homicide Detective Garry Snow. During the interview, Petitioner denied doing the shooting. Petitioner's interview was taped, and the tape was turned over to Det. T. Lean, III, FCSD.[7] Due to defense counsel's ongoing investigation, Petitioner just learned of this interview in March, 2020.

1. Petitioner's Interview by Detective Snow, FPD on the Night of the Murder Has Decisive Force and Value That Would Have More Likely Than Not Changed the Outcome at Trial

Had the defense been able to question Detective Snow at trial regarding the content of his interview with Petitioner, it would have brought to light the fact that Petitioner denied any involvement in the murder of Mrs. Graybeal.

2. This Evidence Was Discovered After Trial, Notwithstanding the Due Diligence of Trial Counsel.

Here, the documents were discovered after trial and were not discovered despite counsel's due diligence. Therefore, counsel could not have reasonably anticipated the inference from the documents.[8] Thus, as it pertains to due diligence, this prong is satisfied because trial counsel was actually duly diligent by securing a motion for discovery (T1 CR Vol. I 26). Specifically, the tape of Detective Snow's Interview of Petitioner, which was turned over to Detective Lean, FSO, in

[7] Exhibit 3e, Declaration of Garry Snow, dated 2-20-20, at 1
[8] Petitioner claims broad IAC, however, the Motion for Discovery secured by Sciandra in 1978, was duly diligent.

1978, was withheld from the defense forever. The fact of the interview was not discovered until March, 2020, about 42 years after trial.[9] This interview tape could not have been discovered by due diligence of defense counsel because the prosecution was compelled to turn over the documents as early as 1978 and never did. Petitioner's denial of his guilt has heightened significance when juxtaposed against his alleged confession to defense psychiatrist Dr. James Missett. Had the defense known about the existence of the Snow interview, it would have raised questions about Missett's confession trial testimony. This would have created an opportunity for counsel to investigate Petitioner's guilt.

3. Admissibility

The information gleaned from the interview is relevant and, therefore, admissible as it pertains to Petitioner's denial of guilt. "Relevant evidence" means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. California Code, Evidence Code § 210. It is also relevant because it raises the possibility of third-party guilt.

The interview tape itself is admissible. Here, for the purposes of a new evidence claim, the value of the tape is that it proves the existence of admissible evidence in the form of testimony from Detective Snow. The new evidence is the declaration of Detective Snow which confirms his interview of Petitioner, as well as any potential expert witnesses the defense likely would have engaged had the evidence been discovered prior to trial.

4. Not Merely Cumulative, Corroborative, Collateral, or Impeaching

This evidence was not cumulative because it would have been the only evidence introduced at trial that directly supported Petitioner's denial of guilt. This evidence was not corroborative for

[9] It is noteworthy that over eighteen defense attorneys represented Petitioner since 1978 but none of them ever had knowledge of this interview nor the actual tape of the interview.

the same reasons in that no fact was introduced at trial to corroborate. The evidence was not collateral because it went directly to the heart of Petitioner's defense. Finally, the evidence would not have been impeaching, but also had substantive evidentiary value as discussed above.

5. Credible

The tape evidence is credible because it was conducted as part of the police investigation. Detective Snow signed a declaration confirming its existence.

C. Marlin Lewis Admission That He Shot Theresa Graybeal

At the second trial, the defense, through cross examination, raised the possibility that codefendant Marlin Lewis committed the murder of Mrs. Graybeal. At the time of the second trial, the defense was apparently not aware of any specific evidence which implicated Lewis in the murder. It wasn't until 2019 that the defense became aware that Lewis admitted that he murdered Mrs. Graybeal. Their awareness came about due to an article in the Fresno Bee from 2013, where it was reported that Laura Wass stated that Lewis made the admission to her. In a declaration, Ms. Wass confirms that Lewis made the admission.[10]

1. Marlin Lewis' Admission Against Interest Made in 2010, Has Decisive Force and Value That Would Have More Likely Than Not Changed the Outcome at Trial

Lewis' admission supports Petitioner's denial of guilt and raises the possibility of third-party guilt, namely Lewis. If the defense had known about Lewis' admission, it would have had reason to investigate the facts and circumstances of the murder for proof of Lewis' guilt.

2. Marlin Lewis' Admission Occurred in 2010, Some 27 Years After the Second Trial

Here, it appears likely that the prosecution knew that Lewis was the shooter. On June 7, 1983, prior to the second trial, DDA Robinson and DA Investigator Martin, went to Tracy prison

[10] Exhibit 3f, Declaration of Laura Wass, dated 1-8-20.

and visited Lewis. Based on the interview report[11], they questioned him regarding the events surrounding the murder. Lewis stated in part that he thought that the Petitioner should not have gotten either death or life without the possibility of parole, but parole. When Lewis 'did not want to discuss the facts of the case'[12], DDA Robinson terminated the interview. Notwithstanding the 1978 discovery order, the report was not turned over to the defense. We do not know whether the interview was recorded. No documents have been discovered to the defense which show that Robinson, Martin or other prosecution or law enforcement went to visit or interview the other codefendants. This points to the likelihood that the prosecution knew that Marlin Lewis was the shooter.

Police overlooked a key statement from Lewis, that he intended to kidnap and/or assault Mrs. Graybeal himself. Lewis told police regarding the kidnapping: "You know me personally, I wanted to hit her cold down and I didn't want Doug and Tina And Bill there."[13] This statement is important because it is consistent with his later admission that he killed the victim.

3. Admissibility

The information gleaned from the interview is relevant and, therefore, admissible as an admission against interest. "Relevant evidence" means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. California Code, Evidence Code § 210. It is also relevant because it raises the possibility of third-party guilt.

[11] Exhibit 3g, FCDA Martin Investigation Report Lewis, dated 6-8-1983
[12] Exhibit 3g, *supra*, at 2
[13] Exhibit 3h, FSO Snow Lewis Interview, dated 2-9-78, at 12-13

4. Not Merely Cumulative, Corroborative, Collateral, or Impeaching

This evidence was not cumulative because it could have been introduced at trial to support Petitioner's denial of guilt. This evidence was not corroborative for the same reasons in that no fact was introduced at trial to corroborate. The evidence was not collateral because it goes directly to the heart of Petitioner's defense. Finally, the evidence would not have been impeaching, but also had substantive evidentiary value as discussed above.

5. Credible

The evidence is credible because it was confirmed in a declaration signed under penalty of perjury.

D. DNA Testing of All Defendants Clothing

At Petitioner's insistence, due to his steadfast proclamation of his innocence of the murder for the proceeding 41 years, pursuant to CA Penal Code Section 1405, the defense filed a Motion to Compel DNA Testing in May, 2019. Said Motion was denied by the court without prejudice. Subsequently on November 27, 2019, Petitioner filed an Amended Motion for DNA Testing in Fresno Superior Court. Included with the Motions were the Declarations of Chris Coleman and Roger Clark. In March, 2019, they viewed all the physical evidence in this case currently stored at the Fresno Sheriff's office and Fresno Superior Court clerk's office.

During their examination of the evidence of this case located at the Fresno Court Sheriff's Office and Fresno County Superior Court, they observed blood stains on the clothing of co-defendants Marlin Lewis, Teena Topping and Christina Menchaca, but not on Petitioner's clothing. They believed that the blood stains could be those of the victim, Theresa Graybeal.[14] Proving that the blood stains on the co-defendants' clothing are from the victim, in the absence

[14] Exhibit 3i, Supplemental Declaration of Roger Clark, dated 11-19-19, at 3; Exhibit 3j, Supplemental Declaration of Chris Coleman, dated 11-20-19, at 1 [from DNA Motion]

of blood stains on the clothing of defendant Stankewitz, would support his contention that he was not involved in the murder.

As a result of their examination of the evidence, Mr. Clark and Mr. Coleman recommended that certain items of evidence be tested for the DNA of the victim, Theresa Graybeal.[15] On May 11, 2020, after receiving no response from either the Fresno County District Attorney or the California Attorney General, the court granted Petitioner's Amended Motion for DNA Testing on May 11, 2020.[16]

Between June 6 – August, DNA Testing was performed by Forensic Analytical Crime Lab (FACL). On September 2, 2020, FACL prepared a report. Its Summary of Findings states: "There is no support for the presence of blood from the victim on any of the defendants' clothing tested. However, it is unclear whether DNA from human blood was recovered from any of the apparent bloodstains tested from the defendants' clothing. Most of the defendants' clothing stains tested were presumptively negative for blood and no human hemoglobin was detected from any of them. All of the defendants' clothing test results from apparent bloodstains also revealed little to no DNA was recovered and the recovered DNA was extremely degraded. Dried human bloodstains contain high levels of DNA which when stored at controlled temperatures will persist for decades and the blood DNA will degrade predictably. These results may reflect deleterious environmental long-term evidence storage conditions".[17]

The defendants' clothing was stored by Fresno law enforcement under unknown conditions. The conditions have never been discovered to the defense. Further, FSO never responded to Petitioner's Public Records Act request for its evidence storage procedures, so we do

[15] Exhibit 3i, *supra*, at 2; Exhibit 3j, *supra*, at 1
[16] Exhibit 3k, FCSC Order for DNA Testing, dated 5-11-20
[17] Exhibit 3l, FACL Summary Report dated 9-2-20, at 2 (emphasis added)

not know whether those procedures were followed.[18] California statutory law requires preservation of evidence. CA Penal Code §1417.9 Retention of biological material states:

> (a) Notwithstanding any other law and subject to subdivisions (b) and (c), the appropriate governmental entity shall retain any object or material that contains or includes biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for deoxyribonucleic acid (DNA) testing.[19]

Fresno County did not adhere to the dictated standards for storage of biological evidence in homicide cases.[20] Case law also dictates evidence preservation in criminal cases.[21] As explained in Claim 4, this is another example of Fresno authorities' misconduct in this case.

1. Admissibility

The experts' opinions and testing results are relevant and, therefore, admissible. "Relevant evidence" means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. California Code, Evidence Code § 210. It is also relevant because it raises the possibility of third-party guilt. The possibility of third-party guilt goes directly to Petitioner's innocence and would have more likely than not changed the outcome of the trial.[22]

2. Not Merely Cumulative, Corroborative, Collateral, or Impeaching

This evidence was not cumulative because it could have been introduced at trial to support Petitioner's denial of guilt. This evidence was not corroborative for the same reason in that no fact was introduced at trial to corroborate. The evidence was not collateral because it goes directly to

[18] Exhibit 3m, Declaration of Alexandra Cock dated 9-18-20, at 2
[19] CA Penal Code §1417.9(a)
[20] Exhibit 3n, NIST Biology Evidence Preservation, at 4; Exhibit 3o, CA-Evidence-Property-Management-Guide, at 3-3 to 3-4
[21] *People v Hitch*, (1974) 12 Cal. 3d 641
[22] *In re Sagin*, (CA 6th Dist. 2019) 39 Cal. App. 5th 570, 578.

the heart of Petitioner's defense. Finally, the evidence also had substantive evidentiary value as discussed above.[23]

3. Credible

The evidence of what appears to be blood stains on the codefendants's clothing is credible because it was confirmed in declarations signed under penalty of perjury. The evidence of the lab report is credible because it is documentation prepared in the course of the investigation.

[23] New evidence *also* would have been impeaching.

CLAIM 4: THE PROSECUTION, INCLUDING LAW ENFORCEMENT, ENGAGED IN PREJUDICIAL MISCONDUCT STARTING WITH THE INITIAL INVESTIGATION THROUGH BOTH TRIALS, IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7; AND HIS RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT.

A. Material Evidence Was Mishandled.

An in-depth review of the police reports and evidence property cards reveal that material evidence was mishandled by law enforcement.[1]

1. The Vehicle Involved in the Crimes Was Not Secured nor Properly Processed.

No police reports indicate that the car was searched at the time of their arrest.[2]

Instead, in the early morning hours on February 9, 1978 at around 1:00 am, the car was impounded and towed from the scene.[3] The vehicle was unlocked and not secured.[4]

The only property listed in this report that was in the car were two cartons of Camel cigarettes and one carton of Virginia Slim cigarettes.[5]

The FPD Inventory Form states that the vehicle was possibly involved in a "PC 187."[6] Normal police procedure would dictate that if there was a gun in the car, it be sealed before being transported.[7] According to the same Inventory Report, later that night, the car was towed to the FSO Basement garage, again by a private towing company, Morris & Sons.[8]

The car was processed by FPD Bonesteel that same day. Bonesteel testified at the Preliminary Hearing that when he searched the vehicle, he had no idea what crime, if any crime,

[1] Exhibit 4d, Declaration of Roger Clark, dated 12-4-2019, at 4
[2] A thorough review of at police reports and property cards demonstrates that no record exists. See Exhibit 4a, Declaration of Alexandra Cock, dated 9-18-2020, at 2
[3] Exhibit 4b, FPD Callahan & Rodriguez Stolen Vehicle Report, dated 2-15-1978, at 3
[4] Exhibit 4b, *supra* at 3
[5] Exhibit 4c, FPD Inventory Towing Receipt, dated 2-8-78
[6] Exhibit 4c, *supra*
[7] Exhibit 4d, *supra* at 4
[8] Exhibit 4c, *supra*

had taken place. (PH Vol. 2 RT 315).

As he testified in the first trial, he referred to the report that he prepared in the case.[9] (T1 Vol. 20 RT 3408). He testified at the first trial that he checked the contents he removed from the vehicle, but not the vehicle itself. (T1 Vol. 20 RT 3417). He further testified that he was not able to lift any prints of any of the items taken from the vehicle. (T1 Vol 20 RT 3418).

At the 2nd trial, he testified that he was not able to recover or obtain any latent fingerprints of any comparison value from the items in the car. (T2 Vol. I RT 132). On cross examination, he stated that he 'didn't dust the vehicle at all. (T2 Vol. I RT 137). On cross examination, he stated that the vehicle was unlocked when he went to search the vehicle. (T2 Vol. I RT 135).

Criminalist Smith also photographed the vehicle around this time.[10] At the first trial, the photos that he took were numbered "46 A – F" for identification. (T1 Vol. 21 RT 3510). When Smith testified at the second trial, he did not testify regarding those photos, nor were the photos presented at court. (T2 Vol. I 243 – 253; 262 - 264). While the photos are listed on the Court's First Trial Exhibit list,[11] they are no longer contained in either the court evidence or the FSO evidence.[12]

Evidence Photo 8-H shows unidentified stains on the floor mat.[13] There is no mention in the police reports when the officers searched vehicle at this time they were searching for blood or a bullet.[14] There is no mention of any testing done on the floor mat stains before the car was returned to the victim's family.[15]

[9] Exhibit 4e, FPD Bonesteel, J, Follow Up Report, dated 2-9-78
[10] Exhibit 4f, FSO Smith, R Technical Services Report: vehicle photos, dated 2-9-78
[11] Exhibit 4g, FCSC First Trial Exhibit Record, at 5
[12] Exhibit 4a, *supra* at 2
[13] Exhibit 4h, FCSC Photo: Court Exhibit 8-H, dated 9-8-83
[14] Exhibit 4e, *supra*
[15] Exhibit 4e, *supra*

The car was released by Detective Lean to victim's family on February 10, 1978,[16] less than two days after the murder. (T2 Vol. IV RT 785). Petitioner was arraigned on February 14, 1978 where he was appointed the public defender as counsel.[17]

Defense counsel had no opportunity to inspect or test the vehicle before it was returned to the victim's family.[18] An inspection of the vehicle by the defense could have meant dusting the inside of the car for fingerprints. Fingerprints inside the car could have revealed who was in the car and where each person was seated. Fingerprints could also have established whether Jesus Meras was ever in the car. The car no longer exists.[19]

The report dated February 15, 1978 states that Rodriguez observed a gun in the rear seat area of the car, days after the vehicle was processed and released to the victim's family.[20]

2. Over Sixty Items Subject to a Discovery Motion Are Unaccounted For.

The Fresno County Sheriff's office claims that it has a perfect record of never permanently losing a single piece of evidence.[21] It is now known that there are over 50 items and groups of items of physical evidence and documents missing from the Court evidence and FSO evidence storage.[22] No reasonable explanation has been given as to why so much evidence is lost.

The attached Chart of Missing Evidence lists each item or group of items and describes their importance, including whether they are likely exculpatory or material.[23] Evidence was stored in the Property & Evidence room which was supervised by the Supervisor of the Field

[16] Exhibit 4d, *supra* at 6
[17] Exhibit 4i, Declaration of Sal Sciandra, dated 9-20-79, at 1; Exhibit 4aa, Fresno Municipal Court Minute Order, dated 2-14-78
[18] Exhibit 4j, FSO Lean Report; vehicle return, dated 2-10-78, at 1; Exhibit 4d, *supra* at 6.
[19] Exhibit 4m, Declaration of Thomas Edmonds, dated 1-31-2020 at (VIN Search)
[20] Exhibit 4b, *supra* at 3
[21] Exhibit 4n, FSO web page showing property and evidence procedures, dated 5-3-2020
[22] Exhibit 4o, Table of Missing Evidence - Stankewitz Habeas
[23] Exhibit 4o, *supra*

Identification Unit.[24] Many of the missing items are likely exculpatory for the Petitioner.

Defense filed a Motion to Compel Specific Evidence with the trial court on May 1, 2017, with the goal of determining whether all discovery had been turned over to the defense.[25] As a part of preparing the motion, all police reports then in the possession of the defense were reviewed and each item of evidence described was listed.[26] The list was included in the Motion to Compel.

In response to the defense Motion to Compel, DDA Pebet prepared an undated Discovery Receipt.[27] It lists the discovery, 80 photos, 295 photocopied pages and copies of 24 FSO Property Tags provided to the defense on August 8, 2017.[28] In the Discovery Receipt document, DDA Pebet stated that other items were no longer in their possession.[29]

3. The Tapes Containing the Statements of the Codefendants and the Handwritten Notes by Law Enforcement Made During the Interrogations Are Unaccounted For.

On the night of the murder, the defendants, including Petitioner, were interviewed by the police. Detective Snow and Brown were assigned to interview them.[30] The codefendants' statements to police were taped and turned over to the FCSD.[31]

The fact that their statements were taped is corroborated by Detective Snow's Report dated February 9, 1978.[32] It is also corroborated by the billing reports of attorneys Smurr and Cox, who represented two of the codefendants.[33] Further verification of the taping is indicated by the content

[24] Exhibit 4p, Declaration of Allen J. Boudreau, dated 3-14-2020, at 3
[25] Exhibit 4q, Motion to Compel Specified Discovery, dated 4-26-2017
[26] Exhibit 4a, *supra* at 1
[27] Exhibit 4r, FCDA Pebet, Discovery Receipt, dated 8-20-2017
[28] Exhibit 4r, *supra*
[29] Exhibit 4r, *supra*
[30] Exhibit 4b, *supra* at 4
[31] Exhibit 4s, FPD Declaration of Garry Snow, dated 2-20-2020, at 1
[32] Exhibit 4t, FPD Snow: Topping Initial Report, dated 2-9-78, at 7
[33] Exhibit 4u, Attorney Smurr Billing Report, dated 10-16-1979, at 4; Exhibit 4v, Attorney Cox Billing Report, dated 10-16-1979, at 3

of the transcribed statements of the codefendants.[34] In a number of places, the transcripts state 'tape turned on/off.'[35]

Without the cassette tape recordings, Petitioner is unable to determine what differences, if any, there are between the cassette recording and the transcription. Any discrepancies could be significant.

Further, throughout Brown's February 11, 1978 interview, you can hear someone writing.[36] We do not know the content of the handwritten notes, and the significance of the notes, because notwithstanding the original discovery order still in effect, these notes have never been turned over by the DA's office.[37]

As a result, Petitioner cannot rely on the typed, unsigned statements attributed to the codefendants.

4. The Evidence Containing Blood Is Unaccounted For.

On February 9, 1978, FCSD Officer Ronlake took Petitioner to Valley Medical Center for a blood draw.[38]

The stated authority for the blood draw was a Court Order from Municipal Judge Armando Rodrigues on February 9, 1978 to take Petitioner's blood.[39] No copy of said Order can be found.[40]

Immediately after his blood was drawn, Petitioner was returned to the Breathalyzer Room where Dep. Duty then photographed his left arm to document the blood draw.[41] The Follow Up Report states that Ronlake placed the envelope with Petitioner's blood into the Identification

[34] Examples include: Exhibit 4w, FSO Lean: Lewis statement, dated 2-11-78; Exhibit 4x, FSO Lean: Menchaca statement, dated 2-12-78
[35] Exhibit 4w, *supra* at 1; Exhibit 4x, *supra* at 52
[36] Exhibit 4a, *supra* at 3
[37] Exhibit 4o, *supra*, Item #48, at 15
[38] Exhibit 4bb, FSO Ronlake Follow-Up Rpt, dated 2-10-78
[39] Exhibit 4bb, *supra*
[40] Exhibit 4a, *supra* at 3; Also See Clerk's Transcript on Appeal (T1 Vol. I & II RT)
[41] Exhibit 4bb, *supra* at 1

Bureau evidence refrigerator.[42]

There are two reports regarding Petitioner's blood sample which document the results of the testing performed:

a. The first is a letter from Pathological and Clinical Services for 'alcohol and morphine determination,' signed by Dr. T. C. Nelson.[43] The letter stated that Petitioner's blood was negative for both of those substances.[44]

b. The second report regarding Petitioner's blood being tested was written by Detective Lean.[45] On February 10, 1978, Detective Lean prepared a FCSD Request for Evidence Examination No. 271.[46] The stated purpose of the Examination was to compare the blood tests of the victim to Petitioner and his clothing.[47]

The Examination Results, written by Criminalist Boudreau over one month later on March 16, 1978, stated that the small bloodstain found on Petitioner's shirt was found to be human blood but insufficient in amount for successful typing.[48] Criminalist Boudreau has confirmed that that report bears his signature.[49]

There are no other reports which document the storage of the February 9, 1978 blood sample.[50] The blood sample cannot be found today.[51]

Although Petitioner's counsel sought expert opinion with respect to the negative result for

[42] Exhibit 4bb, *supra* at 1
[43] Exhibit 4cc, Nelson, Dr. T.C. Letter to FSO, dated 4-17-78
[44] Exhibit 4cc, *supra*
[45] Exhibit 4dd, FSO Lean, Request for Evidence Examination: Blood, dated 2-10-78
[46] Exhibit 4dd, *supra*
[47] Exhibit 4dd, *supra*
[48] Exhibit 4dd, *supra*
[49] Exhibit 4p, *supra* at 3
[50] Exhibit 4a, *supra* at 3
[51] Exhibit 4a, *supra* at 3

heroin in the prosecution's report,[52] we have found no documentation that he attempted to seek an independent examination of Petitioner's blood sample.[53]

On March 3, 1978, DDA Ardaiz filed People's Motion for an Order to Defendants, Douglas Ray Stankewitz, Marlin E. Lewis, Christina G. Menchaca and Teena E. Topping, to Submit Blood Samples.[54] Said motion stated that a sample of Petitioner's blood was necessary to compare to the blood on his t-shirt and a sample of the blood of the other defendants was necessary for comparison to the blood on Petitioner's t-shirt.[55]

According to Property Record cards, on March 4, 1978, blood samples were taken from Petitioner, Menchaca, and Lewis at Valley Medical Center, and stored in the lab refrigerator.[56]

There is no Property Record card showing blood drawn from Topping; nor showing the victim's blood. No copy of a court order can be found.[57]

However, during motions hearings on April 24, 1978, DDA Ardaiz told the Court that the District Attorney's motion for blood test for all defendants was already heard and granted. (PT Vol. 1 RT 66)

In 2012, in response to Petitioner's appellate counsel Harry Simon's request, a phone message was left for defense counsel stating that the Petitioner's blood sample had been lost.[58] In 2017, DDA Pebet stated that the prosecution does not have Petitioner's blood sample. (PRH Vol. XXVI RT 375:20).

[52] Exhibit 4ee, FCPD Sciandra letter to Reynolds, dated 4-21-78; Exhibit 4ff, FCPD Reynolds letter to Sciandra, dated 4-26-78
[53] Exhibit 4a, *supra* at 3
[54] Exhibit 4gg, FCSC People's Motion for an Order to Defendants, to Submit Blood Samples
[55] Exhibit 4gg, *supra* at 2
[56] Exhibit 4hh, FSO Lean Property Record Cards: Blood Stankewitz, Menchaca & Lewis, dated 3-4-78
[57] Exhibit 4a, *supra* at 3
[58] Exhibit 4ii, FSO Voicemail re Stankewitz blood lost, dated 1-24-2013

Blood testing methods have improved dramatically within the last 30 years. If the blood samples had been properly stored, not only could they likely be used to determine the presence of morphine molecules to determine diminished capacity, they could also be used for DNA testing.[59]

Since the victim's blood sample has been lost, Petitioner filed an Amended Motion for DNA Testing, to have all of defendants' clothing tested for remnants of the victim's blood. Said Motion was granted on May 11, 2020.[60]

The State had the ability to preserve blood samples. The vial of blood of George Keys, contained as Exhibit 74 in Petitioner's court evidence is dried up, however, using currently available DNA testing methods, dried blood can be used for testing.[61]

5. The District Attorney's File Is Unaccounted For.

After the defense uncovered extensive prosecutorial misconduct and publicly asserted in 2017 that the Petitioner was framed, DDA Pebet informed the court that the entire DA file prior to 2012 had been lost. (PRH Vol. XXVII RT 404 - 405)

Crucial evidence was in that file. A review of the police case files supplied by DDA Pebet in 2017, for both the Graybeal homicide and Meras crimes shows that they only contain 222 pages and 5 pages, respectively.[62] The files each end with a page stating given the arrest of suspects, the case has been closed.

Despite the absence of the file, between 2014 – 2017, all four DDAs represented to the court that all discovery had been turned over to the defense.[63]

[59] Exhibit 4d, *supra* at 6
[60] Exhibit 4kk, Motion and Order for DNA, dated 5-11-2020
[61] Exhibit 4d, *supra* at 6
[62] Exhibit 4a, *supra* at 4
[63] See Claim 12, Prosecutorial Misconduct Since 2010, *infra*

6. Petitioner's and Codefendants' Clothing Was Not Properly Stored and Cannot Produce DNA Results.

Between June 6 – August, 2020, DNA Testing was performed by Forensic Analytical Crime Lab (FACL). On September 2, 2020, FACL prepared a report. Its Summary of Findings states: "There is no support for the presence of blood from the victim on any of the defendants' clothing tested. However, it is unclear whether DNA from human blood was recovered from any of the apparent bloodstains tested from the defendants' clothing. Most of the defendants' clothing stains tested were presumptively negative for blood and no human hemoglobin was detected from any of them.

All of the defendants' clothing test results from apparent bloodstains also revealed little to no DNA was recovered and the recovered DNA was extremely degraded. Dried human bloodstains contain high levels of DNA which when stored at controlled temperatures will persist for decades and the blood DNA will degrade predictably. These results may reflect deleterious environmental long-term evidence storage conditions".[64]

The defendants' clothing was stored by Fresno law enforcement under unknown conditions. The conditions have never been discovered to the defense. Further, FSO never responded to Petitioner's Public Records Act request for its evidence storage procedures, so we do not know whether those procedures were followed.[65] California statutory law requires preservation of evidence.[66] Fresno County did not adhere to the dictated standards for storage of biological evidence in homicide cases.[67] Case law also dictates evidence preservation in criminal cases.[68]

[64] Exhibit 4jj, FACL Summary Report, dated 9-2-20, at 2
[65] Exhibit 4a, *supra* at 2
[66] CA Penal Code §1417.9 Retention of biological material
[67] Exhibit 4ll, NIST Biology Evidence Preservation, at 4; Exhibit 4xx, CA-Evidence-Property-Management-Guide, at 3-3 to 3-4
[68] *People v Hitch,* (1974) 12 Cal. 3d 641

B. Material Evidence Was Not Tested or Tested Properly.

1. The Shell Casings Were Not Properly Measured in Relation to the Body.

No testing was done to determine if the distance was consistent with how far a .25 casing would travel. See Claim 1: There is a disparity about the distance of the bullets found from the body.

The differences in distance measurement have never been explained.

2. No Testing Was Done to Determine Whether the Victim Was Shot With a .22 Caliber Gun, Rather Than a .25 Caliber Gun.

A thorough review of police reports shows that no testing was done to determine whether the victim was shot with a .22 caliber or a .25 caliber gun. X-rays were taken as a part of the autopsy, from which could determine the caliber; however, the x-rays have disappeared from evidence.[69]

3. No Testing Was Done to Determine the Actual Time of Death of the Victim.

According to the police reports, the victim's body was found at approximately 0123 hours on February 9, 1978.[70] The autopsy report states that she died at 1:23 am.[71] The death certificate states that she was found at 1:23 am and that the approximate time of death was 2000 hours.[72] However, just as with the death certificate stating that the victim was killed with a .25 caliber without any testing to verify that, there are no reports or scientific evidence indicating that any tests were performed to determine the exact time of death. The police reports by FPD state that they questioned Petitioner and the codefendants in Fresno Chinatown at 0800 hours.[73] The victim's body was found in Calwa, not Chinatown. There is

[69] Exhibit 4o, Table of Missing Evidence - Stankewitz Habeas, Item #11 at 4
[70] Exhibit 4tt, FSO Elliott, G Rpt, dated 2-9-78, at 3
[71] Exhibit 4uu, FSO Nelson, Dr. T.C. Graybeal: Post Mortem Record, dated 2-9-78
[72] Exhibit 4vv, Graybeal Death Certificate, dated 2-13-78
[73] Exhibit 4ww, FPD Webb & Mora Follow Up Report, dated 2-8-78, at 3

a conflict between the reports regarding where the Petitioner was at 0800 hours. This is important because it allowed the prosecution to present the version of events on the evening of the murder by Billy Brown, without the defense having an accurate time line with which to cross examine Billy or law enforcement witnesses regarding the actual timing of events.

4. The Investigators Failed to Look at the Victim's Shoes.

The prosecution failed to examine or test the bottom of the victim's shoes to see if she was standing on grass or dirt when she was killed.[74]

5. The Investigators Failed to Properly Test the Victim's Clothes for Forensic Evidence.

There are no reports to indicate that any testing was done prior to the second trial.[75] Given the advances in testing capabilities, proper police procedure would require that the defendants and victim's clothing be tested, and other critical testing be re-done, including height and trajectory calculations before a second trial.[76]

6. Law Enforcement Failed to Investigate or Consider Other Suspects.

Even though they knew that she was involved in a possible murder, police didn't search Menchaca's room for evidence, including a gun. Even though Menchaca told police that she and Teena had gone up to Menchaca's room to get Teena a new blouse at 10 pm on the night of the murder, immediately before being arrested, there is no documented report that police sought a search warrant to search her room.[77]

[74] Exhibit 4d, *supra* at 6
[75] Exhibit 4d, *supra* at 6
[76] Exhibit 4d, *supra* at 6
[77] Exhibit 4x, *supra* at 64 - 65

7. The Codefendants Statements Were Manipulated.

They encouraged codefendants to name Petitioner as the shooter by starting codefendant interviews with 'we know you weren't the shooter', "we don't think that you're the one that pulled that trigger tonight" (Lewis first interview) (three times in the space of a few minutes),[78] "you weren't the one that pulled the trigger on this thing,"[79] and introducing Petitioner's name regarding key events during their interviews.[80]

C. Evidence Was Manipulated and Misrepresented to Triers of Fact and the Court.

1. The Gun Was Misrepresented to the Jury and the Court as the Murder Weapon.

As explained in Claim 1, supra, gun evidence was manipulated to make it appear that the gun in evidence was the murder weapon.[81]

As explained in Claim 7 infra, gun evidence and testimony regarding the gun was manipulated to make it appear that the gun in evidence was used in both the Graybeal murder and Meras attempted murder.[82]

2. The Deputy District Attorney Directed Officers to Manipulate Reports.

The prosecution manipulated reports, manipulated testimony, and offered false testimony.

As explained in detail in Claim 2 supra, there was extensive coordination between law enforcement and the district attorney's office. During the investigation phase, DDA Ardaiz was in charge and his instructions were followed.[83] His name appears on at least 15 FPD and FCSD

[78] Exhibit 4w, *supra* at 10
[79] Exhibit 4w, *supra* at 1
[80] Exhibit 4z, FSO Lean Ardaiz Brown Interview, dated 2-11-78, at 5, 7, 10; Exhibit 4yy, FSO Snow Lean Ardaiz: Topping interview, dated 2-11-78, at 5, 6, 9; Exhibit 4x, *supra* at 21; Exhibit 4w, *supra* at 4, 6, 11
[81] See Claim 1, *supra*.
[82] See Claim 7, *infra*
[83] Exhibit 4nn, Declaration of David V. Schiavon, dated 6-26-2020

investigation reports.[84] He was present for at least five defendant interviews.[85] He interviewed Brown numerous times at his office.[86]

Police reports were re-written after the fact and in some cases, multiple reports were written. In many instances, there are internal inconsistencies within individual police reports, written by one officer, about what happened.

Officers Rodriguez and Callahan's Stolen Vehicle report, dated February 8, 1978, appears to be written the night of the murder.[87] They subsequently wrote a Follow Up report dated February 15, 1978 with L Pesola, which has a different version of the arrests made on the night of the murder.[88]

A key difference between the reports is that the Follow Up Report includes a number of paragraphs which describe the defendants and whether they appeared to be under the influence of alcohol or drugs.[89]

This information coincides with the prosecution's allegation that the Petitioner had diminished capacity. None of these observations were contained in their original Stolen Vehicle report which was written within the day after the crimes.[90]

Another example of these inconsistencies pertains to the blood specimen taken from the Petitioner on February 9, 1978. At that time, Officer Satterberg prepared a report stating that at the request of Detective Tom Lean and DDA Ardaiz, he went to the FCSD to check a suspect for

[84] Exhibit 4a, *supra* at 4
[85] He was present for Brown (2 interviews), Menchaca, Topping and Lewis.
[86] Exhibit 4oo, Declaration of Billy Brown, dated 9-20-1993, at 11
[87] Exhibit 4pp, FPD Callahan & Rodriguez, Stolen Vehicle Rpt, dated 2-8-78
[88] Exhibit 4b, *supra*
[89] Exhibit 4b, *supra* at 3-4
[90] Exhibit 4pp, *supra*

possible injection sites.[91] He then stated that Detective Lean would take Petitioner to Fresno County General Hospital for a blood draw.[92]

Approximately five months later, on July 17, 1978, Officer Satterberg wrote a follow up report in preparation for the trial.[93] It stated that a portion of his previous report had been left out.[94] This report states that he examined and photographed Petitioner's eyes and arms; his initial report stated that he examined and photographed Petitioner's arms.[95]

His July report also states that prior to the blood draw, Petitioner refused a urine test, a fact that he neglected to document in his initial report. He further stated in the same report that he contacted DDA Ardaiz on July 17, 1978 to inform him of the omission.[96] DDA Ardaiz advised Satterberg to prepare the follow up report.[97]

3. The Deputy District Attorney Misrepresented Evidence During Trial.

The Prosecution carefully manipulated testimony and use of evidentiary documents. Prosecution witnesses referred to documents during their testimony but did not have them marked for identification, or admitted into evidence, including the autopsy report referred to by Boudreau. (T1 Vol. 21 RT 3527).

At the second trial, the jury asked 'why have we not received all of the evidence the people presented in testimonies?'[98] The court instructed them that the documents had not been admitted into evidence, so the jury could not consider them in their deliberations. (T2 Vol. III RT 697).

[91] Exhibit 4qq, FSO Satterberg, Follow-Up Rpt, dated 2-9-78, at 1
[92] Exhibit 4qq, *supra* at 3
[93] Exhibit 4rr, FSO Satterberg, Follow-Up Rpt, dated 7-17-78
[94] Exhibit 4rr, *supra* at 1
[95] Exhibit 4qq, *supra* at 1
[96] Exhibit 4rr, *supra* at 1
[97] Exhibit 4rr, *supra* at 1
[98] Exhibit 4ss, FCSC Jury Request, dated 9-22-83

4. The Law Enforcement Witnesses Misrepresented Evidence During Trial and Offered False or Misleading Testimony.

Officers' initial reports differed from trial testimony, and testimony at the first and second trials was inconsistent.

For example, FPD Officer Rodriguez, one of the arresting officers, in his second report, a Stolen Vehicle report dated February 15, 1978, states that he observed what appeared to be the barrel .25 caliber gun behind driver's seat of the car.[99]

However, his testimony at the Preliminary Hearing included nothing about the seeing the barrel of a gun. (PH VOL. 2 RT 415 - 423). In his testimony at the first trial, he stated that observed a holster and the barrel portion of the gun behind the driver's seat of the car. (T1 Vol. 20 RT 3379). In his second trial testimony he stated that he noticed the following items in the rear seat area of the car: the barrel portion of a gun, holster and some cartons of cigarettes. (T2 Vol. I RT 98).

Some examples include Boudreau's testimony misrepresenting the height of defendant listed on the autopsy report as being the measurement from the sole of her foot to the entrance wound, see Claim 2, supra. This false testimony was reinforced by DDA Robinson when he questioned Boudreau asking him to assume that the victim was 5'7" tall, when the autopsy report showed that she was 160 cm, or 5'2.5" tall. (T2 VOL. I RT 169)

Boudreau testified at the second trial that the purpose in determining the height up to Petitioner's shoulders was to provide information that DDA Ardaiz wanted to present as part of his case in chief. (T2 Vol. I RT 165) Further, that that distance was to corroborate the testimony of the primary witness, Brown, concerning the distance of the shooter to the victim. (T2 Vol. I RT 156 and 168).

[99] Exhibit 4b, *supra* at 3

Boudreau also testified regarding the gun in evidence. He stated the gun held 7 bullets and that 3 bullets were used in the attempted murder of Jesus Meras.[100] During the second trial penalty phase, DDA Robinson, citing testimony from the first trial guilt phase, stated that a gun was found in the vehicle and perpetuated the same gun theory. (T2 Vol. IV RT 880).

On the night of the murder, all the defendants were arrested in Fresno Chinatown, but there are conflicting reports about who was in the car at the time of the arrests. One of the arresting officers, FPD Officer Rodriguez, in his Stolen vehicle report, dated February 9, 1978, stated that Topping was in the car.[101] He stated first in his February 15, 1978 Follow up report that he observed two females standing in front of the Olympic Hotel.[102] At the Preliminary Hearing, he stated that there were three suspects inside of a vehicle; (PH Vol. 2 RT 421) one female in the vehicle; (PH Vol. 2 RT 421) and two females outside the vehicle. (PH Vol. 2 RT 422) This is in contrast to his first trial testimony that three subjects exited the vehicle (T1 Vol. 20 RT 3376) and his second trial testimony where he stated that two females who were standing in front of the Olympic Hotel and there were two persons in the vehicle. (T2 Vol. I RT 92-93). He then stated that three persons came out of the car: Stankewitz, Topping and Lewis. (T2 Vol. I RT 95 – 97).

D. The Prosecution Misrepresented Evidence in Court.

At a pretrial hearing on April 28, 1978, in referring to the Graybeal murder and the Meras attempted murder, DDA Ardaiz stated to the Court that it would prejudice the Petitioner for a jury to see exactly what he did. (T1 Vol. 20 RT 3376).

During the first trial penalty phase opening statement, DDA Ardaiz said,

> [W]e expect the evidence to show that subsequent to the murder of Theresa Graybeal, and after Billy Brown was dropped off, that the defendant, in the company Christina Menchaca, Teena Topping, and Marlin Lewis, went out to one of the outlying communities here in the

[100] See Claim 7, *infra*
[101] Exhibit 4pp, *supra* at 3
[102] Exhibit 4b, *supra* at 1-2

County of Fresno called Rolinda. (T1 Vol. 25 RT 4362)

Further, DDA Ardaiz stated that Mr. Meras, the victim of a robbery, had three shots fired at him by the man in front seat. (T1 Vol. 25 RT 4363). Ardaiz stated this even though he knew that Meras did not identify the Petitioner, Teena Topping nor Marlin Lewis, as being with the group who was in the car in Rolinda.

Although he had contrary evidence in his possession, DDA Robinson stated during opening (T2 Vol. I RT 1-L) and argued during closing (T2 Vol. III RT 638) of the second trial guilt phase that Petitioner was guilty of both the Graybeal murder and Meras attempted murder. Neither defense counsel nor the court objected to these statements. (T2 Vol. III RT 640)

E. Conclusion. Taken as a whole, from the initial investigation through the two trials and to the present, this entire case has been a textbook case of extensive misconduct, which was coordinated between law enforcement and the DA's office, and which has been facilitated by the court.

CLAIM 5: THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE FROM THE DEFENSE AND TRIERS OF FACT, NOTWITHSTANDING ITS AFFIRMATIVE DUTY UNDER *BRADY V. MARYLAND* TO DISCLOSE ALL POTENTIALLY EXCULPATORY AND MATERIAL EVIDENCE TO THE DEFENSE. THE WITHHELD EVIDENCE WAS RELEVANT TO THE IMPEACHMENT OF PROSECUTION WITNESSES AND THAT INDICATED THE PROSECUTION HAD MANUFACTURED FALSE TESTIMONY, IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7; AND HIS RIGHT TO PRESENT A DEFENSE AND RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT.

The prosecution withheld material and exculpatory evidence from the defense and the triers of fact.

The original discovery motion filed[1] and discovery order entered in this case on April 24, 1978, is comprehensive and still in effect.[2] It provides a list of all of the types of information, documents and evidence that the State must make available to the defendant.[3] It specifically includes "all oral or written statements and/or admissions allegedly made by the defendant, whether signed or unsigned.[4]

All evidence described in this claim was not discovered to defense in accordance with *Brady v. Maryland.*

A. Petitioner's Interview Tapes

1. Detective Snow, FPD

Petitioner was interviewed by Detective Garry Snow on the night of the Murder.[5] Petitioner's police interview tape and transcript with Detective Snow shows Petitioner denied that he shot the victim.[6]

[1] See Clerk's Transcript (T1 CR Vol. I CT 26 – 34)
[2] See Clerk's Transcript (T1 CR Vol. I CT 108)
[3] See Clerk's Transcript (T1 CR Vol. I CT 26 – 34)
[4] See Clerk's Transcript (T1 CR Vol. I CT at 27)
[5] Exhibit 5a, Declaration of Garry Snow, dated 2-20-2020, at 2
[6] Exhibit 5a, *supra* at 2

At Petitioner's second trial, Detective Snow was not called as a witness.[7] As a result, Detective Snow's interview of Petitioner, that is exculpatory in nature, was withheld from the jury.

2. Detective Lean, FCSO

Petitioner may have been interviewed again by Detective Lean sometime in the days following the murder. When interviewed in March, 2020, Detective Lean told a defense investigator that he thought that the Sheriff's Department interviewed Petitioner.[8] In a subsequent voicemail, Detective Lean stated that he was not sure whether the Sheriff's Department had interviewed Petitioner.[9] At Petitioner's second trial, Detective Lean testified as a witness only during the penalty phase. (T2 Vol. IV RT 783 - 789). DDA Robinson asked him only about the vehicle, not the interview or statements by Petitioner. As a result, Detective Lean's interview of Petitioner, if conducted, was withheld from the jury.

B. Gun Evidence

1. Caliber Inconsistencies

First, the fact that there were two calibers of guns in the Graybeal murder and Meras attempted murder was not discovered to defense prior to or at trial.[10] It was not provided until 2017.[11]

Second, as described at length in Claim 1, there are numerous inconsistencies with the shell casings that are in FSO evidence.[12]

Third, the reports listing the location of the shell casing found at the alleged Graybeal murder scene are inconsistent. One report notes that the casing was found 18 feet away from the

[7] See Second Trial Transcript (T2 Vol. I – V RT)
[8] Exhibit 5b, Transcript of Lean Interview, dated 3-27-2020 (Interview done on 2-7-2020)
[9] Exhibit 5c, Transcript of Lean voicemail, dated 3-2020
[10] Exhibit 5d, Declaration of Peter Jones, dated 6-15-2020, at 1-2
[11] Exhibit 5d, *supra* at 1 - 2
[12] See Claim 1, *supra* at Section F

body,[13] another provides 21.3 feet.[14]

Finally, it is unknown whether the bullet was ever found. The bullet that killed the victim would show the caliber of gun that she was shot with. According to reports by Criminologist Preheim and Officer Duty,[15] Deputy Sheriff Elliott,[16] Officer McDaniel,[17] and Officer Brown[18] there is no indication that a search for the bullet was conducted. However, in an interview in March, 2020, DDA Ardaiz stated that "we had a slug that was used to kill Theresa Graybeal."[19]

Because there is no spent bullet in either the court evidence or the FSO evidence,[20] and so much evidence has been lost,[21] we do not know whether the murder bullet was found. Therefore, the ballistics testing done by law enforcement cannot definitively indicate that the gun in evidence was actually the murder weapon. Having the information about the gun would have enabled Petitioner's second trial counsel to question the death certificate entry that Mrs. Graybeal was killed with a ".25 Cal. Auto",[22] as the defense attorney for codefendant Lewis did at the Preliminary Hearing. (PH Vol. 2 RT 428-429)

2. Chain of Custody and Serial Number Inconsistencies

The gun in evidence has inconsistencies with its chain of custody. There are no logs or indication the gun was not in the possession of FCSO from July 25, 1973,[23] until February 10, approximately two days after the murder.

A Serial Trace Report from 1973 lists the serial number of that gun as in the possession of

[13] Exhibit 5e, FPD Brown Mockalis Rpt, dated 2-9-78
[14] Exhibit 5f, FSO Duty Preheim Follow Up Rpt, dated 2-9-78
[15] Exhibit 5f, *supra*
[16] Exhibit 5g, FSO Elliott Rpt, dated 2-9-78
[17] Exhibit 5h, FSO McDaniel Rpt re: Brown, dated 2-8-78
[18] Exhibit 5i, FPD Brown, L. Rpt, dated 2-9-78
[19] Exhibit 5j, Transcript of Ardaiz Interview, dated 3-14-2020
[20] Exhibit 5k, Declaration of Alexandra Cock, dated 9-18-20, at 3
[21] Exhibit 5l, Table of Missing Evidence – Stankewitz Habeas
[22] Exhibit 5m, Graybeal Death Certificate, dated 2-13-78
[23] Exhibit 5n, FSO Lean, Photo of holster

the FCSO Internal Affairs Division.[24] The next time there is a log of the location of the gun is after February 9, where the serial number is stated at "No. determined to be 146425."[25]

Furthermore, the reports themselves are entirely inconsistent with one another. The reports prior to February 9, 1978 state that there was no serial number,[26] but after February 9, 1978 officers listed a serial number.[27] These inconsistencies indicate that the gun in evidence was not actually the murder weapon because it was in the possession of FCSO at the time of the murder. This was not discovered to defense.

Furthermore, the chain of custody for the .25 caliber gun, .25 cal. test shell casings, and photos of .25 test fires which could be used to show that the gun in evidence is not the murder weapon, were not discovered to the defense prior to, or at trial. At the second guilt phase trial, DDA Robinson asked Billy Brown whether the gun in evidence was the gun that the defendant had and he answered yes. (T2 Vol. II RT 391).

The gun evidence also would have given trial defense counsel the opportunity to cross examine the witnesses who testified about the gun, including Billy Brown and law enforcement. Instead, witnesses were able to testify unchallenged about Petitioner having 'the gun.' (T2 Vol. II RT 501).

3. Meras Description Inconsistencies

The shell casings at that location of the Meras robbery,[28] photos of the recovered cartridge casings,[29] and .22 gun used to test casings[30] could have been used to show that the gun used in the Meras crimes was not the same gun used in the Graybeal murder.

[24] Exhibit 5o, FSO Lean, Serial Number Trace Report, dated 2-10-78
[25] Exhibit 5p, FPS Bonesteel Property Evidence Rpt Ext with hand notes, dated 2-9-78
[26] See Claim 1, *supra*, for a detailed explanation
[27] See Claim 1, *supra*, for a detailed explanation
[28] Exhibit 5q, FSO Sarment Technical Service Rpt, dated 2-13-1978
[29] Exhibit 5q, *supra*
[30] Exhibit 5q, *supra*

The shell casings comparison report was withheld from all four defense lawyers in the first trial and Petitioner's defense lawyer in the second trial.[31]

C. Medical Reports

1. Autopsy Report

Autopsy report which showed the location of the fatal gunshot wound and could have been used to cross examine Dr. T. C. Nelson, who performed the autopsy.[32]

2. X-Rays of Victim

X-rays of victim Graybeal which could show whether or not she was killed with a .25 caliber.[33] The x-rays taken of the victim are missing and were never discovered to the defense.

D. Physical Evidence Capable of Forensic Testing

1. Blood Samples

On February 9, 1978 Petitioner had two vials of blood drawn from him.[34] Petitioner's blood samples which could have been used to test for morphine were not turned over to the defense prior to trial, nor preserved.[35]

Furthermore, the prosecution filed a motion for the codefendants blood to be drawn.[36] There are records that the codefendants blood was drawn.[37] This blood evidence was not discovered to defense before trial for testing. It has since been lost.[38]

[31] See Claim 7, *infra*, for a detailed explanation; and Exhibit 5d, *supra* at 3
[32] Exhibit 5r, FSO Nelson, Dr. Graybeal Post Mortem Record, dated 2-9-78
[33] Exhibit 5s, FSO Ronlake Follow Up Rpt, dated 2-10-78, at 1
[34] Exhibit 5s, *supra* at 1
[35] Exhibit 5l, *supra*, Item #16 at 3
[36] Exhibit 5t, People's Motion Blood Samples, dated 3-3-78
[37] Exhibit 5u, FSO Property Record Card: Menchaca Blood Sample, dated 3-4-78; Exhibit 5v, FSO Property Record Card: Lewis Blood Sample, dated 3-4-78; There is no Property Record Card for Teena Topping's blood sample
[38] Exhibit 5l, *supra*, Item #19 at 3

2. Blood on Clothing

The clothing of the parties charged were taken as evidence.[39] Codefendants Marlin Lewis, Christina Menchaca and Teena Topping have what appear to be blood stains on their clothing.[40]

It is unclear whose blood it is because the victim's blood could have been compared to the blood stains on the defendants' clothing, but was not.[41] Petitioner did not have any blood on his clothing.[42]

This was not discovered to defense before or during trial.

3. Blood in Vehicle

Vehicle and car seat pad involved in the kidnapping and murder could have be tested for blood to determine whether the victim was killed in the car. The vehicle was returned to the victim's family two days after the crimes and the defense never had an opportunity to inspect or examine it.[43] The car seat pad, although in FSO evidence,[44] was never discovered to the defense.

E. Reports

1. Criminalist Smith

a. Photos taken by Criminalist Smith in the afternoon of February 9, 1978 were admitted into evidence.[45] However, they are no longer in the court evidence.[46]

b. They could be compared to photos taken by Bonesteel regarding vehicle contents to verify the contents of what was found in the vehicle. There is no mention of a gun being in the car.[47]

[39] Exhibit 5w, FSO Property Record Cards: Lewis, Menchaca, Stankewitz, Topping Clothing, dated 2-10-78
[40] Exhibit 5x, Declaration of Chris Coleman, dated 11-20-19, at 1
[41] Exhibit 5t, *supra*; Exhibit 5u, *supra;* Exhibit 5v, *supra*
[42] Exhibit 5x, *supra* at 1
[43] See Claim 4.A.1, *supra*
[44] Exhibit 5y, FSO Property Record Card Car Seat Pad, dated 8-18-82
[45] Exhibit 5z, FCSC First Trial Exhibit Record 46 A – F, Page 5
[46] Exhibit 5l, *supra*, Item #29 at 4
[47] Exhibit 5aa, FSO Smith Technical Services Report, dated 2-9-78

F. Witnesses

1. Codefendants

The interviews of the codefendants taken by FPD were taped.[48] These tapes were turned over to Detective Lean.[49] After that, the tapes have not been accounted for.[50] For many of the FSO interviews, Det. Lean was present. However, those tapes have not been accounted for either.[51]

The fact that the interviews were taped and then lost was not discovered to defense before or during trial. The tapes are crucial to understanding inconsistencies between witnesses, omissions, and coaching by officers.

2. Billy Brown, Primary Prosecution Witness

Furthermore, impeachable evidence of Brown's testimony was not discovered to defense. Notes of Billy Brown interviews with DA which could have shown that he was offered to be relocated at the State's expense in exchange for his testimony, and how he was coached by DDA Ardaiz and Robinson about how to testify.[52]

a. Tapes of Billy Brown interviews could have been used to confirm the coercive techniques used by law enforcement on Billy. They could also have been used to determine what Billy was offered in exchange for his testimony.

b. For an in-depth discussion of all of the documents, notes and information withheld regarding Billy Brown, see Claim 6.

3. Petitioner's Cellmates

Law enforcement and prosecution interviews with Petitioner's cellmates Michael

[48] Exhibit 5a, *supra* at 1
[49] Exhibit 5a, *supra* at 1
[50] Exhibit 5l, *supra*, Items ## 27, 31, 32, at 9-11
[51] Exhibit 5l, *supra*, Items ## 28, 29, 30, 33, at 9-10
[52] Exhibit 5bb, Declaration of Billy Brown, dated 9-20-93, at 3

Hammett, Frank Richardson and Troy Jones could have been used to confirm that they were offered a deal if Petitioner would confess the crime to them.[53]

4. Jesus Meras

At the first trial, Meras testified that he met with DDA Ardaiz on the day following the murder. (T1 Vol. 25 RT 4389) Notes of Jesus Meras interviews with DA which could have shown that he was coached by DDA Ardaiz and Robinson about how to testify, were not discovered.

Furthermore, whether he received anything of value for his interview or whether he had ever been arrested or convicted of a crime was not discovered to defense.[54]

Perhaps the most important fact was whether the crime even took place on the night of the murder.[55]

None of this exculpatory information was discovered to defense.

5. Frank Richardson

Frank Richardson was an undisclosed informant who likely turned over exculpatory evidence to the prosecution. DDA Ardaiz sent a letter to Petitioner's first trial counsel confirming that he had a tape of Frank Richardson, pertaining to Petitioner.[56] His attorney's records indicate that the attorney spent 50 hours meeting with DDA Ardaiz and his client.[57] Richardson entered into a plea agreement in April, 1978.[58] Notes of Frank Richardson interviews with DA which could have shown whether he was offered anything of value to get Petitioner to confess the crime to him, or whether he was coached by DDA Ardaiz and Robinson about how to testify, were not discovered. Defense investigation found this information in 2017.

[53] Exhibit 5cc, Memo of Investigator David Schiavon re: Mike Hammett Interview, dated 11-9-2015, at 2
[54] Exhibit 5k, Declaration of Alexandra Cock, dated 9-18-2020, at 2
[55] Exhibit 5dd, Jonah Lamb Investigator Memo Re: Meras Interview, dated 3-15-20, at 4
[56] Exhibit 5ee, FCDA Ardaiz letter to Sciandra, dated 5-1-78
[57] Exhibit 5ff, FCSC Richardson Ardaiz Plea Agreement, dated 4-26-78
[58] Exhibit 5gg, FCSC Richardson Change of Plea, dated 4-27-78

G. Mitigating Evidence at Penalty Phase

1. Petitioner's Mother's History

Petitioner's mother, Marian Stankewitz's rap sheet strongly supports a diagnosis of Fetal Alcohol Syndrome – a neurological disorder.[59] In addition to the rest of her history, is an important piece of the puzzle in assessing Mr. Stankewitz' spectrum of deficits. The rap sheet was withheld from the defense at both trials.

2. Dr. Zeifert's Report

Dr. Zeifert's EEG report documenting that Petitioner, at age 11, had temporal lobe damage which would have prevented him from forming the requisite intent to commit premeditated, deliberative murder.[60] The defense could not have been in possession of the 1965 EEG, which documented a temporal lobe disturbance,[61] because Petitioner's first trial counsel did not subpoena records for those years. Mr. Sciandra does not remember what he had or did not have during the 1978 trial.[62] We know he did not have the 1966-1970 Napa State Hospital records for Petitioner for the following reasons: 1) He only subpoenaed records for 1963 through 1965 (T1 CR Vol. I CT 127) (Petitioner did not go to Napa until March of 1965, so there were no records for '63 and '64) and Napa only sent some of the 1965 records; and 2) The defense files only contained some of the records for 1965 and had the defense subpoena attached to them (the 1965 EEG was not among them). None of the 1966 - 1970 records were in the 58 banker boxes that the defense received. The first time the 1966 thru 1970 records were obtained by the defense was on May 23, 2016 in Department 62 at a status hearing for Mr. Stankewitz.[63]

[59] Exhibit 5hh, Bureau of Criminal Identification and Investigation, Stankewitz nee Sample, Marion RAP Sheet, dated 2-14-78
[60] Exhibit 5ii, Zeifert, Dr. Mark EEG Report, dated 5-6-70, at 3, 4
[61] Exhibit 5jj, Wisen, Dr. H EEG Report, dated 8-26-65
[62] Exhibit 5kk, Declaration of Salvatore Sciandra re: Napa State Hospital Records, dated 10-27-2016
[63] Exhibit 5d, *supra* at 2

These could have been used to provide to the defense's own experts on this issue (information that no expert specifically mentioned or was questioned on at either trial).[64] These records had the defense subpoena attached to them (T1 CR Vol. I CT 127), but the 1965 EEG interpreted by Dr. H. Wisen, was not among them.

Dr. Zeifert, when he testified for the prosecution at the 1978 trial, claimed he had thoroughly reviewed all of Mr. Stankewitz' records, but he was never asked to describe what those records were. (T1 Vol. 24 RT 4152). He was not asked about the 1970 EEG test that he administered.

When he was specifically asked whether Petitioner had a mental defect, or was mentally retarded, Zeifert stated "no." (T1 Vol. 24 RT 4156). On redirect, when he was asked about his knowledge of the history of the defendant, he did not refer to any testing that he had done. (T1 Vol. 24 RT 4184). The prosecution did not turn over the 1970 EEG by Dr. Zeifert until after the two trials.[65]

These facts challenge the prosecution's assertion that Petitioner did not have a mental defect. There is no strategic reason imaginable, in the face of the trial opinion being offered by Zeifert, challenging the Petitioner's only defense being offered, not to confront him with his EEG result and the basis for his recommending the administration of powerful anti-psychotic medications to an 11-year-old boy.

When looking at the entire history and record of this case it seems highly unlikely than the defense was aware of Dr. Zeifert's 1970 report at the time of their cross-examination of him in 1978. It is conclusively demonstrable that the defense did not have the 1966-1970 Napa records at the time of either trial.

[64] See Claim 8, *infra*, for a detailed explanation.
[65] Exhibit 5d, *supra* at 2

H. Evidence That Has Gone Missing

There is an extensive list of documented evidence which is lost or missing. The Table of Missing Evidence found in Claim 4.A.2. and 4.B. infra, contains a description of lost and missing evidence, its materiality and likely exculpatory nature. Much of it was withheld from the defense and triers of fact. The only evidence in the Table that was presented at trial are Items #29 & 30.[66]

[66] Exhibit 5l, *supra* at 4-5

CLAIM 6: THE STATE PREJUDICIALLY COERCED THE TESTIMONY OF BILLY BOB BROWN, AGED 14 YEARS OLD IN 1978, AND 20 YEARS OLD DURING THE SECOND TRIAL IN 1983, WHO RECANTED HIS TESTIMONY IN 1993. THIS COERCED TESTIMONY WAS IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS UNDER THE U S CONSTITUTION, 5TH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7.

A. The Prosecution Used a Pattern of Pressure and Coercion to Secure Billy Brown's Cooperation and Testimony.

Circumstantial evidence indicates that Billy Brown was coerced into testifying and cooperating with the prosecution. The coercion included:

1. multiple interviews and meetings with law enforcement,[1] without his parents present, including the DDAs prosecuting the case, to remind him how to testify;
2. being charged with murder, kidnapping and robbery;
3. being plied with alcohol.

1. Billy's Background.

Billy Brown, a 14-year-old Native American boy, (hereinafter 'Billy') was the only alleged eyewitness to the murder and the primary prosecution at the Preliminary Hearing, and both trials. Billy, like many other children living in poverty and deprivation, had a difficult home life and upbringing. Rather than attending traditional public school, he was enrolled in the Gateway High, an alternative school.[2] Although he was young, he was apparently street

[1] According to available records, Billy was interviewed and testified as follows:

2-8-78 2116 hours	Deputy Prince, FSO Billy's house
2-8-78 2143 hours	Officer McDaniel, FSO Billy's house
2-9-78 1:35 am	Det. Snow, G. and Det. Brown, L., Capt. Mockalis, FPD office
2-11-78	Detectives Christensen & Lean & DDA Ardaiz, Juvenile Hall
2-27-78	DDA Ardaiz Interview prior to Preliminary Hearing
2-27-78	Preliminary Hearing
4-14-78	DDA Ardaiz & DA Investigator Spradling, DDA Ardaiz's office
1978	First Trial
1983	Second Trial
9-20-1993	Interview and Recantation, Defense Investigator's office

[2] Exhibit 6a, FSO McDaniel Juvenile Investigation Report, dated 2-9-78

wise and had a juvenile record.[3] As a young Native American, he was also likely intimidated by Fresno prosecutorial system, which was controlled by the dominant white culture. It is likely that he would do whatever it took to keep himself from taking the blame for any of the activities of the group during February 7 – 8. The group left Fresno on the morning of February 7, and had been on the road, without sleep, until the crimes occurred starting late afternoon February 8.[4]

2. Initial Police Contact on February 8 at 9 pm.

After he had been gone from home for over forty-eight hours,[5] his mother reported his absence to the police. After he arrived home, his mother called the police at 2108 hours, Deputy Prince, FSO, was dispatched to the Brown house.[6] It is unlikely that there are records available of the content of the dispatch phone call. There is no recording of the interrogation, so we have no idea what was said by Billy but omitted from the officer's report or if any words were put into his mouth.

He was initially interviewed by Deputy Prince, FSO, at 9:16 pm, in a bedroom at his home without a parent, or any adult present. It is unknown what FSO procedures were in 1978 for interviewing a witness or suspect, so we do not know whether proper procedures were followed in the detectives' initial interviews with Billy.[7]

Dep. Prince's report is dated 2-8-78 at 2116 hours. It is written in the third person and was not signed by Billy. When he came out of the bedroom, Officer Prince's report stated that

[3] Exhibit 6b, Fresno Juvenile Court and probation records: Billy Brown, dated 1976 - 1980
[4] Exhibit 6c, Defense Investigator Kochuba, Mimi: Billy Brown Interview Memo, dated 9-20-1993, at 1
[5] Exhibit 6c, *supra* at 1
[6] Exhibit 6d, FSO Dispatch log, dated 2-8-78; Exhibit 6e, FSO Miscellaneous Report Prince, W: Billy Brown, dated 2-8-78, at 1
[7] A Public Records Act Request was made to the FSO on December 7, 2019. Exhibit 6f, Copy of PRA request letter, dated 12-7-2019. FSO responded and stated that they needed more time. Exhibit 6g, FSO Copy of PRA Response letter, dated 12-16-2019. No response was ever received.

Billy said that Petitioner was the shooter.[8]

3. Second Police Interview on February 8 at 9:45 pm.

At approximately 2143 hours, FSO Officer McDaniel arrived at Billy's house and prepared a report. His report confirms that Dep. Prince was in a bedroom alone with Billy.[9] His report indicates that he also interviewed Billy.[10] His report was also written in the third person and not signed by Billy. Although interrogation techniques such as this, have been held to be legal, these techniques should raise questions about the veracity of the statements made, especially when made by a youth, with no parental supervision.

4. Third Police Interview on February 9 at 1:35 am.

Based on available documentation, Billy's next police interview was conducted by FPD Detective Snow and his partner, Detective Brown, on 2-9-78 at 1:35 am. Detective Snow recalls that during his multiple interviews with Billy, Topping, Menchaca and Lewis, they all told basically the same version of events. They all confessed to a kidnapping, a murder and a robbery.[11] In the interview, after recounting his version of the events leading up to the murder, Billy confirms that he did not know where the victim was killed.[12] Given that he did not know the location of the victim's body,[13] it is possible that Billy was either asleep or not present at the time of the murder. Billy himself said that he nodded off periodically in the car. (T2 Vol. II RT 538-539) It wasn't until Teena Topping told Detective Snow where the body was, that the sheriffs located it in Calwa.[14] At the end of his report, Det. Snow states that suspect Billy Brown was

[8] Exhibit 6e, *supra*
[9] Exhibit 6h, FSO McDaniel Follow Up Report, dated 2-8-78, at 1
[10] Exhibit 6h, *supra* at 1
[11] Exhibit 6i, Declaration of Garry Snow, dated 2-20-2020 at 2
[12] Exhibit 6j, FPD Snow, G & Brown, L Continuation Report, dated 2-9-78, at 4
[13] Exhibit 6d, *supra*, Officers reports showing that they drove around looking, but Billy could not find the body
[14] Exhibit 6k, FPD Snow, G: Topping Initial Interview, dated 2-9-1978, at 4 - 5

placed in custody for the above listed charges.[15] He was kept in custody at Juvenile Hall for about two months after the night of the murder.[16]

5. Juvenile Murder, Kidnapping and Robbery Charges Filed.

Billy, who was on juvenile probation at the time of the crimes, was charged on February 10, 1978, with murder, robbery and kidnapping.[17] DDA Ardaiz told Billy that they would charge him with murder because he was in the car. (T2 Vol. II RT 550) Notwithstanding his possible involvement in the crimes, he was given immunity from all charges to testify against Petitioner.[18] This pressure from the District Attorney's office for him to testify in line with what the DA needed to make their murder, kidnapping and robbery case, created bias.

6. Fourth Police and District Attorney Interview on February 11.

Billy's next interview was on 2-11-1978, with FCSD Detective Lean, Detective Christensen and DDA Ardaiz. This recording is the only recording of his police interviews that remains. The techniques used during recorded interview were notable. Detective Christensen starts off by saying that he wants to go over things that Billy said in previous interviews and statements. Often Detective Lean will stop Billy or follow something Billy said with a question about an event that happened prior to whatever Billy had been talking about. Under the guise of clarification of Brown's answers, the officer often asks questions that provide options for the answers, instead of asking open ended questions for Billy to answer in his own words. Detective Lean also keeps repeating the 'desire to clarify' line in

[15] Exhibit 6j, *supra* at 5
[16] Exhibit 6c, *supra* at 32-33
[17] Exhibit 6l, FCSC Billy Brown Juvenile Petition, dated 2-10-78
[18] Exhibit 6m, FCSC Billy Brown Immunity Agreement, dated 2-27-78; Exhibit 6n, FCSC Billy Brown Immunity Order, dated 2-27-78

some, way, shape or form. Billy can be heard to qualify some of his answers by saying 'I think' and using 'they' when describing who participated in certain actions.[19] He repeats more than once 'they already shot her',[20] 'they must of shot her',[21] and "they shot her".[22] Billy's words cast doubt on whether Billy was present during the shooting.

When the interview transcript prepared by FSO is compared to a transcript of what is actually said verbatim during the interview, there are a number of discrepancies. Therefore, Petitioner has used the verbatim transcript that the defense has prepared.[24]

Billy is unsure about certain key facts, like where he and everyone were sitting in the car.[25] First he starts to say that he "was seated on the pass[enger], then the drivers side, then the middle on that little lump on the in the car."[26] Later he says, "I was sitting on this side".[27] Still later, "I was in the passenger… I was on this side, the driver side".[28] Later still, "Teena, Christine, Doug, and the girl was still in the middle and I was here they were . . ."[29]

At one point, Billy puts the gun in Teena's hands.[30]

Billy admits that he was sleeping.[31] This also casts doubt on whether Billy saw the shooting.

[19] Exhibit 6p, Defense Verbatim Transcript of Billy Brown Interview, dated 2-11-78, at 3 [text highlighted]
[20] Exhibit 6p, *supra* at 3 [text highlighted]
[21] Exhibit 6p, *supra* at 3 [text highlighted]
[22] Exhibit 6p, *supra* at 4 [text highlighted]
[24] Exhibit 6o, FSO Lean Ardaiz: Billy Brown Interview transcript, dated 2-11-1978, is attached for the court's reference.
[25] Exhibit 6p, *supra* at 4 [text highlighted]
[26] Exhibit 6p, *supra* at 3 [text highlighted]
[27] Exhibit 6p, *supra* at 4 [text highlighted]
[28] Exhibit 6p, *supra* at 5 [text highlighted]
[29] Exhibit 6p, *supra* at 5 [text highlighted]
[30] Exhibit 6p, *supra* at 8 [text highlighted]
[31] Exhibit 6p, *supra* at 4 [text highlighted]

7. DDA Ardaiz Arranges Counsel for Billy on February 27.

On the day of the Preliminary Hearing, February 27, 1978, Billy was interviewed by DDA Ardaiz. (T2 Vol. II RT 550) According to Billy, DDA Ardaiz arranged representation for Billy, by attorney John Kopsinis. (T2 Vol. II RT 550) Mr. Kopsinis represented Billy at the Preliminary Hearing and with regard to the immunity agreement. (PH Vol I RT 6) On the same day, DDA Ardaiz signed an Immunity Agreement for Billy which gave him immunity from being charged with murder, kidnapping, robbery or a vehicle charge.[32] We do not know how long the representation lasted because the District Attorney has 'lost' Billy Brown's file. (PRH Vol. XXVII RT 404 - 405)

8. DDA Ardaiz Known Meeting #3.

On April 14, 1978, Billy met with by DDA Ardaiz and DA Investigator Spradling.[33] During that meeting, Billy incorrectly reenacted the details of the shooting and informed Ardaiz and Spradling that he had falsely testified at the Preliminary Hearing.[34] Nonetheless, the prosecution called him as their primary witness. However, despite the prosecution's duty to disclose this information, neither Billy's false testimony nor the existence of the report was disclosed to the defense prior to or during either trial; nor to the court.

9. DDA Ardaiz Field Trip with Billy.

On June 8, 1978, DDA Ardaiz, DA Investigator Spradling and FSO Sargeant Bob Smith, took Billy to Modesto, where they visited the K-Mart. The report prepared documented the trip wherein Billy allegedly showed them where the victim's car was parked and where the phone booths were.[35] FCSD case photos of the Kmart parking lot were turned over to the defense for

[32] Exhibit 6m, *supra*
[33] Exhibit 6q, FCDA Investigator Spradling Investigation Rpt, dated 4-27-1978
[34] Exhibit 6q, *supra*
[35] Exhibit 6r, FCDA Investigator Spradling, J. Investigation Rpt, dated 6-13-1978

the first time in 2017.[36] It seems likely that these are the photos taken according to FCSD Request for Examination by DA Investigator Spradling,[37] which lists photos taken on 6-8-1978, the same day that DDA Ardaiz and DA Investigator Spradling took Billy to Modesto, where he is seen in four photos.[38] Thus, again, the prosecution and law enforcement spent time with Billy, prepping his testimony. However, the defense has never received any discovery which documents what was discussed during the hours on June 8. Regarding this 'field trip,' Billy initially testified at the second trial that he had never returned to that Kmart. (T2 Vol. II RT 387) However, when he was asked again, said that he did in fact go back there with "Mr. Ardaiz and Jim Spradling." (T2 Vol. II RT 387)

As explained above, in the six interviews and meetings that we are aware of, there is no indication that either of Billy's parents were present, nor was his attorney present.[39] Billy told defense investigators that DDA Ardaiz met with him on weekends at his office.[40] No records of those meetings have been discovered to the defense.[41] That made him vulnerable to being coerced by the prosecution.

10. Alcohol Abuse of a Minor by the Prosecution.

At the first trial, the prosecution plied him with alcohol to give him the courage to testify.[42] His juvenile court and probation records show that he was an alcoholic and drug addict.[43] Besides being illegal to give an underage child alcohol, given his youth, he was especially vulnerable to being affected by giving him intoxicating substances.[44] Further, it

[36] Exhibit 6s, FCDA DDA Pebet, Noelle Discovery Receipt, dated 8-20-2017
[37] Exhibit 6t, FSO Smith/Spradling/Ardaiz, Request for Evidence Examination, Rpt #910, dated 5-5-1978
[38] Exhibit 6u, FSO Sheriff's evidence photos: Kmart parking lot
[39] Exhibit 6v, Declaration of Alexandra Cock, dated 9-18-2020, at 3
[40] Exhibit 6w, Declaration of Billy Brown, dated 9-20-1993, at 3
[41] Exhibit 6v, *supra* Alexandra Cock, at 3
[42] Exhibit 6w, *supra* at 3
[43] Exhibit 6b, *supra*
[44] Exhibit 6w, *supra* at 3

likely undermined his ability to think clearly, much less give accurate testimony.

B. Billy's Statements and Testimony are Not Reliable

An analysis of the Billy's statements and testimony listed above, were inconsistent. Listed below are examples of his inconsistent statements and testimony regarding specific events.

1. Location of a Gun.

Billy's statements and testimony regarding where a gun was at various times during the kidnapping and robbery, were inconsistent:

a. In his 2-11-78 statement to police,[45] he stated that Petitioner had a gun when he got in the car.

b. At the 1978 trial, he testified under cross examination that he didn't know whether or not Petitioner had used a gun in getting Mrs. Graybeal into the car. (T1 Vol. 19 RT 3156).

c. In the second trial, Billy testified that he saw the gun inside the car in Petitioner's possession, he couldn't recall what Petitioner did with it. (T2 Vol. II RT 392). On cross, he admitted that he could only see the upper part of Petitioner's body. (T2 Vol. II RT 495). Petitioner just opened the passenger door and got in. (T2 Vol. II RT 495). Further that he did not see any weapon, any gun until they were getting on highway 99. (T2 Vol. II RT 499).

d. On cross, when his testimony from the first trial was read into the record, it stated that he did not see a gun when the victim was pushed into the car but that Petitioner had a gun when Billy got in the car, (T2 Vol. II RT 500 – 501).

[45] Exhibit 6o, *supra* at 25

2. Actual Shooting of the Victim.

The following documents the inconsistencies in his statements regarding the actual shooting of the victim:

a. In his initial police interview, he stated that the victim was standing with her back slightly towards the two subjects outside the vehicle. He observed Petitioner aim with the right arm, holding the wrist with his left hand. There is no mention of seeing the actual gun. He said a flame was observed as Petitioner's hand was observed to jerk upwards.

b. In his second police interview, he stated that he heard gunshots from about 20 feet away from him and sees Petitioner pointing a gun at the victim's head and she fell to the ground.

c. At the fourth police and district attorney interview on February 11, he demonstrated (as described by the officer), that Petitioner was holding the gun in his right hand, the arm extended straight out, and then taking the left hand, with the palm under what would be the grip of the gun. When he shot it it popped up like that. Just a little bit. He only shot once. The victim was looking the other way, the opposite way when he fired the gun.[46]

d. During his meeting with DDA Ardaiz on 4-14-1978, he states that Petitioner was about a couple of feet from the victim when the shot was fired, or words to that effect. He demonstrated that Petitioner held both his hands together indicating that Petitioner held the weapon with both hands, and stretched his arms out to a position near and pointing toward the back of the DA Investigator's head. When asked to estimate the distance between his hands and the back of the investigator's head, he stated between ten and fifteen inches.[47]

e. At the Preliminary hearing, he testified that 'I seen him (Petitioner) pull

[46] Exhibit 6o, *supra* at 7
[47] Exhibit 6q, *supra*

up the gun and shoot her, and I seen her fall down". She was shot 'when she was facing away from' Petitioner. When asked to demonstrate exactly the way that he saw Petitioner hold the gun, he had his right arm extended, the left arm cupped under the palm of the right hand. With his arm fully extended. (PH Vol. I RT 67).

f. At the first trial guilt phase in 1978, he testified that he saw Petitioner raise up the gun, and he shot it, and she fell down. When asked to demonstrate how Petitioner was holding the gun, he held his arms fully extended, his right arm bracing his left arm, the left hand extended as if a barrel from the shoulder. He further testified that the gun was held about a foot away from the victim, pointed at the right side of her face. That Petitioner fired one shot. (T1 Vol. 18 RT 3672 – 3673).

g. At the second trial guilt phase in 1983 he testified that when Petitioner got out of the car, he did not see him with any type of weapon. (T2 Vol. II RT 404). While the victim was facing away from Billy, he saw Petitioner lift up the gun and shoot her. He had the gun in his left hand with his left arm stretched out at shoulder height, with his right hand underneath his left hand supporting it. He testified that the victim was about a half a foot or foot away from Petitioner when she was shot. Also that she was facing away from him and he was on the right side. That Petitioner fired one shot at her head. (T2 Vol. II RT 407-408).

h. In his recantation declaration and interview in 1993, he stated "I did not at any time see Petitioner holding a gun. I did not see who pulled the trigger".[48] He stated that he was in the car on the middle of the console when he heard the gunshot. At that time, Marlin had the gun in his hand. Marlin was the last one to get in the car. He didn't see anybody

[48] Exhibit 6w, *supra* at 2

shoot.[49]

3. Reluctant Witness with Immunity Agreement.

Brown did not want to testify at either trial but was the main prosecution witness at both trials. He gave false testimony on numerous occasions during the trials. One example of Billy's false testimony is his testimony regarding the gun in evidence. During the first trial, when shown Exhibit 5-A, the gun in evidence, he testified that it was the "gun that Doug had on the lady." (T1 Vol 19 RT 3039-3040). We now know that the gun in evidence was not the murder weapon nor the gun used in the other crimes.[50]

Billy Brown's written immunity agreement, other promises made by the District Attorney[51] and extent of cooperation with the prosecution, were not discovered to defense. Further, neither the immunity agreement nor the immunity order are contained in the superior court file, nor the Clerk's Transcripts for either trial.[52] The fact that Billy had an immunity agreement with the State created bias due to pressure from the prosecution to testify consistent with the theory of the State's case. Circumstantial evidence points to Lewis as being the shooter, but the prosecution had Billy falsely testify that it was Petitioner.[53]

Hugh Goodwin, in the 1983 trial, only briefly probed into Brown's possible immunity agreement. Goodwin asked Brown if D.D.A. Robinson had indicated that some charges could be filed against Brown, and Brown said "No." Goodwin asked if D.D.A. Robinson told him that no charges could be filed against him, and Brown said "No." Goodwin asked him if he was testifying "under the belief that if [he] didn't testify that charges would be filed[.]" Brown responded, "No."

[49] Exhibit 6c, *supra* at 18-19
[50] See Claim 1, *supra*
[51] Exhibit 6w, *supra* at 3
[52] Exhibit 6v, *supra* at 2
[53] See Claims 2, and 3, *supra*

(T2 Vol. II RT 551, 552.) By not knowing the truth of what happened, Goodwin was unable to effectively cross-examine Brown on these points. Billy Brown's 1993 recantation, the immunity agreement and immunity order themselves,[54] show that Billy's statements regarding immunity were false.

A review and comparison of the four transcribed interviews with Billy, and his testimony at the Preliminary Hearing, his April, 14, 1978 meeting with DDA Ardaiz and Investigator Spradling, first trial, second trial and 1993 interview and declaration, reveal that his statements are inconsistent throughout, which makes it difficult to take at face value. Further, his statements and testimony conflict with the physical evidence[55] and key points in the statements given by the other codefendants. Given what the physical evidence is now known to show, his statements and testimony are wholly unreliable, and lack credibility.[56]

The veracity of his second trial testimony was further undermined by the need to refer to his first trial testimony, given while intoxicated by alcohol. In another form of coercion, when Billy would give an 'I don't know' or an answer that was inconsistent, DDA Robinson would ask him to read or refer to his first trial testimony. This occurred over six times during the second trial.[57]

C. Evidence Was Withheld from the Defense that Billy Testified Falsely

Hugh Goodwin was further hampered in his ability to cross-examine Billy due to the State's Brady violations, including withholding the extent of his written immunity agreement and other promises made by the DDA; the April 27, 1978 report[58] showing that Billy had testified

[54] Exhibit 6m, *supra*; Exhibit 6n, *supra*
[55] Exhibit 6kk, Declaration of Roger Clark, dated 12-4-2019, at 5
[56] Exhibit 6kk, *supra* at 5
[57] Exhibit 6x, List of Second Trial Testimony where Billy referred to his first trial testimony
[58] Exhibit 6q, *supra*

falsely at the preliminary hearing about whether he had witnessed the shooting and the audio tapes of Billy's police interviews.

D. Billy's Testimony Was Critical to the Prosecution Proving Its Case, So They Sought Cooperation From Jailhouse Snitches, as a Backup Plan.

During the months after the Preliminary Hearing, the Prosecution was working with jailhouse informants to try to get Petitioner to confess to them. The best documented of these efforts was Frank Richardson's cooperation with DDA Ardaiz. According to court records, on March 28, 1978, Richardson was charged in Fresno Superior Court with a felony: unlawful force and violence against a peace officer. He was in the Fresno County Jail while Petitioner was jailed there awaiting trial in this case. On April 27, 1978, during his first court appearance in his case, Richardson entered a Change of Plea.[59] Richardson was allowed to plead guilty and released on his own recognizance as long as he remained available to testify in the Stankewitz case.[60] His Change of Plea further stated that his sentence would be imposed in two months.[61]

His attorney's billing records state that he represented Richardson from 4-27-78 to 10-16-78. In his Application and Order for Payment of Attorney's fees, Eugene Gomes states that he was appointed to represent Richardson "for purposes of entering a plea of guilty and staying sentencing under a bargain with the District Attorney's office to insure the defendant's cooperation as a material witness in the Stankewitz case."[62] Further, that Gomes "remained involved actively with both the defendant's case as well as the Stankewitz case . . . during a period of six months."[63]

[59] Exhibit 6y, FCSC Richardson, F. Change of Plea, dated 4-27-78
[60] Exhibit 6y, *supra* at 4
[61] Exhibit 6y, *supra* at 4
[62] Exhibit 6z, FCSC Richardson, F. Plea Deal, dated 4-26-78, at 9: Gomes Application for Payment of Attorney's fees
[63] Exhibit 6z, *supra*, at 9

Lastly that "I respectfully invite the Court to contact Chief Deputy District Attorney James Ardaiz who can substantiate the efforts on my part, to some degree."[64]

As explained in Claim 4, supra, the District Attorney's files were reported missing in 2017; therefore we do not have records regarding specific conversations between Richardson, Gomes and Ardaiz on what Richardson might have provided to get a deal of dismissal of serious felony charges. Although Richardson did not testify at the Stankewitz trial, the charges against Richardson were ultimately dismissed on October 16, 1978, as a result of the People's Motion to Dismiss. Defense investigation found this information in 2017.

At the second trial, D.D.A. Robinson declared under oath that Billy Brown was the only witness who could put the gun in Mr. Stankewitz's hand at the time Ms. Graybeal was killed.[65] Without Billy as their witness, the State would not have been able to prove its case.

E. DDA Robinson committed misconduct to insure a conviction

As described above, Billy was a reluctant witness all the way along. Nonetheless, he was an even more reluctant witness for the second trial. On the day that he was supposed to testify, DDA Robinson had to ask the court to delay his testimony because he had been at the hospital twice in the last two weeks.[66] The Court granted the prosecution a continuance until it came up with some declaration from the physician with regard to Brown's physical condition. (T2 Vol. II RT 92) The next day, DDA Robinson gave the court a handwritten note purportedly signed by a doctor whose name was illegible. A medical records request for Brown's medical records to Valley Medical Center showed that there were no records of Brown being a patient in 1983.[67]

[64] Exhibit 6z, *supra* at 9
[65] Exhibit 6aa, FCSC Affidavit of DDA Warren P. Robinson, dated 9-13-1983, at 1
[66] Exhibit 6aa, *supra* at 1-2
[67] Exhibit 6bb, Valley Medical Center Letter, dated 10-22-83

In 1983 D.D.A. Robinson threatened to "bust" his immunity if he did not testify.[68] At trial, D.D.A. Robinson did not set the record straight when Brown responded to Goodwin's questions about immunity. (T2 Vol. II RT 551 - 552). Both prosecutors, Ardaiz and Robinson, used the immunity agreement not as a carrot to entice truthful testimony, but as a threat; they would take away his immunity and prosecute him with a multitude of crimes if he didn't testify the way they wanted him to.

Billy Brown explained in his 1993 recantation that when he was preparing for the 1983 trial, he told Deputy District Attorney Robinson that he could not remember what happened the day of the murder: "I just told him that I don't remember, I don't recall that's it. No, I remembered what Ardaiz told me to say so that was it".[69] He went on to explain that he did not want to testify in the second trial, and that he attempted to avoid doing so:

> **MK**: Did you try to, try to avoid testifying?
> **BB**: Yeah.
> **MK**: How, what did you do?
> **BB**: I was just trying to stay low, but they tracked me down.
> …
> **MK**: Did you tell anybody [that you didn't want to testify]?
> **BB**: Because they said, well, at that time I told them that I didn't want to go to court.
> **MK**: Who?
> **BB**: Well, at that time, they said they could bust that immunity on me if I didn't show up for the court. They could take me into custody for ah…contempt of court. That's what [D.D.A.] Robinson said.
> **RP**: When you said…You just said something about they said they could bust the immunity. Did they tell you that if you didn't testify, that they'd file new charges on you?
> **BB**: Yeah, they said that they could break the immunity charges and then…that I could be filed…you know, have new charges filed on me, and ah…I didn't want that. . . . And that's how come I agreed to come back to court on the second trial.[70]

[68] Exhibit 6c, *supra* at 28
[69] Exhibit 6c, *supra* at 27
[70] Exhibit 6c, *supra* at 28

Brown stated in his recantation interview that the prosecution came to find him to testify.[71] According to Billy's 1993 declaration, 'the district attorney said I would be in contempt of court and my immunity would be lifted if I did not attend the second trial."[72]

D.D.A. Robinson misled the jury by eliciting false testimony from Billy, putting Marlin Lewis inside Ms. Graybeal's car at the time of the shooting. (T2 Vol. II RT 404).

Even though based on all of the evidence that he had, he should have known that he was making a false statement, DDA Robinson argued in the guilt phase closing that "the testimony of Billy Brown is uncontradicted. There was no evidence at all to show that his testimony in this case was not what really happened." (T2 Vol III RT 600). Again, given the information in his possession, thus knowing that it was untrue, he further argued that Petitioner had the gun that was in the car. (T2 Vol. III RT 612). Lastly, with information in his possession showing otherwise, he argued that there were going to be things that Billy didn't remember . . . but it doesn't mean that he didn't see Petitioner kill Theresa Graybeal. (T2 Vol. III RT 639).

F. The Prosecution Falsely Manipulated Circumstantial Evidence to Corroborate Billy Brown's Testimony

As discussed in Claim 2, the prosecution relied heavily in their case in chief at both jury trials upon a height, angle, trajectory calculation they claimed corroborated and proved Billy's testimony was credible i.e., that based on the victim being 5'7", not the 5'3" that she actually was, Douglas Stankewitz had to be the shooter and that Marlin Lewis could not have been. Unfortunately, the prosecution misrepresented the facts to the jury and defense counsel never

[71] Exhibit 6c, *supra* at 27
[72] Exhibit 6c, *supra* at 28

caught them on it—nor did any attorney that handled Petitioner's appeal.[73] Had the truth been told regarding the height/angle/trajectory evidence, the jury would have been presented with much more than a reasonable doubt as to who the shooter actually was. The shooting theory presented by the Prosecution to the jury, could not have been true.[74]

G. Petitioner was Prejudiced by Billy's Lies

At the time that he testified at each trial, Billy knew that if he did not testify as directed by the prosecution, he was likely to be prosecuted for the murder, kidnapping and robbery. Based on DDA Ardaiz's promise of a new identity for he and his mother in exchange for his testimony, he was under considerable pressure to come through for the prosecution.[75] His testimony prejudiced Petitioner because he was the only witness that could tie Petitioner to the killing.[76]

In his police interviews, codefendant Lewis admitted that he had the gun during the hours leading up to the murder.[77] He also admitted that he didn't see the shooting.[78] Codefendant Menchaca told the police that she did not see who fired the fatal shot.[79] However, the jury never heard their testimony.

H. Billy Recanted His Testimony, Which Confirmed His Previous False Statements in Police Interviews and Court Testimony

Billy Brown stated to defense investigators in 1993 that Deputy District Attorney Ardaiz, leading up to the 1978 trial, promised him immunity from a number of charges in exchange for his testimony against Stankewitz. DDA Ardaiz, Brown said, also promised Brown that he would help Brown change his identity. Brown said that D.D.A. Ardaiz had an attorney present, ready to help

[73] See Claims 2, 4, 13 and 14
[74] Exhibit 6kk, *supra* at 5-6
[75] Exhibit 6w, *supra* at 3
[76] Exhibit 6aa, *supra*
[77] Exhibit 6cc, FSO Snow, G: Lewis Interview, dated 2-9-78, at 4, 15; Exhibit 6dd, FSO Snow/Lean/Ardaiz: Lewis Interview, dated 2-11-78, at 4, 11
[78] Exhibit 6cc, *supra* at 22
[79] Exhibit 6ee, FSO Snow/Lean/Ardaiz: Menchaca Interview, dated 2-11-78, at 16

Brown execute the agreement. Brown stated the attorney, "came right up and he told me to say anything…ah…or the same thing Ardaiz told me that, hey we'll give you the free immunity . . ."[80] None of these statements or documents relating to these exchanges was discovered to the defense before or during trial. In fact, at Petitioner's second trial, on cross-examination, he was specifically asked whether his lawyer told him that he could get the charges dropped if he was willing to testify, Billy said that he didn't think so. (T2 Vol. II RT 551)

Billy Brown recanted in 1993, demonstrating the falsity of his testimony. Billy Brown's 1993 recantation is extraordinarily specific about how D.D.A. Ardaiz "cooked it in [his] brain" what to say, so that he "was like a tape recorder when [he] went in front of the judge."[81]

Brown explained to defense investigator Mimi Kochuba that D.D.A. Ardaiz wanted him to tell the judge "that Doug was the one that did it, that Doug pulled out the gun and shot em." He said, "I told him several times I didn't see that. He goes well, this is what I need for you to say. That's exactly what he told me. This is what I need for you to do."[82]

Brown's recantation also shows that Defense counsel Hugh Goodwin could not have effectively confronted and cross-examined witnesses during the guilt phase in 1983. Brown's recant strongly suggested that Lewis was the killer. His recantation statements aligned with the fact that a .25 Titan, the possible murder weapon, was found within immediate reach of Lewis, under the driver's seat.[83] (According to police reports, at the time of their arrest, Lewis was found sitting behind the driver's seat, Stankewitz was in the front passenger side seat).[84] Lewis stated

[80] Exhibit 6c, *supra* at 21
[81] Exhibit 6c, *supra* at 25
[82] Exhibit 6c, *supra* at 25. DDA Ardaiz, prosecutor in the 1978 trial, was elevated to the bench just a few years after his successful prosecution of Douglas Stankewitz. He was 33 years old at the time.
[83] Exhibit 6ff, FPD Callahan/Rodriguez Stolen Vehicle Rpt, dated 2-8-78, at 3
[84] Exhibit 6ff, *supra* at 4; Exhibit 6gg, FPD Bonesteel Follow Up Rpt (typed), dated 2-9-78, at 1–2; Exhibit 6hh, FSO McDaniel Rpt, dated 2-10-78, at 2

that he had a gun at various points in time on February 8.[85] The jury never heard about this because Lewis did not testify, nor did any law enforcement officers testify that a gun was found near Lewis in the car, a possible Brady violation.

Brown's 1993 statements reinforce the inconsistencies in his previous versions of events, the biggest of which was placing Lewis inside the vehicle at the time of the shooting (whereas initially he put Lewis outside the car). His inconsistencies regarding where Lewis was at the time of the shooting, listed below, are confirmed by a lack of physical or corroborating evidence to back them up. The inconsistencies point to third party guilt, not Petitioner's guilt.

a. On the day after the murder, Billy Brown stated to Officer Snow that after they all arrived in Calwa, Stankewitz, Marlin Lewis, and Graybeal exited the car.[86] Brown also placed Lewis outside the vehicle, when he spoke with Officers Christensen, Lean, and DDA Ardaiz on February 11, 1978.[87]

b. At the preliminary hearing, Brown stated that Lewis was inside the car when Graybeal was shot. (PH Vol. 1 RT 68)

c. At the 1978 trial, Brown stated that Lewis was getting into the car when the shot was fired. (T1 Vol. 19 RT 3194)

d. At the 1983 trial, Brown stated that Lewis was already in the car when the shot was fired. (T2 Vol. II RT 405)

e. In 1993, Brown reverted back to his original version of who was outside the car when Graybeal was shot: Lewis, Graybeal, and Stankewitz: "I seen, the gun went off, I seen Marlin heading back to the car. I seen her laying on the ground…Doug was already going toward

[85] Exhibit 6cc, *supra* at 4, 15; Exhibit 6dd, *supra* at 4, 11
[86] Exhibit 6j, *supra* at 4, 6
[87] Exhibit 6o, *supra* at 7-8

the car. Marlin was behind where the girl was at…I didn't see anybody shoot. I just heard the gun go off."[88] Brown's circling back to his original version of who was outside the car (to his original remarks on February 9th and 11th of 1978) supports his statement that the prosecutor "cooked it in [his] brain what to say. I was like a tape recorder when I went in front of the judge. You know, I knew exactly what [the prosecutor] wanted me to tell [the judge]."[89]

Brown's statement in his recantation that Lewis had the gun in his hand immediately after Brown heard the gunshot casts doubt on the idea that Stankewitz shot Graybeal.[90] His statement that Lewis, not Stankewitz, was the one who said something about dropping her, would give more weight to this idea.[91] This information, coupled with Brown's statement that the DDA pressured him to testify that Stankewitz shot Graybeal,[92] leads to a reasonable probability that, but for the prosecution's misconduct, the result of the proceeding would have been different.

His recantation is more consistent with the circumstantial evidence than his original statements. At the time of the recantation, he was out of prison and no longer beholden to the Fresno District Attorney. Mimi Kochuba, one of the investigators who interviewed Billy in 1993, states in a declaration signed in 2019 that she believes that Billy told her the truth in the 1993 interview and had no reason to lie at that point in time.[93] She further states that Billy told her that Marlin Lewis should have been prosecuted "because he did mostly everything."[94]

Billy, in 1993 interview with defense investigators, said 'I didn't see anybody shoot. I just heard the gun go off. See, that's why I can't understand why they said that I said I seen Doug shoot her. I didn't say that. You know, so that's a big mistake on their part because

[88] Exhibit 6c, *supra* at 19
[89] Exhibit 6c, *supra* at 25
[90] Exhibit 6c, *supra* at 19
[91] Exhibit 6w, *supra* at 2; Exhibit 6c, *supra* at 20
[92] Exhibit 6c, *supra* at 25
[93] Exhibit 6ii, Declaration of Mimi Kochuba, dated 3-11-2019
[94] Exhibit 6ii, *supra* at 2

I didn't say Doug shot her."[95]

Brown's recantation and the trial record show not only that the prosecution knew his testimony was false, but also how they ensured his continued cooperation. The immunity agreement and other promises were used to coerce Brown's false testimony. It explains why Brown, in his initial statements,[96] put Marlin Lewis outside the vehicle with Graybeal and Stankewitz, and why that version of events changed to only Stankewitz being outside the vehicle with Graybeal when she was shot. Brown filled in the blanks in order to be valuable to the prosecution and get his best deal.

Brown died in May, 2006, so we are unable to obtain any further information from him. His death certificate states that he died of Acute Intoxication and Combined Effects of Alcohol and Opiates.[97]

[95] Exhibit 6c, *supra* at 20
[96] Exhibit 6j, *supra* at 3
[97] Exhibit 6jj, Billy Brown Death Certificate, dated 8-25-2006

CLAIM 7: THE STATE PRESENTED FALSE AND MISLEADING TESTIMONY THAT PETITIONER WAS A SERIAL KILLER INVOLVED IN THE ATTEMPTED MURDER OF JESUS MERAS ON THE SAME NIGHT AS THE MURDER OF THERESA GRAYBEAL, IN VIOLATION OF PETITIONER'S RIGHTS UNDER BRADY V MARYLAND, HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7; AND RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT.

Jesus Meras was a victim of an alleged robbery and attempted murder unrelated to the murder of Theresa Graybeal. The Prosecution sought to incorporate the unadjudicated Meras charges in its case against the Petitioner as evidence of a pattern of behavior and in a blatant attempt to inflame the jury. Notwithstanding the Court's order that Meras charges be severed from the Graybeal case, the Prosecution was allowed to introduce circumstantial evidence and made false representations regarding the Meras incident to paint the Petitioner as a habitual, violent offender.

A. The Prosecution had Evidence in Its Possession That Different Guns Were Used in the Graybeal and Meras Crimes Yet Represented to the Court and Jury that the Same Gun Was Used in Both Crimes

1. The Shell Casings at the Meras Crime Scene and the Graybeal Crime Scene Were of Different, Incompatible Calibers.

Detectives Arthur Christensen and Thomas Lean took Meras to the alleged location of his attempted murder. On February 13, 1978, Christensen wrote a report.[1] In the report he indicated that he found three shell casings at the Meras crime scene.[2]

Investigations Bureau Technologist, Wes Sarment, joined Christensen at the scene.[3] Sarment "photographed the scene and secured the spent casings."[4] The casings that were collected were compared later that day by the FCSD Investigations Bureau to the casing

[1] Exhibit 7a, FSO Christensen & Lean Crime Report, dated 2/13/78
[2] Exhibit 7a, *supra* at 4
[3] Exhibit 7b, FSO Sarment & Christensen Technical Service Report, dated 2/13/78, at 1
[4] Exhibit 7b, *supra* at 1

collected at the scene of the Graybeal homicide.[5]

The casings from the Meras scene were not a match to the Graybeal homicide casing.[6] The reports discovered to the defense so far do not document that a search was conducted at the Meras crime scene for a gun or other evidence.[7]

In 2015, Mr. Stankewitz's defense team received 58 banker boxes that purportedly contained "all" the discovery and records for his case that had accumulated over the years.[8]

Law student, Jacqui Curry, was hired in the summer of 2015 to inventory and index everything in those boxes.[9] She declared under penalty of perjury that the lab casings comparison report was not in any of the boxes.[10]

In May, 2016, defense counsel Peter Jones prepared and served a Subpoena Duces Tecum on the Fresno County Sheriff's Office, seeking 'production of documents, evidence and other records related to the Meras allegation." [11]

When the defense viewed the evidence at the FSO on August 24, 2017, for both the Graybeal homicide and the alleged kidnap, robbery and attempted murder of Meras, an envelope purporting to contain the .22 caliber casings from the Meras crime scene was discovered. Inside of it, however, were three .25 caliber casings, that had been test-fired from a Titan .25 caliber firearm. It appeared that the three .22 caliber casings reported to have been collected at the Meras crime scene, had been removed and disposed of and three .25 caliber casings matching casings fired by the alleged homicide weapon, had been substituted in their place. None of the reports or

[5] Exhibit 7c, FSO Lean Request for Evidence Examination Rpt #292, dated 2-13-78
[6] Exhibit 7c, *supra*
[7] Exhibit 7d, Declaration of Alexandra Cock, dated 9-18-20, at 2
[8] Exhibit 7e, Declaration of Jacqui Curry, dated 10-14-2016
[9] Exhibit 7e, *supra*
[10] Exhibit 7e, *supra*
[11] Exhibit 7f, Declaration of Peter Jones, dated 6-15-2020, at 1

documents provided to the defense made reference to the recovery of a .22 caliber firearm.[12]

Criminalist Boudreau, who performed the ballistics testing for the Graybeal case, states that he did not perform the evidence testing requested in FSO Document No. 292. When he recently reviewed Document No. 292, Bates Stamp 001827, dated 2-12-78, he says that the Examination Results are not filled in. Instead, that section has handwritten lettering of "Neg", "10-22" and an apparent signature. Under the language 'For Laboratory Use Only', the word 'Neg' is short for negative. He did not recognize the signature in that section. However, when he looked at it more closely, he observed that the signature could be "Tlean", Detective Tom Lean. Given his recollection of the employees in 1978, he cannot think of any other person who would have signed the form. Further, that the crime scene investigation report of case 78-1995, dated 2-13-1978, by Criminologist W. Sarment records three .22 caliber cartridge cases recovered. .22 caliber cartridge cases cannot be compared to .25 caliber cartridge cases.[13]

Regarding whether he did a comparison of .22 casings to .25 casings, he says that would not have done that because the class characteristics are substantially different. He states that you cannot shoot rim fire ammunition in a .25 caliber pistol and you cannot fit .25 caliber bullets into the chamber of a .22 caliber pistol. So, at most he would have opened both envelopes with the .22 casings and determine that there was nothing to test. They are not compatible in either direction.[14]

At the time that he testified at the trials, he was not aware of the Document #292. Regarding the prosecution theory that the same gun was used in both the Graybeal and Meras

[12] Exhibit 7f, *supra* at 2
[13] Exhibit 7g, Declaration of Allen J. Boudreau, dated 3-14-2020, at 2
[14] Exhibit 7g, *supra* at 4

crimes, he states that prosecutors are not forensic scientists, so such a theory may not be something to explore, because it is excluded on the face of it. If .22 casings were recovered from the Meras crime scene, and Thersa Graybeal was shot with a .25 caliber pistol, the same gun could not have been used in both crimes.[15]

As confirmed in a report by DA Investigator Garcia, in the FSSO evidence, an envelope was labeled with a property record card, as containing the alleged .22 caliber shell casings from the Meras crime.[16]

However, as explained in Garcia's report, when the property record card was removed from the outside of the envelope and the contents of the envelope were examined, the envelope contained .25 caliber shell test casings from testing done by Detective Boudreau.[17] In his recent declaration, Det. Boudreau states that he has read DA Investigator's report and that he has no knowledge regarding the empty .22 cartridge cases or how the Evidence Property Card became attached to the cannister with the Test Fired Cases.[18]

However, this report[19] was **never** turned over to the defense until August, 2017.[20] At that time, defense counsel was provided a report prepared by W. Sarment (Hereinafter "Sarment reports"), a Sheriff's officer/criminologist investigating and collecting evidence on the Meras allegation. The Sarment report included a diagram of his work at the Meras crime scene.[21] Pursuant to the Sarment report, three .22 caliber casings had been collected at the crime scene, however, to date, none of those casings have ever been produced to the defense.[22] In 2017, DDA Pebet stated

[15] Exhibit 7g, *supra* at 4
[16] Exhibit 7h, FCDA Investigator Garcia Report of Investigation, dated 7-20-17, at 2
[17] Exhibit 7h, *supra* at 2
[18] Exhibit 7g, *supra* at 4
[19] Exhibit 7b, *supra*
[20] Exhibit 7f, *supra* at 1-2
[21] Exhibit 7f, *supra* at 1-2
[22] Exhibit 7f, *supra* at 2

on the record that "the three .22 or alleged to be .22-caliber casings are no longer in property." (PRH Vol. XXVI RT 377). Also pursuant to the Sarment report, photos were reportedly taken of the recovered .22 casings. No photos have ever been produced to the defense.[23]

Petitioner's first trial attorney, Sciandra, in a sworn declaration, stated that he has no independent recollection of what discovery he had or did not have regarding the Jesus Meras offense.[24] In August, 2017, the prosecution turned over the February 13, 1978 Lean/Christensen/Sarment Report stating that a .22 was used in the Meras case on February 8, 1978.[25] If the defense had these reports prior to the Preliminary hearing or the trials, it could have argued that someone else perpetrated the crimes against Meras, including firing the gun at Meras.

In 2017, DDA Pebet stated on the record that she might or might not use the Meras crime in the penalty retrial. (PRH Vol. XXVI RT 377-78). For a detailed explanation, See Claim 12.D. infra.

Had the prosecution turned over the reports in their possession, the claim by the prosecution that the same gun was used in both crimes would have prompted a swift and effective response by the defense, but such an event never occurred. The only explanation is that the defense did not know that there was a report indicating the casings from the Meras scene did not match the weapon used in the Graybeal homicide.

B. The Prosecution Presented Argument and/or Circumstantial Evidence at Various Stages in the Proceedings, Including Pretrial Hearings, Guilt and Penalty Phases of the First Trial and Guilt and Penalty Phases of the Second Trial, To Imply the Petitioner's Guilt in the Meras Crime and Paint the Petitioner as a Habitual, Violent Offender

1. Preliminary Hearing and Motion to Sever Counts

[23] Exhibit 7f, *supra* at 2
[24] Exhibit 7i, Declaration of Salvatore Sciandra, dated 10-27-2016
[25] Exhibit 7f, *supra* at 1-2

At the Preliminary Hearing and at both trials, because his first language was Spanish, Jesus Meras testified using an interpreter. (PH Vol. 2 RT 323) (T1 Vol. 25 RT 4373) (T2 Vol. IV RT 803)

On April 10, 1978, Sciandra filed a motion to sever the Meras Kidnapping, Robbery and Attempted Murder charges from the homicide charges.[26] On April 28, 1978, and continuing on May 3, 1978, the Court held the hearing. (PT Vol. 1 RT).

Sciandra argued that the Graybeal and Meras crimes should be severed, especially because there was an identification problem. (PT Vol. 1 RT 205).

At the April 28, 1978 Hearing to Sever Counts, in arguing that the Meras crime should be tried with the Graybeal crime, DDA Ardaiz asserted that Petitioner was guilty of both crimes, and states that the defense position that 'it would prejudice Mr. Stankewitz for the jury to see exactly what he did, rather than – I mean, if we're drawing the bottom line, that's really the line that we're drawing, because that argument would not hold water in any other kind of case. So, it would be the position of the People, Your Honor, that the interest of justice is, it is required that this case be handled together.' (PT Vol. 1 RT 187-88). The prosecution argued that the "evidence was strong" that the same gun was used in both crimes.[27]

Based on the evidence presented by the prosecution at the Preliminary Hearing, the Court then goes on to say that joinder of cases is proper "where there is some specific element, such as a weapon, which is come into more than one crime. In this case, you notice two weapons that have a common element of both crimes." (PT Vol. 1 RT 227). The Court is referring to the testimony

[26] See Clerk's Transcript (T1CR Vol. I CT 56 – 62)
[27] In his opposition to defendants' motion to sever counts, D.D.A. Ardaiz wrote "It should be noted that the following factors exist: 1. A gun was used in both crimes and the evidence is strong that it was the same gun; 2. The same car was used in both crimes…" (Pg. 6, PEOPLE'S POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO SEVER COUNTS; Filed May 19th, 1978) See Clerk's Transcript (T1 CR Vol. I CT 87 – 103)

from the preliminary hearing regarding both a gun and knife being used in both the Graybeal and Meras crimes. (PH Vol. 1 RT 20).

The Judge ultimately ruled that the Meras charges had to be severed from the Graybeal charges. (PT Vol. 1 RT 235)

Petitioner told the Judge that he had demanded to be tried on the Meras crimes from prison because he was being blamed for crimes that he didn't commit, by a victim who never picked him out as the perpetrator. He told the court that the prosecution had an opportunity to take the case to trial against him but did not. (T2 Vol. IV RT 850). DDA Robinson denied that his office had ever received a letter. (T2 Vol. IV RT 850). In fact, Petitioner had sent a letter to the Fresno DA's office on August 30, 1979, as evidenced by the "Received" stamp on that same letter dated September 4, 1979.[28] The letter is contained in discovery produced from the Fresno DA's office.[29]

2. First Trial Guilt Phase

On June 21, 1978, defense counsel filed a Motion in Limine to "enjoin the prosecuting attorney from referring in any way, during the court proceedings, to the fact that the defendant is accused of being involved in an attempt to commit murder, kidnapping for the purpose of robbery and robbery which occurred in the same evening but subsequent to the homicide alleged" in the Graybeal case. (T1 CR Vol. I CT 204) The prosecution stipulated to the Motion and it was granted by the Court. (T1 CR Vol. CT 246).

Using Det. Bonesteel as their witness, the prosecution set up the fabricated one-gun theory using Bonesteel's testimony that he removed four bullets from the gun in evidence: two bullets from the magazine and one from the chamber. (T1Vol. 20 RT 3405)

[28] Exhibit 7j, Stankewitz Letter, dated 8-29-1979
[29] Exhibit 7j, *supra*

Jesus Meras did not testify at the first trial guilt phase.

3. First Trial Penalty Phase

In the penalty phase at both trials, using circumstantial evidence, the prosecution introduced testimony from Mr. Meras and argued that Petitioner had kidnapped, robbed and attempted to murder him late in the evening of February 8, 1978. (T1 Vol. 25 RT 4377 - 4383). (T2 Vol. IV RT 811 – 814)

Meras testified that the first time that he talked to the police was the next day in the morning. (T1 Vol. 25 RT 4337). He further testified that he talked to them around the third day after the crimes and that one of the 'police' that he talked to was DDA Ardaiz. DDA Ardaiz brought out some photographs to show Meras. Although there were apparently men and women in the photos, Meras stated that he was only able to pick out "the girl." (T1 Vol. 25 RT 4339).

DDA Ardaiz argued "the evidence that was presented, with respect to Mr. Meras, . . . you must be convinced beyond a reasonable doubt that those things are true before you may consider them in aggravation of penalty." (T1 Vol. 26 RT 4740, L 19-25). He further argued it "cannot be said that there was a greater hand or a stronger hand that lifted that gun, other than Douglas Stankewitz." (T1 Vol. 26 RT 4742, L 14-16). Later, when referring to Petitioner, said there can be no more major involvement in a crime of murder than pulling the trigger. (T1 Vol. 26 RT 4743, L 12-14). He continued, stating that

> The defendant murdered a young woman." And his course of conduct afterwards, the man, Meras, who came in here, who was a victim, after the murder of Theresa Graybeal, and looking at that, and looking at what was done . . . After the killing of a human being, an innocent person, there was not one moment's pause in attaching the dignity of another human being. (T1 Vol. 26 RT 4745, L 17-26).

And further he stated, "you know what he did after he committed the murder of this girl. And again, that defendant killed a young girl without mercy (T1 Vol. 26 RT 4574, L 21-22) . . .

that he went out, and he tried to do it again . . .” (T1 Vol. 26 RT 4748, L 16-19).

4. Second Trial Guilt Phase

Petitioner’s second trial counsel did not file a Motion in Limine regarding the Meras crimes.[30]

During the 1983 Second Trial Guilt Phase, in his opening statement to the jury, DDA Robinson stated “[t]he same night that Theresa Graybeal was killed, . . . the defendant was arrested along with others who were in the car and that a gun was found in the car.” (T2 Vol. 1 RT 1-L).

Further, that Boudreau of FCSD “made the determination that the expended bullet found near the body of Theresa Graybeal had been fired by the gun that was in the car when the arrests were made. (T2 Vol. 1 RT 1-L).

Also during the second trial guilt phase, Detective Boudreau testified that the gun magazine would hold 7 bullets. (T2 Vol. 1 RT 148). (T2 Vol. 1 RT 156). On cross examination he stated that the magazine held two live rounds of ammunition and one loose live round.

His testimony was elicited to support the fabricated prosecution theory that the same gun was used in both the Graybeal and Meras crimes: 1 bullet was used to kill Graybeal; 3 bullets were fired at Meras; 2 bullets were still in the magazine and 1 bullet was in the chamber. Boudreau’s testimony painted Petitioner as a serial killer and tainted the jury.

However, based on police reports first provided to the defense in 2017,[31] regarding the alleged Meras attempted murder, the bullets recovered were .22 caliber.[32]

During argument to the court, outside the presence of the jury, regarding whether the defense would be allowed to argue in closing that Petitioner had not been charged or convicted of

[30] See Clerk’s Transcript on Appeal, Vol. I & II (T2 CR Vol. I & II); Also See Claim 12, IAC Petitioner’s trial counsel.
[31] Exhibit 7f, *supra* at 2
[32] Exhibit 7a, *supra* at 4; Exhibit 7b, *supra* at 1

the Meras crimes, DDA Robinson misstated the facts, saying "with the defendant and Marlin Lewis in the Pawlowski vehicle, was found a gun."[33] He pointed to the testimony of Bonesteel and Boudreau as the basis for arguing that based on the number of rounds remaining in the gun, one bullet was used to kill Theresa Graybeal and three were fired at Jesus Meras. (T2 Vol. IV RT 880). He further stated that "the evidence has shown beyond a reasonable doubt that the defendant was involved in this incident." (T2 Vol. IV RT 880).

When the Court ruled that the jury would have to decide whether Petitioner's involvement was proven beyond a reasonable doubt, DDA Robinson vehemently opposed the Court, continuing to argue that Petitioner had already been prosecuted for the Meras crimes at the Preliminary Hearing. (T2 Vol. IV RT 883).

DDA Robinson moved Exhibit Number 2, "a photograph of the defendant in 1978, informing the court that witness Jesus Meras referred to that photograph in explaining the hair length of the person with the gun," into evidence. (T2 Vol. IV RT 1029). The jury therefore had the photo to look at during deliberations, thus reinforcing Petitioner's alleged involvement in the Meras crimes.

In his closing at the second trial guilt phase, DDA Robinson falsely argued that later on the night of the murder, Petitioner was sitting in the same car with others. (T2 Vol. III RT 638).

Further, that in the car was the weapon that had been used to take the life of Theresa Graybeal. (T2 Vol. III RT 638).

He stated that the fact that those persons were in that car with the murder weapon connects or tends to connect all of them with the crime. (T2 Vol. III RT 638).

However, the only defendant that Meras ever identified was Menchaca. (PH Vol. 2 RT

[33] As explained in detail in Claim 1, the police reports have varying accounts of whether a gun was in the car.

326) (T1 Vol. 25 RT 4339). (T2 Vol. IV RT 807).

The jury instructions given at the second trial guilt phase included CALJIC 2.00 Direct and Circumstantial Evidence – Inferences and CALJIC 2.01 Sufficiency of Circumstantial Evidence - Generally.[34] These instructions state that circumstantial evidence has the same weight as direct evidence. Based on DDA Robinson's opening statement and closing argument described above, this instruction likely allowed the jury to falsely tie Petitioner to the Meras crimes through circumstantial evidence. No instruction was given regarding the need to find Petitioner guilty of the Meras crimes beyond a reasonable doubt.[35]

5. Second Trial Penalty Phase

During the second trial penalty phase, DDA Robinson told the Court that the Petitioner was tied in to the Meras crimes as an Aider and Abetter. (T2 Vol. IV RT 846). He based his assertion on some of Meras's belongings showing up in the same car in which the Petitioner was arrested. (T2 Vol. IV RT 847).

He further stated that Meras testified to two men and two women being in the car, which would correspond to Topping, Menchaca, Petitioner and Lewis. (T2 Vol. IV RT 846). He continued with his assertion stating that the evidence is clear that the Petitioner was with the others, with Menchaca when this crime was committed. (T2 Vol. IV RT 849).

Despite the court's acknowledgment of the prosecution's advantage by being permitted to present the Meras crimes at the penalty phase (T2 Vol. IV RT 882) without the defendant ever presenting his case to a jury, no jury instructions were given to address this.[36] In the defense closing argument, counsel never raised the Meras crimes and the fact that the prosecution never took the

[34] CALJIC 2.00 and 2.01; See Clerk's Transcript (T2 CR Vol. 2 CT 232 - 233)
[35] See Clerk's Transcript (T2 CR Vol. 2 CT 220 - 301)
[36] See Clerk's Transcript (T2 CR Vol. II CT 220 – 301)

case to trial (T2 Vol. V RT 1109 – 1123). The prosecution presented false circumstantial evidence of Petitioner's guilt of the Meras crimes which was accepted by the court. As a result, one of the Special Instructions given to the jury states 'you shall consider all of the evidence which has been received during any part of the trial of this case.[37] At sentencing, the Court found that Petitioner kidnapped and robbed Jesus Meras. (T2 Vol. V RT 1195). In the Court's Findings and Ruling on Application for Modification under Penal Code Section 190.4(e), dated November 3, 1983, where it denied the defense motion for modification of the verdict imposing the death penalty, it found one aggravating factor in the penalty phase was that the Defendant and two companions kidnapped and robbed Jesus Meras. (T2 CR Vol. II CT 379).

In his Response to the defense Motion For A New Trial, DDA Robinson again misled the court by stating that Billy Brown's testimony was corroborated by the police finding Petitioner and the murder weapon in the vehicle shortly after the murder.[38]

C. The Prosecution Had No Corroborating Evidence to Support Their Theory That Petitioner Committed the Meras Crime, And in Fact Had Evidence That Contradicted That Theory

1. Law Enforcement Did Not Question the Codefendants About the Meras Crime.

No statements were obtained from any of the defendants which confirmed the Meras crimes.[39] Marlin Lewis was asked about the robbery of some Mexican man, farm worker around Rolinda, but he didn't know anything about it.[40] Billy Brown was asked whether the group ever talked about "robbing a man, a Mexican man, of his money, shooting at him?" He

[37] See Clerk's Transcript (T2 CR Vol. II CT 335- 338). This instruction specifically states that the jury is to consider the 'Robbery and kidnapping of Jesus Merarz [sic]
[38] See Clerk's Transcript (T2 CR Vol. II CT 386)
[39] Exhibit 7d, *supra* at 2
[40] Exhibit 7k, FSO Snow/Lean/Ardaiz: Marlin Lewis Interview, dated 2-11-78, at 26

essentially answered no.[41] Law enforcement did not investigate the Meras incident to verify the alleged events, including having officers go to Club Rolinda to interview employees or regular customers about what occurred the night of the Meras crimes.[42] No search warrant was issued nor any search conducted of Christina's Menchaca's residence at the Olympic Hotel, for a gun or other evidence of the Meras crimes.[43]

2. Meras Failed to Identify Petitioner or Codefendants at a Live Lineup in Court.

On February 24, 1978, Mr. Sciandra moved ex parte, for a live lineup prior to the Preliminary Hearing. On the same day, an Order for Lineup was granted by Municipal Judge Armando Rodriguez. (T1 CR Vol. I CT 8 – 12). At the Preliminary Hearing, the defense requested and was granted an exclusion order to keep Meras from entering the courtroom, prior to the lineup. (PH Vol. 1 RT 5).

Mr. Meras did not identify Petitioner at the live line-up, a fact the defense raised at a pretrial hearing on May 3, 1978, to sever the Meras incident (PT Vol. 1 RT 205), and at the first trial. (T1 Vol. 25 RT 4400).

Mr. Sciandra pointed out that Mr. Meras described the car the four individuals were in as a 1967 dark blue Monte Carlo. (PH Vol. 2 RT 338- 339). Ms. Graybeal's car was a red-over-white 1971 Mercury Cougar.

Mr. Meras looked at Petitioner at the Preliminary Hearing and again said he could not identify him as being involved. (PH Vol. 2 RT 340). He admitted he could not pick him out of the photo line-ups he had been shown. (PH Vol. 2 RT 340).

[41] Exhibit 7l, FSO Christensen/Lean/Ardaiz: Billy Brown Interview, dated 2-11-78, at 20
[42] Exhibit 7d, *supra* at 2-3
[43] Exhibit 7d, *supra* at 2-3

Mr. Meras also did not identify Teena Topping or Marlin Lewis as being involved. (PH Vol. 2 RT 346). Meras could not identify the handgun in evidence. (PH Vol. 2 RT 347).

3. Meras' Testimony About the Vehicle Conflicted with Other Evidence.

At the Preliminary Hearing, Meras testified that the man in the front passenger seat had a gun (PH Vol. 2 RT 331). and that he got out of the car on the driver's side. (PH Vol. 2 RT 335).

On cross examination, he testified that he heard a noise that sounded like thunder as he was getting out of the car, but that he was not wounded. (PH Vol. 2 RT 352-353).

He testified further that he heard three shots, fired one right after the other one. (PH Vol. 2 RT 352).

Based on his testimony, if Meras was shot at by a man in the front passenger seat as he got out of the car, it seems likely that he would have been wounded; or that the driver who exited the car so that he could get out would have been wounded. He testified that the woman whom he identified as the prostitute that he hired was wearing a black coat and blue jeans. (PH Vol. 2 RT 342).

However, when Christina Menchaca was arrested a short time later, she was wearing rust colored pants and a rust colored top.[44]

D. The Meras Crimes Were a Key Part of the Prosecution Story Which Was Provided to the Media to Prejudice Potential Jurors to Find Petitioner Guilty.

1. Media Stories at the Time of the First Trial Tied the Meras Crimes to the Graybeal Murder.

At the time of Petitioner's arrest for the murder and through the first trial in 1978, there was extensive media coverage of the case. This was true for many reasons, including the killing of

[44] Exhibit 7n, FSO Photos of Menchaca Clothing; Exhibit 7o, FCSC Menchaca Mugshot Photo

a young woman, this case being the first death penalty case tried after the death penalty was reinstated and an ambitious prosecutor. The media got its information from law enforcement and the District Attorney's office. Media coverage by the Fresno TV stations and local newspaper refer to the Meras crimes. The reports and articles attached here, all reference Petitioner being a perpetrator in the Meras crimes.[45]

E. In a Recent Interview, Jesus Meras Said That the Robbery Occurred in 1975 or 1976, Not 1978.

On March 15, 2020, a defense investigator interviewed Jesus Meras. During the interview, he stated that he was robbed in either 1975 or 1976.[46]

[45] Exhibit 7m, Fresno TV scripts and Fresno Bee articles from 1978.
[46] Exhibit 7p Jonah Lamb, Investigator Memo re: Meras interview, dated 3-15-2020, at 4

CLAIM 8: THE STATE UNLAWFULLY CHARGED PETITIONER WITH FIRST DEGREE MURDER ALTHOUGH IT KNEW THAT PETITIONER HAD A MENTAL DEFECT DIAGNOSED BY PSYCHIATRIC EXPERTS THAT PREVENTED FORMATION OF THE INTENT NECESSARY FOR PREMEDITATION AND DELIBERATION, IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7; AND HIS RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT.

As of March 3, 1965, Petitioner was determined to have no parental control and he became a ward of the court.[1] Starting as early as 1970, Petitioner was under the supervision of the Fresno County Probation Department, which kept extensive records regarding his psychiatric and psychological history, starting from age 6.[2]

According to a May 29, 1973 Juvenile Court report, which included details of his medical history starting in 1965, Petitioner had possible "neurological brain damage."[3] An EEG test administered to Petitioner at Napa State Hospital on August 24, 1965, when he was six years old, was "significantly abnormal, showing a widespread chronic dysfunction, probably of a chronic nature."[4]

Other records that showed Petitioner suffered from a temporal lobe disturbance, likely had neurological damage to his executive area of functioning, and had an extremely severe emotional disturbance.[5] This evidence included a 1970 report noting that an EEG exam conducted by Dr. Mark Zeifert when Petitioner was 11 years old, documented his temporal lobe damage, and included a recommendation that he be given anti-psychotic drugs.[6]

There is no record to show that the prosecution did not have all of these records in its possession at the time of both trials. These mental defects and conditions meant that Petitioner

[1] Exhibit 8a, Fresno Neuro Simmang Rpt, dated 3-11-1965
[2] Exhibit 8b, Parole Agent I Dave Innis, dated 9-30-76
[3] Exhibit 8c, FCSC Social Report, dated 5-29-73
[4] Exhibit 8d, SOC Dept of Mental Hygiene 8-24-65
[5] Exhibit 8a, *supra*
[6] Exhibit 8e, Fresno Neuro Zeifert Rpt with EEG, dated 5-6-70

could not form the requisite intent to premeditate and deliberate required for the prosecution to charge him with first degree murder.

In the Court's Findings and Ruling on Application for Modification under Penal Code Section 190.4(e), dated November 3, 1983, where it denied the defense Motion for Modification of the verdict imposing the Death Penalty, it found that there was no evidence that the Defendant was under the influence of extreme mental or emotional disturbance. (T2 CR Vol. II 381).

CLAIM 9: SPECIAL CIRCUMSTANCES WOULD HAVE BEEN REJECTED BY THE JURY IF THEY HAD EVIDENCE WITHHELD BY THE PROSECUTION AND INVESTIGATION HAD BEEN DONE BY THE DEFENSE BEFORE THE JURY TRIALS THIS WITHHOLDING OF EVIDENCE VIOLATED PETITIONER'S RIGHTS UNDER BRADY V MARYLAND AND HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7.

As explained previously in this Writ, Petitioner is not guilty of murder, therefore there is no underlying murder finding necessary for the special circumstance. See Claims 1, 2 and 3. Further, as explained previously in this Writ, Petitioner is not guilty of murder, therefore he is not guilty of murder during kidnapping. See Claims 1, 2 and 3.

Petitioner was charged with special circumstances as follows: (T2 CR Vol. 1 CT 17-20)

First Special Circumstance as charged. The murder of Theresa Graybeal was willful, deliberate and premeditated, and that the murder of Theresa Graybeal was personally committed by Defendant Douglas Ray Stankewitz during the commission and attempt commission of a robbery in violation of Section 211 of the Penal Code.

Second Special Circumstance as charged. The murder of Theresa Graybeal was willful, deliberate and premeditated, and that the murder of Theresa Graybeal was personally committed by Defendant Douglas Ray Stankewitz during the commission and attempted commission of a kidnapping in violation of Section 207 of the Penal Code.

In the second trial, the jury was given several instructions pertaining to special circumstances. The First Special Instruction included both robbery and kidnapping, (T2 CR Vol. 2 CT 273 - 277) and directed the jury to decide whether the prosecution had proved 'that the murder was wilful, [sic] deliberate and premeditated, and that defendant was personally present during the commission of the act causing the death and that defendant with intent to

cause death, physically committed the act causing death; and that the murder was committed during the commission of attempted commission of a robbery. The instruction contained the same language with regard to the kidnapping.

The jury received three other instructions regarding special circumstances:

CALJIC 8.83.1Special Circumstances – Sufficiency of Circumstantial Evidence to Prove Required Mental State. This instruction states in part, that the jury 'may not find the special circumstances charged in this case to be true unless the proved facts not only are consistent with the theory that the defendant had the required mental state but cannot be reconciled with any other rational conclusion.[1]

CALJIC 8.86.1No title which says in part 'Each fact which is essential to complete a set of facts necessary to establish the truth of the special circumstances must be proved beyond a reasonable doubt.'[2]

CALJIC 8.86.3 which says in part 'If you find from the evidence that at the time the alleged crime was committed, the defendant had substantially reduced mental capacity, whether caused by mental illness, mental defect, intoxication, or any other cause, you must consider what effect, if any, this diminished capacity had on the defendant's ability to form the intent to cause death [or] [to form any of the specific mental states essential to the commission of wilful, deliberate and premeditated murder,] [or] [to form the specific intent or mental state essential to constitute the crime of robbery and/or kidnapping.]'[3]

If there was any reasonable doubt in the jury's mind that Petitioner pulled the trigger, they would not have found the special circumstance true. If there was any reasonable doubt in the jury's

[1] See Clerk's Transcript (T2 CR Vol. 2 CT 271 [the second page 271]) CALJIC 8.83.1 Special Circumstances – Sufficiency of Circumstantial Evidence to Prove Required Mental State
[2] See Clerk's Transcript (T2 CR Vol. 2 CT 275) CALJIC 8.86.1
[3] See Clerk's Transcript (T2 CR Vol. 2 CT 276 – 277) CALJIC 8.86.3

mind that he premeditated and deliberated the killing, even if they found beyond a reasonable doubt that he was the actual shooter, they could not have found the special circumstances to be true. In light of what we now know regarding Billy Brown's recantation,[4] and the prosecution's failure to disclose certain evidence[5]—as well as their argument on the evidence that was extremely misleading[6]—it cannot be said the jury would not have reached a different verdict.

The jury never knew that the gun presented to them as the murder weapon, was in fact not the murder weapon, because it was in the possession of law enforcement for the five years preceding the murder through the time of the murder. As explained in Claim 2, Petitioner was not present at the time of the murder. Therefore, he was not the triggerman.

As detailed in Claim 8, the prosecution had knowledge of Petitioner's mental defect, as documented by psychiatric testing starting from age six.[7] Further, without defense counsel obtaining all the records, interviewing and bringing in the experts that had tested and evaluated him and prescribed a regimen, for years, of anti-psychotic drugs, the jury had nothing definitive to consider and rely on. No experts, whatsoever, were called, or even interviewed, for the 1983 trial.[8]

In some retried cases, second trial counsel could use the experts called in defendant's earlier trial as a reference point. Here, however, the few called in 1978 did not have anywhere near an adequate history to base their opinions on, and none of the dozen or more psychiatrists and psychologists that treated Petitioner during his 5 year childhood stay at, and monitoring period by, Napa State Hospital, were ever consulted or called.[9]

[4] See Claim 6, *supra*
[5] See Claim 5, *supra*
[6] See Claim 2, *supra*
[7] See Claim 8 Mental Defect, *supra*.
[8] See Claim 12 IAC Trial Counsel, *infra*; and Exhibit 9a, Declarations of Hugh Goodwin, dated 12-28-1989 & 11-15-1995
[9] See Claim 5.G.2, *supra*, for a detailed explanation.

Petitioner asserted in both of his trials that he was under the influence of heroin at the time of the offense. This condition of intoxication was relevant to the guilt phase, in particular, because it would contribute both to a diminished capacity argument, as well as the argument that he did not have the requisite mental state of "premeditation and deliberation" to satisfy the special circumstances. The evidence of intoxication was overwhelming—the jury, however, did not hear it. The jury heard Billy Brown confirm that when Topping, Menchaca and Petitioner returned from the Olympic Hotel, the three of them were acting differently. Petitioner was drowsy, nodding off and scratching himself (classic symptoms of heroin intoxication—though the defense never called an expert to explain this). (T2 Vol. II RT 529 – 30) Lewis confirmed to police that Petitioner, Topping and Menchaca went up to the hotel and used.[10]

Furthermore, the prosecution was well aware that Christina Menchaca had admitted to the police that Topping gave her some money (around $30.00—the money she had taken from Ms. Graybeal) and she purchased 3 bags of heroin with it.[11] She, Topping and Petitioner then went into the Olympic Hotel and they each injected a bag.[12] During the time that Petitioner, Topping and Menchaca were getting high on heroin, Petitioner left Mrs. Graybeal at the car with codefendant Lewis.[13] If he had been intent on killing the victim, it seems unlikely that he would take the time to get high or risk being high and incapable of committing murder. It seems more likely that he would have killed her before he went off to get high.

The series of events that the codefendants described in their statements does not add up. They all agree that Petitioner, Topping and Menchaca used the $30.00 that they received from Mrs. Graybeal to purchase 3 bags of heroin. Lewis stated that "when they came up, came

[10] Exhibit 9b, FSO Snow/Lean/Ardaiz: Lewis, M Interview, dated 2-11-78, at 6
[11] Exhibit 9c, FSO Snow/Lean/Ardaiz: Menchaca, C Interview, dated 2-11-78, at 48, 57, 61
[12] Exhibit 9d, Declaration of Teena Topping, dated 11-22-1998
[13] Exhibit 9e, FSO Snow: Lewis, M Interview, dated 2-9-78, at 18-19; Exhibit 9b, *supra* at 6; Exhibit 9c, *supra* at 69

back, they didn't have no money."[14] So, driving to Calwa to score more heroin was not likely, since they did not have more money to purchase more heroin. Further, they had just shot up and were still high when Brown, Lewis, Menchaca and Topping went to Calwa.

The jury did not hear about Petitioner shooting up heroin, but the prosecution was well aware of it. The defense in 1978 moved to sever Petitioner's trial from Topping's[15], so Topping could testify that she had injected Petitioner with heroin at the Olympic Hotel—but that motion was denied[16]. Topping later signed an affidavit under penalty of perjury that she had injected Mr. Stankewitz with heroin at the time in question.[17] Ms. Topping, as previously mentioned, is deceased. Menchaca confirmed that Petitioner fixed a bag of heroin.[18] According to the codefendants's statements, including his own, Marlin was the only one who didn't shoot up heroin that evening.[19]

After Petitioner's arrest, the Deputy District Attorney obtained a court order to draw Petitioner's blood.[20] This blood draw was done 24 hours after his use. The D.D.A., accompanied by Fresno Sheriff Officers did the blood-draw.[21] An injection site was noted on Petitioner's arm. A report was written indicating an opinion of Officer Satterberg,[22] with no indication that Satterberg had any training or expertise regarding the physical effects of drug injection, that the blood scabbing at the injection site would indicate heroin use 12 hours earlier than the time

[14] Exhibit 9e, *supra* at 18
[15] See Clerk's Transcript (T1 CR Vol. 1 CT 75 – 86)
[16] See Clerk's Transcript (T1 CR Vol. 1 CT 108)
[17] Exhibit 9d, *supra*
[18] Exhibit 9c, *supra* at 69, 71-72
[19] Although they stated that Petitioner, Menchaca & Topping injected heroin, neither the codefendants statements, nor Billy Brown's statements or testimony say that Marlin injected heroin on February 8. See Exhibit 9e, *supra* at 19; Exhibit 9b, *supra* at 6; Exhibit 9c, *supra* at 71-72
[20] The Court Order signed by Judge Armando Rodrigues, is not found among in either the case court files nor any of the discovery turned over by the prosecution. See Exhibit 9l, Declaration of Alexandra Cock, dated 9-18-2020, at 3
[21] Exhibit 9f, FSO Ronlake, T. Follow Up Rpt, dated 2-10-1978
[22] Exhibit 9g, FSO Satterberg, Follow Up Rpt, dated 2-9-78

Petitioner had gone into the Olympic Hotel with Topping and Menchaca (12 hours earlier he had been with his mother and the rest of the group in Manteca—and had no money). The test, not surprisingly, was negative for heroin.[23]

Heroin, in 1978, would only test positive in the blood within 12 hours of use (at most), using the radioimmunoassay test—which was the only test in use at that time (within the last 30 years, the gas chromatography-mass spectrometry test, GC/MS, was perfected to screen for drugs, and is able to determine the presence of morphine molecules indefinitely in properly preserved specimens). Although Petitioner's first trial counsel communicated with Phillip Reynolds of the Institute of Forensic Sciences regarding writing a report regarding the effect of the passage of time on heroin in the blood of a human being, there are no records or reports indicating that Petitioner's blood was submitted for testing.[24]

Unfortunately, the blood drawn from Petitioner on 2-9-78, is yet another 'lost' piece of evidence.[25] Somehow, the prosecution managed to preserve the vial of blood taken from George Key, court evidence exhibit 72, but not the victim's nor Petitioner's blood and the blood of the codefendants subsequently drawn on 3-4-1978, for other testing reasons. Therefore, the defense is unable to have the blood tested now.

At the 1983 trial, the jury heard that Petitioner had a possible injection site on his arm, and Brown's description of him when he came out of the Olympic Hotel, got into the car and rode out to Calwa with them. At the second trial, Officer Rodriguez testified that at the time of arrest, Petitioner was able to turn around, walk backwards six steps, kneel down and cross his feet without any difficulty. (T2 Vol. I RT 96 – 97) He further testified that later at the Fresno Police Department

[23] Exhibit 9h, Pathological & Clinical Services report, Nelson, T.C. Dr. dated 4-17-1978
[24] Exhibit 9i, Sciandra, S, letter to Reynold, dated 4-21-78; and Exhibit 9j, Reyolds letter to Sciandra, S, dated 4-26-78
[25] Exhibit 9k, FSO voicemail message to Christine, Federal Public Defender, dated 1-24-2013

that he observed that Petitioner appeared to walk normally, that he didn't notice anything unusual about his eyes or manner of speech and that he did not notice any signs that he might have been under the influence of anything. (T2 Vol. I RT 99) With law enforcement testifying that Petitioner was not under the influence, and Billy testifying that he was acting differently, the jury more likely believed the officer.

The defense made no attempt to show the length of time someone's symptoms would be evident after having injected heroin.

Not surprisingly, at the second trial closing argument, the prosecution argued he had not used any heroin and was perfectly sober at the time of the homicide. The DDA discounted Billy Brown's testimony, his own witness, who had testified to the jury that Petitioner's behavior was consistent with being high on heroin. (T2 Vol. III RT 598) He then used the testimony of Officer Rodriguez described above to argue that 'Defendant was not under the influence of anything as far as he could see.' (T2 Vol. III RT 598)

Although they knew that the facts showed otherwise, in order to shore up the reasonable doubt argument on the special circumstances, the prosecution falsely put Marlin Lewis inside the car at the time Theresa Graybeal was shot. (T2 Vol. II RT 405)

The jury instructions on the special circumstances given required far more than the present instructions require before they could be found true. The jury had to specifically find that premeditation and deliberation to murder were proven beyond a reasonable doubt and that Petitioner was the actual killer.[26] Petitioner's mental defects[27] and conditions meant that a reasonable jury would not find, beyond a reasonable doubt, that Petitioner had the requisite intent

[26] For an explanation as to why Petitioner was not the killer, See Claims 1 and 2, *supra*.
[27] For an explanation of Petitioner's mental defect, See Claim 8, *supra*.

and capacity to premeditate and deliberate a killing.[28] Unless those additional elements were found, there would be no penalty phase and a life with parole sentence would result. Petitioner is entitled to rely upon 1983 instructions to assert his right to a new guilt phase trial.

Conclusion. This was one more example of how the prosecutor ignored evidence he knew the jury would not hear or consider, which would have reduced or eliminated Petitioner's culpability, and which misled the jury to believe that Mr. Stankewitz was not under the influence, nor had any mental defect, and have him put to death. It is also one more example of how defense counsel utterly failed to effectively defend against the misconduct and gamesmanship that was going on.

[28] Note: People v. Saille, (1991) 54 Cal. 3d 1103; 820 P.2d 588; 2 Cal. Rptr. 2d 364; People v. Reyes, (1997) 52 Cal. App. 4th 975, 985; 61 Cal. Rptr. 2d 39; and People v. Castillo (1997), 16 Cal. 4th 1009, 1200; 68 Cal. Rptr. 2d 648; were decided after CA Penal Code Section 28 was adopted in 1981.

CLAIM 10: THE VERDICT OF PERSONAL USE OF A FIREARM UNDER PC 12202.5 WAS BASED ON FALSE EVIDENCE PRESENTED BY THE STATE, IN VIOLATION OF PETITIONER'S RIGHTS UNDER BRADY V MARYLAND AND HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7.

One of the basic tenets of the prosecution's case against Petitioner was that he used a gun in the crimes. A PC 12202.5 relies on proving that a firearm was in the possession of the defendant and that same weapon is presented at trial. As discussed at length in Claim 1, although the prosecution knew that the gun in evidence was stolen and in the possession of law enforcement starting five years prior to the murder, it introduced a gun into evidence and represented that it was the gun used in the murder, kidnapping and robbery. However, nothing credible supported the PC 12202.5 gun charge.

The Second Amended Information against Petitioner included the following charge: That during the commission and attempted commission of the offenses, the said defendant personally used a firearm, A pistol. (T2 CR Vol. I CT 17 - 20)

At Petitioner's second guilt phase trial, the jury was instructed as follows:

It is alleged in Counts 1, 2 & 3 that the defendant personally used a firearm during the commission of the crimes charged.

The word "firearm" includes any device designed to be used as a weapon from which a projectile may be expelled by the force of an explosion or other form of combustion.

The term "used a firearm" as used in this instruction, means to display a firearm in a menacing manner, intentionally to fire it, or intentionally to strike or hit a human being with it.

The defendant may be found to have personally used a firearm during the commission of such felonies, only if the proof shows beyond a reasonable doubt that such defendant

personally used a firearm at such time. (T2 CR Vol. II CT 287 - 288)

No direct credible testimony places a gun in Petitioner's hands, let alone that he displayed it in a menacing manner. The sole basis of proof that he had possession—at any point—of a firearm was the testimony of Billy Brown. See Claim 6, Supra, for an explanation about Billy's lack of credibility. Billy Brown gave several versions of whether Petitioner or codefendant Lewis had the gun at various points during the day and evening of February 8. These included:

Petitioner had a gun during the drive from Modesto (PH Vol. I RT 61)

Lewis had the gun to the victim's back during the drive from Modesto to Fresno (PH Vol. I RT 62) and (T1 Vol. 18 RT 3049, 3160-3167)

Billy couldn't remember whether he saw any weapons or a gun (T2 Vol. I RT 167), but then says that he testified at the preliminary hearing that he saw Lewis holding a gun to the victim's back (T2 Vol. I RT 167)

His testimony regarding the use of a gun and "chain of custody" inconsistencies in his statements to police, court testimony and subsequent recantation, means that no reasonable jury would find beyond a reasonable doubt that Petitioner had a firearm at any point.

Given the prosecution's reliance on false testimony and the defense failure to investigate or mount an innocence defense, the jury was further never informed that:

There was physical evidence which showed that the Petitioner did not handle or fire a gun, including the fact that he tested negative for Gun Shot Residue. Also, his fingerprints were not found on the gun in evidence.[1]

There was circumstantial evidence that Petitioner did not have possession of a gun:

[1] For a detailed explanation, see Claim 1, *supra*.

As explained in Claim 1, police reports listed descriptions of multiple guns but contained no proof that any gun was in the possession of Petitioner. This lack of proof tying him to any gun is exculpatory for Petitioner.

The codefendants' statements conflict as to whether Petitioner or codefendant Lewis had a gun at various points in time. Topping told police that once they got in the victim's car, in order to scare the victim, Petitioner pulled out a gun[2] and Lewis pulled out a knife but that they only had them out for a short time.[3] In fact, Lewis told the police multiple times that he had a gun at many points in time, including during the kidnapping when he pointed the gun at the victim,[4] and after the murder.[5] Police reports state that a gun was found under the front driver's seat,[6] Officer Rodriguez, who wrote those reports, in referring to a photo of the victim's car, testified that there was a barrel portion of a gun protruding from under the seat in the left rear portion of the car. (T2 Vol. 1 RT 100). This was directly in front of where Lewis was sitting in the car when the defendants were arrested. (T2 Vol. I RT 104)

Lewis's admissions about having a gun, that he was holding it for Petitioner,[7] that he placed a gun under the seat in front of him,[8] are consistent with his admission that he killed the victim.[9] Absent credible evidence of trial witnesses, and the existence of credible evidence withheld from the jury, showing that a third party, Lewis, had possession of a gun, the jury's verdict was improper and based on false evidence.

[2] Exhibit 10a, FSO Snow/Lean/Ardaiz: Topping Interview, dated 2-11-78, at 11 -12
[3] Exhibit 10b, FPD Snow& Brown, L: Topping Interview #2, dated 2-9-78, at 2
[4] Exhibit 10c, FSO Snow: Lewis Interview, dated 2-9-78, at 15; Exhibit 10d, Snow/Lean/Ardaiz: Lewis Interview, dated 2-11-78, at 4, 5, 28, 29-30
[5] Exhibit 10d, *supra* at 11, 12
[6] Exhibit 10e, FPD Callahan & Rodriguez, Stolen Vehicle Report, dated 2-8-78, at 4; Exhibit 10f, FPD Callahan & Rodriguez, Follow Up Rpt., dated 2-15-78, at 3
[7] Exhibit 10c, *supra* at 8
[8] Exhibit 10c, *supra* at 4, 8
[9] See Claim 3 New Evidence, *supra*; Exhibit 10g, Declaration of Laura Wass, dated 1-8-20

CLAIM 11: THE PROSECUTION ENGAGED IN MISCONDUCT STARTING IN TO 2010 AND CONTINUING TO THE PRESENT, IN VIOLATION OF PETITIONER'S RIGHTS UNDER BRADY V MARYLAND, HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7; AND HIS RIGHT TO PRESENT A DEFENSE UNDER THE SIXTH AMENDMENT.

A. The Prosecution Failed to Follow Discovery Rules.

Notwithstanding the fact that the original discovery order has been in effect since April 24, 1978, the prosecution has committed numerous discovery violations. These violations have prevented, and continue to prevent Petitioner, from getting a fair trial and establishing his innocence of the crimes for which he was convicted.

On June, 22, 2010, Petitioner's federal habeas counsel requested discovery from the FPD and FSO pursuant to *Brady v. Maryland* and the California Public Records Act.[1] In response, Sheriff Margaret Mimms refused to turn over any records, writing "Release by Subpoena Only."[2] Similarly, in response to a request for records and materials pertaining to Petitioner, DDA Dupras stated in a letter dated July 2, 2010, that their office would not provide any records or materials pursuant to the California Public Records Act or *Brady v. Maryland*.[3]

Petitioner's federal habeas counsel then filed a Motion for Post-Conviction Discovery Under Penal Code Section 1054.9 on August 31, 2011.[4] The Motion, which was very comprehensive, requested discovery based on the original discovery order granted on April 24, 1978. On January 13, 2012, the Fresno DA provided a CD of 3,961 pages of discovery.[5] At that time, the DA's office should have conducted a thorough search for all materials in their possession.[6]

[1] Exhibit 11a, Federal Public Defender letter to FPD, dated 6-22-1010; Exhibit 11b, Federal Public Defender letter to FSO, dated 6-22-2010; See *Brady v. Maryland,* 373 U. S. 83 (1963); see also CA Gov. Code 6250 - 6276.48 (Public Records Act)
[2] Exhibit 11b, *supra*
[3] Exhibit 11c, FCDA Dupras, J. Letter to Sheree Cruz-Laucirica, Federal Public Defender, dated 7-2-10
[4] Exhibit 11d, FCSC Motion for Post-Conviction Discovery under Penal Code 1054.9, dated 8-31-2011
[5] Exhibit 11e, FCDA Dupras, J. letter to Harry Simon, Federal Public Defender, dated 1-13-2012
[6] CA PC § 1054.1

Upon doing so, if in fact, the entire case files for Petitioner, Topping, Menchaca, Brown and Lewis, were missing, they should have known. They did not state at that time that the files were missing.

Since Petitioner's penalty phase was reversed in 2012, the prosecution has continued to engage in substantial misconduct. Between 2012 and 2017, discovery has been addressed multiple times with the prosecution, through several DDAs, each telling the court over the course of several years that it had provided all discovery. Those representations are contained in the record as follows: (PRH Vol. V RT 82); (PRH Vol. VI 87); (PRH Vol. XX RT 242); (PRH Vol. XXIV 289); (PRH Vol. XXV 339); (PRH Vol. XXVII RT 408).

On or about May 5, 2016, defense counsel caused to be served a Subpoena Duces Tecum upon the FSO directly. Said Subpoena sought production of documents, evidence and other records related to the Meras allegation.[7] At that time, Petitioner was in Fresno Superior Court pending a retrial of the penalty phase. The prosecution made assertions in the unadjudicated Meras allegation, and subsequently used evidence of that allegation to show an alleged pattern of behavior by the Petitioner to support the prosecution's depiction of him. This included use of the alleged Meras crimes as aggravation in the penalty phase at both trials. Therefore, all investigative documents and evidence should have been made available pursuant to the Subpoena and subsequent discovery requests in order for the defense to challenge the legitimacy and accuracy of the allegations.

As of Petitioner's sentencing date in May, 2019, the FSO had still failed to fully comply with the Subpoena Duces Tecum served upon it and the Fresno District Attorney's office. What had been produced did not include items of evidence which had either been disposed of and no longer existed (for example, the three .22 caliber casings), or were never produced in violation of the Subpoena Duces Tecum.[8]

[7] Exhibit 11f, Declaration of Peter Jones, dated 6-15-2020, at 1, with Subpoena attached.
[8] Exhibit 11f, *supra* at 3

The defense made a request to the Fresno Sheriff's Office in 2019, pursuant to the California Public Records Act for their procedures including, but not limited to, evidence handling and storage, crime scene processing, investigation procedures.[9] The FSO acknowledged receipt of the request and said that they needed more time to provide the materials.[10] No documents were ever received.[11]

B. The Prosecution Lost the Entire Case File for Petitioner and His Codefendants.

After numerous instances of stating on the record that the prosecution had turned over all evidence, DDA Pebet turned over reports on August 8, 2017 that had never before been provided to the defense.[12]

After counsel for Petitioner publicly asserted that Petitioner was framed by prosecutors, DDA Pebet told the Court that the District Attorney's Office did not have the original files on this case for Petitioner, Billy Brown, Christina Menchaca, Teena Topping, or Marlin Lewis. (PRH Vol. XXVII 403 – 404) DDA Pebet gave no explanation for why her office did not have these files or when the Fresno County District Attorney's Office determined that it did not have the files.

Despite providing a number of discovery items previously in 2017, including one report which is exculpatory, DDA Pebet failed to mention at any time that no original files existed. Only in response to defense efforts to view evidence and after substantial misconduct allegations were made, DDA Pebet stated on October 12, 2017, that all original files prior to 2012, including the entire prosecution case file, had been lost. (PRH Vol. XXVII RT 404-05).

[9] Exhibit 11s, FCSO Access to Public Records, dated 12-7-2019
[10] Exhibit 11t, FSO letter in Response to PRA request, dated 12-16-2019
[11] Exhibit 11u, Declaration of Alexandra Cock, dated 9-18-2020, at 1
[12] Exhibit 11g, FSO Christensen & Lean Crime Rpt, dated 2-13-78; Exhibit 11h, FSO Sarment Technical Service Rpt., dated 2-13-78

The withholding of material discovery by the prosecution was outlined in depth in the Second *Trombetta* Motion to Dismiss filed by the defense with the Fresno Superior Court on December 5, 2018.[13] The prosecution was given two extensions of time, for a total granted response time of 70 days. (PRH Vol. XXXIV RT 492) Despite those extensions, the prosecution has never responded to the motion. (PRH Vol. XXXIV RT 492) On March 22, 2019, the court stated that its "intent was to take up the matter the next date and proceed to any argument and ruling." (PRH Vol. XXXIV RT 492) However, on the next date, May 3, 2019, the court declined to rule on the motion. (PRH Vol. XXXV RT 501). Pursuant to California Rule 8.54, the Court should have taken the failure to respond as consent to the granting of the motion.[14] Instead, when defense counsel requested, for medical reasons, more time for oral argument on the motion to dismiss, the Court denied the request. (PRH Vol. XXXV RT 500-501). In his written motion, Petitioner cited 9th Circuit case law which says that if a court is not going to dismiss the case, it must hold an evidentiary hearing.[15] An evidentiary hearing would give Petitioner the opportunity to question the actions of the prosecution, including law enforcement, to determine whether its acts were lawful and in accordance with its policies and procedures.

Nonetheless, the trial court failed to rule on the motion.

C. The Prosecution Knowingly Made False Statements Regarding the Victim's Height.

Perhaps the most egregious misconduct was committed by DDA Pebet, when she affirmed on the Record the false testimony given by Detective Boudreau during the first and second trials regarding the height of the victim.[16]

[13] Exhibit 11i, FCSC Second Motion to Dismiss For Failure To Preserve, Or Destruction Of Evidence, dated 12-5-2018
[14] Cal. R. of Ct. § 8.54
[15] *United States v Cooper*, 983 F.2d 928 (USCA 9th Cir. 1993)
[16] For detail, see Claim 2, *supra*

DDA Pebet further misrepresented to the court that the autopsy report was a "draft notes document used to prepare a report by the coroner." (PRH Vol. XXVI RT 372).

The autopsy report was prepared as a result of the autopsy performed by a highly qualified and experienced forensic pathologist, Dr. T. C. Nelson.[17] It documented his findings regarding the cause of death and the condition of the victim's body. DDA Pebet stated that the fact that the report was only notes was supported "by the fact that it is clear that the time and date of death was not 1:23 a.m. on February 9th, that is 1978." (PRH Vol. XXVI RT 372).

In fact, according to a report filed by FPD Brown, Det. Snow did not find the body until 0123 hours on February 9, 1978.[18] This is confirmed in a separate report by FSO Officer Elliott dated February 9, 1978, which states that the victim was deceased at 0123 hours.[19] According to the victim's death certificate, which was signed by a Deputy Coroner, Mary Baronian, the Sheriff/Coroner is listed as Harold McKinney.[20] The prosecution has never produced a coroner's report.[21]

Thus, despite DDA Pebet's statement, either no coroner's report exists or, like so much other potentially exculpatory evidence, it has been lost or destroyed by the prosecution.

DDA Pebet has said that she stands by the transcripts of the first and second trials, without stating any basis for that position. (PRH Vol. XXVI RT 372). In doing so, she has perpetuated the erroneous testimony by Detective Boudreau that the height listed in the report was not the victim's real height, but was rather a measurement from the sole of the victim's feet to the entry wound. In his recent declaration, Det. Boudreau states that "[a]s I testified at the second trial, the purpose in

[17] Exhibit 11j, Declaration of Dr. Jerry Nelson, dated 3-19-2019, at 1
[18] Exhibit 11k, FPD Brown, L. W. Rpt, dated 2-9-78, at 2
[19] Exhibit 11l, FSO Elliott, G. Rpt, dated 2-9-78, at 3
[20] Exhibit 11m, Graybeal, T. Death Certificate, dated 2-13-78
[21] Exhibit 11m, *supra*

determining the height up to the defendant's shoulders was to provide information that DDA James Ardaiz wanted to present as a part of his case in chief. The autopsy report prepared by Dr. T. C. Nelson shows that the height of the victim was 160 cm, approximately 5'3". This refers to her height from head to toe. When DDA Warren Robinson asked me to assume that the victim was 5'7", I did not correct him despite the actual height of the victim as stated in the autopsy report.[22]

The assertion that "height" meant something other than its ordinary definition has been disavowed by Dr. Jerry Nelson, forensic pathologist and brother of Dr. T.C. Nelson, who performed the autopsy.[23] In his attached declaration, he states that he and his brother performed thousands of autopsies over the course of their careers. He confirms that the term "height" used in the autopsy report is the actual height of the victim, i.e., the measurement from the soles of her feet to the top of her head.[24]

Given that all of the height descriptions from other witnesses were only approximations, the height given in the autopsy report is the only reliable measurement that exists. DDA Pebet further stated without any factual basis that the victim's height was known to be 5'7" and that that measurement supported Billy Brown's testimony at both trials. (PRH Vol. XXVI RT 372-373).

However, Billy Brown had no independent verification of the height of the victim. He was testifying, under threat of a murder charge against him, as he was instructed.[25]

C. The Prosecution Has Perpetuated the Fabricated Theory of the Murder Weapon.

DDA Pebet argued against dismissing Petitioner's case, saying that she might or might not use the Meras crime in the penalty phase retrial. (PRH Vol. XXVI RT 377-378). She knew that the shell casings from the Meras crime did not match the gun allegedly used in the Graybeal

[22] Exhibit 11n, Declaration of Allan J. Boudreau, dated 3-14-2020, at 4-5
[23] Exhibit 11j, *supra* at 1
[24] Exhibit 11j, *supra* at 1
[25] See Claim 6, *supra*

murder. (PRH Vol. XXVI RT 377). She admitted that the shell casings from the Meras case were no longer in evidence. (PRH Vol. XXVI RT 377).

They were replaced with .25 test shell casings that had nothing to do with the Meras case in order to mislead anyone who looked at the FSO evidence into thinking that they were from the Meras case.[26]

DDA Pebet also knew from information available to her, that Jesus Meras never identified Petitioner as a perpetrator in the crimes against him.

Mr. Meras did not identify Petitioner at the live line-up, a fact the defense raised at a pretrial hearing on May 3, 1978, to sever the Meras incident and at the first trial. (PT Vol. I RT 205).

Mr. Meras also did not identify Teena Topping or Marlin Lewis as being involved. Mr. Sciandra pointed out that Mr. Meras described the car the four individuals were in as a 1967 dark blue Monte Carlo. (PH Vol. II RT 338-9). Ms. Graybeal's car was a red-over-white 1971 Mercury Cougar.[27]

Mr. Meras looked at Petitioner at the preliminary hearing and again said he could not identify him as being involved. (PH Vol. II 340). He admitted he could not pick him out of the photo line-ups he had been shown. (PH Vol. II 340).

D. The Prosecution Never Filed a Notice of Aggravation Prior to the Penalty Re-Trial.

Over six years after the penalty phase was reversed, the trial Court scheduled a trial first for May, 2019, and then for November, 2019. (PRH Vol. XXXIV 491). The prosecution had many months to file the notice of aggravation.

[26] Exhibit 11o, FCDA DA Investigator Mike Garcia, Rpt of Investigation dated 7-20-2017, at 2; Exhibit 11f, *supra* at 2

[27] Exhibit 11p, FPD Inventory Towing Rpt, dated 2-8-78

The defense was entitled to reasonable notice of what the factors of aggravation were that would be used against Petitioner.[29] No notice of aggravation was ever filed by the prosecution. Continuing to press for the death penalty without informing the defense of the aggravating factors that it intended to use is another instance of prosecutorial misconduct.

[29] CA Penal Code 190.3

CLAIM 12: PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR AND RELIABLE DETERMINATION OF GUILT AND PENALTY BY TRIAL COUNSEL'S PREJUDICIALLY DEFICIENT PERFORMANCE IN FIRST AND SECOND TRIALS, IN VIOLATION OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT AND UNDER THE CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 15.

Even though each act of misconduct, *Brady* violation, and IAC independently deprived Petitioner of his constitutional rights, Petitioner is still, to this day, at the potent effect of his second trial counsel's failures as outlined below.

A. I.A.C. as to the Guilt Phase of the Second Trial is a New Claim Not Raised in Prior Writs or Appeals

Although this case has been in the courts for over 42 years, with appeals and habeas writs, ineffective assistance of counsel regarding the guilt phase in Petitioner's second trial has never been addressed in either state or federal court. Some IAC issues have been raised in previous appeals and habeas writs.[1] However, the IAC issues previously raised pertained only to Petitioner's mental defense in the second trial.[2]

Furthermore, the discovery of new and false evidence since 2017 casts new light on the competency of trial counsel. (See Claims 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, Supra.)

B. Second Trial Guilt Phase

For Petitioner's second trial, the court appointed Hugh Goodwin as counsel.

The guilt phase defense by Goodwin was almost identical to the lack of defense that he provided for Troy Jones in Merced County in 1982 that was reversed in its entirety by a unanimous California Supreme Court for ineffective assistance of counsel in *In re Jones* (1996) 13 Cal. 4th 552.[3] The Court found that:

[1] See Tables of Previous Stankewitz Case Dispositions, §V, hereinabove
[2] *Id*.
[3] *In re Jones* (1996) 13 Cal. 4th 552.

> defense counsel' s performance before and during the guilt phase of the trial was marked by numerous deficiencies, and that the cumulative impact of counsel's shortcomings at that phase of the proceedings was prejudicial with regard to the judgment of guilt. Petitioner, therefore, is entitled to habeas corpus relief, and the judgment must be set aside in its entirety.[4]

The referee appointed by the court to conduct an evidentiary hearing gave specific details of how Goodwin's representation fell far below the standard required for defense counsel. The details of Goodwin's lack of effective representation of Troy Jones are eerily similar to those of his failures in Petitioner's case.[5]

1. Goodwin did not competently prepare for trial.

As he stated in his 1989 declaration,[6] Goodwin, now deceased, failed to hire an investigator for the guilt phase of the trial. He also stated that he did not consult with Petitioner's prior attorneys, trial or appellate or obtain their files from the first trial.[7]

Despite Petitioner's insistence on a 'whodunit' defense,[8] there are no records to indicate that Goodwin investigated the events of the day of the murder, reviewed police reports or looked at the physical evidence. He did not interview the detectives who wrote key reports in the case.[9] In his declaration, Goodwin states that he had no tactical reason for failing to do so.[10] According the defense expert Roger Clark, all of the defendants' clothing should have been tested prior to the second trial.[11]

The defense hired no experts of their own, neither a scene reconstruction expert nor a pathologist, nor a ballistic expert.

[4] *Id*. at 559
[5] Exhibit 12a, *In re Jones*, Referee's Report, dated 5-3-1993
[6] Exhibit 12b, Declaration of Hugh Goodwin, dated 12-28-1989, at 3
[7] Exhibit 12c, Declaration of Hugh Goodwin, dated 11-15-1995, at 1
[8] Exhibit 12c, *supra* at 3
[9] Exhibit 12d, Declaration of Garry Snow, dated 2-20-2020, at 2; Exhibit 12e, Declaration of Allen J. Boudreau, dated 3-14-2020, at 6
[10] Exhibit 12c, *supra* at 3
[11] Exhibit 12f, Declaration of Roger Clark, dated 12-4-19, at 6

Goodwin did not interview the primary alleged eyewitness Billy Brown[12]. As explained in Claim 6, Supra, Billy Brown was not a credible witness. Goodwin admitted that he did not have a tactical reason for these decisions.[13]

4. Goodwin Did Not Perform Competently During the Trial.

Goodwin did not file a Motion in Limine to prevent the prosecution from raising the Meras crimes during the guilt phase.[14]

Goodwin failed to object to the use of testimony from the first trial by witnesses in the second trial.[15] In fact, he had Billy Brown refer to his testimony from the first trial.[16]

The first trial was reversed by the CA Supreme Court on the grounds that no competency hearing had been held.[17] Therefore, all testimony from that trial was invalid because Petitioner was incompetent to assist counsel.[18]

5. As a Result of His Failure to Competently Handle the Guilt Phase, Petitioner Was Prejudiced.

Due to his lack of due diligence in viewing the physical evidence, or hiring experts to do so, he was not aware of the blood on the codefendants clothing.[19] Defense experts' examination of the physical evidence in 2019 revealed that all of the codefendants clothing had blood on it which could be from the victim.[20] Petitioner's clothing does not have any visible blood.[21] However, because Goodwin did not hire any experts to examine the physical evidence, he was not aware of the blood and did not request that it be tested. This prejudiced Petitioner because had the

[12] Exhibit 12g, Declaration of Billy Brown, at 3-4
[13] Exhibit 12c, *supra* at 4
[14] No Motion in Limine Found: See Clerk's Transcript on Appeal, Vol. I & II (T2 CT Vol. I & II RT)
[15] Exhibit 12h, List of Second Trial Testimony where Billy referred to his first trial testimony
[16] *Id.*
[17] P*eople v. Stankewitz*, (1982) 32 Cal. 3d 80, 95
[18] *Id*. at 95
[19] Exhibit 12i, Supplemental Declaration of Chris Coleman 191120; Exhibit 12f, *supra*
[20] Exhibit 12i, *supra*; Exhibit 12f, *supra*
[21] Exhibit 12i, *supra*; Exhibit 12f, *supra*

clothing been tested before the second trial, it would have more likely than not shown that he was not present at the time of the shooting and pointed to third party guilt, thus creating reasonable doubt in the minds of the jury.

Goodwin's lack of investigation and review of reports failed to uncover the prosecution manipulation of evidence and testimony. For example, the autopsy report and autopsy photos show true height of victim and trajectory of the gun shot,[22] in contrast to the testimony of law enforcement witnesses during the second trial. The victim's height was never mentioned by the defense in the second trial. Defense counsel failed to review transcripts and reports critical to claimed corroborating evidence being offered by the prosecution in the guilt phase, namely those that pertained to regarding the height of the victim and the bullet trajectory. Trial counsel did not adequately cross-examine Boudreau's testimony regarding the autopsy report, the height of the victim or bullet trajectory. (T2 Vol. I RT 155 – 167; 168 – 169) For a detailed explanation, see Claim 2, Supra.

Had he been able to assist counsel in his defense, prosecution witnesses could have been impeached and their false testimony brought to light. Damaging testimony from the first trial, some of which was false or conflicting, was read into the record on the second trial and referred to by witnesses.[23] This prejudiced Petitioner in the second trial because due to his inability to assist counsel in the first trial,[24] he did not have the opportunity to confront the witnesses against him. The use of first trial testimony assumed that testimony was true, when much of it was not.[25]

[22] Exhibit 12j, Declaration of Dr. Jerry Nelson, dated 3-19-19
[23] Exhibit 12h, *supra*
[24] *People v. Stankewitz*, (1982) 32 Cal. 3d 80, 95
[25] See Claim 6, *supra*, for a detailed explanation.

Goodwin lacked an understanding of the basic facts and evidence regarding the shooting. Goodwin did not cross examine or impeach Officer Rodriguez regarding his conflicting reports and testimony regarding what happened on the night of arrest. (T2 Vol. I RT 101-115). Goodwin did not cross examine or impeach Officer Bonesteel regarding his conflicting property reports (T2 Vol. I RT 132-144) regarding the alleged murder weapon. Had he done so; he might have realized that the gun in evidence was not the murder weapon.

As explained in detail in Claim 8, prosecution witness Dr. Zeifert's records for 1966 - 1970 were not subpoenaed or used by the defense in the trial.[26] Petitioner was deprived of showing that he had a mental defect which prevented him from forming the requisite intent to commit first degree murder.

Petitioner was prejudiced by defense counsel's failure to interview alibi witnesses. Petitioner informed counsel and the court that he had seven alibi witnesses.

No evidence of third-party culpability was ever presented at the second trial.

Despite the fact that DDA Robinson's closing argument was not backed up by facts and greatly prejudiced Petitioner (T2 Vol. III RT 638), Goodwin did not file a motion to dismiss at the end of guilt phase. Instead, as discussed in Claim 7, when the court allowed DDA Robinson to argue in his closing statement that Petitioner was guilty of the Meras crimes, Goodwin failed to object. After Petitioner was convicted, and prior to sentencing, in his Motion for Reconsideration of Modification Hearing asking the court to reconsider its refusal to modify the jury verdict of death, Goodwin raised the Meras evidence, stating that there is no evidence that the defendant personally used force on Mr. Meras and no evidence

[26] Exhibit 12k, Fresno Neuro Zeifert Report, dated 5/6/70, at 3

to support the court's conclusion that the defendant "sot [sic] at" Mr. Meras.[27] However, this argument was too late and fell short of convincing the court that it should modify the jury's death verdict.

Conclusion: Counsel's failure violated Petitioner's rights to due process, be present, confront and cross-examine witnesses, pre-trial discovery, equal protection, the effective assistance of counsel, meaningful appellate review, reliable determinations of guilt, and appropriate penalty rendered following fair and meaningful consideration of submitted evidence, and the enforcement of mandatory state laws as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution.

[27] See Clerk's Transcript (T2 Vol. II CT 392) Motion for Reconsideration of Modification Hearing dated 11-11-1983 at p 3

CLAIM 13: PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND PROPER APPELLATE REVIEW, IN VIOLATION OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT AND UNDER THE CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 15.

As explained in the Introduction, this case was on appeal from 1978 – 1982 and 1983 – 2012. From 1978 – 2012, Petitioner was represented by appellate counsel and habeas counsel.

This case was a Capital case until May 3, 2019. Petitioner's current attorneys have contacted Petitioner's appellate attorneys to determine why they did not investigate Petitioner's guilt. Over the years, Petitioner desperately implored each of these attorneys to look at the physical evidence in his case;[1] however, they all declined to do so for various reasons which are described below. None of the claims in this petition, except for the impartial jury claim, have been raised by either appellate or habeas counsel. A cursory visual inspection of physical evidence in custody of the Fresno Sheriff's Office and Fresno Superior Court, resulted in proving substantial evidence tampering. This tampering included the planting of the alleged murder weapon and the realization that the Meras shell casings were not the same caliber as the alleged murder weapon.

Due to the withholding of key evidence by the prosecution from the inception of the case investigation until 2017, appellate counsel were unable to properly represent Petitioner.[2]

Nearly all the misconduct in this case would have been discovered with even moderate, let along, reasonable due diligence on the part of any prior defense attorney. Thus, the prejudicial impact of withholding and fabricating evidence and testimony were compounded by the failure of appellate counsel and habeas counsel to investigate Petitioner's innocence. The most striking of these failures was the fact that until 2017, no defense counsel ever went to view the physical evidence nor have any experts analyze the physical evidence. These failures included interviewing

[1] Exhibit 13a, Declaration of Douglas R. Stankewitz, dated April 27, 2020
[2] See Claims 4 and 5, *supra*

the police detectives involved in the initial investigation where told at least one detective that he denied doing shooting the victim.[3] Another example is the failure to interview law enforcement officers who prepared reports and testified to material facts in the first and second trials.[4] Had counsel performed these tasks, they would have found material evidence that points to Petitioner's innocence. Petitioner was prejudiced because the failure to uncover material facts meant that the central points of the case were unable to be refuted nor any defenses provided.

In addition, as explained in the Introduction, Petitioner was denied proper appellate and habeas review because of the State's misconduct and Brady violations. Due to the errors outlined above, no court has ever heard the exculpatory evidence outlined in this petition. Petitioner also did not receive adequate appellate representation due to counsels' unreasonable and prejudicial failure to raise numerous meritorious issues pertaining to his innocence. Counsels' failure to investigate and view the physical evidence meant that none of them knew about the prosecution's misrepresentations to the jury of crucial evidence. Thus, Petitioner's conviction, sentence, and confinement are unconstitutional.

Petitioner's appointed appellate counsel are listed below, with the years of representation and their current state bar status. Their declarations are attached, stating their reasons for failing to pursue innocence claims:

1. California State Public Defender: Quin Denver (deceased) and Steven W. Parnes, CA (Bar Status: Inactive) Automatic Appeal. Appeal was successful.[5]

[3] Exhibit 13b, Declaration of Garry Snow, dated 2-20-2020, at 2, stating that he has never been contacted by anyone representing Petitioner until 2020.
[4] Exhibit 13c, Declaration of Allen J. Boudreau, dated 3-14-2020, at 6, stating that he has never been contacted by anyone representing Petitioner until 2020.
[5] Exhibit 13d, Declaration of Steven W. Parnes, dated 6-29-2020

2. John Ward, (Bar Status: Active) and Robert Seligson, (Bar Status: Inactive) Automatic Appeal, CA Supreme Court, 1987 - 1990. Counsel were only appointed for pursuing an automatic appeal.[6]

His appointed habeas counsel are listed below, with the years of representation and current state bar status. Their declarations are attached, stating their reasons for failing to pursue innocence claims:

1. California State Public Defender: Quin Denver (deceased) and Steven W. Parnes, CA (Bar Status: Inactive) CA Supreme Court, Writ of Habeas Corpus, filed concurrently with automatic appeal, 1982.[7]
2. Robert Bryan, U S District Court (E.D. Cal.) Writ of Habeas Corpus 1992 - 1996 (Bar Status: Active). Counsel focused only on mental defenses and penalty phase IAC.[8]
3. Nicolas C. Arguimbau, U S District Court (E.D. Cal.) 1993 - 2004 (State Bar Status: Inactive). Counsel, who became sole appointed counsel on September 5, 1996, was not physically capable nor mentally competent to represent Petitioner.[9] Mr. Arguimbau was criticized by the U S District Court, Central California, in a death penalty case for being unsuitable to practice law.[10]
4. Katherine L. Hart, 2000 – 2004 (State Bar Status: Active) Katherine Hart, Stankewitz's appointed second counsel to Nicholas Arguimbau from 2000 – 2004, had a potential conflict of interest, which she failed to disclose to Petitioner.[11] She focused only on IAC penalty phase issues of Petitioner's second trial counsel.[12] Mr. Arguimbau and

[6] Exhibit 13e, Declaration of John Ward, dated 11-20-1994
[7] Exhibit 13d, *supra*
[8] See Exhibit 13f, Declaration of Maureen M. Bodo, dated 2-17-2020, filed under seal
[9] Exhibit 13f, *supra*
[10] Exhibit 13g, *Ross v. Woodford*, USDC Central District, CA, Order Discharging Habeas Counsel, dated 11-19-2003.
[11] Exhibit 13a, *supra*; Exhibit 13h, Declaration of Katherine Hart, dated 7-31-2020, at 1
[12] Exhibit 13h, *supra* at 1

Ms. Hart allowed the time for filing Petitioner's certiorari petition to expire,[13] costing him an appeal of his to the United States Supreme Court.[14]

5. Joseph Schlesinger (State Bar Status: Active), Supervisor, California Habeas Unit, Office of the Federal Defender, Eastern District of California, 1998 – 2015. Mr. Schlesinger's office represented Petitioner from approximately 2004 – 2007; and from 2007 -2012 as the supervising attorney for Harry Simon. Mr. Schlesinger and Mr. Simon concluded that any attempt to amend Mr. Stankewitz's federal habeas corpus petition with additional guilt phase claims would not be allowed under federal statute.[15]
6. Harry Simon, Officer of the Federal Defender, Central District of California, 2007 - 2012 (State Bar Status: Active) Harry Simon, Petitioner's appointed counsel from 2007 - 2012, began representing Douglas Stankewitz in federal habeas proceedings in December 2007.[16] Mr. Simon and his investigators focused solely on Mr. Stankewitz's penalty phase claims.[17]

The inaction of Petitioner's appellate counsel was objectively unreasonable. If what previous counsel did was reasonable, it caused substantial delay which was beyond Petitioner's control. Under *Reno*,[18] there was good cause for delay. In the event that this Court finds that reasonably competent habeas counsel would have discovered the facts relevant and necessary to this claim earlier in time and would have presented those facts and the instant claim to this Court prior to this time, petitioner has been deprived of the effective assistance of counsel on habeas

[13] Exhibit 13i, Declaration of Harry Simon, dated 2-26-20; Exhibit 13h, *supra* at 2
[14] Exhibit 13h, *supra* at 2
[15] Exhibit 13j, Declaration of Joseph Schlesinger, dated 4-23-2020, at 2-3
[16] Exhibit 13i, *supra* at 1
[17] Exhibit 13i, *supra* at 2
[18] *In re Reno*, 55 Cal. 4th 682 (2012)

corpus.

In the event that this Court finds that the habeas claims in this Petition should have been presented on automatic appeal, petitioner was deprived of the effective assistance of counsel on appeal.

CLAIM 14: THE PROSECUTION ELIMINATED THE ONLY NATIVE AMERICAN JUROR IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT TO AN IMPARTIAL JURY AND HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.

A. The Prosecution Used a Peremptory Challenge to Remove Rosemary Moreno, the Only Known Native American.

Petitioner's second trial occurred in 1983, prior to the *Batson* decision and after the *Wheeler* decision. The prosecution prosecutor used a peremptory challenge to remove the only known Native American juror, Rosemary Moreno. Ms. Moreno, Panel 33, number 157, was asked hardship voir dire, Hovey voir dire[1] and general voir dire questions. The transcript of her voir dire refers to question numbers.[2] These question numbers refer to the questions on the juror questionnaires. The answers to these questions give counsel information regarding the juror's race and ethnic background, experience with law enforcement and position on subjects related to the crimes that are the subject of the prosecution. The juror questionnaires in this case have been lost and are no longer available.[3]

The crime had racial overtones. Petitioner is Native American, the victim, Ms. Graybeal was Caucasian.

B. Loss of Critical Documents by Fresno County, Impairs Petitioner's Ability to Prove a *Prima Facie* Case

The Memo of Points and Authorities, *infra*, outlines what is needed to establish a *prima facie* case and show purposeful discrimination under *Batson*[4] and *Wheeler.*[5]

The three-part test as applied to this case is as follows:

First part: Native Americans are a cognizable group.

[1] Exhibit 14a, Rosemary Moreno voir dire transcript, 1983, at page 2671
[2] Exhibit 14a, *supra*
[3] Exhibit 14b, Letter from FCSC stating juror questionnaires not available, dated 5-15-2020
[4] *Batson v Kentucky,* (1986) 476 U S 79
[5] *People v. Wheeler,* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748

Second part: Prospective juror Rosemary Moreno stated that she was Indian[6]. She also stated that she worked for Indian counsel. The prosecution specifically asked her whether she would tend to favor Petitioner, because he is Indian.[7]

Third part: Other facts and relevant circumstances that raise an inference that the prosecution used a peremptory challenge to exclude Ms. Moreno because she was a Native American would be considered. Based on current case law[8], these could include:

Disparate questioning, for example the number of questions that the juror was asked compared to the number of questions that other jurors were asked. The nature of the questions asked, including whether a person of the same race could be fair and impartial to both the prosecution and the defense. In this case, the prosecutor asked leading questions to justify his striking Ms. Moreno.[9] Asking a prospective Native American juror whether s/he knows the Stankewitz family could be discriminatory because the Fresno Native American community is small and it is more likely that they would know one another than non-Native American Fresno residents.

Whether the prosecution intended to use challenges to eliminate jurors of the same race as the defendant. This has been proven in other cases by using notes taken by the prosecutor.[10]

Whether the prosecution had a pattern and practice of using challenges to eliminate jurors of the same race as the defendant. Given Petitioner's race of Native American, it is difficult to get an impartial jury of Petitioner's peers. This is due in part to the fact that Native Americans are a

[6] In this case, 'Indian' was used in place of 'Native American'. There may have been other prospective jurors who were Native American but we do not know because we do not have the juror questionnaires. See Exhibit 14b, *supra*
[7] See Exhibit 14a, *supra* at page 2684
[8] *Flowers v Mississippi*, (2019) 588 U.S. 1
[9] Exhibit 14a, *supra*
[10] The Discovery Order issued in 1978 (T1 CR Vol. I CT 116) and still in effect, includes notes – as admitted by the DA files are lost, so we do not have notes. See Exhibit 14c, Table of Missing Evidence – Stakewitz Habeas, Item #51 at 16

very small percentage of the population in Fresno County. According to Census data, the percentage of Native Americans in Fresno County is between 1.6% - 3.0%. Arguably, given the sources of prospective jurors, the number of Native Americans who are called to jury duty is far less.[11] This requires hiring a consultant to review and analyze cases tried in the same county to determine whether this occurred.[12]

Comparing jurors who were struck and not struck, including whether similarly situated jurors were removed for cause and a juror of the same race was removed using a peremptory challenge. In this case, there were several jurors who, like Rosemary Moreno, knew members of Petitioner's family. In this case, a survey of 233 of the prospective jurors shows that of the four who said that they knew the Stankewitz family, three were removed for cause and only one, Rosemary Moreno, was challenged with a peremptory.[13] One prospective juror[14] who was empaneled was not truthful in answering whether she knew the Stankewitz family. It was not until jury deliberation that she told her fellow jurors that she did and that she was afraid of the family.[15]

In a capital case, another criteria in determining whether a juror of the same race answered death penalty related questions the same as other jurors, but was still removed using a peremptory challenge. In this case, Ms. Moreno stated that she would be able to vote for the death penalty.

C. Ineffective Assistance of Counsel as to *Wheeler*

As was alleged in Petitioner's federal habeas writ filed in 1996, Hugh Goodwin, Petitioner's second trial counsel rendered ineffective assistance of counsel because he failed to

[11] Prospective jurors are generally contacted using voter registration rolls. Native Americans living in poverty in 1983, may not have been registered to vote.
[12] Petitioner lacks the resources to hire a consultant to do a full-fledged jury analysis, including hiring experts to prepare data and analyze statistics regarding jury practices in Fresno County.
[13] Exhibit 14d, Jury Chart
[14] This is believed to be Karol Golding, Registered Nurse
[15] Exhibit 14e, Declaration of Marilyn Schlotthauer dated 11-2-1998

make a *Wheeler* motion during jury selection.[16] Without the juror questionnaires,[17] we are unable to see what questions jurors were asked and answered, and given those questions and answers, whether counsel asked the right questions in voir dire or paid attention to whether other Native American jurors were in the prospective jury panel. Because counsel did not make a Wheeler motion during trial, the trial court did not make any findings regarding whether Petitioner established a prima facie case, nor whether the prosecution articulated a permissible, race-neutral reason for the excusal which was supported by substantial evidence.

Post-trial, Mr. Goodwin filed a written motion for a new trial on November 2, 1983, arguing that the prosecutor had improperly used a peremptory challenge to remove "the only person of Indian descent" from Petitioner's jury. (T2 CR Vol. II CT 368). The prosecution argued in its Response to Motion for A New Trial, that juror Moreno was dismissed due to her "answers of questions on voir dire" and that Petitioner "did not make a *Wheeler* objection at trial". (T2 CR Vol. II CT 388). The motion for new trial was denied without comment by the court. (T2 CR Vol. II CT 399).

D. Prior Appellate Court Proceedings in This Case Raised Jury Discrimination; However, Petitioner Has Never Been Given the Opportunity to Demonstrate Discrimination

In 1990, in this case, the California Supreme Court ruled that counsel failed to preserve the issue by moving to invalidate jury selection in a timely manner, stating that counsel failed to raise a Wheeler objection at trial and that the record was barren for purposes of review.[18]

The jury discrimination issue was raised in Petitioner's federal habeas filed in 1996, where it was argued in part that counsel's failing to investigate and present a motion challenging the

[16] Tables of Previous Stankewitz Case Dispositions, §V, hereinabove
[17] Exhibit 14b, *supra*
[18] *People v. Stankewitz*, (1990) 51 Cal. 3d 72, 105 - 106

removal of Moreno fell below the standards for reasonably competent counsel. In 2000, the United States District Court (Central District CA), considered whether the facts presented established race neutral reasons for dismissing Ms. Moreno. In its decision,[19] the court ruled that the facts presented by the prosecution do present race neutral reasons. The court made the ruling despite the fact that although Ms. Moreno thought that she might know Petitioner's nephew, she said that fact and the fact that she and Petitioner were Indian would not influence her ability to be fair and partial to both the prosecution and the defense.

The District Court did not reach the issue of whether counsel's failure to make a *Wheeler* motion disqualified the court from reviewing the jury discrimination issue.[20]

When Petitioner's 1996 federal habeas was heard by the Ninth Circuit Court of Appeals, neither of its decisions in 2004 nor 2012 addressed whether Petitioner was barred from raising jury discrimination. Nor did the court rule on whether his ability to raise the issue was barred by *Wheeler*. Notwithstanding the changes in case law regarding jury discrimination, it does not appear that Petitioner's appellate counsel prepared an analysis or raised other facts and relevant circumstances in Petitioner's appeals or previous habeas writs.

Petitioner has never had the opportunity to present an analysis of whether discrimination took place. Given the IAC of Petitioner's trial counsel and changes in case law since the second trial in 1983, and the 1996 federal habeas, Petitioner should now be given the resources to analyze and present jury discrimination to show whether his equal protection rights were violated. He should not be penalized by the unavailability of juror questionnaires and the district attorney's notes, which are unavailable through no fault of his own.

[19] Tables of Previous Stankewitz Case Dispositions, §V, hereinabove, Addendum 2, Claim #30
[20] Tables of Previous Stankewitz Case Dispositions, §V, hereinabove, *supra*

CLAIM 15: PETITIONER HAS NOT, AND NEVER CAN RECEIVE A FAIR TRIAL

In an adversarial system, fairness means that each side has an equal opportunity to fully present its case and let the jury decide whether a defendant is guilty of the crimes charged. In Petitioner's case, through no fault of his own, he has never had that opportunity. As explained in previous claims, it is clear from the host of new revelations concerning the withholding and manipulating of evidence by the prosecution that Petitioner did not receive a fair trial, at either the guilt phase or penalty phase of either his 1978 or 1983 trials.

A fair trial means the prosecution and the defense are on equal footing, in other words, there is not extensive misconduct by the DA. This list of misconduct, alone, more than justifies a new guilt phase. See Claims 4 and 5, *supra*. At present, the known misconduct includes:

- Suppression of an exculpatory casing comparison report
- Disposal of exculpatory evidence, i.e. three .22 casings, accompanied by an apparent attempt to supplant those casings with casings fired from the alleged homicide weapon (and suppression of the reports detailing their collection)
- False claims that Marlin Lewis was inside the car when Ms. Graybeal was shot and killed
- False claims regarding a missing autopsy report page, and the manipulation of evidence documenting the victim's true height
- Failure to disclose exculpatory reports, including mental health records of Petitioner
- Loss by the prosecution of all of their original files on this case, foreclosing full review and transparency (see section *g.*)
- Loss or destruction of a potentially exculpatory blood test.
- The failure to disclose interviews by law enforcement with Petitioner's cellmates

A fair trial means having access to all relevant documents and evidence in advance of trial. In this case, due to the prosecution's failure to comply with Court-ordered discovery for

either his 1978 or 1983 trial, Petitioner did not have access to a substantial amount of material evidence, some of which is either exculpatory, or like exculpatory.

2As previously described, in 1978, as part of the pretrial motions, the Court entered a broad discovery order and ordered the prosecution to produce records. In 2012, some 34 years post Discovery Order, the prosecution turned over 3,961 pages of discovery. Evidence that was not provided until 2012 includes Napa State Hospital Records from Dr. Zeifert, including EEG showing significant left frontal lobe damage.

In 2017, after the Defense informed the Court of a pattern and practice of extensive prosecutorial misconduct, and after the prosecution had contended for the previous five years that they had turned everything over, the Defense received material evidence that had never previously been produced.[1] Most notably, this was key evidence that casts significant doubt on if the alleged murder weapon was the actual murder weapon.

Also, in 2017, the prosecution admitted that it had lost Petitioner's entire file, and the files of all of the codefendants. (PRH Vol. XXVII RT 404 - 405) These files contained statements and evidence from Billy Brown and the other codefendants that Petitioner was not the killer.

In this case, there are no less than 50 items or groups of items missing from the court file, sheriff's files and DA's file.[3]

A fair trial means an opportunity to present evidence on third party guilt. This requires investigation of the client's innocence and facts surrounding the crimes by defense counsel, which was never done by either trial or appellate counsel until 2017. Given the passage of time, and failure of trial and appellate counsel to investigate and preserve witness testimony, current investigation and expert testimony are extremely compromised. See also, Claims 3 and 6 for

[1] See Claim 11, *supra*
[3] Exhibit 15a, Table of Missing Evidence – Stankewitz Habeas

discussion about evidence of third-party guilt.

The 42-year delay for a fair trial was caused through a combination of ineffective assistance of counsel, court decisions, and the DA's Office. As documented in Claims 3, 4 and 5, the extent of the Fresno County District Attorney's failure to produce or active destruction of relevant, exculpatory evidence is vast; this has prevented Petitioner from ever having a fair trial.

As the court stated in *Reno*, the test is whether the proceedings were so fundamentally unfair that absent the error, no reasonable jury or jury would have convicted the Petitioner. Given the unfairness of the entire legal process toward Petitioner, the only equitable and feasible remedy is for this court to dismiss the case in its entirety.

CLAIM 16: PETITIONER HAS BEEN REHABILITATED

Although Petitioner is now rehabilitated, he committed some serious misconduct when he first entered the prison system. His behavior was largely based on his drug addiction, and the violent nature of prisons in the late 1970's and early 1980's. He was placed in isolation for misconduct and because he refused to cut his hair (it is against his Native American religion to do so). He has never been in a prison gang.

However, Petitioner is not the same person that he was in 1978 – he is a changed man. He is now 62 years old. Since his time in isolation ended in 2001, he has been working on his case and has been a model inmate. He has had no infractions for over 20 years. Due to his good behavior, Petitioner has been Grade A classification for many years. Two recent cell searches showed that his cell was clear.[1]

Petitioner has attended the Native American spiritual circle (when allowed), and Catholic Church, both at San Quentin, on and off, since 2005. As documented by San Quentin Rabbi Paul, he has consistently attended Jewish temple for the last several years.[2] He has spiritual practices, including spiritual reading and meditation. He does physical exercise. He is not under psychiatric care at San Quentin. Despite the fact that there are no AA or other treatment programs available for Death Row inmates, through his own efforts and choices, he has been sober for over 23 years.

He has many people who attest to his good character, including the current San Quentin rabbi, former San Quentin chaplain and corrections officers. The current SQ Rabbi Paul Shleffar wrote a letter on his behalf.[3] Former SQ Chaplain Earl Smith wrote a letter on Petitioner's behalf.[4]

[1] Exhibit 16a, SQSP Confiscated Property Receipts 2020
[2] Exhibit 16b, Records of Temple attendance
[3] Exhibit 16c, Letter from Rabbi Paul, dated 8-21-2018
[4] Exhibit 16d, Letter from Rev. Earl Smith 8-28-2018

He has received laudatory chronos (Form 128) from prison officers. There are eight such chronos attached.[5]

When he is released, Petitioner has committed housing.

[5] Exhibit 16e, General Chronos from Officers Akinshin and Harris; Exhibit 16f, General Chrono from Officer Williams; Exhibit 16g, General Chrono from Officer L. Brown; Exhibit 16h, General Chrono from Officer Guttig; Exhibit 16i, General Chrono from Officers Escalante and Mahmood; Exhibit 16j, General Chrono from Officer Runge

CLAIM 17: PETITIONER WAS WRONGFULLY CONVICTED AND IS ACTUALLY INNOCENT. HIS CONVICTION VIOLATES HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7; AND HIS RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDENT.

A. Petitioner Has Steadfastly Proclaimed His Innocence from the Beginning.

When interviewed by homicide Det. Garry Snow, on the night of the murder, he was the only one who denied being involved in the shooting.[1] He did not confess, nor did he testify at either the guilt or penalty phase of either the original trial or the retrial.

Because Petitioner was worried about being thought guilty in the Meras crimes, he moved to have Meras prevented from seeing him at the Preliminary Hearing, because he was not involved in Meras incident.[2]

Petitioner cooperated with the investigation. Specifically, in addition to having the interview with Det. Snow described above, Petitioner allowed himself to be measured by Det Boudreau (T2 Vol. I RT 155) (T2 Vol. I RT 165).

B. The Physical Evidence Shows That He Is Innocent.

The gun in evidence was not the murder weapon and was planted by law enforcement.[3]

After defense experts saw stains that appeared to be blood on clothing of the co-defendants, Petitioner insisted that DNA testing be done all the defendants' clothing in evidence, including his own. The likely presence of blood on all of the defendants' clothing, except for Petitioner's, corroborates his statement that he was not present at the time of the murder.[4]

[1] Exhibit 17a, Declaration of Garry Snow, dated 2-20-2020, at 2
[2] See Claim 7, *supra*.
[3] See Claim 1, *supra*
[4] Exhibit 17b, Declaration of Douglas Stankewitz, dated 4-24-2019, at 1

The height of victim compared to Petitioner's height and trajectory of bullet made it physically unlikely for him to be the shooter.[5]

C. Witness and Cellmate Statements Point to His Innocence.

The sole eyewitness testimony from Billy Brown, shows that his testimony was coerced and that Billy didn't know who the shooter was.[6]

Petitioner maintains that he was not with the group of codefendants during the evening of February 8, when the murder occurred. This is corroborated by codefendant Christina Menchaca's, statement to the police, referring to Petitioner shooting up heroin at the motel soon after the group arrived in Fresno Chinatown. She told the police that 'I didn't see him go back down' (2-11-78 at 72), after shooting up. Although she told police that Petitioner was in Calwa when the victim was shot, she also told the police that she did not see who shot the victim.

Michael Hammett, Petitioner's cellmate, who was interviewed in 2015, states that Petitioner never said anything incriminating. Hammett stated that he was offered leniency if he offered anything incriminating. He also stated that his 1978 interview was taped; however, no tape has been produced.[7]

Codefendant Marlin Lewis admitted to the police that he had the gun and told Laura Wass that he was the killer.[8]

D. Law Enforcement and Prosecutorial Misconduct Led to His Wrongful Conviction.

As explained in previous claims, law enforcement and prosecution misconduct was present at every stage of this case.[9] As found in a recent study by the National Registry of Exonerations,

[5] Exhibit 17c, Declaration of Roger Clark, dated 12-4-2019, at 5-6; and See Claim 2, *supra*
[6] See Claim 6, *supra*
[7] Exhibit 17d Memo of Investigator D. Schiavon regarding Mike Hamett, dated 11-9-15
[8] See Claim 3, *supra*
[9] See Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, *supra*

official misconduct contributed to over half of false convictions of defendants who were later exonerated. In discussing their findings, their summary report states, "Some major patterns we observed:

- Official misconduct contributed to the false convictions of 54% of defendants who were later exonerated. In general, the rate of misconduct is higher in more severe crimes.
- Concealing exculpatory evidence—the most common type of misconduct—occurred in 44% of exonerations.
- Police officers committed misconduct in 35% of cases. They were responsible for most of the witness tampering, misconduct in interrogation, and fabricating evidence—and a great deal of concealing exculpatory evidence and perjury at trial.
- Prosecutors committed misconduct in 30% of the cases. Prosecutors were responsible for most of the concealing of exculpatory evidence and misconduct at trial, and a substantial amount of witness tampering.
- In state court cases, prosecutors and police committed misconduct at about the same rates.

In the last section we consider what led officials to commit misconduct. We conclude that the main causes are pervasive practices that permit or reward bad behavior, lack of resources to conduct high quality investigations and prosecutions, and ineffective leadership by those in command".[10]

E. Conclusion.

Petitioner realleges the allegations of Claims 1 - 13 and 15 above and alleges that he is factually innocent of the charges of first degree pre-meditated murder with special circumstances, and of the death penalty originally imposed, and his current sentence of LWOP.

[10] Exhibit 17e, Government Misconduct and Convicting the Innocent: Preface, September 1, 2020, at iii – iv; the entire report can be found at https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf

Petitioner alleges such innocence by virtue of the facts, inter alia, that the murder was committed by the co-defendants. The evidence indicating that petitioner was not the perpetrator is newly discovered evidence under CA Penal Code Section 1473 and applicable case law.[11] The evidence establishes that petitioner is factually innocent of capital murder.

In consequence, petitioner's confinement is unlawfully in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

[11] See Claim 3, *supra*

CLAIM 18: TIME OF IS OF THE ESSENCE BECAUSE AN INNOCENT MAN HAS BEEN INCARCERATED ON DEATH ROW FOR OVER 42 YEARS FOR A CRIME THAT HE DID NOT COMMIT.

It is accepted in the law that justice delayed is justice denied. This case is no exception. Petitioner was first arrested and incarcerated for murder, as a teenager, at the young age of 19.

He is now age 62.

Through no fault of his own, but due to the inadequacies of the court system, as is typical with death penalty cases, his case has wound through the courts for over four decades. During this time, he has had five execution dates. Petitioner battled with his trial and appellate attorneys over 39 plus years to look at the evidence and focus on innocence. Until three years ago, they all failed to do so.

Over these 42+ years, he has suffered many deprivations promised to free people. These deprivations include life, liberty and the pursuit of happiness. He has been deprived of a relationship with his family, having children, and he has been alienated from his Indian tribe.

While in prison, he has been subjected to suffered due to horrific prison conditions, including time spending over 18 years in solitary confinement, in part due to his refusal to cut his hair.[1] He has also suffered through woefully inadequate medical[2] and dental care and chronic health conditions.[3] In June, 2020, he had COVID19[4] and is suffering with post- COVID symptoms.

Given all this, this court should bring this chapter of Petitioner's life to a close and act with all due haste to grant Petitioner relief from incarceration.

[1] Exhibit 18a, State of California Rules Violation: Grooming, dated 6-2-1998
[2] Due to substandard medical care, California state prison conditions have been under supervisor by court receivers for much of the time of Petitioner's incarceration.
[3] Petitioner suffers from high blood pressure and is obese. He has a family history of diabetes and liver disease, from which both his mother and sister died.
[4] Exhibit 18b, Stankewitz COVID Test Result, dated 6-18-2020

CLAIM 19: PETITIONER'S CONVICTIONS AND LWOP SENTENCE MUST BE VACATED BECAUSE OF THE CUMULATIVE EFFECT OF ALL OF THE ERRORS AND CONSTITUTIONAL VIOLATIONS ESTABLISHED IN THIS PETITION AND IN SENTENCING APPEAL

1. Petitioner's confinement is illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution, because the errors complained of in this petition compounded one another, resulting in a trial that was fundamentally unfair and in the imposition of cruel and unusual punishment.

2. All of the other allegations and supporting exhibits are incorporated into this claim by reference.

3. Each of the specific allegations of constitutional error in each claim and subclaim of this petition requires the issuance of a writ of habeas corpus. Assuming arguendo that the Court finds that the individual allegations are, in and of themselves, insufficient to justify relief, the cumulative effect of the errors demonstrated by this petition, compels reversal of the judgment and issuance of the writ. When all of the errors and constitutional violations are considered together, it is clear petitioner has been convicted and sentenced to LWOP in violation of his right to an accurate and reliable penalty determination, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

4. The prejudicial impact of each of the specific allegations of constitutional error presented in this petition must be analyzed within the overall context of the evidence introduced against petitioner at his second trial. No single allegation of constitutional error is severable from any other allegation set forth in this petition and/or in petitioner's appeal.

5. Petitioner also incorporates by reference every claim of this petition, and the exhibits incorporated therein, as if fully set forth in this paragraph.

6. Justice demands that petitioner's convictions and sentence of death/LWOP be reversed because the cumulative effect of all of the errors and violations alleged in this petition "was so prejudicial as to strike at the fundamental fairness of the trial." (*United States v. Parker* (6th Cir. 1993) 997 F.2d 219, 222 (citation omitted); *see also United States v. Tory* (9th Cir. 1995) 52 F.3d 207, 211 [cumulative effect of errors deprived defendant of fair trial].)

7. Petitioner alleges that he has also been prejudiced by state law violations which may not independently rise to the level of a federal constitutional violation, (*see, e.g.*, *Barclay v. Florida* (1983) 463 U.S. 969, 951). The cumulative effect of the state law errors in this case resulted in a denial of fundamental fairness and the due process and equal protection guarantees of the Fourteenth Amendment. (*See Walker v. Engle* (6th Cir. 1983) 703 F.2d 903, 962.)

8. In light of the cumulative effect of all the errors and constitutional violations that occurred over the course of petitioner's case, petitioner's convictions and death sentence must be vacated to prevent a fundamental miscarriage of justice.

XIII. MEMO OF POINTS AND AUTHORITIES

A. Jurisdiction

The California Courts of Appeal have original jurisdiction in all habeas corpus proceedings.[1] A defendant has a right to seek habeas corpus relief under the California Constitution[2] and by statute under Penal Code § 1473(a).[3] A habeas corpus remedy may be available when, among other circumstances, relief by direct appeal is inadequate;[4] false evidence that is substantially material or probative on the issue of guilt or punishment relating to his incarceration;[5] or "new evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that is would have more likely than not have changed the outcome at the trial."[6]

B. Burdens of Proof

Petitioner bears a the burden initially to plead sufficient grounds for relief and then later prove them.[7] Courts evaluate a habeas corpus petition under the prima facie standard by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief.[8] If the Court finds the factual allegations, taken as true, establish a prima facie case for relief, the Court must then issue an order to show cause.[9] Further, a petitioner for writ of habeas corpus bears the initial burden of alleging the facts on which he relies to explain and justify delay and /or a successive petition.[10]

[1] Cal. CONST. art. VI § 10 Original Jurisdiction
[2] Cal. CONST. art. I, § 11 Suspension of Habeas Corpus
[3] Cal. Pen. Code § 1473(a)
[4] *In re Sanders* (1999) 21 Cal. 4th 697, 703–04
[5] Cal. Pen. Code § 1473(b)(1)
[6] Cal. Pen. Code § 1473
[7] *People v. Duvall* (1995) 9 Cal. 4th 464, 474
[8] *Id*.
[9] *Id*. at 474-75
[10] *In re Reno* (2012) 55 Cal. 4th 428, 455

C. Timeliness of Petitions

California Penal Code section 1475 provides standards for the timeliness of habeas corpus petitions as well as prohibiting certain successive petitions.[11] In *In re Reno*, this Court outlined a three-level analysis for assessing whether claims in a petition for writ of habeas corpus have been raised timely.[12]

First, a claim must be raised without substantial delay.[13] Substantial delay "is measured from the time a habeas corpus petitioner or his counsel knew, or reasonably should have known, of the information offered in support of the claim and legal basis for the claim."[14] A petitioner must provide facts with specificity that show what information was not known and that it could not reasonably have been known.[15]

Second, if there was substantial delay but good cause for such a delay, the claims are not barred and courts may hear the claims on the merits.[16] Good cause for delay includes ineffective assistance of counsel because the Petitioner would unable to raise the valid claims in an earlier habeas corpus petition.[17] To establish ineffective assistance of counsel, Petitioner must "allege with specificity the facts underling the claim."[18] "If established, 'may be offered in explanation and justification of the need to file another petition.'"[19]

Third and finally, this Court should still consider certain claims after substantial delay in exception to the *Miller* rule.[20] These claims include constitutional errors creating a fundamentally

[11] Cal. Pen. Code § 1475
[12] See *Reno* 55 Cal. 4th at 434
[13] *Id*. at 460.
[14] *Id*. at 460 citing *In re Robbins* (1998) 18 Cal. 4th 770, 780
[15] *Id*. at 460
[16] *Id*.
[17] *Id*. at 463
[18] *Id.* citing *In re Clark* (1993) 4 Cal. 4th 750, 780 [superseded by statute on other grounds]
[19] *Id*.
[20] *Id*. at 460

unfair trial, actual innocence, or the sentencing was done under by misrepresentation of Petitioner.[21] New facts, alone, to support a previously rejected claim will not fall within an exception to the *Miller* rule; however, if such additional facts are tied to a claim of ineffective assistance of counsel, the claims will not run afoul of the general rule because of the Sixth Amendments protections.[22]

D. Types of Claims

In addition to the timeliness of habeas corpus claims, there are also procedural bars on the types of claims that can be raised in a habeas corpus petition. These procedural bars includes the *Waltreus* rule, which precludes a habeas corpus petitioner from raising a claim that was rejected on appeal.[23] Similarly, the *Dixon* rule precludes a habeas corpus petitioner from raising a claim that was not raised on appeal, but should have been.[24] Furthermore, the Supreme Court of California in *In re Seaton* clarified that objections that should have been made at trial but were not may not be raised in a petitioner for habeas corpus.[25] Finally, there is a procedural bar on raising claims that were raised in prior habeas corpus petitions.[26] These procedural bars, however, are subject to the exception for fundamental constitutional errors striking at the heart of the case.[27]

E. Ineffective Assistance of Counsel

The exception for a fundamental constitutional error includes the right to the effective assistance of counsel as part of the 6th Amendment's protections.[28] Prior habeas corpus counsel's ineffective assistance is therefore grounds for a habeas corpus petition.[29] Similar to the *Strickland*

[21] *Id*.
[22] *Clark* 18 Cal. 4th at 782; see also U.S. CONST. amend. VI
[23] *In re Harris* (1993) 5 Cal. 4th 813, 834
[24] *Id*. at 829
[25] *In re Seato*n (2004) 34 Cal. 4th 193, 199-200
[26] *Reno* 55 Cal. 4th at 496–97
[27] *Id.* at 200-01
[28] *In re Scott* (2003) 29 Cal. 4th 783, 811
[29] *Reno* 55 Cal. at 463–64; Cal. Pen. Code § 1473(b)

standard,[30] the habeas corpus counsel must not only have acted objectively unreasonable, but the result must result in actual prejudice.[31]

In measuring the objective standard of reasonableness, attorneys are held to the "prevailing professional norms" at the time.[32] One of the standards is a duty to investigate.[33] While such a duty does not require counsel attempt "unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment."[34] Instead, in capital cases, counsel should investigate "meritorious grounds for relief that come to habeas corpus counsel's attention in the course of [among others,]. . . *making reasonable efforts to discuss the case with the defendant*, trial counsel, and appellate counsel."[35] These reasonable efforts, although dependent on the circumstances of each case, generally includes investigating information to discredit prosecution witnesses and finding witnesses favorable to the defense.[36] Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.[37] In the event counsel provides a "total absence of any evidence being introduced to establish a particular defense," the attorney's performance has failed *Strickland* standard.[38]

With respect to prejudice, the standard is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable to defendant, i.e., a probability sufficient to undermine confidence in the outcome."[39]

In this case, given Petitioner's insistence on pursuing his innocence, failure of counsel

[30] See generally *Strickland v. Washington* (1984) 466 U.S. 688
[31] *Scott* 55 Cal. 4th at 811
[32] *Reno* 55 Cal. 4th at 463 citing *Strickland* 466 U.S. at 688.
[33] *Id.* at 472
[34] *Id*. at 468
[35] *Id.* at 469
[36] *People v. Rodriguez* (1977) 73 Cal.App.3d 1023, 1029
[37] *In re Gay* (2020) 8 Cal 5th 1059, 1076
[38] *Id.*; see also *People v. Shells* (1971) 4 Cal. 3d 626
[39] *Scott*, 29 Cal. at 811 citing; *In re Ross* 10 Cal. 4th 184, 201

to conduct a defense investigation into the police work, autopsy report, physical evidence, forensics, ballistics and alibi witnesses was deficient. Under Strickland, trial and appellate counsel's performance was deficient so he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) "the deficient performance prejudiced the defense" so that he was deprived of "a trial whose result is reliable".[40]

F. Client Protected Autonomy

The Sixth Amendment guarantees the defendant the right to choose the objective of his defense.[41] It is structural error to present the case contrary to the defendant's direction. Structural error effects the framework within which the trial proceeds.[42] In this case, it protects the interest of the client to make his own choices about the proper way to protect his liberty.[43] When a structural error occurs, a new trial is the required corrective.[44]

G. Brady/Prosecutorial Misconduct

The 5th Amendment provides for due process protections in criminal cases,[45] and, likewise, California Constitution Article I section 15 also provides due process protections for criminal defendants.[46] The state therefore has a constitutional obligation to furnish all materially exculpatory evidence and material impeachment evidence to the defendant.[47] When the duty by the state to disclose material evidence has been breached, a writ of habeas corpus is appropriate to vacate the conviction.[48]

[40] *Strickland* at 687
[41] *McCoy v Louisiana*, 583 U. S. 1, 6 -7
[42] *Id*, at 11.
[43] *Id*, at 11.
[44] *Id*, at 13
[45] U.S. CONST. amend. V
[46] Cal. CONST. art. I § 15
[47] *People v. Salazar* (2005) 35 Cal. 4th 1031, 1042
[48] See *In re Ferguson* (1971) 5 Cal. 3d 525

The evidence must be favorable and material.[49] Favorable evidence is that which helps the defendant or hurts the prosecution.[50] Evidence is material only if there is a reasonable probability that, had it been disclosed to the defense, the results of the trial would have been different.[51] The duty to disclose evidence extends even to evidence known only to police investigators and not to the prosecutor.[52]

"'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"[53] The unfairness is present when the prosecution's conduct involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"[54]

H. New Evidence

California Penal Code § 1473 also provides that evidence may be introduced and a writ of habeas corpus issued when "new evidence exists that is credible, material, presented without substantial delay, and is of such decisive force and value that it would have more likely than not changed the outcome at trial."[55]

The standard for new evidence changed in 2017 with amendments to California Penal Code section 1473[56] away from the *In re Johnson* "unerringly towards innocence" standard.[57] Instead, the Legislature now provides that new evidence is "evidence that has been discovered after trial,

[49] *In re Sassounian* (1995) 9 Cal. 4th 535, 543–44
[50] *Id.*
[51] *Salazar* 35 Cal. 4th at 1043
[52] *Id.*
[53] *People v. Hill* (1998) 17 Cal. 4th 800, 819 citing *People v. Gionis* (1995) 9 Cal. 4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal. 4th 806, 820
[54] *Clark* 52 Cal.4th at 950; *Id.*
[55] Cal. Pen. Code § 1473(b)(3)(A)
[56] Stats 2016 Ch 785 § 1 (S.B. 1134)
[57] *In re Miles* (2017) 7 Cal. App. 5th 821, 828 citing *In re Johnson* (1998) 18 Cal.4th 447, 462 [overturned by statute]

that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, or impeaching."[58]

I. False Evidence

California Penal Code section § 1473 further provides for writ of habeas corpus where false evidence is "substantially material or probative on the issue of guilt or punishment" and was introduced at a hearing or trial relating to his incarceration.[59]

False evidence includes when a witness testified falsely,[60] such that they testified "contrary to his belief at the time."[61] The prosecution has a duty to disclose that a witness has testified falsely, even if it finds out of the falsity after the testimony has already been given.[62] When a witness testifies falsely and the state knew such testimony was perjurious, the Petitioner may seek habeas corpus relief after showing, by a preponderance of the evidence, that the testimony was material.[63] Where the prosecution has knowingly used perjured testimony, or failed to correct testimony which it subsequently learned was false, the falsehood is deemed to be material and reversal is required if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[64] Materiality is "a reasonably probability the result would have been different without the false evidence."[65] The Court has provided that the showing of prejudice for false evidence is the same as the reasonable probable test for state law error under *People v. Watson* (1956) 46 Cal. 2d 818, 836.[66]

[58] Cal. Pen. Code. § 1473(b)(3)(B)
[59] Cal. Pen. Code. § 1473(b)(1)
[60] *In re Rogers* (2019) 7 Cal. 5th 817, 833–34
[61] *In re Imbler* (1963) 60 Cal. 2d 554, 561
[62] *Napue v. Illinois, supra,* 360 U.S. 264; *Alcorta v.Texas* (1957) 355 U.S. 28; *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011
[63] *In re Roberts* (2003) 29 Cal. 4th 726, 741
[64] *United States v. Bagley*, 473 U.S. at p. 679, fn. 9; *United States v. Agurs* (1976) 427 U.S. 97, 103; accord *Giglio v. United States*, 405 U.S. at p. 154; *Napue v. Illinois*, *supra*, 360 U.S. at p. 271.
[65] *In re Figueroa* (2018) 4 Cal. 5th 576, 589
[66] *Roberts* 29 Cal. 4th at 686

Due process is violated when the prosecution calls a witness who testifies falsely, even if the prosecution is unaware at the time the testimony is given that it is false.[67] Where the prosecution has unwittingly presented false evidence, reversal is required if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[68] Due process is also violated when the prosecution has used improper suggestive and manipulative techniques in order to attain sought-after witness testimony.[69]

J. Discrimination in Jury Selection

Equal protection is a fundamental right under the U S Constitution. Since Petitioner's second trial in 1983 and filing of federal habeas writ in 1996, the courts, especially the United States Supreme Court, have evolved their thinking about how to determine whether race was a factor in eliminating prospective jurors.

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). The "Constitution forbids striking even a single prospective juror for a discriminatory purpose."[70]

The Supreme Court has articulated a three-part test to govern the analysis of *Batson* claims:

First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion

[67] *United States v. Young* (9th Cir. 1994) 17 F.3d 1201, 1203-1204; *Sanders v. Sullivan* (I) (2nd Cir 1988) 863 F.2d 218, 222; *Sanders v. Sullivan* (II) (2nd Cir. 1990) 900 F.2d 601

[68] See *United States v. Bagley*, *supra*, 473 U.S. at p. 682; *United States v. Young*, *supra*, 17 F.3d at pp. 1203-1204; *United States v. Alzate* (11th Cir. 1995) 47 F.3d 1103, 1109

[69] See *Foster v. California* (1969) 394 U.S. 440; *Simmons v. United States* (1968) 390 U.S. 377, 384; *People v. Shirley* (1982) 31 Cal.3d 18

[70] *Flowers v Mississippi* (2019) 588 U S 1, 18; *Mayfield v. Broomfield* (C.D.Cal. June 26, 2020, No. CV 97-3742 FMO) 2020 U.S.Dist.LEXIS 112667.(Discriminatory intent shown); *Oliver v Davis* (2019) U.S. Dist. Central CA LEXIS 204538 (*Batson* claim granted as to one juror)

by offering permissible race-neutral justifications for the strikes. Third, if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination.[71]

"[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."[72] A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case.[73] A defendant may establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.[74] At the third step of the *Batson* inquiry, "the persuasiveness of the [prosecution's] justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination."[75]

The court must determine whether the strike was "'motivated in substantial part by discriminatory intent.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008)); *see also id.* at 1754 n.6 ("In *Snyder*, we noted that we had not previously allowed the prosecution to show that 'a discriminatory intent [that] was a substantial or motivating factor' behind a strike was nevertheless not 'determinative' to the prosecution's decision to exercise the strike.

A court must decide "not only whether the reasons stated are race-neutral, but whether they are relevant to the case, and whether those stated reasons were the prosecutor's genuine reasons for exercising a peremptory strike, rather than pretexts invented to hide purposeful discrimination."

[71] *Johnson v. California*, 545 U.S. 162, 168 (2005) (internal quotation marks, alterations, citations, and footnote omitted).
[72] *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam).
[73] *Batson v Kentucky* (1986) 476 U S 79, 96 - 97
[74] *Id, at* 96 -97
[75] *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam).

Green v. LaMarque, 532 F.3d 1028, 1030 (9th Cir. 2008). As the Supreme Court explained in *Snyder*, "[t]he prosecution's proffer of [one] pretextual explanation naturally gives rise to an inference of discriminatory intent[,]" even where other, potentially valid explanations are offered. 552 U.S. at 485. The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.[76]

In undertaking its "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," *Batson*, 476 U.S. at 93 (internal quotation omitted), the court may conduct "side-by-side comparisons" of prospective jurors in the protected group who were struck and prospective jurors outside the group who were allowed to serve.[77] "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.* The court looks at all of the relevant facts and circumstances taken together establish that the State's peremptory strike was not motivated in substantial part by discriminatory intent.[78] In *Walker v Davis*, the court examined whether race was a substantial motivating factor and determined that it was.[79]

California courts have used juror questionnaires as a part of looking at facts and other relevant circumstances.[80] They have also used prosecutor's notes regarding jury selection as a part of their analysis.[81]

[76] *Batson v. Kentucky,* (1986) 476 U S 79, 96 - 97
[77] *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (finding that side-by-side comparisons of Black venire members who were struck and non-Black venire members allowed to serve were "[m]ore powerful" than bare statistics). See also *People v. Gutierrez* (2017) 2 Cal.5th 1150 [218 Cal.Rptr.3d 289, 395 P.3d 186]
[78] *Flowers v Mississippi* (2019) 588 U S 1, 18
[79] *Walker v. Davis* (9th Cir. July 31, 2020, No. 19-15087) 2020 U.S. App. LEXIS 24188
[80] *People v Rhoades* (8 Cal 5th 393, 426 2019); *Oliver v Davis* (2019) U.S. Dist. Central CA LEXIS 204538; *People v Peterson* (2020) Cal. LEXIS 5457
[81] *Crittenden v. Chappell* (2015) 804 F.3d 998, 1026; 2015 U.S. App. LEXIS 18636 **

K. Standard of Review

In the category of cases involving jury selection before the high court clarified the prima facie case standard in *Johnson v. California*, the California Supreme Court has adopted a mode of analysis under which, rather than accord the usual deference to the trial court's no-prima-facie case determination, we "review the record independently to determine whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis."[82]

Because the trial court in Petitioner's case did not determine the credibility and demeanor of the prosecution's stated reasons, the court must apply *de novo* review.[83]

[82] *People v Rhoades*, (2019) 8 Cal 5th 393, 428 - 429 citing *People v. Kelly (2007) 42 Cal.4th 763, 779 [68 Cal. Rptr. 3d 531, 171 P.3d 548]*; accord, *People v. Reed (2018) 4 Cal.5th 989, 999 [232 Cal. Rptr. 3d 81, 416 P.3d 68]* (*Reed*); *Davis, supra, 46 Cal.4th at pp. 582–583*; *Bell, supra, 40 Cal.4th at p. 597*
[83] *Davis v. Ayala*, (2015) 135 S. Ct. 2187, 2201

XIV. PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully requests that this Court:

1. Take judicial notice of the contents of the certified record on appeal and all pleadings filed in People v. Stankewitz, Case No. CF78227015;

2. Order respondent to show cause why petitioner is not entitled to the relief sought;

3. Grant petitioner the right to seek sufficient funds and time to secure additional investigative and expert assistance as necessary to prove the allegation in this petition;

4. Permit petitioner to issue subpoenas for documents and depose witnesses, particularly those persons whose age and health make it unlikely that they will be available to testify at an evidentiary hearing should the state dispute the material facts presented in this petition;

5. Order the Fresno County District Attorney to disclose all files pertaining to petitioner's case and grant petitioner leave to conduct discovery, including the right to take depositions, request admissions, propound interrogatories, issue subpoenas for documents and other evidence, and afford petitioner the means to preserve the testimony of witnesses;

6. Order an evidentiary hearing at which petitioner will offer this and further proof in support of the allegations herein;

7. Permit petitioner a reasonable opportunity to supplement the evidentiary showing in support of the claims presented here and to supplement the petition to include claims which may become known as a result of further investigation and information which may hereafter come to light;

8. After **full** consideration of the issues raised in this petition, considered

cumulatively and **in** light of the errors alleged on direct appeal, vacate the judgment and sentences imposed upon petitioner **in** Fresno County Superior Court No. CF78227015.

9. That Petitioner's conviction be vacated and case dismissed with prejudice and Petitioner released from incarceration by the State of California immediately.

10. Grant petitioner such further relief as is appropriate and just in the interests of justice.

XV. DECLARATION OF COUNSEL CURTIS L. BRIGGS

Counsel, predicated on his information and belief, avers the following:

1. From December, 2012 – May, 2019, when Petitioner's case was in Fresno Superior Court for a penalty phase retrial, the prosecution never filed a notice of aggravation.

2. On information and belief, codefendant Teena Topping died in 2015 – 2016; codefendant Marlin Lewis died in late 2000.

I declare under penalty of perjury that the above is true and correct based on my information and belief. Executed on September 29, 2020, at San Francisco, California.

/s/ Curtis L. Briggs .
CURTIS L. BRIGGS

XVI. VERIFICATION

State of California, County of San Francisco:

I, the undersigned, being first sworn, say:

I am an attorney licensed to practice law in the State of California and have my professional office located at 3330 Geary Blvd., 3rd Floor East, San Francisco, CA 94118. I am one of the attorneys of record for Petitioner, Douglas R. Stankewitz, in this action.

I have read the foregoing petition and know the contents thereof to be true based on my representation of the Petitioner.

I am authorized to file this petition for writ of habeas corpus on Petitioner's behalf.

All facts alleged in the above document not otherwise supported by citations to the record, exhibits, or other documents are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 29, 2020, at San Francisco, California.

/s/ Curtis L. Briggs .
Curtis L. Briggs

XVII. WORD COUNT CERTIFICATION

In accordance with California Rules of Court 8.384(a)(2) and 8.204(c)(5), limiting a non-capital habeas writ petition to 14,000 words, I hereby certify that the Petition contains 57,979 words, including footnotes and excluding tables, as ascertained by the word count function of the computer program MS Word used to prepare the brief.

Dated: September 29, 2020

Respectfully Submitted,

J. TONY SERRA
CURTIS BRIGGS

Attorneys for Defendant
DOUGLAS RAY STANKEWITZ

/s/ J. Tony Serra .
J. Tony Serra

/s/ Curtis L. Briggs .
Curtis L. Briggs

XVIII. PROOF OF SERVICE

The undersigned declares:

I am a citizen of the United States. My business address is 2171 Francisco Blvd. E, Suite D, San Rafael, California 94901. I am over the age of eighteen years and not a party to the within action.

On the date set forth below, I caused a true copy of the within

PETITION FOR WRIT OF HABEAS CORPUS and APPLICATION FOR PERMISSION TO FILE PETITION IN EXCESS OF 14,000 WORDS.

to be served on the following parties in the following manner:

TrueFile __x____ Mail ____ Overnight mail ____ Personal service ____ Fax ____

California Attorney General's Office
2550 Mariposa Mall, Room 5090
Fresno, CA 93721-2271

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on October 1, 2020, at San Rafael, California.

/s/ Alexandra Cock .
Alexandra Cock