IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

DOUGLAS R. STANKEWITZ, Petitioner, vs. FRESNO COUNTY SUPERIOR COURT, Respondent, _____ PEOPLE OF THE STATE OF CALIFORNIA and OFFICE OF THE CALIFORNIA ATTORNEY GENERAL, Real Parties in Interest.	Court of Appeal No. _____ Related Appeal Pending – LWOP SENTENCE and Motion for New Trial No. F079560 Current habeas case: In re Douglas Stankewitz, Amended Emergency Petition for Writ of Habeas Corpus, Fresno Superior Court No. 21CRWR685993

Underlying criminal case: Fresno County Superior Court No. CF78227015
Honorable Judge Arlan J. Harrell

PETITION FOR WRIT OF MANDATE – After Failure to Issue an Order to Show Cause on Amended Emergency Petition for Writ of Habeas Corpus (Penal Code § 1473 and CA Rule of Court 4.551);
MEMORANDUM OF POINTS AND AUTHORITIES

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PETITION FOR WRIT OF MANDAMUS

THE HONORABLE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT:

The Indigenous American Petitioner, Douglas R. Stankewitz, respectfully petitions this Court for a writ of Mandate directed to respondent Fresno County Superior Court (hereinafter "FCSC"), and by this verified petition represents that:

It's difficult to imagine a more egregious California death penalty, now LWOP, case, than this one. Petitioner was wrongfully convicted and is innocent. Petitioner has maintained his innocence for over 44 years. He has been on Death Row for over 44 years. But for the law enforcement and prosecutorial misconduct, Petitioner would not have been convicted. Despite the efforts of his defense team, he has not received an evidentiary hearing to demonstrate the true facts of what happened, including egregious law enforcement and prosecutorial misconduct starting from day one. Due to the appeals process and previously filed habeas petition, the State has had this case for 37 out of the last 44 years. It has therefore known the facts, and the law enforcement and prosecution documents which prove the facts, which are contained in the Amended Emergency[1] Petition. At the very least, the State has had the contents of the Petition for Writ of Habeas Corpus since was filed with this Court in October, 2020 and timely served on the Attorney General. Unfortunately, as evidenced by the unwillingness of FCSC to give meaningful consideration to any pleadings or motions filed by Petitioner, and the Fresno County District Attorney's (hereinafter "Fresno DA") continued commission of Brady offenses and evidence manipulation, this case is a maze, with Petitioner having no way out.

[1] Petitioner filed a Petition for Writ of Habeas Corpus with this court on October 2, 2020 (hereinafter "original Habeas Petition"). Petitioner filed an almost identical Petition for Writ of Habeas Corpus with FCSC on January 28, 2021, which was dismissed by FCSC without prejudice. It is only referenced procedurally in this document. Petitioner then filed an identical Amended Emergency Petition for Writ of Habeas Corpus in FCSC to add a wet signature, on March 8, 2021 (hereinafter "Emergency Petition"). See Exhibit 22.

On October 2, 2020, Petitioner filed a Petition for Writ of Habeas Corpus (hereinafter "original Habeas Petition") with this Court, case #F081806. Approximately 15 months ago, on January 7, 2021, in dismissing the petition, this Court directed Petitioner to demonstrate that he had exhausted his remedies by first petitioning "FCSC". Petitioner did as directed.

However, to date, he has no remedies, just time delay after time delay. Some of the delays have been for petty procedural reasons, i.e. no wet signature on the Petition, incorrect form for filing a Motion under seal. Some have been grants of extra time to the Fresno DA and FCSC itself. Notwithstanding its pattern of either denying every defense motion despite no objection from the prosecution and without a hearing, so far, the FCSC has not denied the Emergency Petition. Just as in his criminal case before the FCSC, Petitioner's legal rights have been violated over and over. Having a habeas petition, an expedited proceeding, pending for over 20 months, is an unreasonable delay. Sending the case back to FCSC, in front of the Honorable Arlan Harrell, is an exercise in futility.

STATEMENT OF FACTS

I. Relevant case recitals regarding Honorable Arlan J. Harrell:

1. On December 8, 2018, in the underlying criminal case, defense counsel filed a Civil Code of Procedure §170.1 Disqualification of Judge regarding Honorable Arlan J. Harrell (hereinafter "Judge Harrell"). Judge Harrell replied saying that it should be denied as not timely filed. The reviewing Judge agreed and denied counsel's disqualification request.

2. From December, 2012 – May 3, 2019, Judge Harrell presided over criminal defendant Stankewitz's case. During that time, Judge Harrell, despite there being no response or

objection from the Fresno DA, denied numerous defense motions and made decisions without affording Mr. Stankewitz a hearing. He also denied some defense motions within 24 – 48 hours.[2]

3. On December 6, 2018, the defense filed a Second Motion To Dismiss For Failure To Preserve, Or Destruction Of Evidence, Pursuant To Penal Code §§ 1054.1, 1054.5(b); *Brady v. Maryland* (1963) 373 U.S. 83; *Arizona v. Youngblood* (1988) 488 U.S. 51; AND *California v. Trombetta* (1984) 467 U.S. 479; Request For Evidentiary Hearing. (Hereinafter "Second Trombetta Motion".)

4. Judge Harrell gave the Fresno DA 70 days to respond. The Fresno DA never responded. Judge Harrell never ruled on the Motion.

5. At his sentencing on May 3, 2019, without citing any legal authority, he prevented Petitioner from making a statement stating that he would be subject to cross examination. PRH Vol. #XXXV RT 509. Then, as he sentenced Petitioner to Life Without the Possibility of Parole (hereinafter "LWOP"), Judge Harrell smirked at Petitioner.

> UNIDENTIFIED PERSON IN THE AUDIENCE:· Look at that
> ·7· smirk.
> ·8· THE COURT:· Yes, in point of fact, I am smirking,
> ·9· because Mr. Stankewitz is smirking at me.· That's the only
> 10· reason.· You folks probably were not here when Mr. Stankewitz
> 11· first made his appearance in this department, when he talked
> 12· about how important it was for him to have his dental work
> 13· done so he could have a Kool-Aid smile.· So Mr. Stankewitz
> 14· and I have seen one another occasionally for quite some time.
> 15· I have no ill will towards Mr. Stankewitz.· I want everyone
> 16· to know that.· I'm sure he does already.
>
> PRH Vol #XXXV RT 509.

[2] For complete list of summarily denied motions, see Chart/Exhibit 19f, to Petitioner's Reply (See Exhibit 33)

II. FCSC court recitals:

6. In 2019, Petitioner appealed his LWOP sentence and denial of the trial court to hear his Motion for New Trial, to this Court. The briefing has been completed but no decision has been issued. The case number is F079560.

7. All the proceedings about which this petition is concerned have occurred within the territorial jurisdiction of respondent Court and of the Court of Appeal of the State of California, Fifth Appellate District.

8. This petition is made to this Court in the first instance pursuant to Penal Code § 1473 or Civil Code of Procedure § 1085 Petitioner previously filed a Writ of Mandate pursuant to Penal Code § 1405(j) DNA Testing.

9. Petitioner has no right of appeal from the FCSC's failure to decide on the Emergency Petition because there is no final order and does not have a plain, speedy or adequate remedy at law other than the relief sought in this petition, and he will be irreparably harmed if this Court does not intervene. Petitioner is prejudiced by the delay.

10. Real parties in interest are the People of the State of California, who prosecuted the petitioner in the court below, and the Office of the Attorney General.

11. All of the above-named parties are properly joined as parties directly affected by the proceedings below. Petitioner has a clear, present, and substantial right to the performance of respondent's duty to decide on his Petition.

12. Petitioner has performed all conditions precedent to the filing of this petition. The accompanying memorandum of points and authorities and exhibits support petitioner's contentions.

13. Petitioner DOUGLAS R. STANKEWITZ is in the custody of the California Department of Corrections and Rehabilitation. For the last 44 years, he has been incarcerated in San Quentin State Prison (CDC No. B97879) in San Quentin, California, by Kathleen Allison, Secretary of the California Department of Corrections and Rehabilitation, and Ronald J. Broomfield, Warden.

14. Petitioner is confined pursuant to the Judgment of the California Superior Court, County of Fresno, Case No. CF78227015, serving a sentence of LWOP imposed on May 3, 2019, for the murder, kidnapping, and robbery of Theresa Graybeal on February 8, 1978.

15. Petitioner did not confess, nor did he testify at either the guilt or penalty phase of either the original trial or the retrial. He was convicted of first-degree murder, kidnapping and robbery and was sentenced to death on October 12, 1978. The California Supreme Court reversed the guilt and penalty phases and remanded for a new trial. (*People v. Stankewitz* (1982) 32 Cal. 3d 80 ("Stankewitz I").) Petitioner was tried a second time and convicted and sentenced to death on November 18, 1983. The Ninth Circuit Court of Appeals reversed the penalty phase on October 29, 2012. The Ninth Circuit Court 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 LWOP. *Stankewitz v. Wong* 698 F.3d, 1163, 1176 (9th Cir. 2012).

16. As a result of the Ninth Circuit's ruling, starting on December 20, 2012, the case was before FCSC. Between 2012 – 2019, there were numerous Deputy District Attorneys assigned to the case and several changes of appointed counsel for Stankewitz. Pretrial motions

and discovery took place starting May, 2015, and were ongoing. The defense motions filed included a Motion to Dismiss, with the recantation of Billy Brown, the key witness against Mr. Stankewitz.

17. The defense filed a second *Trombetta* Motion to dismiss on December 6, 2018. That Motion alleges bad faith by the Fresno DA's office and law enforcement over the previous 40 years. The bad faith consists of widespread prosecutorial misconduct, including manipulation and loss of exculpatory evidence. Despite being given extensions of time to respond, the Fresno DA never replied to that Motion. FCSC never ruled on the second *Trombetta* Motion. See Exhibit 23 Second *Trombetta* Motion with Exhibits.

18. A trial date was set for November, 2019. On April 19, 2019, seven years after the death penalty was reversed, the Fresno DA requested that FCSC sentence Petitioner to LWOP. Over objection by defense counsel to an LWOP sentence, FCSC granted the request, and on May 3, 2019, Petitioner was so sentenced.

19. In a separate document filed with this Petition, Motion for Judicial Notice, Petitioner requests that this Court take judicial notice of the record on file in his Petition for Writ of Habeas Corpus filed with this Court on October 2, 2020, Case # F081806.

20. This Petition is brought as a separate proceeding, to challenge the failure of FCSC to issue an order to show cause on Petitioner's Emergency Petition pursuant to California Penal Code §1473. Petitioner has no right to appeal.

21. Petitioner is indigent.

III. Current FCSC habeas petition history, by type of motion or ruling:

A. Petition for Writ of Habeas Corpus and Emergency Petition for Writ of Habeas Corpus -COVID19

22. On January 28, 2021, Petitioner filed his Petition for Writ of Habeas Corpus with FCSC. That Petition was dismissed without prejudice, so it is not attached.

23. On February 23, 2021, FCSC entered an Order Finding Petition for Writ of Habeas Corpus is Unverified and Granting Leave to File Amended Petition. The reason given was "that although counsel's name is typed along the signature line of the verification page of the petition, neither Petitioner nor his counsel have physically signed the petition." (See Exhibit 24).

24. On March 8, 2021, Petitioner filed his Amended Emergency Petition for Writ of Habeas Corpus – COVID19 (hereinafter "Emergency Petition"), to add a wet signature. The content of the Emergency Petition is identical to the petition filed with FCSC in January, 2021. The Emergency Petition is attached as (Exhibit 22).

B. Declaration of Maureen Bodo, Under Seal

25. On March 25, 2021, FCSC entered an Order Denying Petitioner's Application to File Declaration of Maureen Bodo Under Seal Without Prejudice, due to several procedural filing errors. See Exhibit 25.

26. On April 15, 2021, Petitioner filed his Amended Application for Permission to File Declaration of Maureen Bodo Under Seal, Public Redacted Materials from Conditionally Sealed Record; Unredacted Declaration of Maureen Bodo Lodged Conditionally Under Seal with Research Attorney. (Exhibit 26)

27. On May 4, 2021, FCSC entered an Order Granting Petitioner's Amended Ex Parte Application to File Unredacted Declaration of Maureen Bodo Under Seal. (Exhibit 27)

C. Request for Hearing

28. On May 28, 2021, pursuant to CA Rules of Court 4.551 (3) (b), Petitioner, with no ruling being after more than 60 days, filed a Notice and Request for Ruling. (Exhibit 28)

29. On June 10, 2021, FCSC entered an Order Denying Petitioner's Request for Ruling, stating that it had already ruled by issuing an Order for Informal Response, and further that the request was moot because of the June 2 Request for Informal Response. See Exhibit 29.

D. Informal Response and Reply

30. On June 2, 2021, FCSC entered an Order for Informal Response to the California Attorney General's Office (hereinafter "AG"). The stated reason for the Order for Informal Response was because 'further information was needed with respect to the claims presented.' The Order gave the Attorney General an additional 30 days beyond the 15 days provided in the rules of court to file its informal response and Petitioner an additional 30 days to file a reply. The Order also states 'further consideration of the petition for writ of habeas corpus is stayed pending conclusion of the informal response process.' See Exhibit 30.

31. On June 17, 2021, the AG filed a letter with FCSC, promptly denying the request. (See Exhibit 31) When the AG failed to respond, it automatically went back to the Fresno DA.

32. On September 1, 2021, the Fresno DA filed its Informal Response, which was not signed under penalty of perjury. It was replete with boilerplate, incorrect characterizations of applicable law and included an unlawful false report regarding material evidence in the case, the alleged murder weapon. The Informal Response had no declarations attached from counsel or any experts. (Exhibit 32 Informal Response) In Claim 1 of his Emergency Petition, Petitioner submitted a CLETS report from law enforcement showing that the alleged murder weapon was in the possession of law enforcement from 1973 through the date of the murder. See Emergency Petition, p. 56-57 and Emergency Petition Exhibit 1a. The Fresno DA's Informal Response

included a false report regarding the holster, excluding the exculpatory engravings located on the gun holster. Further, according to police practices expert, Roger Clark[3], the so-called examination that they performed on the gun holster was unscientific because it was not performed by a qualified lab under scientific magnification.

33. The examination was done with the naked eye by Deputy District Attorney Freeman, Fresno DA Investigator Isaac, Exhibits Clerk Juan Menses and Court Deputy Seth Yoshida, and signed off on by Supervisor Clark Crapo. None of them have the skills or knowledge to perform a credible examination.[4] The unscientific nature of their examination is further demonstrated by the content of the report which is equivocal in stating what they observed. Further, two of the photos attached to their report clearly show an additional date on the holster. See Informal Response Exhibit B.

34. Their discussion of the CLETS report, found at page 1 -2 of the Fresno County DA's Report #78DA0001-Supplemental-1-Report, Informal Response Exhibit A, in which Investigator Isaac parses her words, further demonstrates factual disputes regarding the possession of the gun from 1973 through two days after the murder. Thus, the content of the Informal Response, when contrasted with the Emergency Petition, made it clear that there is a factual dispute regarding whether the gun in evidence, and used to convict Petitioner, is the alleged murder weapon.

35. On October 13, 2021, Petitioner filed his Reply (hereinafter "Reply") to Informal Response. See Exhibit 33. As explained in the Reply, at p. 6 -7, the State concedes 1) that it presented false evidence at Petitioner's second trial regarding the victim's height; 2) that it committed Brady violations; 3) that it cannot explain the over 50 missing items of evidence; and

[3] See Exhibit 19c Declaration of Roger Clark, dated 10-8-2021 @ 11

[4] These Fresno DA and FCSC employees are now witnesses in this case.

4) that the juror questionnaires have been lost. As further explained in the Reply, at p. 8 - 15, the State's Informal Response, contrasted with the Emergency Petition claims, established factual disputes or application of law issues regarding Claims 1- 19[5]. Petitioner asked that the Emergency Petition be transferred to another county[6]. The Reply also contained a Declaration from Roger Clark, Police Practices expert, stating that the prosecution report regarding the holster in evidence was a false report.[7] Thus, FCSC has knowledge of this instance of misconduct. To date, the court has not admonished or sanctioned the Fresno DA.

E. Extensions of Time

36. In its Order dated March 25, 2021, the court granted its own *sua sponte* motion extending its time to rule until May 14, 2021. See Exhibit 25.

37. On June 28, 2021, the Fresno DA filed a Request for Extension of Time to File Respondent's Informal Response, along with a Declaration in Support of the Request, asking for additional time to respond until September 1, 2021. See Exhibit 34.

38. On June 30, 2021, the FCSC granted the Fresno DA's request 'for good cause shown' and gave it an additional 45 days until September 1, 2021, to file its response. The Order stated that Petitioner had 45 days from September 1, 2021, to reply. See Exhibit 35.

39. On June 30, 2021, Petitioner filed a Request to Deny Any Further Requests for Continuance by the Fresno District Attorney and Request for an Expedited Process. (Exhibit 36).

40. On August 9, 2021, FCSC entered an Order Denying Petitioner's Request to Deny Any Further Requests for Continuance by the Fresno District Attorney and Request for an Expedited Process. See Exhibit 37.

[5] Only Claim 16 does not fall into this category.
[6] See Reply p. 15 – 17.
[7] See Exhibit 19c, Declaration of Roger Clark, supra @ 12.

41. On August 11, 2021, Petitioner filed his Renewed Objection to Any Further Requests for Continuance by the Fresno District Attorney and Request for an Expedited Process. (Exhibit 38).

42. On August 27, 2021, FCSC entered an Order Denying Petitioner's Renewed Objection to Any Further Requests for Continuance by the Fresno District Attorney and Request for Expedited Process stating that it had already considered and rejected the requests and declined to reconsider them. See Exhibit 39.

43. On November 29, 2021, FCSC entered an Order Extending Court's Time to Rule. In that Order, FCSC *sua sponte*, gave itself an additional 62 days to decide. The reason given in the order for granting the additional time was 'to further review and consider the habeas petition, informal response and reply'. See Exhibit 40.

44. On January 27, 2022, FCSC entered an Order Extending Court's Time to Rule. It found 'good cause' for an extension to further review the Emergency Petition, Informal Response, Reply, First Supplemental Filing and Second Supplemental Filing. The Order gave FCSC an additional 63 days until March 31, 2022, to decide. See Exhibit 41.

45. On March 29, 2022, FCSC entered an Order Extending Court's Time to Rule. It found 'good cause' for an extension to further review the Emergency Petition, Informal Response, Reply, First Supplemental Filing and Second Supplemental Filing. The Order gave the court an additional 180 days, until September 30, 2022, to decide.

46. Per CA Rules of Court Rule 4.551, given the current case posture, the total allotted time for responses and decisions is 165 days. In this case, FCSC gave the prosecution total additional time of 75 days; the court gave itself total additional time of 305 days. This additional time totals 380 days.

F. Motion for Conditional Examination

47. On June 30, 2021, Petitioner filed a Motion for Conditional Examination to Preserve Evidence. (Exhibit 42) The underlying criminal case started over 44 years ago. The remaining witnesses, i.e. those who are still alive, are in there 70s, 80s and 90s and could die at any time. Petitioner filed a Motion for Conditional Examination to preserve important testimony from these witnesses.

48. On August 9, 2021, in its usual practice, despite no objection or reply from the Fresno DA, the Court denied the Motion without a hearing. FCSC entered an Order Denying Petitioner's Motion for Conditional Examination to Preserve Evidence, stating that it was premature because FCSC had not entered an Order to Show Cause on the petition. See Exhibit 43.

49. On August 11, 2021, Petitioner filed his Formal Request for a Hearing Date and/or Briefing Schedule for Previously Filed Motion for Conditional Exam to Preserve Evidence. (Exhibit 44)

50. On August 27, 2021, FCSC entered an Order Denying Request for Hearing for Conditional Exam to Preserve Evidence stating that it had already denied the Motion for Conditional Exam and that there is no need to set a hearing date. See Exhibit 45.

G. Motion for Release on Own Recognizance or Setting of Bail at Reasonable Amount

51. On November 22, 2021, Petitioner filed his Notice of Motion and Motion for Release on Own Recognizance or Setting of Bail at Reasonable Amount. (Exhibit 46)

52. On January 3, 2022, FCSC, without any objection filed by the Fresno DA and without a hearing, entered an Order Denying Petitioner's Motion for Release On Own Recognizance Or Setting Bail. See Exhibit 47.

H. Supplemental Filings

53. On January 12, 2022, Petitioner filed his Supplemental Filing to Emergency Petition for Writ of Habeas Corpus (hereinafter "Supplemental One"). (Exhibit 48)

54. On January 26, 2022, Petitioner filed his Second Supplemental Filing to Emergency Petition for Writ of Habeas Corpus (hereinafter "Supplemental Two"). (Exhibit 49)

GROUNDS FOR RELIEF

Petitioner continues to be irreparably injured by his wrongful incarceration of over 44 years. Under Penal Code §1473, and CA Rules of Court 4.550 *et seq*, he is entitled to timely consideration of his Emergency Petition. The claims presented show his innocence for the murder for which he has been convicted and sentenced over 44 years ago. If respondent FCSC is not compelled to perform its legal duty and issue a decision in the habeas proceeding, without further unreasonable delay, Petitioner will continue to be denied his substantive and due process rights and continue to be wrongfully incarcerated.

PRAYER

WHEREFORE, Douglas Stankewitz prays that:

A writ of mandate issue from this Court, pursuant to California Code of Civil Procedure § 1085 to issue a peremptory writ, ordering either 1) that due to extensive, egregious law enforcement and prosecution misconduct that the underlying criminal case be dismissed with prejudice, that Petitioner be released from incarceration immediately and that pursuant to Penal Code § 1485.55, Petitioner be declared factually innocent; or 2) that the Emergency Petition be transferred to another county, that pursuant to Code of Civil Procedure § 170.1(c), the Emergency Petition be assigned to a different judge, and that a referee be appointed to hold an evidentiary hearing for the presentation of witnesses and evidence with regard to all disputes as

to fact; or 3) pursuant to CA Rules of Court 4.551(c), issue an Order to Show Cause why the Emergency Petition should not be granted; and further order that the Emergency Petition proceedings started as of the date that FSCS issued a Request for Informal Response, namely June 2, 2021; and that Petitioner is entitled to appointed counsel, including fees and costs for investigation and experts, as of that same date, June 2, 2021; or 4) issue a Writ of Mandate ordering the FCSC to rule on the Emergency Petition after an evidentiary hearing under CA Rules of Court 4.550 *et seq*.

Further, that This Court grant Petitioner such other and further relief as may be appropriate and just.

Dated: May 17, 2022

Respectfully Submitted,

/s/ Curtis L. Briggs .
CURTIS L. BRIGGS
Attorney for Petitioner
Douglas Stankewitz

/s/ Marshall D. Hammons .
MARSHALL D. HAMMONS
Attorney for Petitioner
Douglas R. Stankewitz

VERIFICATION

I am an attorney licensed to practice law in the State of California. My professional office is 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.

Regarding Local Rule 8(b):

1. A copy of every order entered in the FCSC habeas proceeding is attached as an exhibit to this Petition for Writ of Mandate.
2. Copies of all documents submitted to the trial court supporting and opposing petitioner's petition are attached as exhibits to this Petition for Writ of Mandate; and
3. There have been no in-court hearings in the FCSC habeas proceeding, therefore, there are no transcripts. The proceedings have been fairly summarized in the within Petition @ pages 10 - 22.

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 mandate on Petitioner's behalf.

As stated in previous pleadings, the weight and influence of the original prosecutor, James Ardaiz, makes fair consideration in Fresno impossible.

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 May 17, 2022, at San Francisco, California.

/s/ Curtis L. Briggs .
CURTIS L. BRIGGS
Attorney for Petitioner
Douglas Stankewitz

WORD COUNT CERTIFICATION

In accordance with California Rules of Court 8.384(a)(l) and 8.204(c), limiting the memorandum accompanying a petition to 11,000 words, I hereby certify that the attached Memo of Points and Authorities contains 8,471 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: May 17, 2022

Respectfully Submitted,

J. TONY SERRA
CURTIS BRIGGS

/s/ Curtis L. Briggs .
CURTIS L. BRIGGS
Attorney for Petitioner
Douglas Stankewitz

/s/ Marshall D. Hammons .
MARSHALL D. HAMMONS
Attorney for Petitioner
Douglas R. Stankewitz

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

There is no dispute as to the facts of the habeas proceeding to date. The complete facts are stated in paragraphs 1 - 53, *supra*. To summarize, Petitioner filed his Habeas Petition in FCSC on January 28, 2021. He subsequently filed an Amended Emergency Petition on March 8, 2021. FCSC ruled on the Emergency Petition by issuing a request for Informal Response on June 2, 2021. The Fresno DA has filed its Informal Response; Petitioner has filed his Reply to Informal Response, as well as two supplemental filings. FCSC had all the pleadings as of January 26, 2022. It has continued *sua sponte*, to give itself more extensions of time to decide on the Emergency Petition, stating simply 'for good cause'. Given the most recent extension, if it rules on September 30, 2022, FCSC will not rule until after it has had the Emergency Petition for over 600 days.

ARGUMENT

I. THIS COURT HAS THE AUTHORITY TO ISSUE A WRIT OF MANDATE PURSUANT TO CA CCP §§ 1085 & 1086

The legal right we seek to protect is Petitioner's right to a timely decision on the Emergency Petition and further the court failing to state the 'good cause' for granting itself more time. Petitioner is beneficially interested in the result.

Code of Civil Procedure § 1085

> (a) A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and party to the use and enjoyment of a right or office to which the party is entitled, and party to the use and enjoyment of a right or office to which the party is entitled, and

Code of Civil Procedure § 1086

> The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

"As with the writ of habeas corpus, the California Constitution grants this court, the Courts of Appeal, and superior courts original jurisdiction to issue writs of mandate [and prohibition]. (Cal. Const., art. VI, § 10.)" *Townsel v. Superior Court* (1999), 20 Cal. 4th 1084, 1088. Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy; the respondent has a duty to perform; and the petitioner has a clear and beneficial right to performance. (Code Civ. Proc., §§ 1085, 1086; 5 Witkin, Cal. Procedure (2d ed. 1971) Extraordinary Writs, § 61, p. 3838.); *Payne v. Superior Court of L.A. Cty.* (1976), 17 Cal. 3d 908, 925.

There is no doubt that a judge of the superior court may be compelled by a writ of mandate to proceed with the trial of either an issue of law or fact in an action rightly pending in his court when he refuses without legal reason so to do. *Tomkin v. Harris* (1891) 90 Cal. 201.

Conversely, if legal justification for his refusal to act as the petitioner demands is disclosed mandamus will not lie. In this proceeding the statutory disqualification constituted such legal justification. Also, the party making the application must be beneficially interested in the result (Code Civ. Proc. §1086). There must be a legal right to be enforced or protected by the petitioner as well as a legal duty to be performed by the judge in order that the writ may be made available (16 Cal. Jur. 819). *San Diego v. Andrews* (1924) 195 Cal. 111, 120. But it is an appropriate remedy to compel a court or government officer to exercise that discretion "'under a proper interpretation of the applicable law.'" *People v. Rodriguez* (2016) 1 Cal.5th 676, 684 quoting *Anderson v. Phillips* (1975) 13 Cal.3d 733, 737; see *Babb v. Superior Court* (1971) 3

Cal.3d 841, 851 "[a]lthough it is well established that mandamus cannot be issued to control a court's discretion, in unusual circumstances the writ will lie where, under the facts, that discretion can be exercised in only one way"]. "'[W]here one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy and adequate remedy in the ordinary course of law, he [or she] is entitled as a matter of right to the writ, or perhaps more correctly, in other words, it would be an abuse of discretion to refuse it.'" *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 114 *citing Shorts v. Superior Court* (CA2 Div. 7 2018) 24 Cal. App. 5th 709, 719.

Before seeking mandate in an appellate court to compel action by a trial court, a party should first request the lower court to act. If such request has not been made the writ ordinarily will not issue unless it appears that the demand would have been futile. *People v. Romero* (1861) 18 Cal. 89, 91-92; *Bank of America etc. Assn. v. Superior Court* (CA2 Div. 2 1936) 15 Cal.App.2d 279, 280; *Friedland v. Superior Court* (CA3 1945) 67 Cal.App.2d 619, 628; see 16 Cal.Jur. 771-773; Cf., *Christ v. Superior Court* (1931) 211 Cal. 593, 596; *Moore v. Superior Court* (CA3 1912) 20 Cal.App. 299, 304 *Phelan v. Superior Court of San Francisco* (1950) 35 Cal. 2d 363, 372.

Here, Petitioner has no other plain, speedy and adequate remedy because the lower court's failure to decide on the Emergency Petition is not appealable. Petitioner asked FCSC make a decision on whether to issue an Order to Show Cause when he filed a Request for Ruling on May 28, Request for Expedited Process on June 30, and Request for Expedited Process on August 11, all of which were denied by FCSC. Petitioner's requests have proven futile. Further, Petitioner is beneficially interested in the resolution of the Emergency Petition because he is still wrongfully incarcerated. FCSC has also abused its discretion by not following its duty under

Penal Code § 1473 and Cal. Rules of Court, Rule 4.550 *et seq* to decide on the Emergency Petition in a timely manner.

II. STANDARD OF REVIEW

The facts here are the pleadings filed in FCSC in Petitioner's habeas case. There is no dispute as to the facts.

A. Discretionary Review Is Appropriate Because The Trial Court Had A Legal Duty To Act But Abused Its Discretion In The Way It Acted

"The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principled governing the subject of its action . . ." *People v. Jacobs* (CA1 Div. 2 2007) 156 Cal.App.4th 728, 737 (internal quotations omitted). "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." *Jacobs*, *supra* @ 737 (internal quotations omitted). See also *Denton v. City and County of San Francisco* (CA1 Div. 2 2017) 16 Cal.App.5th 779.

In *Jacobs*, *supra*, the court held that there was an abuse of discretion in denying a continuance, and ended its discussion with this observation: "In *Concord Communities v. City of Concord Communities v. City of Concord* (CA1 Div. 4 2001) 91 Cal.App.4th 1407, 1417, our colleagues in Division Four of this court observed that 'Abuse of discretion has at least two components: a factual component … and a legal component. [Citation omitted.] This legal component of discretion was best explained long ago in *Bailey v. Taaffe* (1866) 29 Cal. 422, 424: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal

discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice …".

"All this is well described in Witkin where, likewise citing the still vital *Bailey*, *supra*, 29 @ 424, the author distills the principle as follows: 'Limits of Legal Discretion. [¶] The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. (See 5 Am.Jur.2d, Appellate Review § 695.) …' (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 358, pp. 406–407.)" (*Jacobs*, *supra*, 156 Cal.4th at pp. 737–738.) …'A court abuses its discretion when it acts unreasonably under the circumstances of the particular case.' " *People v. Panah* (2005) 35 Cal.4th 395, 426; *People v. Richardson* (2008) 43 Cal. 4th 959, 995.

B. De Novo Review Is Proper For Appearance Of Partiality Of Judge

The standard of review for determining the partiality of a judge is de novo. *Haworth v Superior Court* (2010) 50 Cal. 4th 372, 384, 385 and see Section IX. *infra*.

III. PETITIONER MET HIS BURDENS PURSUANT TO CALIFORNIA PENAL CODE §1474 AS TO CONTENT AND FORM

CHAPTER 1. Of the Writ of Habeas Corpus

1473. (a) A person unlawfully imprisoned or restrained of their liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of the imprisonment or restraint.
(b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:
(1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to the person's incarceration.

1474.
Application for the writ is made by petition, signed either by the party for whose relief it is intended, or by some person in his behalf, and must specify:

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them, if they are not known;
2. If the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists;
3. The petition must be verified by the oath or affirmation of the party making the application.

Penal Code § 1473 defines the basis for filing a petition for writ of habeas corpus. Petitioner filed his Emergency Petition pursuant to 1473 (b) (1) false evidence, (b) (3) new evidence; and (d) numerous constitutional grounds. Penal Code § 1474 provides what must be specified in such a petition. FCSC stated in its Order dated February 23, 2021, that Petitioner failed to properly verify the petition. That failure was cured with the filing of the Emergency Petition. The Emergency Petition states fully and with particularity the facts on which relief is sought, as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. See *In re Serrano* (1995) 10 Cal. 4th 447, 455.

IV. THE COURT ABUSED ITS DISCRETION BY FAILING TO FOLLOW PROPER PROCEDURE PER CA RULES OF COURT 4.550 *et. Seq*.

A. Ordinary Principles Of Statutory Construction Govern Rules Interpretation

"[O]rdinary principles of statutory construction govern our interpretation of the California Rules of Court. *Crespin v. Shewry* (CA1 Div. 1 2004) 125 Cal.App.4th 259, 265; *Life v. County of Los Angeles* (CA2 Div. 3 1990) 218 Cal.App.3d 1287, 1296. Our objective is to determine the drafter's intent. If the rule's language is clear and unambiguous, it governs. *Crespin v. Shewry*, *supra*, at p. 265. As cited in *Bi-Coastal Payroll Services v. California Ins. Guarantee Assoc.* (CA2 Div. 5 2009) 174 Cal. App.4th 579, 585.

"The usual rules of statutory construction are applicable to the interpretation of the California Rules of Court." *Volkswagen of America, Inc. v. Superior Court* (CA1 Div. 5 2001) 94 Cal.App.4th 695, 703. Our objective is to determine the drafters' intent using the words of the rule as our starting point. *Kahn v. Lasorda's Dugout, Inc.* (CA2 Div. 8 2003) 109 Cal.App.4th 1118, 1122–1123. If the language of the rule is clear and unambiguous, it is unnecessary to probe the rule's drafting history in order to ascertain its meaning. (*Ibid*.) If possible, we attribute significance to every word, phrase, sentence and part of a court rule. *Lammers v. Superior Court* (CA4 Div. 1 2000) 83 Cal.App.4th 1309, 1321. "We accord a challenged rule a reasonable and commonsense interpretation consistent with its apparent purpose, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." *Shewry*, *supra* @ 265.

The goal … of the procedures that govern habeas corpus is to provide a framework in which a court can discover the truth and do justice in timely fashion. *People v. Duvall* (1995) 9 Cal. 4th 464, 482. ("Any material allegation of the petition not controverted by the return is deemed admitted for purposes of [a superior court habeas corpus] proceeding"; all rule references are to the California Rules of Court.) *In re Duval* (CA4 Div. 3 2020) 44 Cal.App.5th 401, 407, fn 4, citing Cal. Rules of Court, rule 4.545 and 4.551(d).

> **Rule 4.550. Habeas corpus application**
> This article applies to habeas corpus proceedings in the superior court under Penal Code section 1473 et seq. or any other provision of law authorizing relief from unlawful confinement or unlawful conditions of confinement, …

> **Rule 4.551. Habeas corpus proceedings**
> (a) (3) (A) On filing, the clerk of the court must immediately deliver the petition to the presiding judge or his or her designee. The court must rule on a petition for writ of habeas corpus within 60 days after the petition is filed.
> (B) If the court fails to rule on the petition within 60 days of its filing, the petitioner may file a notice and request for ruling.

(i) The petitioner's notice and request for ruling must include a declaration stating the date the petition was filed and the date of the notice and request for ruling, and indicating that the petitioner has not received a ruling on the petition. A copy of the original petition must be attached to the notice and request for ruling.

Rule 4.551 (a)(4)(c)
(4) For the purposes of (a)(3), the court rules on the petition by:
…
(C) Requesting an informal response to the petition for writ of habeas corpus under (b).

Rule 4.551 (a)(5)
(5) The court must issue an order to show cause or deny the petition within 45 days after receipt of an informal response requested under (b).

V. THE COURT ABUSED ITS DISCRETION BY GRANTING EXCESSIVE TIME FOR THE HABEAS PROCEEDING

Rule 4.550 *et seq* provides two different procedures for a habeas proceeding. One, the court can review the habeas petition and determine if it meets the prima facie criteria. If it determines that the petition meets the *prima facie* criteria, it must issue an order to show cause to the State. (Rule 4.551(c) Show Cause). The second procedural route is for the court, before passing on the petition, to issue an order requesting an informal response to any interested party in the case. Then, the interested party can file an informal response; and the petitioner may file a reply. (Rule 4.551(b) Informal Response).[8]

In explaining habeas procedure for determining whether the petition establishes a prima facie case, the California Supreme Court stated '… if the record, including the court's own

[8] Rule 4.551 (b) Informal response
(1) Before passing on the petition, the court may request an informal response from:
(A) The respondent or real party in interest; or
(B) The custodian of any record pertaining to the petitioner's case, directing the custodian to produce the record or a certified copy to be filed with the clerk of the court.
(2) A copy of the request must be sent to the petitioner. The informal response, if any, must be served on the petitioner by the party of whom the request is made. The informal response must be in writing and must be served and filed within 15 days. If any informal response is filed, the court must notify the petitioner that he or she may reply to the informal response within 15 days from the date of service of the response on the petitioner. If the informal response consists of records or copies of records, a copy of every record and document furnished to the court must be furnished to the petitioner.
…

documents, "contain[s] facts refuting the allegations made in the petition," then "the court is justified in making a credibility determination adverse to the petitioner."'" *People v. Lewis*, (2021) 11 Cal.5th 952, 971, citing *People v. Drayton* (CA6 2020), 47 Cal.App.5th 969, 979, quoting *In re Serrano* (1995) 10 Cal.4th 447, 456; Accord, *People v. Harrison* (CA1 Div. 4 2021) 73 Cal.App. 5th 429, 438. Since Judge Harrell has previously stated that he 'is not privy to the transcripts, and has not read the record', (PRH Vol. XXV RT 321), it is unclear whether he has used the requisite information to make such a determination. If he had made a credibility determination, the FCSC could have then denied the petition. However, because the claims in the Emergency Petition primarily contain facts documented by the prosecution's own reports, obtained through discovery, are not contradicted by the record because they were not presented at trial.

Petitioner filed his Petition for Writ of Habeas Corpus with an /s/ for signature, on January 28, 2021. The court below required that it be re-filed with a wet signature. Petitioner re-filed it on March 8, 2021. Therefore, arguendo, the FCSC has had it to review since January, 2021. Calif. Rules of Court provides for specific time periods for filings and rulings.[9] It also provides that the court, for good cause stated, can extend time for doing any act under the rule. See Calif. Rules of Court, rule 4.551(h).

In this case, for unknown reasons, the FCSC chose to use the Informal Response procedure. While FCSC did have the authority to utilize and informal response procedure, utilizing this procedure meant that more time passed. Given that it chose this procedure and the Emergency Petition, Informal Response, and Reply were filed, FCSC could have reviewed their content and determined whether there were any factual disputes. Here, the prosecution's

[9] See Calif. Rules of Court, rules 4.551 (a)(3)(A), (a)(3)(B)(ii), (a)(5).

Informal Response was unverified and had no declarations attached. Further, there are many material allegations of the Emergency Petition that were not controverted by Informal Response. See Exhibit 33, Reply @ 11 - 15. Further, given the numerous factual disputes shown in the Emergency Petition, Informal Response and Reply, FCSC should have issued an Order to Show cause or ordered an evidentiary hearing.

Given the posture of the Emergency Petition, and FCSC's decision to issue a Request for Informal Response, the allotted time provided by the Rule would mean that FCSC should have either denied the Emergency Petition or entered an order to show cause after approximately five and a half months. However, at present, thirteen months have already elapsed. Therefore, per Rule 4.551, time has already been exceeded by over eight months, with an additional five months granted before possible ruling. With FCSC's most recent order extending time, at the earliest, the court would act eighteen months after the Emergency Petition was filed.

The FCSC further abused its discretion by extending time in its Order dated June 2, 2021, wherein it stayed the habeas proceedings. See Exhibit 30. There is nothing in Calif. Rules of Court, rule 4.550 et seq which provides that a court may impose a stay of the proceedings.

The FCSC gave the State 60 days to file the Informal Response. This is greater than the 30 days provided for filing a return, specified in Rule 4.551(d). Further delays in the habeas proceeding are highly prejudicial to Petitioner. Judicial economy dictates that rather than now starting the habeas proceeding over by issuing an Order to Show Cause, this Court should find that the State's Informal Response is the equivalent of a return under Rule 4.551(d)[10]. *Cf*. *People v. Romero* (1994) 8 Cal.4th 728, 740 which states that unless they waive it, the opposing side must be given an opportunity to file a return to the petition.

[10] Rule 4.551 (d) states the respondent may, within 30 days, file a return.

The FCSC violated the express language of CA Rules of Court Rule 4.551. Given the current case posture, the total allotted time for responses and decisions is 165 days. In this case, the court gave the prosecution total additional time of 75 days; the court gave itself total additional time of 305 days. This additional time totals 380 days. If the FCSC does decide on September 30, 2022, the total elapsed time will be 600 days. By violating the express language of the governing Rules of Court, and the spirit of the habeas procedure, FCSC has abused its discretion.

V. THE COURT ABUSED ITS DISCRETION BY FAILING TO GIVE ADEQUATE REASONS OR EXPLANATION FOR EXTENDING TIME

Rule 4.551 (h) provides:

> Rule 4.551 (h) Extending or shortening time
>
> On motion of any party or on the court's own motion, for good cause stated in the order, the court may shorten or extend the time for doing any act under this rule. A copy of the order must be mailed to each party. [Emphasis added]

Under the California Rules of Court, as a general matter, the superior court must rule on a petition within 90 days of when it is filed. (Cal. Rules of Court, rule 4.551(a)(3). *Maas v. Superior Court* (2016) 1 Cal.5th 962, 981. *Maas* further states … "the timelines for ruling on petitions for writ of habeas corpus are intended, not for the purpose of judicial economy, but rather to afford prompt relief to petitioners who present meritorious claims. (See Pen. Code, § 1476 [providing that a superior court must issue the writ "without delay"]." *Ibid*.)

Rule 4.551 does not state what constitutes good cause. However, good cause is explained in the appellate rule, Cal. Rules of Court, rule 8.63(b) Policies and Factors Governing Extensions of Time:

Rule 8.63. Policies and factors governing extensions of time

(b) Factors considered

In determining good cause-or an exceptional showing of good cause, when required by these In determining good cause-or an exceptional showing of good cause, when required by these

(1) The degree of prejudice, if any, to any party from a grant or denial of the extension. A party claiming prejudice must support the claim in detail.

(2) In a civil case, the positions of the client and any opponent with regard to the extension.

(3) The length of the record, including the number of relevant trial exhibits. A party relying on this factor must specify the length of the record. In a civil case, a record containing one volume of clerk's transcript or appendix and two volumes of reporter's transcript is considered an average-length record.

(4) The number and complexity of the issues raised. A party relying on this factor must specify the issues.

(5) Whether there are settlement negotiations and, if so, how far they have progressed and when they might be completed.

(6) Whether the case is entitled to priority.

(7) Whether counsel responsible for preparing the document is new to the case.

(8) Whether other counsel or the client needs additional time to review the document.

(9) Whether counsel responsible for preparing the document has other time-limited commitments that prevent timely filing of the document. Mere conclusory statements that more time is needed because of other pressing business will not suffice. Good cause requires a specific showing of other obligations of counsel that:

(A) Have deadlines that as a practical matter preclude filing the document by the due date without impairing its quality; or

(B) Arise from cases entitled to priority.

(10) Illness of counsel, a personal emergency, or a planned vacation that counsel did not reasonably expect to conflict with the due date and cannot reasonably rearrange.

(11) Any other factor that constitutes good cause in the context of the case.

In *In re Michael C*. (CA2 Div3 1979) 98 Cal. App. 3d 117, 123, the Second District Court held that "since the order of extension of the time period did not state reasons adequate to establish good cause therefor, the order was ineffective. (See *In re Freddie R.*, *supra*, 96 Cal.App.3d at p. 832)." As in *In re Michael C.*, *supra*, FCSC did not state a reason for giving itself an extension of time. Good cause is a flexible phrase, capable of being expanded or contracted by judicial construction. *People v. Accredited Surety Casualty Co*. (CA5 2014) 230

Cal. App. 4th 548, 559. Good cause should be interpreted based on the statutory intent. *Ibid,* @ 559.

Applying the rule to the instant case, the applicable factors to consider are:

(b)(1)(3)(4)(6)(7)(11): whether the case is entitled to priority. Taking them in order, (b)(1) Petitioner is greatly prejudiced by the delays because he continues to be wrongfully incarcerated.

(b)(3) The FCSC has not specified in its orders that the length of the record is long. is habeas complex litigation Although the record is admittedly long here, the underlying criminal case was remanded to the FCSC in 2012.

(b)(4) The FCSC has not specified in its orders that this habeas complex litigation.

(b)(6) Given that habeas proceedings are expedited proceedings, and Petitioner's extremely long incarceration, rendering a decision should be entitled to priority.

(b)(7) The FCSC is not new to the case. Petitioner's counsel has not been hiding the ball. Starting in 2017, Petitioner's legal team and the Fresno DA's office has presented the information in some of the material Claims as part of the motions filed in the underlying criminal case. Further, starting in approximately 2017, the defense informed the FCSC that it would be filing a habeas petition. In fact, the reason that the defense has filed numerous motions is to present the facts of wrongful conviction to FCSC. See for example Exhibit 23, Second Trombetta Motion to Dismiss.

(b)(11) The FCSC did not specify any other factors in its orders extending time.

In most of its orders extending time, FCSC failed to give a reason or explanation as to why it granted additional time. Instead stating only the words 'good cause'. The court's refusal to either deny the Emergency Petition or to issue an Order to Show Cause within the time

provided by the Rules is an abuse of discretion. Further, giving itself additional time without stating what the good cause is, as clearly provided by Rule 4.551(h) and previously-cited case law, is also an abuse of discretion as FCSC did not provide any, let alone adequate, reasons constituting good cause.

VI. THE COURT ABUSED ITS DISCRETION BY FAILING TO ENTER AN ORDER TO SHOW CAUSE ON THE EMERGENCY PETITION

Rule 4.551 (c), in relevant part, states as follows:

> Rule 4.551 (c) Order to show cause
>
> (1) The court must issue an order to show cause if the petitioner has made a prima facie showing that he or she is entitled to relief. In doing so, the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause. …

As discussed above, here, the prosecution's Informal Response was unverified and had no declarations attached. Further, the Informal Response filed by the State, did not rebut numerous material allegations in the Emergency Petition. Petitioner's Reply described the Claims one by one and highlighted the lack of denial by the State. See Exhibit 33, Reply @ 10 - 15. Pursuant to Calif. Rules of Court, Rule 4.551(c), as soon as FCSC received the Informal Response and the Reply, and seen that this was so, it should have entered an order to show cause. The show cause procedure provides for a return and traverse to narrow the issues for a court to address. Because the Fresno DA filed an Informal Response and Petitioner filed a Reply to it, as would have happened with the return and traverse procedure, as intended by the rules, FCSC has the benefit of having the issues that it must decide narrowed.

VI. THE LOWER COURT ABUSED ITS DISCRETION BY FAILING TO ORDER THAT AN EVIDENTIARY HEARING BE HELD

Rule 4.551 (f) states as follows: Evidentiary hearing; when required

> … An evidentiary hearing is required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.

Based on the content of the Emergency Petition, the Informal Response and the Reply to Informal Response, it has been established that there are disputes as to fact. Any issues of fact must be resolved in an evidentiary hearing. Petitioner has been seeking an evidentiary hearing since 2017.[11] Despite Petitioner's motions in the underlying criminal case and the Emergency Petition, it seems apparent that FCSC does not want to hold an evidentiary hearing. Based on Petitioner's investigation to date, an evidentiary hearing will establish the true facts of the case. Namely, that Petitioner was framed, exculpatory evidence was intentionally 'lost', false testimony was presented at the second trial's guilt phase, and that there is new evidence which establishes Petitioner's innocence. Given the already existing delays, and the material factual disputes outlined [12], the admissions made by the Fresno DA in its Informal Response and by its failure to rebut the remaining Emergency Petition Claims, this Court should order the lower court to proceed with an evidentiary hearing or dismiss the action with prejudice because FCSC abused its discretion by not doing so as required under the Rules of Court and case law.

VII. THE COURT ABUSED ITS DISCRETION BY VIOLAING PETITIONER'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT AND CA CONSTITUTION ARTICLE I, SECTION 7

U. S Constitution, Amendment XIV: …nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The federal rights afforded by the Federal Constitution include the right to writ of habeas corpus. *Slaughterhouse Cases* (1863) 83 U.S. 36. The 14th Amendment

[11] See for example, Exhibit 23, Second Trombetta Motion to Dismiss, which includes a request for evidentiary hearing.
[12] See Exhibit 33, Reply @ 11-15.

gives indigent prisoners a right to file a habeas petition without paying a filing fee. *Smith v. Bennett* (1963) 365 U.S. 708. The United States Supreme Court "has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme . . . [and] has steadfastly insisted that 'there is no higher duty than to maintain it unimpaired.'" *Johnson v. Avery* (1969) 393 U.S. 483, 485, citing *Bowen v. Johnston* (1939) 306 U.S.19, 26.

Cal. Constitution, Art. I, Sect. 7: (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws. Under the California Constitution, the courts are granted the original jurisdiction to issue a habeas writ. *Townsel, supra,* at 1088. These constitutional provisions are found in article VI, sections 10 and 11 of the California Constitution. Specifically, article I, section 11, provides that the right of "habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion." Cal. Const. Art. I § 11. Habeas corpus is the proper remedy for every unlawful imprisonment. *Ex Parte McCullough* (1868) 35 Cal. 97, see also *In re Newman* (CA2 Div. 2 1960) 187 Cal.App.2d 377, *In re Ferguson* (1961) 55 Cal.2d 663.

A criminal defendant has a due process right to a fair trial by an impartial judge. *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868. The 14th Amendment clearly requires a fair trial in a fair tribunal. *People v Chatman* (2006) 38 Cal.4th 344, 363. A judge should be disqualified for appearance of bias. *Ranger v. Shinn* (U. S. Dist. Court AZ 2021) LEXIS 175347. While a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances of the particular case, there must exist "'the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.'" *People v. Freeman* (2010) 47 Cal. 4th 993, 996 citing *Caperton v. A. T. Massey Coal Co.* (2009)

556 U. S. 868. Only the most extreme facts would justify judicial disqualification based on the due process clause. *Caperton v. A.T. Massey Coal* (2009) 556 U. S. 868, 887. Accord, *People v. Cowan* (2010) 50 Cal. 4th 401, 456 – 457.

VIII. THE LOWER COURT'S FAILURE TO HOLD HEARINGS ON PETITIONER'S MOTIONS WAS FUNDAMENTALLY UNFAIR AND VIOLATED PETITIONER'S DUE PROCESS

Judicial Canon (7) states "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the full right to be heard according to law.*"

The hallmarks of due process, including fundamental fairness, dictate that because Petitioner's liberty is stake, he be given an opportunity at a meaningful time and in a meaningful way, to be heard on his motions. That right is protected under the 5th and 14th Amendments. See *People v. Silva* (CA1 Div. 4 2021) 72 Cal. App. 5th 505. *Cf. Rector v. New York Bank of Mellon* (Dist. Ct. CA Central 2014) U.S. Dist. LEXIS 206341 (The opportunity to submit written briefs satisfies the due process requirement of an opportunity to be heard.)

While whether or not due process does not provide "exact boundaries," it must be determined on a case-by-case basis. *People v. Ramirez* (1979) 25 Cal.3d 260, 268. Known as the Ramirez test, a court must consider "(1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Ramirez*, *supra* @ 268-89.

Without in-court hearings, Petitioner does not have an important avenue for raising issues at the trial court level. This is in violation of due process and the *Ramirez* test. Here, the private interest is perhaps that most fundamental one: liberty, especially that of an innocent person wrongfully convicted. Second, the risk of erroneous deprivation and the lack of procedural safeguards here is that Petitioner's opportunity to make a record and show his innocence, is eliminated on the whims of a lower court. Third, the dignity interest enabling Petitioner to present his side of the story is completely eliminated, and especially with regard to a *Trombetta* motion, means that crucial evidence cannot be presented to the Court.

The lack of in-court hearings, further eliminates his opportunity to make a record based on the issues that the court raises. It is adverse to Petitioner's dignity because given his indigenous American heritage of oral history tradition, without a hearing, with him present, he is unable to participate in a meaningful way. Finally, while the government likely has a fiscal and administrative interest in not holding hearings, this is the only factor that weighs against holding actual hearings on these motions. Therefore, the fiscal and administrative interest in the inefficiency of holding hearings, is far outweighed by the incredible private and public interest, potentially significant and actual erroneous deprivation and importance of Petitioner's ability to present his side of the story.

It is accepted law that an appellate court will not address any issues not raised at the trial court level. *In re Campbell* (CA4 Div. 3 2017) 11 Cal.App.5th 742, 756. This further demonstrates the importance of Petitioner having the opportunity to present oral argument at an in-court hearing.

As a result of prosecutorial misconduct and ineffective assistance of counsel during the life of this case until 2017, Petitioner has been extremely limited in his ability to present a

defense. Among other things, until recently, he has never been afforded the opportunity to review crucial evidence or interview critical witnesses. The probative value of prosecution evidence has only now come to light. Given this backdrop, it is even more egregious that the FCSC has favored the prosecution by ruling against defendant/Petitioner despite any objection by the Fresno DA. The court's failure to meaningfully consider new evidence or false evidence uncovered by Petitioner further demonstrates its bias.

During the current Emergency Petition proceeding, Petitioner filed nine motions, requests and applications in FCSC. Just as FCSC did in the underlying criminal case, it denied motions and requests despite their being no objection by the Fresno DA and without a hearing[13]. In December, 2018, Petitioner filed a Motion to Dismiss pursuant to *Trombetta* and *Brady*, in his criminal case for the second time[14]. FCSC gave the Fresno DA 70 additional days to respond. No response was ever filed. Yet, FCSC never ruled on the Motion. By failing to rule on these motions, it is clear that FCSC abused its discretion by violating Petitioner's Constitutional Rights to be heard.

Judicial Canon 7 dictates that the court treat the parties evenhandedly. Judicial Canon 3 (B) (8) provides that a judge manage the courtroom so that all litigants' cases are fairly adjudicated. On numerous occasions, the court has held a double standard: one for the prosecution; one for the defense. For example, when the Fresno DA filed its Informal Response unverified and without any declarations, the court did not reject the filing or require that the Informal Response be re-filed with verification. Further, although the defense must file all

[13] See Exhibit 19g to Reply (Exhibit 33), Chart of Motions and Rulings Filed in In Re Douglas R. Stankewitz FCSC Case #21CRWR685993.
[14] See Exhibit 23.

petitions and pleadings with verification and declarations, that requirement has not applied to the prosecution.

IX. PETITIONER'S DUE PROCESS RIGHT TO A FAIR & IMPARTAL JUDGE HAS BEEN VIOLATED BECAUSE THE CURRENT LOWER COURT JUDGE IS MANIFESTLY BIASED AGAINST PETITIONER

The standard of review for appearance of partiality by a judge is *de novo* because it involves the application of the rule to the facts, making it a mixed question of law and fact. *Haworth v Superior Court* (2010) 50 Cal. 4th 372, 384, 385.

Due process thus mandates a "stringent rule" that may sometimes require recusal of judges "who have no actual bias and who would do their very best to weigh the scales of justice equally" if there exists a "probability of unfairness." *In re Murchison* (1955) 349 U.S. 133, 136, 99 L. Ed. 942 . Accord, *Hurles v. Ryan* (9th Cir. 2014) 752 F. 3d 768, 789. Neither adverse rulings nor impatient remarks are sufficient to overcome the presumption of judicial integrity, even if the remarks are 'critical of or disapproving of, or even hostile to counsel, the parties or their cases'. *Barrios v. Madden* (Central Dist. CA 2017) U.S. Dist. LEXIS 219135 citing *Larson v. Palmateer* (2008) 515 F.3d 1057, 1067 (9th Cir.) quoting *Liteky*, (1994) 510 U.S. 540, 555.

Judicial Canon 3 B (3) states "A judge shall require* order and decorum in proceedings before the judge. (4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers and of all staff and court personnel under the judge's direction and control. (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias, prejudice, or harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity,*

gender expression,* religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment."[15]

Judicial Canon 3 D (2) states "Whenever a judge has personal knowledge,* or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority." ADVISORY COMMITTEE COMMENTARY: Judges should note that in addition to the action required by Canon 3D(2), California law imposes additional mandatory reporting requirements to the State Bar on judges regarding lawyer misconduct. See Business and Professions Code sections 6086.7 and 6086.8, subdivision (a), and California Rules of Court, rules 10.609 and 10.1017.

Judicial Canon 3(B)(8) states "A judge shall dispose of all judicial matters fairly, promptly, and efficiently. A judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.*"

In reviewing the first three Judicial Canons of the California Code of Judicial Ethics, the court in *Nuño v. California State University, Bakersfield* (CA5 2020) 47 Cal. App. 5th 799, 810 found that in general terms, the Code of Judicial Ethics "requires judges to treat all litigants fairly." (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 2:28, p. 96 (Handbook).[16] In *Haluck v. Ricoh Electronics, Inc.* (CA4 Div. 3 2007) 151 Cal. App. 4th 994, 1008, the *Haluck* Court held that the judge's conduct warranted remand and assignment to a new judge. *Ibid* @ 1011. The *Haluck* Court stated "The test is not whether plaintiff has proved harm, but whether the court's comments would cause a reasonable person to doubt the impartiality of

[15] A review of the Judicial Canon 3 cases in Lexis shows that they are unpublished, save for the *Nuño* case, *supra*.
[16] A Lexis search reveals that this is one of the only published cases interpreting the Code of Judicial Ethics.

the judge or would cause us to lack confidence in the fairness of the proceedings such as would necessitate reversal." *Ibid* @ 1011.

This Court has the authority to determine if there was manifest injustice. *Denton v. City and County of San Francisco* (CA1 Div. 2 2017) 16 Cal. App. 5th 779, 793.

As he has during the underlying criminal proceedings,[17] Judge Harrell continued to demonstrate his bias against Petitioner in his habeas rulings by ruling against Petitioner despite the lack of objection by the Fresno DA and failing to hold hearings on motions and requests. See Exhibit 19g, of Petitioner's Reply. All of these actions on the part of Judge Harrell cause a lack of confidence in the fairness of the proceedings.

X. THE LOWER COURT'S PHYSICAL CONDUCT SHOWS ITS BIAS AGAINST PETITIONER

As Petitioner raised in his FCSC pleadings, Judge Harrell is biased against Petitioner. Judge Harrell violated Judicial Cannon 3B(3), which requires a judge to be dignified and courteous to litigants. Judge Harrell has directly shown his bias against the Petitioner by smirking at him at his sentencing hearing. See Exhibit 33, Reply @ 16 and see paragraph # 5, *supra*. This inappropriate derision of Petitioner sends a message of disrespect to Petitioner, and also to the prosecution and the public.

XI. THE FRESNO DISTRICT ATTORNEY'S OFFICE CONTINUES TO VIOLATE THE LAW AND THE FAILURE OF THE LOWER COURT TO ACT SHOWS BIAS

Penal Code Sect. 141(c) provides:

> A prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon

[17] See Exhibit 19f of Petitioner's Reply (Exhibit 33).

a trial, proceeding, or inquiry, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.

Rule 5-110 Special Responsibilities of a Prosecutor
Rules of Professional Conduct
(Rule approved by the Supreme Court, effective Nov. 2, 2017)
The prosecutor in a criminal case shall:
(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
…
(F) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
(1) Promptly disclose that evidence to an appropriate court or authority, and
(2) If the conviction was obtained in the prosecutor's jurisdiction,
(a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and
(b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
(G) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion:
[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

…
[3] The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by Brady v. Maryland (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows or reasonably should know casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. …

> [6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (E) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

Petitioner raised the issue of the DA's Duty to Investigate per 5-110 in his Reply to Informal Response at p. 5.

The Fresno DA has continued to violate *Brady* by withholding discovery, including an interview conducted on 2-21-2019, with Det. Thomas Lean III, retired, a key officer involved in framing Petitioner for murder.[18] Det. Lean confirmed this interview in a defense interview. (See Emergency Petition Exhibit 1e, Transcript of Detective Lean Interview, dated 2-7-2020, at 4). In 2017, Fresno DA Investigator Garcia stated in a report that evidence in this case, shell casings, was tampered with. (See Emergency Petition Exhibit 7h, FCDA Investigator Garcia Report of Investigation, dated 7-20-17, at 2)

Petitioner detailed many examples of prosecutorial misconduct in the Emergency Petition and Reply to Informal Response, including the Fresno DA lying to FCSC about exculpatory evidence as recently as 2021[19]. However, neither the Fresno DA nor the FCSC has investigated any of this wrongdoing nor taken any action to correct it. The Judge's failure to order an investigation into misconduct by the Fresno DA and failure to admonish or sanction the misconduct violates Judicial Canon 3D(s) and further gives the appearance of bias and impropriety. Each of these factors demonstrate the probability of actual bias that is too high to be constitutionally tolerable. See *People v. Peyton* (CA2 Div. 6 2019) 229 Cal. App. 4th 1063, 1072.

[18] See Exhibit A to Informal Response (Exhibit 32), *supra* @ 1.
[19] See Emergency Petition (Exhibit 22) and Reply (Exhibit 33).

Given the narrower standard for judicial bias under constitutional principles, if this court does not find that Petitioner's due process rights are violated, then it should find that Petitioner's right to a fair trial by an impartial judge under the judicial canons was violated.

CONCLUSION

Because FCSC failed to follow proper procedure under CA Rules of Court 4.551 and to properly exercise its discretion, this Court must issue a writ of mandate. In the interest of justice, this Court is obligated to intervene and grant Petitioner the relief that he asks: that pursuant to California Code of Civil Procedure § 1085 issue a peremptory writ, ordering either 1) that due to extensive, egregious law enforcement and prosecution misconduct that the underlying criminal case be dismissed with prejudice, that Petitioner be released from incarceration immediately and that pursuant to Penal Code § 1485.55, Petitioner be declared factually innocent; or 2) that the Habeas Petition be transferred to another county, that pursuant to Code of Civil Procedure § 170.1(c), the habeas petition be assigned to a different judge, and that a referee be appointed to hold an evidentiary hearing for the presentation of witnesses and evidence with regard to all disputes as to fact; 3) pursuant to CA Rules of Court 4.551(c), issue an order to show cause why the Emergency Petition should not be granted; and further order that the habeas proceeding started as of the date that FSCS issued a Request for Informal Response, namely June 2, 2021; and that Petitioner is entitled to appointed counsel, including fees and costs for investigation and experts, as of that same date, June 2, 2021; or 4) issue an writ of mandate ordering the lower Court to rule on the Habeas Petition after an evidentiary hearing under CA Rules of Court 4.550 et seq. .

Further, that This Court grant Petitioner such other and further relief as may be appropriate and just.

PROOF OF SERVICE

The undersigned declares:

I am a citizen of the United States. My business address is P. O Box 7225, Cotati, California 94931. 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 MANDATE

to be served on the following parties in the following manner:

California Attorney General's Office by: Truefiling to
SacAWTTrueFiling@doj.ca.gov

Petitioner, Douglas Stankewitz by: First Class mail to
Douglas Stankewitz, B97879
San Quentin State Prison
San Quentin, CA 94974

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on May 17, 2022, at Cotati, California.

_____
Alexandra Cock