LISA A. SMITTCAMP
Fresno County District Attorney
ROBERT L. VENEMAN-HUGHES
Senior Deputy District Attorney
State Bar No. 278187
2100 Tulare Street
Fresno, CA 93721
Telephone: (559) 600-3141
Fax: (559) 600-4900
E-mail: rvenemanhughes@fresnocountyca.gov

Attorneys for Respondent

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

In re **DOUGLAS R. STANKEWITZ** Petitioner, On Habeas Corpus.	Case No. 21CRWR685993 **RETURN TO ORDER TO SHOW CAUSE**

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

RETURN TO ORDER TO SHOW CAUSE

COMES NOW the Secretary of the California Department of Corrections and Rehabilitation, through the District Attorney of Fresno County, real party in interest, and states for a Return to the Order to Show Cause issued on September 29, 2022, ordering respondent to show why petitioner, Douglas R. Stankewitz, is not entitled to relief as alleged in Claim 1, Claim 2, Claim 3, Claim 4, Claim 5, Claim 6, Claim 7, Claim 8, Claim 9, Claim 10, Claim 11, Claim 12, Claim 13, Claim 14, Claim 17, and Claim 19 of his amended emergency petition for writ of habeas corpus, filed March 8, 2021, as follows:

PRELIMINARY STATEMENTS

1. Petitioner is lawfully held in custody pursuant to a November 18, 1983 conviction in the Fresno County Superior court in case CF78227015 and a May 3, 2019 resentencing on that same case.

2. The judgement was affirmed in its entirety on July 5, 1990, by the California Supreme Court. (*People v. Stankewitz* (1990), 51 Cal.3d 72.)

3. Petitioner filed his first state habeas writ (S014015) on February 2, 1990. It was denied on April 19, 1990. Petitioner asked for a rehearing which was denied on August 28, 1990.

4. Petitioner's federal habeas writ, CV-91-00616-AWI, was filed on November 15, 1990. It was denied in the Eastern District of California on December 12, 2000.

5. Petitioner appealed to the 9th Circuit Court of Appeal on December 28, 2001. The 9th Circuit affirmed in part and reversed in part on April 8, 2004. (*Stankewitz v. Woodford* (2004), 365 F.3d 706.)

6. The case was sent back to the Eastern District for proceedings consistent with the 9th Circuit decision in CV-91-00616-AWI. The Eastern District set aside the penalty phase on ineffective assistance of counsel. (*Stankewitz v. Wong* (E.D.Ca. 2009) 659 F.Supp.2d 1103.)

7. The State appealed, and the 9th Circuit affirmed the district court judgment on October 29, 2012. (*Stankewitz v. Wong* (2012) 68 F.3d 1163.)

8. The case returned to the Fresno Superior Court for potential retrial of the penalty phase. On April 19, 2019, the People elected not to retry Petitioner for the death penalty. Petitioner was sentenced to Life Without the Possibility of Parole on May 3, 2019.

9. Stankewitz appealed the sentence. On June 28, 2022, the Fifth District Court of Appeal remanded the case back to the Superior Court for resentencing so the court could determine whether or not to impose the special circumstances or gun enhancement. (F079560)

10. On March 8, 2021, the instant writ was filed.

SPECIFIC DENIALS AND ADMISSIONS

I. PROCEDURAL HISTORY

11. Respondent admits petitioner's factual allegations in paragraphs 1-3 of the Petition for Writ of Habeas Corpus (Petition).[1]

12. Respondent denies petitioner's factual allegation in paragraph 4 of the Petition that V. Table of Previous Stankewitz Case Dispositions and Addendums 1-5 that claim to list the issues raised in previous habeas writs and appeals based on a lack of information and belief sufficient to warrant agreement with the facts alleged as a review of the original filings in those cases has not been able to be completed.

13. Respondent admits petitioner's factual allegations in paragraphs 5-6 of the Petition.

14. Respondent denies, on information and belief, the factual allegation in paragraph 7 of the Petition that the documents produced by the Fresno County District Attorneys Office and

[1] Petitioner does not number the lines or paragraphs of their Petition. Respondent begins numbering with the first paragraph of Petitioner's section IV, Procedural History, as the first paragraph.

physical evidence in the case show a pattern or practice of prosecutorial misconduct starting at the beginning of this case. Respondent asserts that petitioner's factual allegations fail to meet their burden for relief in that the allegations in the Petition do not establish, as a matter of law or fact, that prosecutorial misconduct occurred. Further Respondent denies, on information and belief, the factual allegation in paragraph 7 of the Petition that the Superior Court never ruled on the *Trombetta* Motion filed on December 20, 2017 that was filed by Defense when the Court's written order "denying motions to dismiss" filed on December 6, 2018 specifically addresses and denies Defendant's Motions to dismiss for violations of *Trombetta* and *Brady*.

15. Respondent admits petitioner's factual allegations in paragraph 8 of the Petition.

16. Respondent denies, on information and belief, the factual allegation in paragraph 9 of the Petition that the grounds stated by the District Attorney's Office requesting a resentence of Petitioner to Life Without the Possibility of Parole were anything other than what was stated on the record. The claim that the grounds lack credibility and are more likely based on the new evidence turned over by defense starting in 2017 is speculative at best.

17. Respondent admits petitioner's factual allegations in paragraphs 10-12 of the Petition.

II. STATEMENT OF FACTS

18. Respondent admits the factual allegations in paragraphs 13-22 of the Petition as they are the summary of Prosecution's case taken directly from the opinion in *People v. Stankewitz*, (1982) 32 Cal. 3d 80, 83-85 with 'Stankewitz' substituted for 'appellant'.

19. Respondent denies petitioner's factual allegation in paragraphs 23-24 of the Petition that the facts presented in this case to the jury in the guilt phase of the 1983 trial along with the rendition of facts stated above in the appeal where "inaccurate" based on a lack of information and belief sufficient to warrant agreement with the facts alleged. Respondent asserts that petitioner's

factual allegations fail to state cognizable claim for relief in that the undisputed allegations in the Petition do not establish, as a matter of law or fact, that these facts are inaccurate.

III. JURISDICTION

20. Respondent admits this court has jurisdiction as described in paragraph 25 of the Petition and alleges that Stankewitz is lawfully confined and properly in the custody of the warden of San Quentin State Prison, and is presently confined as a result of a life without parole sentence in Fresno Superior Court Case Number CF7822015. That sentence was reversed on appeal and is pending resentencing.[2] Respondent alleges that petitioner's previous confinement after sentencing and his current confinement pre-sentencing is constitutional and legal.

IV. JUDICIAL NOTICE AND INCORPORATION

17. Responding to paragraphs 26, 28, and 30 of the petition, Stankewitz requests that this Court take judicial notice of all of the records, documents, exhibits, orders, and pleadings filed in this case in Fresno County Superior Court Case No. CF78227015, and in the California Supreme Court Case Nos. 20705/21310, S004602, S014015 and S047659, as well as the briefs, motions, orders, and other documents filed in Federal Court Case Nos. CV-91-00616-AWI, and 01-99022. (Pet. 52) Respondent has no objection to this Court taking judicial notice of the records in Stankewitz's prior state trial and appellate proceedings in this case, which he has identified. (Cal E.C. §§ 452, subd. (d), 459.) Indeed, "petitioners may cite and incorporate by reference prior briefing, petitions, appellate transcripts, and opinions in the same case but no longer need to separately request judicial notice of such matters." (*In re Reno* (2012) 55 Cal.4th 428, 450 (*Reno*).)

[2] Habeas is a post-conviction relief. Petitioner filed the instant Petition prior to the appellate division's remand for resentencing; at the time, Respondent alleges Petitioner's confinement was constitutional and legal. Presently, Petitioner's confinement pending sentence is also legal. Petitioner is pending resentencing.

18. Respondent denies the factual allegation in paragraph 27 of the petition as the Order to Show Cause denied Claim 14 which this paragraph addresses. Respondent denies that the issues raised in the Petition are raised for the first time, as stated fully below.

19. Respondent objects to the consideration of all of the allegations in the amended petition cumulatively as well as the arguments and claims alleged in the underlying appeal that was before the 5th District Court and is now before this court for a resentencing. (Pet. 52 [see also paragraph 29.].) Thus, the Return addresses only the factual basis for the issue included in the Supreme Court's order to show cause. (*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16 (*Clark*); *In re Sassounian* (1995) 9 Cal.4th 535, 547.)

20. Respondent denies paragraphs 31-32 Petitioner purports to incorporate all exhibits filed in support of the petition and amended petition and the facts contained in those exhibits and re-alleges the material therein so as to allow consideration of each fact and conclusion in the exhibits as if each was repeated in every allegation of the petition. (Pet. 5.) However, respondent objects to a general "incorporation by reference" to the extent Petitioner fails to state with particularity an incorporated factual allegation and the supporting documentation that he contends supports the relief sought. (See *People v. Karis* (1988) 46 Cal.3d 612, 656.)

21. Respondent denies paragraphs 33-34. Petitioner cannot raise other claims not stated in this petition or in the order to show cause.

22. Respondent denies paragraphs 34 in so far as it suggests that the evidence it has proffered as to ineffective assistance of counsel does not involve at least a limited waiver of attorney-client privilege.

23. Respondent denies paragraphs 35-36. Respondent asserts that petitioner's supported factual allegations are insufficient to establish, as a matter of law or fact, the claims and therefore a contested hearing cannot be requested on this fact alone as petitioner has requested.

24. Respondent denies paragraph 37; this blanket claim is conclusory and states no facts upon which relief can be granted. ("[C]onclusory allegations without specific factual allegations do not warrant relief." (*In re Reno* (2012), 55 Cal.4th 428, 493.)

25. Respondent denies paragraph 38, as set forth fully in this Return. Respondent denies that in the last 45 years, Petitioner has proffered a showing of a lack of resources to present his defense, and further notes that no evidence has been proffered in support of this claim. Respondent denies that petitioner was convicted in violation of his due process rights under the 5th, 6th, 9th, and 14th Amendments of the United Stated Constitution or cognate provisions of the California Constitution.

26. Respondent denies, on information and belief, the factual allegation in paragraphs 39-42 of the Petition, that petitioners counsel was ineffective at both the guilt of petitioner's second trial in 1983 and his appellate counsel was ineffective throughout his appellate proceedings both state and federal, as fully set out below. Respondent denies that the judgment in petitioner's case should be vacated as alleged in paragraph 42.

V. SCOPE OF CLAIMS AND EVIDENTIARY BASES

27. Respondent denies that petitioner has established a case of their claims and that any of their claims stand on their merits, as described fully below.

28. Except as otherwise expressly admitted, respondent denies each and every material allegation of the petition, denies Petitioner's confinement is in any way illegal, and denies that Petitioner's rights have been violated in any respect. Respondent generally denies of the petition and generally and specifically denies every factual claim contained within the petition.

WHEREFORE, respondent respectfully submits that the petition for writ of habeas corpus should be denied and the order to show cause discharged.

MEMORANDUM OF POINTS AND AUTHORITIES

General Legal Principles Applicable to Habeas Corpus

In California, "it is the trial that is the main arena" for determining guilt or innocence and whether the death penalty should be imposed. (*In re Robbins* (1998) 18 Cal.4th 770, 777 (*Robbins*), superseded by statute as stated in *In re Friend* (2021) 11 Cal.5th 720, 724 (*Friend*).) And "[i]t is the appeal that provides the basic and primary means for raising challenges to the fairness of the trial." (*Ibid.*) At trial, an accused enjoys constitutional rights and procedural protections to ensure fairness. The state devotes considerable resources to criminal trials and appeals. (*Ibid.*)

While the right to habeas corpus is guaranteed by the state Constitution and acts as a "safety valve" or "escape hatch" for cases in which a criminal trial has resulted in a miscarriage of justice despite the provision to the accused of legal representation, a jury trial, and an appeal, this "safety valve" role should not obscure the fact that "'habeas corpus is an extraordinary, limited remedy against a presumptively fair and valid final judgment.'" (*In re Reno* (2012) 55 Cal.4th 428, 450 (*Reno*), *Friend*, *supra*, 11 Cal.5th 720; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260 (*Gonzalez*).) A post-conviction habeas corpus attack on the validity of a judgment "is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension." (*In re Clark* (1993) 5 Cal.4th 750, 766-767 (*Clark*), superseded by statute on other grounds as stated in *Briggs v. Brown* (2017) 3 Cal.5th 808.)

A habeas corpus petition must be summarily denied unless it states a prima facie case for relief.[3] (*Gonzalez*, *supra*, 51 Cal.3d at p. 1258.) An informal response is designed to perform a "screening function" and assist this Court in its determination of whether any claims in the petition state a prima facie basis for relief or are procedurally barred. (*People v. Romero* (1994) 8 Cal.4th 728, 737, 742 (*Romero*).) In order to state a prima facie case, a petitioner must set forth

[3] Though the court found a prima facie case when it issued its order for show cause, Respondent maintains that the burden for these claims have not been met as described throughout.

specific facts which, if true, would require issuance of the writ. (*Ibid.*) The petition will be judged on the factual allegations contained within it, and a petitioner may not reserve the right to supplement his claims with facts to be developed later. (*Clark*, *supra*, 5 Cal.4th at p. 781, fn. 16.) "An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. [Citations.] If no prima facie case for relief is stated, the court will summarily deny the petition." (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475 (*Duvall*).) In contrast, if the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court must issue an order to show cause, which indicates the court's "*preliminary assessment* that the petitioner would be entitled to relief if his factual allegations are proved." (*Duvall*, *supra*, 9 Cal.4th at p. 475, italics in original.) Additionally, procedural bars exist which limit the availability of habeas corpus relief. (*Reno*, *supra*, 55 Cal.4th at p. 452.)

The procedural rules applicable to habeas corpus petitions are [] 'a means of protecting the integrity of our own appeal and habeas corpus process' [citation] and vindicate 'the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments' [citation]. (*Ibid.*)

Absent the unusual circumstance of some critical evidence that is "truly 'newly discovered' or a change in the law, successive petitions, like the instant petition, rarely raise an issue even remotely plausible, let alone state a prima facie case for actual relief. (*Reno*, at p. 457.) As recognized by the *Reno* court, "petitioners frequently file second, third, and even fourth habeas corpus petitions raising nothing but procedurally barred claims." (*Ibid.*) Such is the case here. As explained below, the claim (and subclaims) presented in the Amended Petition are procedurally barred, and the petition should be denied summarily for this reason.

ARGUMENT

VI. CLAIM 1: ALLEGATION THAT 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.

Respondent denies Claim 1 in its entirety[4]. Petitioner appears to make a factual claim that the gun used in trial is not the gun used in any or either of the kidnapping, robbery, or murder of Theresa Graybeal. The requested basis for relief in Claim 1 is not clear, but appears to be a claim under *Brady v. Maryland* (1963) 378 U.S. 83.[5] In the interests of completeness, Respondent also evaluates Claim 1 under Cal P.C. 1473(b)(1), the "false evidence" standard.

A. Substantive Legal Standard

1. *Brady*

Under *Brady, supra* at 87, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Accordingly, the state has a duty to disclose any favorable and material evidence even without a request. (*Ibid.*; *United States v. Bagley* (1985) 473 U.S. 667, 678; *In re Sassounian* (1995) 9 Cal.4th 535, 543.) "Evidence is 'favorable' if it either helps the defendant or hurts the prosecution" (*In re Sassounian, supra*, at 544), that is, if it is exculpatory or has impeachment value. (*Strickler v. Greene* (1999) 527 U.S. 263, 282.) Evidence is material where there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

[4] In addition to the general denial above, Respondent denies each every claim individually to mirror the structure of the Petition.

[5] Other than in the title of the claim, Petitioner makes only factual claims in the body of Claim I, and so the Respondent is left in part to speculate about the legal basis for relief sought in Claim 1.

different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley, supra*, at 682.)

Brady imposes a duty on the state to provide exculpatory discovery, not to pinpoint its location. This is true even in cases with voluminous discovery. (See *Rhoades v. Henry* (9th Cir. 2011), 637 F.3d 1027, 1039 ("Rhoades points to no authority requiring the prosecution to single out a particular segment of a videotape, and we decline to impose one."), and see also *United States v. Warshak* (6th Cir. 2010) 631 F.3d 266, 297 ("As a general rule, the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence."))

Additionally, "evidence presented that is presented at trial is not considered suppressed." (*People v. Lucas* (2014), 60 Cal.4th 153, 274.) Furthermore, "if the prosecution provides the defense with, or the defense otherwise has, sufficient information to obtain the evidence itself, there is no *Brady* violation." (*People v. Superior Court (Johnson)* (2015), 61 Cal.4th 696, 716.)

Claims that are "speculative" are not favorable or material evidence within the meaning of *Brady*. (*People v. Burgener* (2003), 29 Cal.4th 833, 875 (There is no duty to disclose evidence that is … neutral, speculative, or inculpatory, citing to *United States v. Flores-Mireles* (8th Cir. 1997), 112 F.3d 337, 340); see also *Barker v. Fleming* (9th Cir. 2005), 423 F.3d 1085, 1099 (finding no violation because "[t]he flaw in Barker's theory is that it is mere speculation.")) Indeed, "the mere possibility that an item of undisclosed information might have aided the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense." (*United States v. Ayurs* (1976), 427 U.S. 97, 109.)

2. False evidence (Cal P.C. 1473(b)(1))

Cal P.C. 1473(b)(1) allows a writ of habeas to be granted when "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at a hearing or trial related to the person's incarceration."

Habeas relief based on false evidence requires a petitioner to show first that the proffered evidence was "false", second that that the evidence was "introduced against a person at a hearing or trial", and finally that the evidence was "substantially material or probative on issue of guilt or punishment." (Cal P.C. 1473(b)(1); see also *In re Hall* (1981), 30 Cal.3d 408, 424)

Facts in support of a habeas claim, including the fact that particular evidence is "false" and that particular evidence was "introduced" must be proved by Petitioner by a preponderance of the evidence. (*In re Cox* (2003), 30 Cal.4th 974, 997.)

False evidence is "material" when there is a "reasonable probability that the false evidence affected the outcome." (*In re Richards* (2016), 63 Cal.4th 291, 312.) Such false evidence needs to be that which "undermines the reviewing court's confidence in the outcome." (Id.)

However, habeas is not the venue to retry issues of fact or the sufficiency of the evidence at trial. (*In re Scoggins* (2020), 9 Cal.5th 667, 673, following *Ex parte Lindley* (1947), 29 Cal. 2d 709, 22 ("[E]vidence which is uncertain, questionable, or directly in conflict with other testimony does not afford a ground for relief upon habeas corpus.")) Indeed, such claims are "improper", because "claims of the insufficiency of evidence to support a conviction are not cognizable in a habeas corpus proceeding." (*In re Reno* (2012), 55 Cal.4th 428, 505.)

3. Actual innocence

Throughout the Petition, Petitioner asserts claims based on actual innocence. As described above, California gives statutory relief based on false evidence, and as described later in this Return (see sec. VIII) California also gives statutory relief based on new evidence that would "have more likely than not changed the outcome at trial." (Cal P.C. 1473(b)(3)(A).)

The Supreme Court has never definitively opined on whether a constitutional right exists relief based on actual innocence, "nothing the difficult questions such a right would pose and the high standard any claimant would have to meet." (*Osborne*, supra, 557 U.S. at 71.) Due process claims under such a theory appear to require that "in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."

(*House v. Bell* (2006), 547 U.S. 518, 537, citing *Schlup v. Delo* (1995) 513 U.S. 298, 327.) Indeed, "because of the very disruptive effect that entertaining claims of actual innocence would have on capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." (*Herrera v. Collins* (1993), 506 390, 417.)

Assuming such a right exists, it appears, like the California statutory standard, that it is limited to circumstances where new evidence demonstrates actual innocence. (*Bell* and *Schlup*, supra.)

B. Analysis of Petitioner's Sub-Claims

As a threshold question, Petitioner needs to show suppression by the government in order to trigger a *Brady* claim. Petitioner makes seven factual sub-claims related to Claim 1; in none of them is there any showing that the evidence was suppressed. Additionally, in-so-far as Petitioner's subclaims deal with evidence at all, that evidence was neither favorable or material.

Under a false evidence claim, Petitioner must also show that the evidence in question is false, which he fails to do.

1. Claim 1-A: Allegation that "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"

Petitioner claims that while reviewing the prior discovery in the case, they located a "1973 Fresno County Sheriff's Office (FCSO) Recovery Report for the alleged murder weapon." (Pet. 56). Petitioner attaches no such recovery report to their petition, and Respondent denies that any such 1973 Fresno County Sheriff's Office Recovery Report exists. Even should such a report exist, Petitioner indicates in their motion that this report was present in discovery. Respondent neither admits nor denies this report was present in discovery because Respondent denies the

existence of any 1973 report documenting the recovery of the murder weapon by the Fresno Sheriff's Office.

Petitioner also points to a California Law Enforcement Telecommunications "serial number trace" report ordered by FSO Det. Thomas Lean in 1978 that they allege shows the gun was recovered in 1973, contained in Petitioner's Exhibit 1a. Respondent denies that Petitioner's Exhibit 1a in fact shows the gun was recovered in 1973; in fact, the plain language of Petitioner's 1a shows that the weapon in question was reported stolen in Sacramento on June 7, 1973, and shows no recovery at all. (See also Respondent's Exhibits A and B; Exhibit A, a report from Sr. DA Investigator Isaac, states that the CLETS record in Petitioner's 1a shows the gun being stolen in 1873. Exhibit B, page 2, is the Sacramento PD incident report documenting the theft of the gun.)[6] While Petitioner does not explicitly concede this issue, in Petitioner's 3rd Supplemental Filing he changes his proffered statement of facts to suggest the gun was stolen on June 7 and recovered sometime later, implicitly conceding this point. (Pet. 3rd Supplemental Filing 2) In any case Petitioner indicates in their motion at p. 56 and Respondent admits that this "serial number trace" report was present in discovery.

Petitioner additionally alleges that the holster in court evidence contained two sets of engravings; one marked 'T.L. III / 2-10-78' and one marked '351 7/25/73.' Respondent admits Petitioner's factual claim that the holster in court evidence is marked 'T.L. III / 2-10-78' and neither admits nor denies petitioner's factual claim that the holster is marked '351 7/25/73'; respondent admits that the first number on the holster begins with 35 but cannot be sure if the final number is a number '1' or number '7' and admits that that date is 7/25/7 but cannot be sure based on photos in Petitioner's exhibits what the final number is. In any case, Petitioner claims and Respondent admits that this holster was in court evidence in both the first trial (Exhibit 5A;

[6] Respondent notes the start of a troubling pattern on the part of Petitioner. Petitioner claims that this CLETS report refers to the gun being recovered in Sacramento in 1973. In their Third Supplement, Petitioner no longer advances this claim explicitly but fails to correct it. Petitioner's own exhibits also make it clear that they had evidence that this claim was not true; for example, see Pet. Ex. 5b at 4, where Det. Lean interprets what appears to be the same document in 2020 and says "Sacramento PD stolen back in 73." Petitioner's counsel have a duty of candor to the court, including a duty to correct false evidence if discovered later. Cal. R. Prof. Cond. 3.3.

see RT 1486[7], First Trial Vol. 21 p. 3582) and second trial (Exhibit 5-A; RT 2759, Second Trial Vol. I p. XV).

a. Suppression

In this case, Petitioner makes no cognizable argument for suppression for any of the three proffered items of evidence in Claim 1-A. In the case of the so-called '1973 Recovery Report', Petitioner offers no evidence for the existence of such a report and in any case says they located this report in discovery. In the case of the "serial trace report", Petitioner located this report in discovery. In the case of holster, the holster was introduced into the 1978 trial as well as the 1983 trial; petitioner thus had knowledge and access to the holster from at least 1978 on.

b. Favorability

Petitioner's theory, whether the version advanced in his Amended Petition or the version advanced in his Third Supplement crosses well beyond speculation to the realm of fancy. In the Amended Petition, Petitioner proffers an expert, Roger Clark, who states under penalty of perjury that he "reviewed a recovery report that documented the gun was recovered in Sacramento in 6-7-1973." (sic) (Petitioner's Exhibit 1b, p. 5 ln 4.) As discussed above, no such recovery report has been proffered to the court, and in the Third Supplement Petitioner appears to quietly abandon Clark's declaration and the theory; there, Petitioner claims without reference to an exhibit or proffered evidence that "Titan handgun stolen out of Stockton in 6/7/73." (Pet. 3rd Supp. p. 3, line 20-21.) Respondent denies this claim; the Respondent's position is that the handgun in question was stolen from Sacramento on June 7, 1973, as described above.

In the second version of Petitioner's theory, the handgun was stolen on June 7, 1973, and then recovered by unknown law enforcement on July 25, 1973. The gun then "remains in close proximity and in control of at least one Fresno area law enforcement officer or agency until

[7] All citations to the reporter's transcript are to the 5,747-page 'Fresno Superior Court Transcripts' attached to the original Petition, which comprise the collected transcripts of the case.

2/10/78." (*Id.*, p. 3:22-4:1.) No exhibit or proffered evidence is supplied in support of this claim, and Respondent denies it.

The only support offered for this inference is the marking on the holster which Petitioner claims reads '351 7/25/73'. As discussed above, Respondent neither admits nor denies the claim as to the last digit of the first number and the last digit of the year. Petitioner claims that this marking was made by law enforcement, and offers in support a 10/8/21 declaration of Roger Clark marked 'Reply Exhibit 19c' at p. 13. Without a pin cite, it is difficult to know what Petition is alleging, but Respondent notes the following on page 13 of Reply Exhibit 19c related to the claimed 1973 marking: "In my opinion, this Report is a false report because it excludes the exculpatory information of the 1973 date and badge number on the holster." (Petitioner's Reply Exhibit 19c, p. 13:2-3.) While Petitioner proffers evidence that in 1978, police procedure was to mark initials and a date of recovery, Petitioner proffers no evidence (nor in fact explicitly claims) anywhere in Reply Exhibit 19c that procedure in 1973 was in regards to marking evidence, including whether or not a badge number would be used instead of initials, whether or not 351 is of the form of a badge number in 1973, or any other relevant offer of proof. In fact, no Sacramento Police Officer appears to have had badge number 351 in 1973. (Respondent's Exhibit B, p. 1.) Similarly, no Fresno Police Officer had badge number 351 in 1973. (Respondent's Exhibit C.) The Sheriff's Office no longer retains badge number information from 1973. (*Id.*)

Petitioner also proffers no evidence that the holster was connected to Titan handgun in 1973. The report of the handgun's theft lists only the pistol taken, not a holster. (Respondent's Exhibit B.) The holster in question is leather and manufactured by Viking, not Titan. (Petitioner's Exhibit 23a, p. 000013.)

Petitioner's theory is complete speculation. Many other possible inferences could be drawn from the state of the evidence. As discussed above, favorable evidence must be more than mere possibility or speculation, and the evidence here is not that.

c. Materiality

None of this evidence was suppressed, so the court can conclude easily that it was not material. As discussed above, the *Bagley* test for materiality is whether or not disclosure would have a reasonable probability of the proceeding having a different outcome. In this case, evidence was disclosed, and the Petitioner was convicted.

d. False Evidence

The threshold question for a false evidence claim is that the evidence in question was introduced against the defendant in a trial or hearing related to their incarceration, and additionally that the evidence was false.

Given Petitioner's shifting claims in Claim 1, it's difficult to characterize what evidence, exactly, he believes was false and when he thinks it was introduced. As discussed above, the holster was introduced at trial, but the holster contains the disputed marking that Petitioner claims reads '351 7/23/78' (Respondent neither admits not denies the claim about the marking). Respondent denies that any false evidence exists related to the holster as described more fully under "Favorability" above.

Taken broadly, Petitioner's dispute about the meaning of the markings on the holster is clearly an issue of fact, and as discussed above in *Scoggins*, habeas writs are not the appropriate venue to dispute issues of fact decided by the trial jury.

2. Claim 1-B: "There Were Conflicting Reports Made by The FCSO as to Description of the Gun"'

Petitioner claims that there are more than nine police reports in the case referring to the gun, and that they conflict as to the gun's serial number. (Pet. 57-58.) Respondent denies that these reports conflict, as discussed more fully below.

Petitioner advances no claim that these reports were not discovered prior to the 1983 trial, and regardless the reporter's transcript is clear that police reports were turned over well in

advance of the 1978 trial, much less the 1983 trial. (RT 63, Preliminary Hearing Vol. I p. 54, where CDDA Ardaiz says that all police reports were transferred to defense counsel, and RT 622:24-26, Pretrial Motions Vol. I p. 133:35-37, where Petitioner's counsel says "As far as incidents, I assume that that I have all the police reports, and it appears as though I do on the actual incidents."

a. Suppression

No suppression has occurred as to any of these reports, and so no *Brady* violation has occurred.

b. Favorability

As discussed above, Respondent denies that these reports conflict. Petitioner argues that the reports conflict because in the reports dated prior to February 11, 1978, the reports list the serial number removed. In reports from February 11, 1978 on, the reports list a serial number of 146425. (Pet. 58.) Petitioner's Exhibit 1q documents this transition, when in the remarks section of the property it notes "D.R. 2-9-78 No. determined to be 146425." Similar handwriting signs under "Date Out" with a date of 2-9-78, and initials under "Returned" with "D.R." and 2-9-78. Finally, a "D.Robinson" with similar handwriting signs the "OK TO RELEASE" stamp with a date of 2-10-78. (Pet. Exh. 1q.) Visible scratches appear over the firearm's serial number as it appears in the court file. (People's Exhibit 5-A from trial; also visible in a photograph of trial exhibit 5-A in Respondent's Exhibit D.) The Respondent's interpretation of this evidence is that D. Robinson at the Fresno Police Department determined the serial number of the firearm to be 146425 on 2/9/78, despite efforts by a prior possessor to scratch out the serial number.

Evidence that some possessor of the firearm tried to erase the serial number but was unsuccessful is not favorable in a constitutional sense. Arguably, evidence of prior criminal activity involving the murder weapon is inculpatory, but at most the facts in question are neutral as to the Petitioner's guilt.

c. Materiality

As discussed above, this information was in the possession of Petitioner prior to his 1983 trial, and he was found guilty.

d. False Evidence

None of these reports were introduced at trial in 1983. To prevail on a false evidence claim under Cal. P.C. 1473(b)(1), Petitioner must show that the purported "false evidence" was introduced at a trial or hearing against him. He does not. Furthermore, Respondent denies that this evidence was false as discussed more fully under "Favorability" above.

3. Claim 1-C: "There Was No Forensic Evidence Tying Petitioner to the Gun"

Petitioner claims and Respondent admits there was no fingerprint evidence linking Petitioner to the recovered firearm. No claim is made that this lack of fingerprint evidence was not disclosed to the defense. Petitioner additionally claims and Respondent neither admits nor denies that "law enforcement did not attempt to perform further forensic investigations, including blood typing." (Pet. 59)

Evidence of potential leads (though Respondent does not admit that there were additional leads) is not "evidence that shows Plaintiff did not commit the crime. In any investigation, there are likely to be leads that are not pursued. Investigators must make decisions about how to use their resources to investigate cases." (See *Beaman v. Souk* (C.D.Ill. 2014), 7 F.Supp.3d 805, 822, aff'd sub nom. *Beaman v. Freesmeyer* (7th Cir. 2015), 776 F.3d 500.)

a. *Brady* Suppression, Materiality, and Favorability

The alleged lack of forensic evidence in this case is not evidence, and regardless was not suppressed. Petitioner advances no claim that he was unaware that this investigation was not done

at the time of his trial. As discussed above, mere speculation is not evidence and is not favorable. Because there was no suppression, the alleged lack of forensic evidence was necessarily not material.

b. False Evidence

As described in the immediately previous section, Respondent denies that the alleged lack of forensic evidence is evidence at all. A false evidence claim must be about evidence introduced against the Petitioner at trial. In this case, Petitioner complains about a lack of information, rather than evidence being introduced, and so a false evidence claim fails.

4. Claim 1-D: "Police Reports Have Conflicting Information Where The Gun Was Recovered."

Petitioner claims that the police reports show conflicting information as to the location of the recovered gun. Respondent denies this claim; in Petitioner's motion, Petitioner claims that in the initial report, the car was not searched for a gun, and that the car was towed and later searched, at which point the gun was found. (Pet. 59-60) Respondent denies that these statements are inconsistent.

While not reports, Petitioner also claims that FPD Officer J. Bonesteel, who conducted the search, testified inconsistently at Preliminary Hearing in 1978 when he testified that he found the firearm under the seat, found the holster separately, and photographed them each and that that testimony was inconsistent with photographs that "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 was located." (Pet. 59) Despite Petitioner's 3000+ pages of exhibits, he does not attach the photograph which he claims is inconsistent with Bonesteel's testimony. All the same, on its face Respondent denies that even Petitioner's description of testimony and photographs are inconsistent.

Regardless, Petitioner is claiming a *Brady* violation for reports, testimony, and photographs discussed in Preliminary Hearing during the first trial in 1978. All of this information was clearly in Petitioner's hands by the time of his 1983 trial.

a. *Brady* Suppression, Materiality, and Favorability

As discussed above, Petitioner was in possession of relevant police reports, and in fact these issues were discussed at preliminary hearing. There was no suppression prior to the 1983 trial, and thus no materiality. This evidence is also not favorable – the officer photographing part of a gun in the car, testifying that the exhibit in court is the gun he recovered, and then that gun being ballistically linked to the shell casing from the murder is inculpatory, rather than exculpatory.

b. False Evidence

Respondent denies that this evidence constituted false evidence as discussed above in the introduction to this subsection, subsection VI(B)(4). Petitioner's claim here is again about police reports, and Petitioner offers no support for the proposition that these reports were introduced against him at trial in 1983. Respondent also denies this claim because there has been no showing it was introduced against Petitioner at trial.

5. Claim 1-E: "The Deputy District Attorney Offered Unsupported and Conflicting Evidence to Demonstrate the Gun Was the Murder Weapon."

Petitioner claims that during the preliminary hearing, CDDA Ardaiz referred to a "Weapon Disposition Report" to show Petitioner's possession of the gun. . (Pet. 60; appearing to refer to RT 63, Preliminary Hearing Vol. I p. 54.) Petitioner contrasts this with police reports from 1978 that show Petitioner was not armed with a firearm when he was arrested. Respondent denies the claim that these reports are conflicting or unsupported, or that Ardaiz offered the "Weapon Disposition Report" to show Petitioner's possession of the gun during the preliminary hearing. Respondent alleges that Petitioner's claim misstates the facts; in fact, defense counsel was engaged in a conversation about discovery, and CDDA Ardaiz replies that "I'm sure that Counsel have all the police reports that I have in my possession, save and except one which I have

represented to several of the defense counsel which is a police report that simply shows the transfer of the weapon from the police department to the sheriff's office for purposes of custody." Petitioner claims that this report is the report is the one copied in Petitioner's Exhibit 1s, which the Respondent neither admits nor denies, as it does not know the report to which Mr. Ardaiz referred on the record.

Respondent denies the claim that Petitioner's Exhibit 1s claims that the handgun was personally possessed by Petitioner, however: Petitioner's Exhibit 1s says in full, when describing the firearm, "Owner: in possession Douglas Stankewitz." As described elsewhere, the firearm was reported stolen in 1973 by its lawful owner. (Respondent's Exhibit B.) Respondent contends that the "in possession" language in the "Owner" line is not a on Petitioner's 1s is not a claim in a police report about where the gun was located and is at most a claim about the constructive possessor of a stolen firearm.

a. *Brady* Suppression, Materiality, and Favorability

Exhibit 1s and indeed all reports were disclosed to defense prior to the 1978 trial, as discussed above. No suppression occurred, and so these reports could not have been material in that they would cause the Petitioner to not be convicted. These reports also do not appear to be exculpatory: the People's theory at trial was not that Petitioner was armed with a firearm when he was arrested, but that the firearm was found in the car.

b. False Evidence

As discussed above, Petitioner's claim is about a report purportedly offered into evidence at Petitioner's 1978 preliminary hearing, though Respondent denies that the report was offered into evidence or offered for proof at all, as discussed above in VI(B)(5), and also denies the claim that this evidence was false.. Claims under PC 1473(b)(1) related to false evidence presented at a "hearing or trial related to the person's incarceration." Petitioner's incarceration is the result of a jury trial in 1983, not a preliminary hearing in 1978.

6. Claim 1-F: "There Is No Proof That the Gun that Killed the Victim Was a .25 Caliber, the Gun Offered as the Murder Weapon"

Petitioner makes five individual claims in this sub-claim: (1), that there was a disparity in police reports about the distance of the shell casing from the body, with one report saying 18 feet and another saying 21.3 feet, (2) there was no testimony about how far a .25 cal casing would travel, (3), that there was no recovered expended slug, (4) the single casing recovered at the scene forensically matched to the recovered Titan handgun, and (5) the autopsy could not determine the caliber of the gun that caused the fatal wound. (Pet. 61-63)

Respondent admits all five of these claims: (1) the police reports did have a 3.3 foot difference in measurement, (2) no testimony about how far a casing would travel was given, (3) no expended slug was recovered, (4) the single casing at the scene matched to the Titan handgun, and (5) the autopsy could not conclude the caliber of the gun that caused the wound. None of these factual claims, however, bear resemblance to a *Brady* violation.

a. *Brady* Suppression, Materiality and Favorability

All of these facts were present prior to trial, and many of them were discussed at trial. Petitioner cites Det. Boudreau's testimony at the 1983 trial that they did not locate an expended slug. ((Pet. 62; RT 2938, Second Trial Vol. I p. 160.) The caliber of the bullet that caused the fatal wound was questioned in 1978 at preliminary examination and was struck from the report. (Pet. 62.) As discussed above, Petitioner was in possession of all police reports, including the differing police reports. Testimony was introduced at trial about the forensic match between the bullet and the weapon. (RT 2928, Second Trial Vol. I p. 150.)

No cognizable claim of suppression, and thus materiality, can be made. Some of this information is favorable to the Petitioner, for example the inconsistency between distances or the inability for the autopsy to determine the calendar, though other information, like the ballistics link, is inculpatory. However, all of that material was available to Petitioner to present to the jury, and in many cases the jury heard it and still convicted.

b. False Evidence

As discussed above, these facts were presented at trial. Petitioner does not advance any of the five individual claims as false, which a the threshold requirement for a showing of false evidence. Instead, Petitioner disputes the conclusion the jury came to when weighing what Petitioner characterizes as contradictory evidence. Such sufficiency of the evidence claims are inappropriate for habeas. (*Scoggins*, supra.)

7. Claim 1-F: "The Gun Was A Key Part of the Prosecution Story Which Was Provided to the Media to Prejudice Potential Jurors to Find Petitioner Guilty."

Petitioner claims that there was extensive media coverage of the 1978 trial. Respondent admits that the 1978 trial received media coverage, but denies that the media's coverage represented any wrongdoing on the part of the state or caused any bias in Petitioner's instant trial, which occurred in 1983. Petitioner does not articulate, and the Respondent cannot independently construct, an argument that media coverage in 1978 resulted in a *Brady* violation in 1983 or a false evidence allegation in 1983. It is well-established in habeas law that "conclusory allegations without specific factual allegations do not warrant relief." (*In re Reno* (2012), 55 Cal.4th 428, 493.)

C. Timely and Successive Petition Analysis

1. Legal Standard

Habeas claims cannot be raised in successive or untimely petitions, subject to some exceptions. "There may be no more venerable a procedural rule with respect to habeas corpus than what has come to be known as the *Waltreus* rule; that is, legal claims that have been previously raised and rejected on direct appeal ordinarily cannot be reraised in a collateral attack by filing a petition of habeas corpus." (*In re Reno* (2012) 55 Cal.4th 428, 476; *In re Waltreus* (1965), 62 Cal.2d 218, 225.)

Even if a claim was not raised on direct appeal, they are barred when they could have been raised on such appeal (the *Dixon* rule): "the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from the judgment of conviction." (*In re Dixon* (1953), 41 Cal.2d 756, 759.)

Issues raised and rejected in a previous habeas petitiion are also barred from habeas under the *Miller* rule, providing that success petitions should be denied if there is a prior petition "based on he same grounds set forth in the present petition … and since that time, no change in the facts of the law substantially affecting the rights of the petitioner has been disclosed." (*Ex parte Miller* (1941), 17 Cal.2d 734, 735.)

Finally, under the *Clark/Horowitz* rule, claims are improper when they could have been raised in a prior habeas proceeding, because "the petitioner cannot be allowed to present his reasons against the validity of the judgment against him piecemeal by successive proceedings for the same general purpose." (*In re Horowitz* (1949), 33 Cal.2d 534, 547, citing to *In re Drew* (1922), 188 Cal 717, 722.)

There are some exceptions to this rule, codified in *Clark* and restated in *Reno*: "(1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; [or] (4) that the petitioner was convicted or sentenced under an invalid statute." (*In re Reno*, supra, 55 Cal.4th at 472, citing *In re Clark* (1993), 5 Cal.4th 750, 797.) To advance an actual innocence claim under the *Clark* standard, a petitioner must proffer new evidence; "[e]vidence relevant only to an issue disputed at trial, which does no more than conflict with trial evidence, does not confidence "new evidence" that fundamentally undermines the judgment." (*Clark*, supra, 5 Cal.4th at fn 33, citing *People v. Gonzalez*, 51 Cal.3d 1179, 1246.)

Finally, claims must be raised "without substantial delay": "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the

information offered in support of the claim and the legal basis for the claim. A petitioner must allege, with specificity, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time. It is not sufficient simply to allege in general terms that the claim recently was discovered, to assert that second or successive postconviction counsel could not reasonably have discovered the information earlier, or to produce a declaration from present or former counsel to that general effect. A petitioner bears the burden of establishing, through his or her specific allegations, which may be supported by any relevant exhibits, the absence of substantial delay." (*In re Robbins*, (1998), 18 Cal.4th 770, 780.) If the claims are substantially delayed, a court can still consider them if the petitioner demonstrates good cause. (*In re Reno*, supra, 55 Cal.4th at 460.) Finally, even if there is delay and a lack of good cause, a writ can be heard when it falls into one of the four *Clark* exceptions. (*Reno,* supra.)

2. Application

Claim 1 fails these tests. All of Petitioner's cited evidence was available prior to the 1983 trial, and so could have been raised in an appeal or prior claim under the *Dixon* rule or the *Clark/Horowitz* rule. Petitioner's claim, fundamentally, is one of insufficient evidence, and all of the facts underlying Claim 1 were known in 1983. Petitioner articulates no *Clark* exception that applies, and Respondent cannot identify an exception: there is no error of constitutional magnitude, there is not a showing of actual innocence based on new evidence such that no reasonable juror could convict, this is not a death penalty case, and the statute is not invalid. Petitioner's claim should be denied as untimely and successive.

VII. CLAIM 2: ALLEGATION THAT 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 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.

Respondent denies Petitioner's second claim for relief in its entirety, which contains various and sundry allegations of purported prosecutorial misconduct. As in Claim 1, Petitioner does not state a particular legal theory upon which he seeks relief, leaving Respondent to speculate as to the legal theory for his claim. In the title, Petitioner both cites to *Brady* and refers to the presentation of false evidence; in light of that, Respondent's best interpretation is that Petitioner is requesting relief under *Brady,* under constitutional prohibitions on prosecutorial misconduct, and under Cal. Pen. C. 1473(b)(1).

A. Legal Standard

1. *Brady* and False Evidence

The applicable legal standards for *Brady* violations and Cal. P.C. 1473(b)(1) false evidence violations are discussed above in section VI (A). In the interests of brevity the Respondent does not repeat them here.

2. "Pattern and practice" prosecutorial misconduct

"The applicable federal and state standards regarding prosecutorial misconduct are well established." *(People v. Smithey* (1999) 20 Cal.4th 936, 959, internal quotation marks and citations omitted.) The prosecution "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." (*Ibid*) "In contrast, under our state law, prosecutorial misconduct is reversible error where the prosecutor uses deceptive or reprehensible 'methods to persuade either the court or the jury and it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Martinez* (2010) 47 Cal.4th 911, 955, internal quotation marks and citations omitted.) To preserve a claim of prosecutorial error, a defendant must timely object in the trial court. (*People v. Brown* (2003) 31 Cal.4th 518, 553.)

B. Analysis of Petitioner's Sub-Claims

1. Claim 2-A: "The Prosecution's Physical Evidence Shows That Petitioner Was Not the Murderer."

Petitioner claims (Pet. 65, claim 2(A)(1)) that the victim was 160cm tall.[8] Petitioner relies upon the autopsy report in making this claim, included as Petitioner's Exhibit 2b. Respondent denies that the victim was 160cm tall and neither admits not denies that the autopsy report lists the victim at 160cm, because the second number in the autopsy report cannot be clearly read. (Petitioner's Exhibit 2b.) During the 1983 trial, the victim's father testified that his daughter was 5'7". (RT 2786, Second Trial Vol. I p. 8.) Five feet and seven inches is 170 centimeters.

Petitioner relies upon the Declaration of Roger Clark to claim that the "physical evidence therefore shows that the victim was shot by someone approximately the same height as she was because of the angle." (Petitioner's Exhibit 2b.) Clark puts himself forward as a "police practices expert" and describes no training or experience in forensic science. (*Id.*) Respondent denies Clark's claim. In trial, Detective Boudreau testified that he had a degree in criminalistics as well as specific training and experience in forensics and ballistics. (RT 2923-2924, Second Trial Vol. I p. 145-146.) He testified that, at least where the distance determination is concerned, the height of

[8] Without explanation, Petitioner claims that 160 centimeters is 5', 2 1/2" in height. (Pet. 65) 160 centimeters is 62.99 inches, or 5 feet and 2.99 inches. Of similar interest is Petitioner's Exhibit 2a, the Declaration of Roger Clark, where he asserts under penalty of perjury that "according to documented reports, Miss Graybeal was 5'2.5"." No such reports are present in discovery or attached anywhere as exhibits. A similar 'reach' is made as to Mr. Stankewitz' height, which Petitioner claims is 6'1" without citation. Detective Boudreau's measurement on the record was that Stankewitz stood approximately 72 inches tall or 6 foot. (RT 2933, Second Trial Vol. I p. 155.)

the victim was not important. (RT 2947, Second Trial Vol. I p. 169.) However, when opining in general on a hypothetical, Boudreau used the victim's height of 5'7" as given by her father. (RT 2948, Second Trial Vol. I p. 170.)

Petitioner further claims (Pet. 66, Claim 2(A)(2)) that a blood sample taken from Petitioner's shirt was lost prior to trial. Respondent admits that a blood sample was lost prior to the 1983 trial.

Finally, Petitioner claims (Pet. 67, Claim 2(A)(3)) that the Petitioner's GSR test was negative. Respondent admits that the GSR test was negative.

a. Brady

No *Brady* violation seems evident. Petitioner does not allege in Claim 2 that any of this evidence was suppressed, and as discussed above *Brady* requires suppression. Additionally, as discussed fully above in section VI(B)(2), evidence exists that all reports were turned over prior to trial. (RT 63, Preliminary Hearing Vol. I p. 54.)

If there was a *Trombetta* issue with the lost blood sample, it was forfeited when defense did not file such a motion prior to trial.

b. False evidence

While the lost blood sample was discussed at trial, it does not appear that Petitioner is alleging that it was false that the sample was lost, and in any case does not offer evidence to support that conclusion. Petitioner does not advance an argument that GSR evidence was falsely introduced at trial despite the GSR test being negative.

The victim's father's estimate of his daughter's height is not obviously false evidence, which is the threshold question for false evidence relief. The victim's father, Mr. Pawlowski, did not have a strained relationship with his daughter or a lack of familiarity; instead, the testimony is that he saw her shortly before she was kidnapped, when she came by so he could tune up her car and she could borrow the car that was ultimately stolen from her. (RT 2782, Second Trial Vol. I

p. 4.)) She left from her father's house to go to the store where she was kidnapped from. (*Id.*) He testified that the nature of their relationship was such that she "wouldn't just run off without letting me know where she's at." (RT 2784, Second Trial Vol. I p. 6.) Taken generally, Respondent claims that Mr. Pawlowski's testimony had the indicia of a person familiar with the victim and thus his claim was reliable.

Even if the evidence was false, it was not material. As discussed above, Detective Boudreau testified that at least in distance considerations, height was not important. A great deal of other evidence existed, including eyewitness testimony of the murder. Here, Petitioner's claim appears to have the hallmarks of complaining about the sufficiency of the evidence rather than its falsity, since competent evidence to support the criminalist's conclusions was entered at trial.

c. Prosecutorial Misconduct

No objection to misconduct on Mr. Robinson's part was made when he posed the hypothetical question to Detective Bourdreau, though a foundation objection was made and overruled. (RT 2948, Second Trial Vol. I p. 170) Such a claim now is forfeited as discussed above. Even were it not forfeited, Robinson's hypothetical relied upon evidence properly before the jury. The autopsy report is unclear, while the victim's father was in a position to judge her height. Petitioner was in possession of the autopsy report and could have cross-examined on the issue; in fact, the record indicates that his counsel did cross-examine on the importance of height in distance calculations. (RT 2947, Second Trial Vol. I p. 169) Relying on the testimony of a young woman's father as to her height is not a "deceptive method" in the meaning of the law.

2. Claim 2-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."

On its face, Claim 2-B appears to allege only violations related to Petitioner's overturned 1978 trial. Habeas claims relate to misconduct in hearings related to the Petitioner's confinement, and Petitioner is not confined because of the results of his first trial. That trial was reversed in its entirely. (*People v. Stankewitz* (1982), 32 Cal.3d 80, 95.)

3. Claim 2-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."

Petitioner makes six sub-sub-claims in his Claim 2-C. He claims (1) that DDA Robinson falsely said in his opening that Petitioner possessed a gun; (2) Robinson produced false testimony from Billy Brown; (3) Robinson produced false testimony about the gun; (4) Robinson produced false testimony in his examination of Det. Boudreau about the characteristics of the fatal wound; (5) Robinson and his office should have known that Martin Lewis was the murderer; and (6) that Robinson misstated facts during his guilt phase closing argument.

Respondent denies all of these claims. As a threshold matter, none of these claims appear to allege *Brady* violations, and in-so-far as they could be construed to raise a *Brady* violation that is discussed elsewhere. While Petitioner once again fails to specify the legal theory his habeas claims in this section rely on, Respondent will analyze each of these six claims under false evidence analysis and prosecutorial misconduct analysis. In each of the six sub-sub-claims, Respondent finds no violation.

a. Robinson's opening statement

Petitioner claims that in Robinson's opening statement, Robinson stated that Petitioner had a gun in hand, and that Billy Brown saw Petitioner shoot victim. Respondent agrees that Robinson made these statements. Petitioner also claims that Robinson said "that a gun was found

in the car with the petitioner and others." (Pet. 72.) Respondent denies this claim; at Petitioner's pin-cite, what Robinson said was "Fresno Police Department Officers Robert Rodriguez and Joe Callahan arrested the defendant and the others who were in the car or in the vicinity of the car itself. A gun was found in that car." (RT 2778, Second Trial Vol. I p. 12.)

In sub-sub-claim 2(C)(1), Petitioner advances no argument that these claims are false. Additionally, Petitioner appears to concede that these claims were made in opening statement. Opening statements are not evidence, and the jury was so instructed: "Statements made by the attorneys during the trial are not evidence." (RT 3430, Second Trial Vol. III p. 643.)

Petitioner did not object that Robinson's opening was misconduct, and so the claim is forfeited as discussed above. Even were it not forfeited, Robinson's statement was an accurate statement of the evidence produced at trial, where Billy Brown did in fact testify that that the defendant shot the victim (RT 3189, Second Trial Vol. II p. 407), Officer Rodriguez did in fact testify that he arrested Petitioner and others in the vicinity of the car (RT 2873, Second Trial Vol. I p. 95), and Officer Bonesteel did in fact testify that he found a gun in the car (RT 2903-2904, Second Trial Vol. I p. 125-126.) It's long established that the "purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present." (*People v. Seumanu* (2015), 61 Cal.4th 1293, 1342.) Doing exactly that is neither "egregious" or "reprehensible" as described in *Smithey* or *Martinez* as discussed supra.

b. Billy Brown's allegedly false testimony

Petitioner claims that Robinson committed misconduct by offering Brown as a witness to the shooting, because Brown's testimony at trial was allegedly inconsistent with his testimony at preliminary hearing, because Brown allegedly "told DDA Ardaiz that he lied at the preliminary hearing", because Brown had allegedly told James Ardaiz "he did not see the shooting", and because Brown's statement was allegedly "contradicted by the physical evidence." (Pet. 72-73.)[9]

[9] Note that this claim is different from some other claims involving Billy Brown; rather than relying on Brown's 1993 recant, this claim alleges misconduct solely based on the information available to Robinson at the time of trial in 1983.

Respondent denies each of these claims, and regardless they do not constitute misconduct or false evidence.[10]

Petitioner offers no citations to the reporter's transcript to demonstrate inconsistency between the 1978 preliminary hearing and the 1983 trial. Petitioner does offer Petitioner's Exhibit 2v in support of his claims that Brown told Ardaiz that he "lied" and that he "did not see the shooting", however.

Exhibit 2v says in part: "BROWN was asked how far the defendant was from the victim when the shot was fired and stated just a couple of feet or words to that effect. ARDAIZ then read lines 3 through 16, page 126, of the reporters transcript[11] of the preliminary hearing and asked if that was correct. BROWN stated that no and related that he had meant that he, while seated in the vehicle, was approximately five yards from the defendant." Respondent denies that this exchange can be construed beyond a reasonable doubt as an admission of a "lie."

Nowhere in Exhibit 2v is any statement that Brown did not see the shooting, despite Petitioner's citation.[12]

Petitioner offers Exhibit 2a at p.6, the 2019 declaration of Roger Clark, in support of the proposition that Robinson engaged in misconduct because he knew the physical evidence "contradicted" Brown's proffered testimony. There, Clark opines in lines 1-3, "the Prosecution knew that the victim was shot on the right side of the head or neck, which contradicted Brown's testimony." Petitioner does not, however, offer citation to the actual allegedly contradictory record, including crucially the testimony of Brown that is claimed to contradict the physical evidence. The burden in habeas lies with the Petitioner, and Respondent cannot evaluate whether or not some portion of Brown's testimony regarding the angle of attack is false evidence without a claim about what that testimony is.[13]

---

[10] While Petitioner once again does not allege a legal theory for relief, it appears in this sub-sub-claim that Petitioner is relying on allegations of misconduct and false evidence.

[11] This exchange appears on Page 135 of the consolidated Reporter's Transcript in this case, during Mr. Sciandra's cross-examination of Mr. Brown:

Q: So he was – strike that. How far was Mr. Stankewitz away from the victim?

A: About five yards.

[12] See Cal. Rule of Prof. Conduct Rule 3.3, "Candor Toward the Tribunal".

[13] Respondent directs the court to RT 3190. In at least his initial description of the killing, (continued...)

Even construing all of these factual claims most favorably to Petitioner, they do not constitute misconduct or false evidence. At best, all of these claims amount to questions about the sufficiency of evidence or conflicts in the evidence for the trier of fact to resolve, which are not appropriate issues for habeas. Even if Brown did testify at one point that from his viewpoint, victim was shot on the left side, he also testified that she was shot on the right side and was inside a car some distance from the shooting. That testimony would not be false beyond a preponderance of the evidence and producing it would not be the kind of egregious conduct required for a finding of sustained misconduct.

c. Alleged false testimony about the gun

In his sub-sub-claim 2(C)(3), Petitioner alleges that the People introduced false testimony about the gun. Petitioner describes several portions of testimony, including Bonesteel's testimony about recovering the gun, Bonesteel's identification of the gun, Brown's identification of the gun, and Brown's testimony that Petitioner used the gun to commit the murder.

Petitioner does not identify which, if any, of these statements are false, or offer any argument to support their falsity. Petitioner also does not offer any argument to show knowledge on the part of Robinson as to the potential falsity of any of these statements, or indeed any other misconduct.

As discussed above, conclusory allegations do not merit relief. (*In re Reno* (2012), supra, 55 Cal.4th 428, 493.) Additionally, Respondent denies that any of these claims are false.

d. False or misleading Testimony by Nelson and Boudreau

Petitioner's sub-sub-claim 2(C)(4) restates the "height discrepancy" argument advanced in Petitioner's sub-sub-claim 2(B)(1). Respondent denies this claim here as it did there, and incorporates by reference its arguments in section VII(B)(1)(b) and VII(B)(1)(c) about how

---

Brown indicated that Graybeal was shot on the right side. Brown testified: "She was looking this way, and he was standing over here on the side (indicating). The court then responded "Indicating that she was facing forward and he was –" Brown responded: "Yes." The court continued: "—on the right side. That is what the witness is gesturing."

expert testimony involving height in the 1983 trial is neither false evidence nor prosecutorial misconduct.

e. The prosecution "focused their efforts" on Petitioner

Petitioner claims without any proffered evidence or offer of proof that "DDA Warren Robinson knew, or should have known, that codefendant Lewis was the murderer." (Pet. 75.) Respondent denies this claim both on its merits and as conclusory. The burden lies on Petitioner to proffer evidence in support of his claim, and he proffers none.[14]

f. Robinson's guilt phase closing argument misstated facts and evidence

Petitioner makes several claims of misconduct in Robinson's closing argument. As a threshold matter, the arguments of counsel are not evidence, as discussed above, and Respondent denies that any claims made by Respondent are violations of either *Brady* or false evidence, as both of those theories require the disputed information to be evidence. Respondent also denies all of the claims because they were not objected to; as discussed elsewhere, claims of misconduct are forfeited by his failure to timely object. (*Brown*, supra, 31 Cal.4th 518, 553)

Petitioner claims that the following five statements were misconduct: (1) Robinson's statement that petitioner planned the kidnapping; (2) Robinson's statement that the testimony of Bill Brown was uncontradicted; (3) Robinson's statement that Brown was there to see everything that happened; (4) Robinson's statement that the evidence showed that Petitioner fired the shot; (5) Robinson's statement that Petitioner killed the victim because he wanted to eliminate a

[14] Respondent maintains that Petitioner, Douglas Stankewitz, was the actual killer of Theresa Graybeal. This was Respondent's theory at trial, was found true beyond a reasonable doubt by two juries, and is the objectively reasonable conclusion from the evidence even with the benefit of an additional 40 years of post-trial record. When evaluating materiality, however, Respondent notes that even assuming no testimony came in at trial about Brown personally observing Petitioner shoot Miss Graybeal, Petitioner would still be guilty of first degree murder with special circumstances under the felony murder rule. This is true even if Petitioner were subjected to today's additional elements for felony murder, as he was a major participant in the robbery.

witness. Respondent denies that any of these statements were misconduct. As discussed above, prosecutorial misconduct requires egregious and outrageous conduct.

Robinson's statement (1) about Petitioner planning the robbery is drawn from the testimony; Brown testified that Petitioner "said whenever the girl got into the car for Tina to push her over and for Marlin to jump into the back seat and open the passenger door." (RT 3166, Second Trial Vol. II p. 384.) Presenting the evidence from the trial in closing argument is not misconduct; it is called lawyering.

Robinson further stated (2) that Brown's testimony was uncontradicted. This is again an accurate summation of the witnesses at trial. Petitioner suggests that Brown's testimony had "physical impossibilities", but does not proffer what those impossibilities are. In-so-far as those issues are raised elsewhere in the brief, Respondent denies them for the reasons stated elsewhere, or else denies the claim as being conclusory.

Robinson said (3) that Brown saw everything that happened. Petitioner refers without proffer or reference to "Brown's admission to DDA Ardaiz otherwise." Petitioner offers no evidence that Brown ever said he was not able to see what happened, and Respondent denies this claim as unsupported and conclusory. As discussed at length in VII(2)(C)(b) of this brief, Brown's testimony was not false.

Robinson stated (4) that Petitioner fired the fatal shot. Petitioner claims this was "not supported by any evidence or testimony," but Billy Brown testified to that as discussed above.[15] (RT 3189, Second Trial Vol. II p. 407.) Presenting evidence from trial is not misconduct.

Finally, Robinson stated (5) that Petitioner committed the murder out of a motive to eliminate a witness. It is long established that prosecutors can draw reasonable inferences in closing argument. A prosecutor "enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom." (*People v. Hamilton* (2009) 45 Cal.4th 863, 928.) Here, Petitioner's elimination of the sole witness of his kidnapping and robbery, especially when the evidence is that she saw Petitioner and all of his co-defendants, is a reasonable inference to draw from the evidence.

[15] Cal. Rule. Prof. Conduct 3.3, "Candor Towards The Tribunal."

4. Claim 2-D: "From the Time of the Murder on, the Prosecution Was Aided By the Defense Lack of Investigation."

This claim appears to in part mirror Petition's Claim 12 concerning IAC by Petitioner's counsel during the guilt phase. Respondent denies this claim here just as it does there. Petitioner does not cite to ineffective assistance of counsel in raising Claim 2-D, and so Respondent will address IAC issues later in the context of Claim 12.

While Petitioner does not distinguish his claims in this section, Respondent identifies two claims: first, that "alibi witnesses would have testified that when the codefendants arrived by car in Clovis, shortly after the murder, Petitioner was not with them," and second, "the Prosecution knew that the Petitioner's second trial attorney did not hire any investigators or experts to contest the Prosecution's witnesses." (Pet. 76-77) It appears that these are allegations of false evidence or misconduct, and Respondent denies them both.

a. Alibi witnesses

Petitioner advances without any proffered evidence that alibi witnesses exist who said that the Petitioner was not in Clovis after the murder. No declarations or reports are attached. As discussed above, it is the responsibility of the Petitioner to prove the facts underlying a habeas writ. Speculation and conclusory statements do not give rise to relief. Even if these witnesses did exist, Petitioner advances no evidence that the prosecution knew of them. There was also no objection at trial, as needed for a misconduct finding on habeas. Petitioner does not allege what evidence he thinks was false, as is needed for a PC 1473(b)(1) false evidence finding. Respondent denies this claim for all of those reasons.

b. Prosecution's alleged knowledge of defense lack of investigation.

Petitioner alleges misconduct under some theory because the "DA's office took advantage" of an alleged lack of investigation. A misconduct claim here is forfeited due to a lack of objection, and regardless, any potential lack of investigation by Petitioner is not misconduct on

the part of the prosecution. Petitioner advances no legal basis for this proposition, and more than that the logical conclusion of this proposition would be that the prosecution would become responsible for defense investigation, which would have significant impacts on the attorney-client privilege. Respondent denies this claim as specious and not supported by the law or facts.

C. Timely and Successive Petition Analysis

The applicable legal standards for timely and successive petition analysis under the *Reno*, *Waltreus*, *Dixon*, *Miller* and *Clark/Horowitz* rules are described in section VI(C)(1).

Claim 2 also fails these tests. All of Petitioner's cited evidence was available prior to the 1983 trial, and so could have been raised in an appeal or prior claim under the *Dixon* rule or the *Clark/Horowitz* rule. Petitioner's claim is once again one of insufficient evidence, and all of the facts underlying Claim 2 were known in 1983. Petitioner articulates no *Clark* exception that applies, and Respondent cannot identify an exception: there is no error of constitutional magnitude, there is not a showing of actual innocence based on new evidence such that no reasonable juror could convict, this is not a death penalty case, and the statute is not invalid. Consequently Petitioner's claim should be denied as untimely and successive.

VIII. CLAIM 3: ALLEGATION OF THERE BEING 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

Respondent denies Petitioner's third claim in its entirety. Petitioner claims that four[16] items of "new evidence" have arisen within the meaning of Cal P.C. 1473(b)(3). None of these items constitute new evidence or would have changed the outcome of the trial.

[16] In the body of his motion, Petitioner claims "three known pieces of evidence" (Pet. 78), but he lists four different items, A-D.

A. Legal Standard

Habeas corpus relief based on newly discovered evidence may be granted when "[n]ew 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." (Cal P.C. 1473(b)(3)(A).)

"New evidence" as used in this section means "evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching." (Cal P.C. 1473 (b)(3)(B).)

While not all relevant evidence is admissible, "no evidence is admissible except relevant evidence." (Cal. E.C. 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove a disputed fact that is of consequence to the determination of the action." (Cal. E.C. 210.)

B. Analysis of Petitioner's Sub-Claims

1. Claim 3-A: "The Meras Weapon Reports"

Petitioner claims that for the first time in 2017, he received a document (Petitioner's Exhibit 3d) indicating that the three shell casings from the Meras robbery were of a different caliber than the .25 cal Titan handgun alleged to be used in the murder of Theresa Graybeal. Based on the state of the record at trial, it does not appear that any party was aware of this record in 1983, and so Respondent admits that this evidence was more likely than not discovered after trial. Respondent denies, however, that the document is admissible or that it would have changed the outcome of the trial.

a. Admissibility

The Meras robbery was not an issue in fact during the guilt phase of Petitioner's 1983 trial. This is an inconvenient truth for Petitioner, who cites at length in his Claim 3-A to Meras' testimony during the 1978 preliminary hearing and closing arguments during the 1978 penalty phase. (Pet. 79.) Petitioner cannot cite to the Meras robbery being raised in his 1983 guilt phase because it was not; instead, he cites only to Robinson's closing argument, where Robinson argued that Petitioner was found sitting in the car with the murder weapon: "Shortly after Theresa Graybeal was murdered, the same night her body was discovered, sitting in the car that she had that same day driven from her father's place was the Defendant. The Defendant was sitting in that car with others. But he was there in that car. And with the Defendant and the others in that car was the weapon that had been used to take the life of Theresa Graybeal." (RT 3425, Second Trial Vol. III p. 638,)

On its face, this statement in closing clearly is concerned with the gun that killed Theresa Graybeal and only the gun that killed Theresa Graybeal. Meras' name is not mentioned. From context, the circumstance discussed here is Rodriguez' locating of Petitioner in the car where the murder weapon was found. As discussed above, both of those facts came into evidence.[17] There is no potential inference that can be drawn from Robinson's statement that he is discussing the Meras' robbery, especially since no testimony involving that robbery came in at trial.

Because the Meras robbery was not an issue at trial, the caliber of the shell casings recovered from the Meras robbery are not relevant and are not admissible. The shell casings lack any probative value as to an issue of fact in Petitioner's trial for the murder of Theresa Graybeal, and Petitioner does not advance a theory about how a robbery where Petitioner was not identified as a participant having shell casings of a different caliber is a relevant fact for Petitioner's trial.

[17] Officer Rodriguez testified that he found Petitioner in the front passenger seat of the car (RT 2873, Second Trial Vol. I p. 95), and Officer Bonesteel testified that he found a gun in the car (RT 2903-2904, Second Trial Vol. I p. 125-126.)

except as to counter-weight a prosecution argument that the same gun was used in the Meras robbery and the Graybeal murder.[18]

While Respondent denies that the Robinson closing argument references Meras, even if it did this would still not make the caliber relevant. As established above, Robinson's closing argument was not evidence, and so any impeachment value of the casing report would be non-existent.

b. Decisive Force So As To Change The Outcome

As discussed above, the Meras robbery was not discussed in Petitioner's guilt phase in 1983. The Meras robbery was used only in Petitioner's penalty phase, and so even if the report had been in defense's hands the only potential changed outcome would be to the penalty phase – a penalty phase already overturned by the 9th Circuit's remand order in this case. (*Stankewitz v. Wong* (2012), 698 F.3d 1163, 1176)

2. Claim 3-B: "Fresno Police Department Interview with Petitioner Early on February 9, 1978"

Petitioner claims that Detective Snow interviewed him on February 9, 1978, and that Petitioner did not learn of this interview until March, 2020, in a declaration from FPD Det. Gary Snow. (Pet. 82; Pet.'s Exhibit 3e.) Petitioner claims that during the interview, he denied doing the shooting, but attaches no declaration, report, or proffer of evidence in support of that proposition. Petitioner claims this interview was taped, turned over to FSO Det. Thomas Lean, and then never turned over to defense. (Pet. 83.) Respondent admits that Det. Snow attempted to interview him on February 9, 1978, but denies that this fact was not turned over. Respondent denies that there is a preponderance of the evidence that Petitioner denied the shooting in the interview or that the interview was taped. If the interview was taped, Respondent denies that the tape was not turned over.

[18] This court reached the same conclusion when evaluating Petitioner's 2017 motion to dismiss; in the court's December 20, 2017 Order Denying Motion to Dismiss, p. 17-19, the court evaluates the same transcript as proffered in this habeas petition and reaches the same conclusion.

Petitioner was aware of Detective Snow's interview well before 2020. The fact that Detective Snow attempted to interview Petitioner is documented in Snow's 2-9-78 continuation report, which Petitioner attached to his petition at least twice in Exhibits 2z and 2bb: "After questioning susp TOPPING RO had returned to the DetDiv where he questioned susp Christina MENCHUCA, Marlin LEWIS, Billy BROWN, & Douglas STANKE-WITZ." (Pet. Exh. 2z/2bb, p. 7.)

Detective Snow was questioned about at least one report he wrote on February 9, 1978, while on the stand during Petitioner's 1978 trial. (RT 1250, First Trial Vol. 20 p. 3351.) There, Snow was questioned about a report written in 1978 of Billy Brown's statement by Petitioner's counsel, who followed up with "Now, there were other statements taken; is that correct?" (*Id.*, line 22-23.) As established previously, all police reports in the case were turned over to defense prior to preliminary hearing. (RT 63, Preliminary Hearing Vol. I p. 54.) Taken as a whole, the questioning of Detective Snow, the conversation on the record about discovery, as well as Petitioner himself attaching the report as an exhibit apparently pulled from his prior file[19] establishes that he was aware of this interview.

Respondent denies there is a preponderance of the evidence that the interview was taped. Petitioner attaches for support that the evidence was taped Gary Snow's declaration from 2020, Petitioner's Exhibit 3e, where he says that "All of the interviews were recorded using cassette tapes. Our usual practice was to take a suspect's statement, while recording it. I then dictated the reports and they were typed up. Very often, I would listen to their tape as I dictated my report. Then, we would book the tapes into evidence." (Pet. Exhibit 3e at 1.) However, in Snow's report, Snow writes "RO had given Det LEAN a tape recorded statement of susp Marlin LEWIS confession & also Christina MENCHUCA statement" without reference to a tape of Petitioner. (Pet. Ex. 2z/2gg at 7.)

[19] It appears that Exhibit 2z/2bb was part of the files Petitioner's counsel inherited from prior counsel. Elsewhere, Petitioner has made specific claims that he received a report in habeas discovery (cf. Petitioner's Claim 3A, where he claimed the Meras information was not received until 2017.) He has made no such claim here, and the evidence from the trial transcript suggests he was in possession of Snow's report in 1978.

Similarly, Respondent denies that there is a preponderance of evidence that in his interview, Stankewitz denied the shooting. Petitioner attaches again Snow's declaration, Pet. Ex 3e, where on page 2 he indicates that he remembered "The only one that I remember didn't confess to the shooting was Stankewitz. Stankewitz denied doing the shooting." No such statement occurs in Snow's report, Pet. Ex. 2z/2gg.

Just over 42 years separates Snow's reports from February 9, 1978 to his declaration on February 20, 2020. In his declaration, Snow describes a standard procedure of taping, transcribing, and reporting an interview. If that procedure was followed in 1978, the reasonable conclusion would be that Stankewitz was attempted to be interviewed and did not talk to law enforcement; there would thus be no tape and no report outside of Pet. Ex. 2z/2gg. That conclusion is also not inconsistent with Snow's statement in 2020; Snow's 2020 statement is that "The only one that I remember didn't confess to the shooting was Stankewitz. Stankewitz denied doing the shooting." (Pet. Ex. 3e at 2.) That statement would be consistent with Stankewitz refusing to talk in a formal interview, and would be consistent with Stankewitz's consistent outbursts during hearings in 1978. This is also consistent with what CDDA Ardaiz remembers of the state of the case in 1978: "I understood that basically he was not cooperative. I don't recall that he said he did—I don't recall that he made a statement in interrogation." (Pet. Ex. 5j, 2020 Interview of James Ardaiz, p. 5.) Finally, it is consistent with Det. Lean's memory: "[The Police Department's] interaction in this and if I recall correctly, again it's been 42 years ago, they made the original arrests in the field and they may have Mirandized the group, including Douglas, and he may have refused to or invoked his Miranda and refused to talk which would not allow us to interview him in the future." (Pet. Ex. 5c.)

Given the state of the record, Respondent believes the evidence is insufficient to conclude by a preponderance of the evidence that Petitioner denied in an interview that he did the shooting and that that interview was taped and denies those claims.

Regardless, if there was a tape of the interview, it was made accessible to the defense. During the pre-trial phase in 1978, defense filed a discovery motion to have access to the tape

recordings for copying, which was granted without objection.[20] (RT 565, Pretrial Motions Vol. I p. 76.) Ardaiz confirmed in his 2020 interview that that actually happened: "He was given access to all physical evidence, under the supervision of an investigator." (Pet. Exh. 5j at 9.)

a. Timing of Discovery

As demonstrated above, this is not new evidence. The report in question was in defense's hands by 1978, well before Petitioner's 1983 trial. If an interview tape existed, then it was available for Petitioner to inspect also in 1978. For a claim under 1473(b)(3) to prevail, the evidence must have been discovered after trial, notwithstanding the due diligence of counsel. Because that is not the case here, this claim must be denied.

b. Admissibility

Petitioner claims that the new evidence in question is a statement the night of the murder denying that Petitioner is who shot Theresa Graybeal. Respondent, as discussed above, denies the existence of that statement, but regardless it is inadmissible.

Petitioner asserts that "[t]he information is gleaned from the interview is relevant, and therefore, admissible." (Pet. 83.) This extremely broad view of admissibility comes as news to Respondent and perhaps also the authors of the California Evidence Code.

Generally, "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted" is inadmissible hearsay. (Cal. E.C. 1200, the "hearsay rule".) Many exceptions to the hearsay rule exist; Petitioner identifies none of them in his motion, and Respondent cannot locate an applicable hearsay exception.

[20] CDDA Ardaiz objected to items being removed from the prosecution file without government knowledge, but not to copying or inspection.

c. Decisive Force So As To Change The Outcome

Even were defendant's alleged statement admitted, it would not have decisive force. A plea of not guilty is a denial of the charges against the defendant; a simple denial, without detail or examination, would have no additional force upon the jury without accompanying testimony.[21]

3. Claim 3-C: "Marlin Lewis Admission That He Shot Theresa Graybeal"

Petitioner claims that Marlin Lewis said he was the person who shot Theresa Graybeal on October 5, 2000. (Pet. 84) They offer Petitioner's Exhibit 3f in support of this claim, a 2020 declaration of Laura Wass. Wass said that starting in 1998, she began to assist Lewis in gaining membership to the Table Mountain Rancheria Tribe, and that on October 5, 2000, she hosted Marlin Lewis in her home prior to the tribal meeting where Lewis and his sister were to be "formally accepted as members of the tribe." Before the meeting began, Wass received a call from Petitioner's brother, William Stankewitz. She gave the phone to Lewis and believes William and Lewis discussed the Graybeal homicide. (Pet. Ex. 3f. para. 2-8.)

After William Stankewitz hung up, Wass told Lewis "that as a part of my professional duties, I had been working with Douglas on his criminal case. Marlin just stared at me and shrugged his shoulders as I talked. Referring to the Graybeal crimes, I then stated "you're the one who did it" and Marlin shook his head yes. He then said that he had already paid for his actions, and that he was sorry Doug was still paying for Marlin's actions." (Pet. Ex. 3f. para. 8)

Respondent denies that this statement is an admission that Marlin Lewis shot Theresa Graybeal at all; several crimes were committed against Theresa Graybeal, and Lewis was a co-participant in all of them, including murder. This statement appears to be one of joint responsibility rather than a statement indicating Petitioner was not involved.

Even if this is interpreted as a statement that tends to exculpate Petitioner, Respondent denies that it meets the requirements set out in PC 1473(b)(3).

[21] Defendant did not testify at his trial in 1983.

a. Timing of Discovery

Cal P.C. 1473(b)(3) requires the writ be prosecuted "without substantial delay" after the discovery of new evidence. In his exhibit, Petitioner claims that Wass was "working with Douglas on his criminal case" at the time Lewis made this statement to her. (Pet. Ex. 3f. para. 8.) However, despite Wass' apparently participation in his defense team, Petitioner did not advance this claim until the instant petition in 2021, twenty-one years later.[22] According to Petitioner, this claim about Lewis was repeated again in the Fresno Bee in 2013, nine years prior to the filing of the instant writ. Petitioner claims his counsel did not learn of a public news article about their client in the largest newspaper in the city in which he was tried until 2019, but fails to explain how due diligence by counsel could not have located the information when it was disclosed to a member of the defense team in 2020 or published in the local news in 2013.

Respondent argues that, under the circumstances, this claim should be denied because it was not filed without substantial delay from counsel did or should have discovered this alleged new evidence.

b. Admissibility

As discussed above, out of court statements are hearsay and are not admissible absent a statutory exception. Lewis' statement to Wass in 2000 is exactly such a statement; Wass would not be able to testify to what Lewis told her in 2000.

Petitioner argues that Lewis' statement would be admissible as an admission against interest, Cal E.C. 1230. However, Petitioner fails to establish that Lewis is unavailable as a witness, a threshold requirement under E.C. 1230.

Respondent also contends that as described, this is not an EC 1230 declaration against interest: such declarations are admissible only when the contrariness to such interest is such "that

[22] Petitioner's timing calculation is inconsistent. In their Petition, they allege that "Marlin Lewis' Admission Occurred in 2010, Some 27 Years After the Second Trial." However, Wass' declaration indicates that the admission occurred in 2000.

a reasonable man in his position would not have made the statement unless he believed it to be true."

Here, Wass says that Lewis made the statement after speaking to William Stankewitz, Petitioner's brother, and after hearing that Wass was working for William and Petitioner. Wass also said that Lewis "said that he had already paid for his actions, and that he was sorry Doug was still paying for Marlin's actions." (Pet. Ex. 3f. para 8.)

Statements against penal interest must be evaluated in their context, because "declarations against penal interest may contain self-serving and unreliable statements." (*People v. Duarte* (2000), 24 Cal.4th 603, 609.) Such declarations may be "merely attempts to shift blame or curry favor." (*Williamson v. United States* (1994), 512 U.S. 594, 603.) A statement is properly excluded under EC 1230 when a defendant has "insufficient belief that he could be punished for his role." (*Frierson v. Calderon* (C.D.Cal. 1997) 968 F.Supp. 497, 509.) When statements by co-defendants are untrustworthy, they are appropriately excluded from EC 1230 consideration. (*Phillips v. Herndon* (9th. Cir. 2013) 730 F.3d 773, 775.)

Here, the context does not indicate reliability or a genuine statement against penal interest. According to Wass, Lewis was at her home seeking her assistance to become a member of the Table Mountain Rancheria Tribe not only for himself but for his sister and "other family members." (Pet. Ex 3f, para. 6.) Wass told Lewis that she was working with Petitioner. Then after that, Wass told Lewis "you're the one that did it", at which point Lewis agreed. In context, Respondent argues that Lewis was confronted by Wass accusing him of guilt when she had influence over his pending tribal membership as well as the membership of his family members. Furthermore, Lewis believed that he no longer could be punished for his involvement; according to Wass, he said "he had already paid for his actions." (Pet. Ex. 3f. para. 8.)

Lewis had a strong motive to curry favor with Wass, who was assisting him and his family gain tribal membership and who believed was close with both William and Douglas Stankewitz. He also believed that he no longer had penal liability for the Graybeal murder; thus, his statement is not admissible under E.C. 1230. Because his statement is not admissible, the claim under P.C. 1473(b)(3) should be denied.

c. Decisive Force

Even were Lewis' statement admissible, it would not have decisive force of the sort needed to change the outcome at trial. In his initial interview, Lewis says that Stankewitz was the murderer. (Pet. Ex. 3h, Det. Snow's interview of Lewis, p. 11.) Billy Brown, an eyewitness, identified Petitioner as the shooter. (RT 3189, Second Trial Vol. II p. 407.) Respondent also incorporates all of the arguments above about reliability in terms of admissibility into weight: the circumstances of Lewis' statement give it very little weight, coming as they do in a situation where Lewis' has a strong interest in pleasing Laura Wass in order to secure tribal membership. For all of these reasons, Respondent urges the court to deny Petitioner's claim 3-C.

4. Claim 3-D: "DNA Testing of All Defendants Clothing"

Petitioner claims that the inability to test all the co-defendants' clothes for DNA from blood is new evidence within the meaning of Cal. P.C. 1473(b)(3). (Pet. 86.) Respondent denies that this is new evidence.

Petitioner first claims that Petitioner's experts "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 on the co-defendants' clothing are from the victim, Theresa Graybeal. Proving that the blood stains on the co-defendants' clothing are from the victim, in the absence of blood stains on the clothing of defendant Stankewitz, would support his contention that he was not involved in the murder."[23] (Pet. 86-87.)

After testing, the laboratory concluded that that "little to no DNA was recovered" and that what DNA was recovered was degraded, possibly due to evidence storage. (Pet. Ex. 3l.)

[23] Petitioner appears to be advancing a claim – that there were blood stains on Lewis, Topping, and Menchaca's clothing, but not on Petitioner's clothing – that he knows is untrue. Petitioner claims here that there were no blood stains on Petitioner's shirt, but in Claim 2(A)(2) (Pet. 66) claims that there was a blood sample taken from Petitioner's shirt that was tested and lost. Petitioner also attached to his petition Pet. Ex. 3l, discussing Petitioner's expert's testing of apparent blood stains on Petitioner's clothing. (Pet. Ex. 3l at 3.) Respondent cannot reconcile Petitioner's exhibits and Petitioner's other claims with Petitioner's representation to the court that there is an "absence of blood stains on the clothing of defendant Stankewitz." See Cal. Rule. Prof. Conduct 3.3, "Candor Toward The Tribunal."

Respondent denies that the lack of DNA results is evidence at all, much less newly discovered evidence. Even if it is evidence, it fails to pass the test required for relief under Cal. P.C. 1473(b)(3).

a. Timing of Discovery

Defense filed a motion to compel DNA testing under Cal. P.C. 1405 in May, 2019. (Pet. 86.) Penal Code section 1405 was first enacted on January 1, 2001, and Petitioner offers no explanation for his 19-year delay in seeking this testing in his petition. Cal P.C. 1473(b)(3) requires motions to be brought without undue delay, and respondent urges denial of this claim on the grounds that a 19-year delay is unjustified.

b. Admissibility

Respondent admits that the testing of the blood stains on all of the parties' clothing would be admissible at trial.

c. Decisive Force

Respondent denies that the lack of DNA results on all blood stains would have any decisive effect upon the outcome of the case. At trial, the prosecution did not argue anything involving blood stains on Petitioner's clothing, including their existence. Petitioner's proffered evidence here is not that victim's DNA is not on his clothing, but that tests as to whether or not her DNA is on his clothing are inconclusive. Such inconclusive results would not outweigh the eyewitness and other testimony, and in fact might be inculpatory facts, as the presence of blood (even if it cannot be conclusively linked to the victim) on Petitioner's clothing tends to connect him to being short range when victim was murdered.

C. Timely and Successive Petition Analysis

The applicable legal standards for timely and successive petition analysis under the *Reno*, *Waltreus*, *Dixon, Miller* and *Clark/Horowitz* rules are described in section VI(C)(1).

Claim 3 contains several disparate sub-claims. Respondent admits that the Meras weapon reports were recently discovered, but they concern the overturned penalty phase, and thus could not create a situation where no reasonable juror could convict in the guilt phase. Similarly, as discussed above, Lewis' 2000 statement lacks credibility and also does not reach the high standard set out in *Reno* and the applicable case law. It additionally has been 21 years since that statement was made until now, with no explanation for the lack of substantial delay. Even were the court to find the statement was not discovered until 2013, an eight year delay still resulted. Finally, DNA testing did not produce any additional evidence, and so is not new evidence within the meaning of *Clark*.

The police department interview was known in 1983, and so is barred by *Dixon* and *Clark*. No exception applies.

Evaluating the sub-claims as a whole, Respondent urges that sub-claim 3-B and 3-C be denied as untimely, and sub-claim 3-A and 3-D be denied for failure to state a claim.

IX. CLAIM 4: ALLEGATION THAT 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.

Respondent denies Claim 4 in its entirety. Petitioner makes four broad claims, each of which he alleges is egregious prosecutorial misconduct of the sort compelling this court to grant relief. In fact, none of these claims constitute prejudicial misconduct of the sort contemplated by law.

A. Legal Standard

As discussed above, prosecutorial misconduct is grounds for habeas relief under state and federal law when it either either (a) is so egregious as to render the subsequent conviction a denial of due process or (b) if it involves "deceptive or reprehensible" methods to persuade the finders of fact: "In California, the law regarding prosecutorial misconduct is settled: 'When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.'" (*In re Masters* (2016), 7 Cal.5th 1054, 1085.)

While Petitioner does not cite to *Brady* in this claim (or indeed any law) some of Petitioner's claims seem to suggest *Brady* analysis, under the standards of suppression, favorability and materiality discussed fully above in section VI(A)(1).

B. Analysis of Petitioner's Sub-Claims

1. Claim 4-A: "Material Evidence Was Mishandled"

Petitioner claims that a variety of material evidence was mishandled both before and after trial, including (1) the victim's vehicle was allegedly not stored correctly; (2) items were missing from FSO and court evidence in 2021; (3) tapes and notes by law enforcement cannot be located in 2021; (4) blood evidence from 1978 could not be located in 2021; (5) the District Attorney's office did not retain their internal file; and (6) evidence clothing was allegedly not stored correctly after trial and so could not produce DNA results in 2020. (Pet. 90-98.)

a. Evidence Pre-Trial

Only one of these sub-sub-claims relates to pre-trial activity. Sub-sub-claim 1 (Pet. 91) alleges that the victim vehicle was "unlocked and not secured" when it was seized on February 8, 1978. Petitioner cites to the stolen vehicle report authored by FPD Officers Callahan &

Rodriguez, attached to Petitioner's motion as their Exhibit 4b on page 4. Respondent denies this factual claim; while Exhibit 4b is extremely difficult to read, Respondent can make out only that "veh was then inventoried and towed to FPD basement Mel WEST Towing." Nothing about this statement suggests that the vehicle was unlocked or unsecured.

Regardless, this alleged mis-storage is misconduct of the sort that results in a fundamental due process violation, nor is this suppression in the meaning of *Brady*. Detective Lean was questioned about evidence storage during the preliminary hearing in 1978. (RT 247-248, Preliminary Hearing Vol. II p. 234-235.) There was ample opportunity to object to misconduct then or in the subsequent five years prior to trial in 1983. More than that, Petitioner makes no claim about how these allegedly defective storage methods are misconduct on the part of the prosecutor of the sort required for a *Masters*-style misconduct finding.[24] None of this states a cognizable claim and Respondent urges this claim be denied.

b. Evidence Post-Trial

Petitioner's remaining five sub-sub-claims in this sub-claim related to evidence handling between 1983 and 2021 (Pet. 92-98), when they concern evidence at all.[25] As discussed above, relief is appropriate for prosecutorial misconduct when either that misconduct is so egregious that it renders the subsequent conviction a violation of due process, or when deceptive or reprehensible methods are used by a prosecutor against the trier of fact. *Brady* violations occur, as discussed at length through this Reply, when evidence is suppressed prior to trial. *Brady* is not applicable to post-trial proceedings. (See *District Attorney's Office for Third Judicial Dist. v. Osborne* (2009), 557 U.S. 52, 68.)

[24] Respondent is once again left in the difficult position of trying to divine the legal theory behind Petitioner's factual claims. This claim, like many of Petitioner's, appears to boil down to "the jury got it wrong", which is not a cognizable claim on habeas. See *Scoggins*, supra, 9 Cal.5th at 673: "evidence which is uncertain, questionable, or directly in conflict with other testimony does not afford a ground for relief upon habeas corpus."

[25] One of Petitioner's claims alleges prejudice because of the destruction of the prosecution's file, without authority. How the prosecutor's file is evidence or what duty the District Attorney has to maintain a file for decades after conviction is left apparently for Respondent and the court to divine.

Respondent denies generally that any of Petitioner's claims about post-trial evidence storage constitute misconduct, but more importantly those claims are all post-trial: facially, they cannot constitute misconduct that would have rendered a subsequent conviction inappropriate under any theory. Because these claims deal with matters that post-date trial, Petitioner's claim should be denied.

2. Claim 4-B: "Material Evidence Was Not Tested or Tested Properly."

Petitioner makes seven sub-sub-claims regarding the "testing" of material evidence: (1) shell casings were not properly measured; (2) no testing was done to determine if the fatal wound was from a .22 or .25 caliber firearm; (3) no testing was done to determine the actual time of death; (4) investigators did not examine the victim's shoes; (5) clothes and other evidence was not re-tested; (6) law enforcement failed to consider other suspects; and (7) co-defendant's statements were manipulated. (Pet. 99-101.)

None of these claims hold merit and respondent urges each be denied.

a. Investigative & Autopsy Claims (4-B-1 through 4-B-4)

Four of Petitioner's seven sub-sub-claims deal with steps they think criminalists, pathologists or investigators should have taken in regards to material evidence. As to criminalists and investigators, first, Petitioner alleges that no testing was done to see how far a .25 cal shell casing would travel (4-B-1, Pet. 99), and second, Petitioner alleges that the victim's shoes should have been inspected (4-B-4, Pet. 100). As to pathologists, first Petitioner claims they did not complete testing to determine the caliber of the gun the victim was killed with (4-B-2, Pet. 99), and second that no testing was done to determine time of death (4-B-3, Pet. 99).

Respondent admits that testing could have been done to see how far a .25 cal shell casing can travel, including by Petitioner. Respondent denies that pathologists could have determined the caliber of the entry wound. Petitioner cites without authority that an x-ray can distinguish between .22 and .25 caliber wound, and Respondent denies that factual assertion. Respondent

denies and Petitioner fails to assert that pathologists could have determined "the exact time of death." (Pet. 99.) Respondent denies and Petitioner fails to assert that the bottom of victim's shoes could determine "if she was standing or grass or dirt when she was killed." In fact, Petitioner's proffered exhibit (Pet. Ex. 4d at 6, para. 14) indicates that the bottoms of victim's shoes were photographed and no evidence of sand or dirt can be seen.

Regardless, evidence which is uncertain or questionable does not provide grounds for habeas relief. (*Scoggins*, supra, 9 Cal.5th at 673.) Petitioner cites no authority, and Respondent can locate none, that holds that the government had an obligation to pursue leads that the defense thinks should have been pursued over forty years later. (See *Beaman*, supra, 7 F.Supp.3d at 822.) No suppression is alleged here, and regardless does not exist: as discussed above, Petitioner had access to all physical evidence prior to trial (Pet. Ex. 5j at 9), and actual questioning occurred about the shell casing at the scene. (RT 2964, Second Trial Vol. I p. 186.)

b. Evidence Re-Testing Before Trial (4-B-5)

Petitioner's sub-sub-claim 5 claims that "given the advances in testing capabilities", clothing in evidence should have been re-tested prior to the 1983 trial. Petitioner cites for this authority again the declaration of Roger Clark. (Pet. Ex. 4d.) Clark states "There have been significant advancements in scientific analysis 1978 and 1983. [sic] These includes techniques of blood analysis, microscopic analysis and chemical analysis." (*Id.* at 6 para. 13.) Petitioner fails to state with specificity what testing was done in 1978 that was eclipsed by later scientific analysis, what testing or re-testing should have done, or why Petitioner (who had access to the exhibits) could not conduct that testing. Petitioner does not allege that any test conducted by the People had a false or untrue result.

In-so-far as this claim is a *Brady* claim, there is no suppression. If this is instead an egregious misconduct claim, Petitioner fails to allege with specificity what alleged misconduct occurred. Respondent can locate no authority (and, as is Petitioner's habit, Petitioner cites no authority) for the proposition that it is the government's obligation to re-test evidence. Because

Petitioner does not allege that the results of any 1978 testing were false in claim 4-B-5, a false evidence claim is also not supported. Respondent urges this court to deny.

c. Failure to "Consider Other Suspects" (4-B-6)

Petitioner claims again that investigators failed to consider other suspects. Petitioner made a version of this claim in Claim 2-C; here, the claim specifically is that some kind of misconduct occurred because police "didn't search Menchaca's room for evidence." (Pet. 100.)

As discussed above, habeas is not a venue to litigate sufficiency of the evidence. There is nothing here introduced at trial that Petitioner is suggesting was false, deceptive, or reprehensible. Moreover, "speculation that favorable and material evidence might be found does not establish a violation of *Brady*." (*People v. Zaragoza* (2016), 1 Cal.5th 21, 52.)

d. "Co-defendant admissions were manipulated." (4-B-7)

Finally, Petitioner alleges (Pet. 101) that the prosecution manipulated co-defendant interviews. Respondent denies this claim factually, but even if true it does not arise to prosecutorial misconduct or *Brady*. Topping, Menchaca, and Lewis did not testify at trial, and so any alleged manipulation of their statements could not have had a material impact on trial.

Co-participant Billy Brown did testify at trial. Petitioner alleges manipulation of Brown more fully in their Claim 6, which Respondent denies its entirety. In-so-far as this sub-sub-claim can be viewed as separate from Claim 6, which focuses on Brown's trial testimony, Petitioner had the opportunity to cross-examine Brown about this statement to law enforcement. Petitioner was in possession of his statement to law enforcement and it is not his statement to law enforcement which was argued to the jury, it was his testimony.

As discussed above, the various legal schemes involving prosecutorial misconduct focus on the effect of misconduct on the result at trial. Billy's recorded interview was not played. He was not an unavailable witness where his statement was produced in his absence. He was available at

trial and so any prejudice related to his 1978 police statement was dispelled by his conduct in the trial court in 1983.

3. Claim 4-C: "Evidence Was Manipulated and Misrepresented to Triers of Fact and the Court."

Petitioner makes four sub-sub-claims in this section, which are largely duplicative of other claims. Respondent denies each of these claims.

a. Gun allegedly misrepresented as murder weapon

Petitioner adopts its arguments in Claims 1 and 7 about the .25 caliber Titan pistol in this section by reference without further argument. Respondent denies these claims in their entirety, and also denies this claim.

As stated fully elsewhere, Petitioner's Claim 1 appears to rely on a misreading of the CLETS report. While Petitioner implicitly admits that in their 3rd Supplemental Filing, their third supplemental filing does not address Claim 4 at all.

Petitioner's Claim 7 concerns the alleged linking of the Meras robbery to Petitioner's trial. As discussed elsewhere, the Meras robbery is not raised in Petitioner's guilt phase, the only portion of the trial remaining after appeal. Any inappropriate references in the penalty phase are not material because the penalty phase has been reversed.

b. DDA allegedly directing officers to manipulate reports

Petitioner argues here (Pet. 101-102), as he does elsewhere, that CDDA Ardaiz directed the investigation. Respondent admits that CDDA Ardaiz was involved in the investigation. Petitioner does not, however, claim that as a result of Ardaiz' involvement any false testimony was offered, any false evidence produced, or any evidence suppressed. Habeas corpus, as discussed extensively elsewhere in this reply, is focused on correcting defects in the proceeding that caused the Petitioner's commitment. While prosecutorial misconduct during an investigation might conceivably render a subsequent trial violative of someone's due process, Petitioner makes no

allegation of that: nowhere in this sub-sub-claim does he point to some false, deceptive, egregious or reprehensible thing that happened that rendered his trial unfirm. All of his references are to things that happened in 1978 without any connection drawn to the 1983 guilt phase trial that is the source of Petitioner's commitment.

For example, Petitioner argues without citation to authority that it is misconduct for officers Rodriguez and Callahan to write a supplemental report (Pet. Ex. 4b) with additional detail after their initial report on the night of the murder (Pet. Ex. 4pp.) Petitioner claims it is an inconsistency for Officer Satterburg to write a follow-up report including information not contained in his earlier report. (Pet. 102-103.)

As discussed before, it is Petitioner's burden to show grounds for relief upon a preponderance of the evidence. He does not do so. In-so-far Petitioner instead makes some claim of suppression under *Brady*, he does not allege that any of these reports were withheld prior to trial, and as discussed elsewhere there is ample evidence that reports were turned over and the DA's file was made available to Petitioner. Respondent urges denial.

c. Prosecution alleged misrepresentations during trial

Sub-sub-claim 4-C-3 (Pet. 103) is concerned with the existence of documents in trial referred to by witnesses but not introduced into evidence. Petitioner fails to allege how this is misconduct; instead, Respondent denies that this is misconduct and claims instead that this is standard practice in a criminal trial. Documents that are otherwise hearsay (like police reports and autopsy reports) are often used to refresh the recollection of a witness.

Petitioner's own citations seem to support that appropriate procedures were followed. Witnesses might refresh their recollection with a document, which must be produced at request of the adverse party. (Cal. E.C. 771.) Petitioner here does not allege that this provision was not followed, and the discussion of documents in the transcript provides at least circumstantial evidence that it was. Moreover, the one concrete example cited to by Petitioner occurred in the first trial, which is not the subject of this writ of habeas corpus. (Pet. 103.)

d. Alleged false testimony of law enforcement witnesses at trial

Petitioner alleges false testimony by officers at trial. Many of his citations are to the first trial, the preliminary hearing, or the penalty phase of the second trial, none of which are the source of Petitioner's confinement.

Of those statements cited by Petitioner in regards to the second trial guilt phase, Petitioner does not explain what or why they are false.

Petitioner alleges that Officer Rodriguez's testimony did not exactly match between preliminary hearing, first trial, and second trial. (Pet. 104.) However, Petitioner does not explain which statements are false and which are true. Regardless, conflicting testimony does not give grounds for habeas relief. (*Scoggins*, supra, 9 Cal.5th at 673.)

Petitioner alleges that Detective Boudreau testified falsely about the victim's height. This is merely a repetition of Petitioner's "height discrepancy" argument made in sub-sub-claim 2(B)(1). Respondent denies this claim here[26] as it did there, and incorporates by reference its arguments in section VII(B)(1)(b) and VII(B)(1)(c) about how expert testimony involving height in the 1983 trial is neither false evidence nor prosecutorial misconduct.

None of these statements are false or misconduct, as has been demonstrated here or elsewhere in this motion. Respondent urges denial.

4. Claim 4-D: "The Prosecution Misrepresented Evidence In Court"

Claim 4-D is largely concerned with the first trial, including statements pre-trial and the penalty phase. The first trial was reversed in its entirety (*People v. Stankewitz* (1982), 32 Cal.3d 80) and is not an appropriate subject for this habeas proceeding.

Petitioner does raise one claim related to the guilt phase of the second trial. Petitioner claims "DDA Robinson stated during opening and argued during closing of the second trial guilt

[26] Respondent notes that once again Petitioner claims, without support, that 160 centimeters is 5' 2.5".

phase that Petitioner was guilty of both the Graybeal murder and the Meras attempted murder." If true, this would be significant, but Petitioner cites to a portion in Robinson's opening (RT 2778, Second Trial Vol. I p. 12) where Robinson does not mention Meras at all. Petitioner further cites to a page of Robinson's closing (RT 3426, Second Trial Vol. III p. 649) where the only words printed said by Robinson are "...true. Any other verdict simply would not be just. Thank you."[27]

Respondent denies that Robinson made any reference the Meras robbery in either opening or closing; because of that, the court does not need to reach whether any such statement would be prejudicial misconduct.

C. Timely and Successive Petition Analysis

The applicable legal standards for timely and successive petition analysis under the *Reno*, *Waltreus*, *Dixon*, *Miller* and *Clark/Horowitz* rules are described in section VI(C)(1).

With the exception of continued claims about the Meras issue, all of Petitioner's cited evidence in Claim 4 was available prior to the 1983 trial, and so could have been raised in an appeal or prior claim under the *Dixon* rule or the *Clark/Horowitz* rule. Petitioner articulates no *Clark* exception that applies, and Respondent cannot identify an exception: there is no error of constitutional magnitude, there is not a showing of actual innocence based on new evidence such that no reasonable juror could convict, this is not a death penalty case, and the statute is not invalid.

As discussed elsewhere, the Meras gun issue fails to state a claim about the guilt phase of the trial. The remainder of the claims should be denied as untimely.

[27] In a petition of this size, Respondent might expect the occasional overlooked citation or typographical error, despite the years Petitioner had to prepare the petition. Instead, however, Respondent identifies a pattern of inaccurate citations to the record or Petitioner's own exhibits, all of which appear to be inaccuracies that portray the exhibits or record in a fashion more favorable to Petitioner's arguments. To Petitioner's credit, Respondent has not identified inaccurate citations to the law in the body of the petition, though Respondent would note that almost no law is cited in support of the petition's claims. Regardless, Petitioner's counsel have a duty of candor to the tribunal, as outline in Cal. R. Prof. Cond. 3.3.

X. CLAIM 5: ALLEGATION OF THE STATE WITHHELD MATERIAL EXCULPATORY AND EVIDENCE FROM THE DEFENSE AND TRIERS OF FACT, NOTWITHSTANDING ITS AFFIRMATIVE DUTY UNDER BRADY V. MARYLAND TO DISCLOSE ALL POTENTIAL EXCULPATORY AND MATERIAL EVIDENCE TO THE DEFENSE. ALLEGATION OF 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.

Petitioner's Claim 5 alleges *Brady* violations by the government. Many of the sub-claims underneath Claim 5 are duplicative of claims made elsewhere in the Petition, but regardless, Respondent denies all of Claim 5 in its entirety.

A. Legal Standard

The legal standard for *Brady* claims has been outlined at length elsewhere, including in section VI(A)(1). To prevail on a *Brady* claim, Petitioner must (1) identify evidence, (2) show that it was suppressed, (3) show that it was favorable, and (4) show that it was material.

In general, *Brady* does not compel the government to do a defendant's investigation for him, but instead serves as a safeguard against government suppression of evidence, whether in good or bad faith. Many of Petitioner's sub-claims are not about evidence in government hands not provided to Petitioner but instead about investigation that Petitioner wishes were done. However, "the prosecutor has no constitutional duty to conduct defendant's investigation for him. Because *Brady* and its progeny serve 'to restrict the prosecution's ability to suppress evidence rather than provide the accused a right to criminal discovery,' the *Brady* rule does not displace the adversary system as the primary means by which truth is uncovered." (*People v. Superior Court (Johnson)* (2015), 61 Cal.4th 696, 715.)

B. Analysis of Petitioner's Sub-Claims

1. Claim 5-A: "Petitioner's Interview Tapes"

Petitioner alleges that his interview tapes were suppressed. (Pet. 107.) This a variation of Petitioner's Claim 3-B, which claimed that these interview tapes were new evidence. Respondent denies this claim, and incorporates here its response in section VII(3)(B). Respondent's best view of the evidence is that this tape did not exist, and if it did exist, it was made available to the defense. Moreover, this tape would not have been admissible at trial, which means that it would not have been material – even if it did exist and its existence was (contrary to the evidence) withheld from defense, it would not have changed the outcome.

As described fully in section VIII(3)(B) of this Reply, Petitioner was aware that Snow conducted the interview and had access to the prosecution's open file. Furthermore, a discovery motion was made and granted in 1978 (RT 555-556, Pretrial Motions Vol. I p. 66-67) and again in 1983 (RT 4675, Clerk's Transcript T2 Vol. I p. 79). No motion to compel was filed subsequent to either discovery motion, which suggests that both motions were complied with.

Petitioner further alleges that "Detective Lean's interview of Petitioner, if conducted, was withheld from the jury." (Pet. 108.) Respondent denies that such an interview was conducted. Petitioner cites to no report showing such an interview occurred. Lean's statement to Petitioner's investigator is that "I can't at all in good conscience say we interviewed Douglas Stankewitz." (Pet. Exh 5c.)[28] Petitioner offers mere speculation that such tapes exist. Speculation does not give rise to a *Brady* violation. (See *Zaragoza*, supra, 1 Cal.5th at 52.)

2. Claim 5-B: "Gun evidence"

Petitioner's second sub-claim largely restates his Claim 1 involving the murder weapon. (Pet. 109.) Respondent denies claim here as it did Claim 1, for reasons outlined in detail in section VI of this Return. Respondent incorporates those arguments into this section as well.

[28] In an earlier interview, transcribed in Pet. Ex. 5b, Lean indicates he thinks he did interview Stankewitz; Pet. Ex. 5c is his call back to Petitioner's investigator clarifying that upon review of the file he believes Petitioner may have refused to talk or invoked his Miranda rights.

Several specific claims are made, including that the People failed to disclose that the gun was in possession of law enforcement from 1973 until 1978. While Respondent has denied that issue at length in section VI of this Return, Petitioner alleges here specifically that "A Serial Trace Report from 1973 lists the serial number of that gun as in the possession of the FCSO Internal Affairs Division." (Pet. 109-110). Petitioner attaches Exhibit 5o in support of this proposition, but nowhere on exhibit 5o is there any indication of Fresno Sheriff involvement. Instead, Exhibit 5o says "Sacramento PD Stolen 6-7-73."[29] Respondent denies that the gun was in law enforcement possession; Petitioner's theory is highly speculative, and as discussed at length, evidence for *Brady* purposes must be more than speculative.

Petitioner also alleges inconsistency between reports in certain measurements, including the distance of the shell casing. Petitioner does not, however, allege that these reports were not provided. Even if these inconsistencies were favorable or material, they were not suppressed.

Finally, Petitioner alleges a violation related to the Meras shell casing report. Respondent concedes that suppression occurred on this report, though denies that there was any willfulness or bad faith on the part of the prosecution. However, *Brady* suppression does not require bad faith. As discussed above, the shell casings report was favorable but not material. Because the Meras robbery was introduced only in the penalty phase, were the report in defense's hands it would have had no impact on the guilt phase of Petitioner's 1983 trial.[30]

3. Claim 5-C: "Medical Reports"

Petitioner claims that two medical reports were not disclosed to defense in violation of *Brady*. Respondent denies both claims.

---

[29] While Petitioner makes an argument elsewhere that internal affairs from Sacramento PD was involved in reporting the theft of this gun, Respondent can find no evidence from this document that supports Petitioner's stated claim that it "lists the serial number of that gun

[30] The court noted this as well in its December 20, 2017 denial of a motion to dismiss, filed partly on *Brady* grounds: "Defendant has failed to show that the shell casings report was material to his guilt phase trial for *Brady* purposes … Had the report been disclosed, the prosecution would have been without one of several arguments offered in aggravation. They would not have been left to retry the case." (CF78227015, Dec. 20, 2017, Order Denying Motions To Dismiss at 7-8.)

a. Autopsy Report

Petitioner first claims that the autopsy report was not discovered. (Pet. 111) However, Petitioner elsewhere in his Petition argues about the autopsy report at length, including noting that the autopsy report was shown to witnesses on the record. (Pet. 103.) In fact, Petitioner attaches the autopsy report as an exhibit in support of his claim that no autopsy report was provided. (Pet. Ex. 5r.)

Respondent denies this claim as it appears on its face Petitioner has failed to state a claim for suppression, much less favorability or materiality.

b. X-Rays of Victim

Petitioner further claims that X-Rays were taken of the victim, that they were never discovered to defense, and that they could show whether or not she was killed with a .25 caliber firearm. Respondent admits that X-Rays were taken but denies that there is a preponderance of the evidence shown that they were never discovered, and also denies that there is a preponderance of the evidence that X-Rays could show the caliber of the fatal wound.

As described throughout this Return, discovery was complete and defense counsel was additionally given an opportunity to inspect the file. (See RT 63, Preliminary Hearing Vol. I p. 54, describing discovery; RT 555-557, Pretrial Motions Vol. I p. 66-68, the first trial discovery motion; RT 4675, Clerk's Transcript T2 Vol. I p. 79, the second trial discovery motion; as well Pet. Ex. 5j at 9, James Ardaiz discussing his open file.)

From the record, it does not appear that suppression occurred. Even assuming there was suppression, there is no indication that the X-Rays would be favorable. Petitioner offers no proffered evidence to support the proposition than an examination of X-Rays taken in 1978 would allow an expert to determine the caliber of a fatal wound where a bullet is not recovered, and even if such evidence were proffered, it is speculation to believe that the X-Rays would show that the caliber was anything other than .25 cal. As discussed at length elsewhere, mere speculation is not cause for *Brady* relief.

4. Claim 5-D: "Physical Evidence Capable of Forensic Testing"

Petitioner further claims that blood samples, blood on clothing, and blood in the victim vehicle was suppressed in violation of *Brady*. Respondent denies each and every one of these claims. (Pet. 111-112.)

a. Blood samples

Petitioner claims that blood samples drawn from Petitioner and others are suppressed because the "samples which could have been used to test for morphine were not turned over to defense prior to trial." It is long established that especially in the case of physical evidence, the obligation is to give defense access to the evidence: "Numerous federal decisions have made clear that if the prosecution provides the defense with, or if the defense otherwise has, sufficient information to obtain the evidence itself, there is no *Brady* violation." (*People v. Superior Court (Johnson)* (2015), 61 Cal.4th 696, 716.)

Here, as established above, the People maintained an open file and all physical evidence was available to the defense to inspect. The People also filed a motion referring to blood samples, which certainly put defendant on notice as to their existence. (Pet. Ex. 5t.) The standard is not if physical vials of blood were given to defense – the question is if they have reasonable access, which they did. Moreover, Petitioner's theory of favorability is that the vials "could have been used to test for morphine." As stated above, speculative claims are not favorable within the meaning of *Brady*.

b. Blood on clothing

Petitioner further claims that the blood on the co-defendants' clothing was suppressed.[31] (Pet. 112) Once again, Petitioner had access to all physical evidence in the case. (Ardaiz

[31] Petitioner claims here that "Petitioner did not have any blood on his clothing." This is in stark contrast to Petitioner's arguments elsewhere. In Claim 2(A)(2) (Pet. 66), he claims that there was a blood sample taken from Petitioner's shirt that was tested and lost. Petitioner also attached (continued...)

declaration, Pet. Ex. 5j at 9.) Petitioner's claim of favorability is also entirely speculative; he claims only that "the victim's blood could have been compared to the blood on the defendants' clothing." Speculative or insubstantial evidence is not favorable.

c. Blood in vehicle

Finally, Petitioner claims that the victim's vehicle and car seat pad "could have been tested for blood to determine whether the victim was killed in the car." (Pet. 112.) The car seat pad was in the possession of the prosecution, and as discussed above, the physical file was open to the defense.

The car was not in the prosecution's possession, as it belonged to the victim's father. "*Brady* ... does not require the government to act as a private investigator and valet for the defendant, gathering evidence and delivering it to opposing counsel." (*United States v. Tadros* (7th Cir. 2002) 310 F.3d 999, 1005.)

In neither case was evidence suppressed, but even if it were, there is no showing that the evidence was favorable or material. (See *United States v. Erickson* (10th Cir. 2009), 561 F.3d 1150, 1163: "A *Brady* claim fails if the existence of favorable evidence is merely suspected. That the evidence exists must be established by defendant.")

5. Claim 5-E: "Reports"

Petitioner claims that photos taken by Criminalist Smith on February 9, 1978, were admitted into evidence and then lost. (Pet. 112) *Brady* suppression does not occur when evidence is introduced at trial. (*People v. Lucas* (2014), 60 Cal.4th 153, 274.)[32] moreover, the proffered

---

to his petition Pet. Ex. 3l, discussing Petitioner's expert's testing of apparent blood stains on Petitioner's clothing. (Pet. Ex. 3l at 3.) Respondent cannot reconcile Petitioner's exhibits and Petitioner's other claims with Petitioner's representation to the court here. See Cal. Rule. Prof. Conduct 3.3, "Candor Toward The Tribunal."

[32] Respondent acknowledges that there is ambiguous case law suggesting that in some circumstances, evidence introduced at trial may still be suppressed for *Brady* purposes if delayed disclosure prevented defense counsel from effectively using the evidence. (See *People v. Mora and Rangel* (2018), 5 Cal.5th 442, 467.) However, that circumstance is not alleged here.

favorability and materiality is that they could have been compared to trial testimony; the exhibits were introduced at trial, and the Petitioner was convicted.

6. Claim 5-F: "Witnesses"

Petitioner finally claims *Brady* related to several witnesses.

a. Tapes of Codefendants

Petitioner claims tapes of co-defendant statements were suppressed, though he offers only speculation as to their materiality. (Pet. 113.) Generally, the fact that the government has entered in negotiations with a non-testifying potential witness or co-defendant is not exculpatory. (*United States v. Inzunza* (9th Cir. 2011), 638 F.3d 1006, 1021.)

Regardless, as discussed fully elsewhere, tapes of all interviews were made available for listening and copying. (RT 565, Pretrial Motions Vol. I p. 76.) No suppression occurred.

b. Impeachment Evidence of Billy Brown

Petitioner claims that impeachment evidence relating to Billy Brown was withheld, specifically tapes, interview notes, and other items.

As discussed above, tapes were not suppressed, and in fact Petitioner is still in receipt of transcripts of the interviews. Given the existence of transcripts, even if tapes were not made available to defense, no material suppression occurred. A claim without proffered evidence that tapes and transcripts would differ is merely speculation; as discussed throughout this Return, speculation does not give rise to *Brady* relief.

Petitioner further claims that notes exist corroborating Billy Brown's 1993 recant document. Petitioner proffers no evidence in support of the proposition that these notes exist. (See *Erickson*, supra, 561 F.3d at 1163: "That the evidence exists must be established by the defendant.") As discussed more fully elsewhere in this Return, including specifically in section XI, Respondent denies the truth of Billy Brown's recantation statement. In general, "the offer of a

witness, after trial, to retract his sworn testimony is to be viewed with suspicion." (*In re Weber* (1974), 11 Cal.3d 703, 722.) This court concluded correctly when evaluating Brown's statement in the context of a motion to dismiss that "[i]n light of of Brown's numerous earlier statements that Defendant shot Graybeal, this court finds Brown's recantation and claims of misconduct unreliable." (CF78227015, Dec. 20, 2017 Order Denying Motions to Dismiss at 14.)

Because there is no evidence that these notes exist, nor is there credible evidence that their content would be favorable if they did exist, Respondent urges denial of this claim.

c. Petitioner's Cellmates

Petitioner alleges that interviews by members of the prosecution team with Michael Hammet, Frank Richardson, and Troy Jones were favorable, material evidence suppressed by the prosecution in violation of *Brady*. (Pet. 113-114.) Respondent denies this claim.

Petitioner proffers in support of his claim an interview conducted with Michael Hammet in 2015 (Pet. Ex. 5cc) where Hammet said that he had never talked to Petitioner about Petitioner's case and said he did not cooperate with law enforcement to provide information about Petitioner because "he was not a "Rat"". No other evidence is proffered in support of claim 5(F)(3), though Petitioner mentions elsewhere in his Petition that the prosecution made available a tape of Frank Richardson. (Pet. Ex. 5ee; Pet. 114.)

On its face, the Hammet statement does not appear to be evidence. In his 2015 interview, Hammet "denied talking to Stankewitz about his case." (Pet. Ex. 5cc at 2.) Hammet further denied giving any information to the prosecution team. (*Id.*) Petitioner merely speculates as to evidence not in the record. As discussed throughout this return, speculation does not give rise to *Brady* relief.

Richardson's tape was made available to Petitioner. (See Pet. Ex. 5ee, and the extensive discussion of tapes being made available to Petitioner, supra, including the discovery motion at RT 565, Pretrial Motions Vol. I p. 76; and Ardaiz's interview in Pet. Ex. 5j.) No suppression

occurs when evidence is made available to a defendant, and regardless, Petitioner fails to allege any facts to show that Richardson's tape was favorable or material.

As discussed above, even if this evidence was found to be suppressed, attempts to negotiate with non-testifying witnesses is not exculpatory. (*Inzuna*, supra, 638 F.3d at 1021.)

d. Jesus Meras

Petitioner alleges that notes of a meeting between Jesus Meras and James Ardaiz were favorable, material evidence suppressed by the prosecution. (Pet. 114) Petitioner cites to Meras' testimony during the 1978 penalty trial to support the existence of this meeting, pin-citing to Trial 1, Volume 25, p. 4389. (Consolidated RT 2302.) No statement on that page seems to refer to a meeting at all.

On RT 2311-2312 (T1 Vol. 25 4398-4999) Meras discusses the first time he talked to police and indicates that CDDA Ardaiz was present as his initial police interview. A record of that interview was provided to Petitioner in the form of a police report, which Petitioner attached to his motion as Pet. Ex. 7a. If this is the meeting Petitioner refers to, that report was turned over and there is no suppression.

Regardless, none of this is material: as discussed elsewhere in this motion, Meras' testimony was relevant only to the penalty phase of Petitioner's trial. Petitioner's penalty phase was overturned in its entirety, and so even if some suppression had occurred, which Respondent denies, it would have no outcome-determinative impact on Petitioner's guilt phase.

e. Frank Richardson

Petitioner alleges that "Frank Richardson was an undisclosed informant who likely turned over exculpatory evidence to the prosecution." (Pet. 114.) On its face, Respondent denies this as speculative. Respondent admits that there was a tape of Frank Richardson which was made available to defense. (Pet. Ex. 5ee) Petitioner claims that this letter was only discovered in 2017, but on its face it appears to have been sent in May, 1978. (See Cal. E.C. 641: "A letter correctly

addressed and properly mailed is presumed to have been received in the ordinary course of mail.")

No suppression appears to have occurred. No evidence has been proffered for the existence of material beyond the tape.[33] In addition, Petitioner's own claim appears to be that Richardson's information was inculpatory, not exculpatory; in Pet. Ex. 5ff, Richardson's counsel Gene Gomes tells the court that Richardson entered a plea bargain "to insure the defendant's cooperation as a material witness in the Stankewitz case." Cooperators provide inculpatory rather than exculpatory evidence and regardless Richardson did not testify at Petitioner's 1983 guilt trial.

7. Claim 5-G: "Mitigating Evidence at Penalty Phase"

Petitioner's claim 5-G concerns mitigating evidence in the penalty phase of Petitioner's trial. Petitioner's penalty phase has been overturned in its entirely. (*Stankewitz v. Wong* (2012), 698 F.3d 1163, 1176) Material evidence is evidence which, if known, might produce a different result, but the penalty phase in question is no longer in effect. Respondent denies this claim as failing to demonstrate that any of this evidence is material, much less favorable or suppressed.

8. Claim 5-H: "Evidence That Has Gone Missing"

Petitioner's Claim 5(H) restates earlier Claim 4(A)(2) and 4(B). Respondent denied those claims, including under *Brady*, in section IX(B)(1) and IX(B)(2) of this Reply Respondent incorporates the denials in that section by reference here.

Petitioner alleges that "much of it was withheld from the defense and triers of fact" without elaboration or distinction. Evidence withheld from a trier of fact does not give rise to a *Brady* violation, which is concerned with suppression of evidence to the defense. Moreover, "Conclusory allegations made without any explanation for the basis of the allegations to do not warrant relief." (*People v. Karis* (1988), 46 Cal.3d 612, 656.)

[33] Petitioner also attaches several court documents related to Richardson's plea. Respondent denies these are material or favorable, but regardless, public court documents are not suppressed. (See *Johnson*, supra, 61 Cal.4th at 715.)

C. Timely and Successive Petition Analysis

The applicable legal standards for timely and successive petition analysis under the *Reno, Waltreus, Dixon, Miller* and *Clark/Horowitz* rules are described in section VI(C)(1).

Once again, all of Petitioner's cited evidence was available prior to the 1983 trial, and so could have been raised in an appeal or prior claim under the *Dixon* rule or the *Clark/Horowitz* rule. Petitioner articulates no *Clark* exception that applies, and Respondent cannot identify an exception: there is no error of constitutional magnitude, there is not a showing of actual innocence based on new evidence such that no reasonable juror could convict, this is not a death penalty case, and the statute is not invalid. Petitioner's claim is untimely and should be denied.

XI. CLAIM 6: ALLEGATION OF THE STATE PREJUDICIALLY COERCED THE TESTIMONY OF BILLY BOB, AGED 14 YEARS OLD IN 1978, AND 20 YEARS OLD DURING THE SECOND TRIAL IN 1983, WHO RECANTED HIS TESTIMONY IN 1993. ALLEGEDLY THIS COERCED TESTIMONY WAS 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.

Petitioner's claim 6 alleges misconduct by the prosecution team regarding the testimony of Billy Brown. Respondent denies this claim in its entirety.

A. Legal Standard

The legal standard for *Brady* and prosecutorial misconduct requiring habeas reversal has been outlined at length above, including but not limited to in sections VI(A) and VII(A) of this Return.

In short, *Brady* relief requires the suppression of favorable, material evidence by the prosecution team. Habeas prosecutorial misconduct relief requires egregious, deceptive or reprehensive conduct that undermines the court's confidence in a subsequent conviction.

B. Analysis of Petitioner's Sub-Claims

1. Claim 6-A: "The Prosecution Used a Pattern of Pressure and Coercion to Secure Billy Brown's Cooperation and Testimony"

Petition's first sub-claim alleges that Billy Brown was improperly coerced into testimony. Petitioner proffers in support of this proposition that Brown had multiple interviews with law enforcement, testified under an immunity agreement, was subject to criminal charges prior to that immunity agreement, and was "plied with alcohol to give him the courage to testify." (Pet. 124.) Respondent admits that there were multiple meetings and an immunity agreement, and denies that Brown was given alcohol by the prosecution. In any event, Respondent denies that there was improper coercion.

Petitioner cites no authority for the proposition that multiple police interviews constitute improper coercion and Respondent can find none. Indeed, the "mere questioning of a suspect while in the custody of police officers is not prohibited as either a matter of common law or due process." (*Lyons v. Oklahoma* (1944), 322 U.S. 596, 601.) Indeed, the courts appear to rule that even in cases of egregious pre-trial coercion, pretrial coercion does not give rise to relief if there is not a showing of impropriety at trial. (*People v. Douglas* (50 Cal.3d 468, 268, holding that a pretrial beating by Mexican authorities that caused a confession did not render subsequent trial testimony inappropriate.)

Similarly, testimony under an immunity agreement is not coercive, provided that the agreement conditioned only that the witness testify truthfully. (*People v. Badgett* (1995), 10 Cal.4th 330.) That is what happened in this case; at trial, Mr. Robinson questioned Brown about his agreement, asking "Is it your understanding that the only thing you could be charged with at all in any way connected with the case would be pejury if you did not testify truthfully?", at which point Brown answered, "Yes." (RT 3136. Second Trial Vol. II p. 354.)

Finally, Petitioner alleges that Brown was given alcohol prior to the first trial in 1978. Respondent denies this factual claim; it is drawn only from Brown's 1993 recant statement. In general, post-trial recantations are to be viewed with suspicion. (*In re Weber* (1974), 11 Cal.3d

703, 722.) Moreover, CDDA Ardaiz was questioned about giving Brown alcohol and denied any knowledge of that occurring. (Pet. Ex. 5j at 10.)

Even if the court were to assume some coercive activity by the prosecution in 1978, a five year lapse occurred between 1978 and 1983. Such an "ample period for reflection" underlies any misconduct as having a coercive effect on Brown's 1983 testimony. (See *People v. Boyer* (2006), 38 Cal.4th 412, 445, holding that a nine-year gap between police interviews and trial ameliorated any coercive effect.)

2. Claim 6-B: "Billy's Statements and Testimony are Not Reliable"

Petitioner's second sub-claim claims that "[a]n analysis of the Billy's statements and testimony … were inconsistent." (Pet. 125) Petitioner lists multiple alleged inconsistent statements between reports, Brown's testimony at preliminary hearing, and Brown's testimony at trial in 1978 and 1983. Respondent denies that these statements are substantially inconsistent; all of these statements conform to the essential facts of the crime, namely that Petitioner kidnapped Theresa Graybeal in Modesto, robbed her of her car, drove with her to Fresno, and ultimately killed her in the Calwa area of Fresno County with a single shot to the head.[34]

As part of this sub-claim, Petitioner again claims that the gun was planted, that immunity was not disclosed to Petitioner or was inappropriate, and that Lewis was the actual killer. (Pet. 128) Respondent denies all of these claims here as it has elsewhere. (See section VI for Respondent's complete denial about the alleged planting of the gun, section XI(B)(1) for Respondent's denial about the coercive power of the immunity agreement as well as its discussion during trial, and section VII(B)(3) 2(c)(e) for Respondent's denial that Lewis is the actual killer.)

[34] This court evaluated the state of the evidence correctly in its December 20, 2017 denial of Petitioner's motion to dismiss, footnote 26: "While Defendant has cataloged a number of discrepancies in the details of Brown's prior statements, the body of prior statement when viewed as a whole show that Brown was consistent on two points: (1) that Defendant shot and killed Graybeal and (2) that Defendant made the "drop her" statement after shooting Graybeal.

Habeas is not a venue to-relitigate the sufficiency of the evidence, including when evidence produced at trial allegedly contradicts. (See *Scoggins*, supra, 9 Cal.5th at 673.) Respondent urges denial here because at most, all this sub-claim does is raise a claim of insufficiency.

3. Claim 6-C: "Evidence Was Withheld from the Defense that Billy Testified Falsely"

Petitioner alleges again that Brown's immunity agreement was withheld from defense, and also alleges that the April 27, 1978 report clarifying Brown's preliminary hearing testimony was withheld from defense. (Pet. 129.) Respondent denies both claims.

The immunity agreement issue has been raised elsewhere by Petitioner and denied by Respondent. In short, Brown was questioned by Petitioner's counsel about the agreement at trial; evidence which is introduced at trial is not suppressed.

Claims related to the substance of the April report were raised by Petitioner in claim 2(C)(2). Respondent incorporates the denial outlined in section VII(B)(3)(b). Petitioner alleges without proffered evidence that the 1978 report was never provided to defendant[35]; in fact, as discussed at length elsewhere, all reports in the case were provided to defense. (See RT 565, Pretrial Motions Vol. I p. 76, discussing defense's 1978 discovery motion; as well as RT 764, Pretrial Motions Vol. I p. 275, discussing defense's receipt of additional aggravation police reports; as well as the 1983 discovery motion at RT 4675, Clerk's Transcript T2 Vol. I p. 79.)

4. Claim 6-D: "Billy's Testimony Was Critical to the Prosecution Proving Its Case, So They Sought Cooperation From Jailhouse Snitches, as a Backup Plan"

Petitioner's sub-claim D appears to relate to individuals who did not testify at trial, specifically Frank Richardson. (Pet. 130.) Petitioner raised a claim related to Richardson in his

[35] Compare the instant argument, involving Pet. Exh 6q (labeled also elsewhere as exhibit 2v, as well as in other locations), with the argument involving Pet. Exh. 7b, where Petitioner attached a declaration that the report in 7b was not contained in defense files. Respondent does not concede that something not being in defense files in 2015 indicates that it was not turned over in 1983, but regardless even that minimal argument is not present here.

Claim 5-F, which Respondent denied in section X(B)(6)(e) of this Return and incorporates here. In so far as any claim at all is raised in this section, Respondent denies it for the reasons stated.

5. Claim 6-E: "DDA Robinson committed misconduct to insure a conviction"

Petitioner claims here that Robinson lied to the court when he represented that Brown had been to the hospital in his request for a continuance. (Pet. 131) Respondent denies this claim.

Petitioner cites to Volume II of the second trial's reporter transcript at page 92 for Robinson's representation on the record, but a review of that portion of the transcript shows nothing concerning Billy Brown. Respondent admits that Robinson made a motion for continuance (RT 4802, Clerk's Transcript T2 Vol. I p. 206) and supplied a doctor's note (RT 4804, Clerk's Transcript T2 Vol. I p. 208), as indicated in the minute orders. There is also a conversation on the record about the doctor's name being illegible.[36] (RT 3109, Second Trial Vol. II p. 327.)

Petitioner proffers in support of this what Petitioner claims is a response from Valley Medical Center that "showed there were no records of Brown being a patient in 1983." (Pet. 13; Pet. Ex. 6bb.) Petitioner misstates his own evidence; the 1993 request contained in Petitioner's Exhibit 6bb is for "any psychological, psychiatric, neurological, drug/alcohol rehabilitation reports … I **do not need** the entire file." (Emphasis original.) Valley Medical Center's response is "After researching our records I can find no records in files for Bill Brown (D.O.B. 4-9-63) prior to 1984." Petitioner's request was for a narrow band of records, explicitly not the entire file. To suggest that Valley Medical Center's response, 10 years after trial, excludes Brown getting a doctor's note unrelated to those issues in 1983 seems unsupported by the proffered evidence.

Regardless, misconduct of this sort requires egregious, dishonest, or reprehensible conduct that undermines confidence in a verdict. Even if Brown's note was not genuine, Petitioner proffers no evidence to suggest that Robinson was aware of that or was dishonest, nor does a two-

[36] Petitioner insinuates that a doctor's note containing an illegible doctor's signature is an indication of unreliability; Respondent denies this insinuation and suggests to the court that illegible handwriting in the medical profession is not remarkable.

day continuance undermine confidence in the outcome of the trial. Brown did come to court and did testify, and Petitioner makes no argument why a delay in witnesses where other witnesses were called caused prejudice at all to the Petitioner.

Petitioner further restates his claims involving improper immunity and Brown's subsequent recantation. Respondent denies those claims here as it has elsewhere in this section for the same reasons.

6. Claim 6-F: "The Prosecution Falsely Manipulated Circumstantial Evidence to Corroborate Billy Brown's Testimony"

Petitioner advances in this claim (Pet. 133) the same height claim made elsewhere in his Petition, most notably in Claim 2(A)(1). Respondent denies this claim here as it did there in section VII(b)(1) of this Return.

7. Claim 6-G: "Petitioner was Prejudiced by Billy's Lies."

Petitioner advances a conclusory claim here that Respondent denies in its entirety. "Conclusory allegations made without any explanation for the basis of the allegations to do not warrant relief." (*People v. Karis* (1988), 46 Cal.3d 612, 656.)

8. Claim 6-H: "Billy Recanted His Testimony, Which Confirmed His Previous False Statements in Police Interviews and Court Testimony."

Claim 6-H deals again with Brown's 1993 recant statement. Respondent denies factually the truth of Brown's recantation, and denies also that any prosecutorial misconduct or *Brady* violation took place as a result of that recant statement.

The *Weber* rule remains controlling law in this area: "[T]he offer of a witness, after trial, to retract his sworn testimony is to be viewed with suspicion." (*Weber*, supra, 11 Cal. 3rd at 722.) Moreover, in this case the record reflects attempts to dissuade Brown by Petitioner's family during trial. (RT 3114-3115, Second Trial Vol. II p. 332-333.) Here, Brown gave multiple, largely consistent statements, testified twice, and only ten years later recanted. His statements were

corroborated by physical evidence, including the gun being located near Petitioner in the vehicle and the statements of co-defendants inculpating Petitioner.[37] Taking the record as a whole, Brown's recantation is not credible and this court should deny claims based on it.

Regardless of the recantation's credibility, however, Petitioner is advancing in his Claim 6 that the recantation supports a finding by the court of prejudicial misconduct on the part of the prosecution, either under a *Brady* theory or an egregious misconduct theory. Both of these theories are concerned with pre-trial misconduct that renders the subsequent verdict a violation of due process, whether that misconduct is suppression of material, favorable evidence or is egregious, dishonest, or reprehensible conduct on the part of the prosecutor. Petitioner advances no such argument here: the recant occurred in 1993, ten years after Petitioner's trial and after Petitioner's conviction became final in 1990. (*People v. Stankewitz* (1990), 51 Cal.3d 72.) A subsequent recantation by Brown might unsuccessfully be argued to constitute new evidence (a claim not apparently advanced by Petitioner, perhaps because of issues surrounding timeliness, and one certainly contrary to the law surrounding recantations), but Respondent denies that it is legally possible for actions from 1993 to constitute misconduct prior to 1983.

C. Timely and Successive Petition Analysis

The applicable legal standards for timely and successive petition analysis under the *Reno*, *Waltreus*, *Dixon, Miller* and *Clark/Horowitz* are described in section VI(C)(1).

Petitioner's Claim 6 rests either on trial testimony, which was available in 1983, or on a 1993 recant statement by Billy Brown prepared in advance of Petitioner's federal habeas petition. Substantial delay of 28 years occurred between 1993 and the filing of the instant petition, and Petitioner does not explain why the Billy Brown information was not raised in his federal habeas petition – indeed, the interview was conducted in anticipation of that filing. (Pet. Ex. 6c.)

[37] While the statements of the co-defendants were not admitted at trial, they are attached by Petitioner as exhibits in support of his motion. All of their statements inculpate Petitioner and corroborate Brown's statement. (See, e.g., Pet. Exh. 3h at 22, interview of Marlin Lewis saying Petitioner claimed he shot victim; Pet. Exh. 2aa at 4, Teena Tapping saying that Petitioner was the last person she saw with the gun before victim's killing; and Pet. Exh. 4x at 15, interview of Christina Menchaca, saying that the person with the gun at the time of the shooting was a man with long hair.)

Petitioner articulates no *Clark* exception that applies, and Respondent cannot identify an exception: there is no error of constitutional magnitude, there is not a showing of actual innocence based on new evidence such that no reasonable juror could convict, this is not a death penalty case, and the statute is not invalid. Petitioner's claim is untimely and should be denied.

XII. CLAIM 7: ALLEGATION OF 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 OF 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 SIXTH AMENDMENT.

Petitioner's Claim 7 (Pet. 139) concerns the Jesus Meras robbery. Respondent denies this claim in its entirety as it has elsewhere in this Return.[38]

Petitioner claims that the casings recovered at the Meras scene were different from those recovered at the Graybeal scene, a claim that Respondent admits. In-so-far as this raises a *Brady* claim, that claim was also raised in regards to this evidence in Petitioner's Claim 5(B), which Respondent denied fully in sections VII(B)(1) and X(B)(2) and incorporates herein. In short, the Meras case was used only in the penalty phase of the 1983 trial, a phase which has been overturned by the 9th Circuit Court of Appeal.

Petitioner advances here again a statement that the government argued the facts of the Meras robbery during the guilt phase in 1983. The name Meras was never said before the jury. No facts in support of the Meras robbery were introduced to the jury. For a complete discussion of the record of the guilt phase in 1983 where the Meras robbery is concerned, see section VII(B)(1)(a) of this Return, which Respondent incorporates within.

Petitioner makes additional allegations about the preliminary hearing, the first trial, and the guilt phase of the second trial, none of which are the cause of the Petitioner's confinement.

[38] Respondent concedes that the Meras shell casings issue is not barred by *Waltreus* and its successor cases, but notes above that the Meras issue fails to state a claim about Petitioner's guilt trial.

Petitioner makes further sufficiency of the evidence claims about the Meras robbery, including statements about eyewitness identification, faulty memory, and inconsistency. Respondent does not reach those claims because, as stated above, the Meras robbery was not tried to the jury in the 1983 guilt phase of the case. Because the Meras case was never presented to the jury, Respondent argues that it cannot "undermine the reviewing court's confidence in the outcome." (*In re Cox* (2003), 30 Cal.4th 974, 1009)

XIII. CLAIM 8: ALLEGATION OF 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.

A. Substantive Analysis

A prosecutor should never file a criminal charge or prosecute a case when the prosecutor believes the defendant to be innocent. (*Berger v. U.S.* (1935) 295 US 78, 88.) A Prosecutor should not file criminal charges that are not supported by probable cause. (Cal. Rules of Prof Cond 5-110(A). Prosecutors are responsible for charging crimes in all but grand jury cases. (Govt Code §§ 26500-26501.) Prosecutors have broad discretion in charging. He or she cannot charge at all. (see Govt Code § 26501; see Cal Rules of Prof Cond 5-110 on prosecutor's ethical obligations in charging). It appears that Stankewitz is claiming that in filing his case the prosecution committed some ethical violation. This claim is vague and unsupported by any law.

Stankewitz is claiming the prosecutor should have known his mental state prior to filing based on reports that were years old. Specifically, that his previous mental status negated the criminal mental state of his crime. In support of this he cites to juvenile reports written from 1965-1973 that were supposedly in the prosecutions file. (Exhibit 8a-8e.)

Stankewitz appears to argue that his juvenile reports were so powerful that the prosecutor

either did know, or should have known, that he was incapable of premeditating and deliberating a first degree murder. Stankewitz, however, ignores the substantial contemporaneous evidence that showed his ability to premeditate and deliberate Theresa Graybeal's murder. This includes the evidence of Stankwitz's activities prior to, during, and after the murder, including Stankwitz's exclamation that he had "dropped" the victim. Stankewitz has cited no authority for his apparent assertion that a prosecutor must not file charges if any evidence suggests that the defendant may not have the mental capacity to commit the charged offense. Obviously, there is no such authority and to hold otherwise would effectively eliminate our adversarial system of justice. Just because evidence is known to the prosecution that may be used as a basis for a defense does not mean that the prosecution cannot charge an offense for which evidence supporting the charge exists. Stankewitz's efforts to re-write the American criminal justice system should be rejected.

Indeed, Stankwitz's argument would create an unworkable and unprecedent burden on the prosecution when making initial charging decisions in a criminal case. Stankewitz is essentially claiming it is required for a prosecutor to review and pull every prior file on any defendant submitted and review them in their entirety before filing. This requirement is not only not supported by law but not practical in application alone as it would create such a burden on prosecution that filing would not occur timely and it would drain resources. Such a requirement would also cause the prosecutor to speculate whether a previously diagnosed mental condition still existed at the time of the current crime. Prosecutors are not doctors and are not equipped to make such evaluations. What if a defendant's previous case was so old it was shredded, what if the case was out of county, or out state, would the reviewing of previous conviction files be required on all defendants or just those looking at serious or violent crimes, these are just some of the many issues legislatures would have to address to cause uniformity to the idea that Stankewitz is proposing. It would affect the entire justice system.

The fact that these reports alone existed, whether known by the prosecution or not, was not a sufficient basis for the prosecution to decline to file murder charges in this case.. California has well-established provision to permit defendants to raise, at trial, mental health issues as related to mens rea. Furthermore, California provides substantial protections to defendants to ensure that no

person is tried while incompetent. There is nothing improper for the prosecution to expect that any evidence of mental conditions or issues from a defendant's past will be thoroughly reviewed by defense counsel and presented as a defense, if appropriate. Stankewitz's mental state was thoroughly discussed by his attorney's, the court, and through his review process. To place such a burden on the prosecution, in determining a defendants mental status prior to filing, is preposterous and unsupported by law.

Petitioner states that "these mental defects and conditions meant that Petitioner could not form the requisite intent to premeditate and deliberate required for the prosecution to charge him with first degree murder." (Pet. p 155.) But this statement in and of itself is an opinion that only an expert could reach, and it is not supported by any such expert opinion. It is merely Stanketwiz's lay opinion regarding the effect of his alleged mental defects on his criminal liability at the time.

If Stankewtiz is attempting to claim that the court should have declared a doubt this claim is procedurally barred because Stankewitz did not raise it on direct appeal. A claim that the trial court should have declared a doubt is limited to the evidence that was before the trial court. *(People v. Welch* (1999) 20 Cal.4th 701, 739 *(Welch); People* v. *Marks* (2003) 31 Cal.4th 197, 218, fn. 3; *Ghobrial, supra, 5* Cal.5th at p. 271; *Mickel, supra,* 2 Cal.5th at pp. 201-202.) Because Stankewitz could have, but did not, raise this claim on direct appeal, he is barred from now doing so in habeas proceedings. *(In re Harris* (1993) 5 Cal.4th 813, 829 *{Harris); Ex parte Dixon* (1953) 41 Cal.2d 756, 759 *(Dixon).)* If Stankewitz is alluding he wanted a not guilty by reasons of insanity defense, this claim is procedurally barred because he did not raise it on direct appeal. A claim that the trial court should have declared a doubt is limited to the evidence that was before the trial court. *(People v. Welch* (1999) 20 Cal.4th 701, 739 *(Welch); People* v. *Marks* (2003) 31 Cal.4th 197, 218, fn. 3; *Ghobrial, supra, 5* Cal.5th at p. 271; *Mickel, supra,* 2 Cal.5th at pp. 201-202.) Because Stankewitz could have, but did not, raise this claim on direct appeal, he is barred from now doing so in habeas proceedings. *(In re Harris* (1993) 5 Cal.4th 813, 829 *{Harris); Ex parte Dixon* (1953) 41 Cal.2d 756, 759 *(Dixon).)* If Stankewitz is contending that the prosecutor should have declared a doubt about his competency to stand trial. This claim is barred because

Stankewitz could have, but did not, raise it on direct appeal. *(Dixon, supra,* 41 Cal.2d at p. 759.)

The prosecution properly filed this case in accordance with the law and did not violate any constitutional rights. There was no basis for the prosecutor to not file the case as first degree murder—even assuming such duty exists. In any event, the claim lacks merit.

B. Timely and Successive Petition Analysis

The applicable legal standards for timely and successive petition analysis under the *Reno, Waltreus, Dixon, Miller* and *Clark/Horowitz* rules are described in section VI(C)(1).

Mental health issues related to Petitioner were raised on direct appeal (*People v. Stankewitz* (1990), 51 Cal.3d 72, 85) and again on federal habeas (*Stankewitz v. Woodford,* CIV F-91-616-AWI-P, Final Memorandum and Order at 10-29).[39] In-so-far as this argument is not contained within those arguments and barred by the *Waltreus* and *Miller* rules, it could have been raised at that time and so is barred by *Dixon* and *Clark/Horowitz.*

Petitioner further articulates no *Clark* exception that applies, and Respondent cannot identify an exception: there is no error of constitutional magnitude, there is not a showing of actual innocence based on new evidence such that no reasonable juror could convict, this is not a death penalty case, and the statute is not invalid. Petitioner's claim is untimely and should be denied.

XIV. CLAIM 9: ALLEGATION OF 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

[39] Because Judge Ishii's order is not contained in publicly accessible databases such as Westlaw or Lexis, Respondent attaches a courtesy copy from PACER as Respondent's Exhibit E. Respondent's citation is to the certified court document, however, not the exhibit.

A. Substantive Analysis

Petitioner's Claim 9 (Pet. 156) is a conclusory claim that because the defendant did not commit the crimes, he could not be found guilty. This is fundamentally a complaint about the jury's findings of fact, an inappropriate claim for habeas relief. (*Scoggins*, supra, 9 Cal.5th at 673.) Petitioner alleges in the title of the claim but not in the body violations under *Brady* causing issues surrounding ineffective assistance of counsel, though Petitioner points in Claim 9 neither to what he believes is *Brady*-violative nor what he believes is IAC. In-so-far as Petitioner raises claims under either of those theories, Respondent denies them and incorporates its *Brady* arguments throughout this Return as well as the IAC arguments in section XVII of this return responding to Petitioner's Claim 12.

While Petitioner does not differentiate his sub-claims in Claim 9, all of them appear to be duplicative of claims elsewhere, including "Petitioner is not guilty of murder, therefor he is not guilty of murder during kidnapping. See Claims 1, 2 and 3" (Pet. 156; see sections VI, VII, and VIII of this Return); "In light of what we now know regarding Billy Brown's recantation, and the prosecution's failure to disclose certain evidence—as well as their argument on the evidence that was extremely misleading—it cannot be said that jury would not have reached a different verdict" (Pet. 158; see sections IX, X, and XI of this Return); "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 time of the murder" (Pet. 158; see section VI of this Return); "As explained in Claim 2, Petitioner was not present at the time of the murder" (Pet. 158; see section VII of this Return); "As detailed in Claim 8, the prosecution had knowledge of Petitioner's mental defect" (Pet. 158; see section XIII of this Return); and "the prosecution falsely put Marlin Lewis inside the car at the time Theresa Graybeal was shot" (Pet. 162; see sections VII(B)(1) and VIII(B)(3), among others.)

The only novel claim raised in Claim 9 appears to be a voluntary intoxication claim that Petitioner was on heroin at the time of the murder. Petitioner's own petition notes that witnesses testified that Petitioner did not appear to be under the influence, though others said he was "acting

differently." (Pet. 161-162.) This factual dispute went to the judge and jury; as discussed in *Scoggins*, above, dispute on that issue is not appropriate for habeas relief, and in the context of misconduct Petitioner makes no showing that there was egregious, dishonest or reprehensible conduct of the sort requiring relief.

B. Timely and Successive Petition Analysis

The applicable legal standards for timely and successive petition analysis under the *Reno*, *Waltreus*, *Dixon*, *Miller* and *Clark/Horowitz* rules are described in section VI(C)(1).

Voluntary intoxication issues related to Petitioner were raised on federal habeas (*Stankewitz v. Woodford,* CIV F-91-616-AWI-P, Final Memorandum and Order at 22-29). In-so-far as this argument is not contained within those arguments and barred by the *Waltreus* and *Miller* rules, it could have been raised at that time and so is barred by *Dixon* and *Clark/Horowitz*.

Petitioner further articulates no *Clark* exception that applies, and Respondent cannot identify an exception: there is no error of constitutional magnitude, there is not a showing of actual innocence based on new evidence such that no reasonable juror could convict, this is not a death penalty case, and the statute is not invalid. Petitioner's claim is untimely and should be denied.

XV. CLAIM 10: ALLEGATION OF THE VERDICT OF PERSONAL USE OF A FIREARM UNDER PC 12022.5 WAS BIASED ON FALSE EVIDENCE PRESENTED BY THE STATE, IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7

Petitioner's Claim 10 is a factual innocence claim relying on the same facts and allegations put forward in Petitioner's Claim 1, that "the prosecution knew the gun in evidence was stolen and in the possession of law enforcement starting five years prior to the murder." (Pet. 164.) Respondent denies this claim in its entirely[40]. As described at length in section VI of this Return, Petitioner's argument is based on an incorrect reading of the evidence. Petitioner implicitly

[40] Including a denial of timeliness, as set forth in section VI(C) of this Return.

concedes this as to Claim 1 in their Third Supplemental Filing, but makes no representation to the court about the impact of their concession on Claim 10.

Petitioner proffers as additional evidence a rehash of its claims about Billy Brown's testimony from Petitioner's Claim 6, denied in its entirety by Respondent in section XI of this Return, as well as arguments about statements from the co-defendants that were not introduced at trial. As discussed above in footnote 40, all co-defendants gave inculpatory statements pointing to Petitioner as the actual killer and discharger of the firearm.

Generally, this is neither a misconduct, false evidence, or new evidence claim. Instead, it merely seeks to have this court re-evaluate the evidence presented to the jury in 1983 and reach a different result. Such an enterprise is not appropriate for habeas relief.

XVI. CLAIM 11: ALLEGATION OF 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 RIGHT TO PRESENT A DEFENSE THE UNDER SIXTH AMENDMENT.

Petitioner's Claim 11 raises an allegation of prosecutorial misconduct starting in 2010. As discussed above, habeas prosecutorial misconduct claims are those "where the prosecutor uses deceptive or reprehensible 'methods to persuade either the court or the jury and it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Martinez* (2010) 47 Cal.4th 911, 955)

In this claim, Petitioner facially is asserting misconduct that took place 27 years after his trial, with no theory about how misconduct from 2010 on could have caused a more favorable result to Petitioner in 1983.[41] Indeed, the Supreme Court had held this directly in the *Brady* context, finding "a criminal defendant proved guilty after a fair trial does not have the same

[41] Respondent acknowledges that, in-so-far as Claim 11 raises issues from 2010 on, it is not barred by *Waltreus* and *Clark* in respect to earlier appeals and writs. However, it may be substantially delayed within the meaning of *Reno*. Regardless, the court does not need to reach that issue because it is not properly a claim for habeas relief.

liberty interests as a free man", ruling that *Brady* obligations do not extend to post-conviction proceedings. (*District Attorney's Office for Third Judicial Dist. v. Osborne* (2009), 557 U.S. 52, 68.) In his Fourth Supplemental Filing, Petitioner cites to the recent case of *In re Jenkins* (2023), 14 Cal.5th 493, for the proposition that *Brady* obligations extend past conviction. *Jenkins* distinguished *Osborne* because *Osborne* was concerned with evidence "unavailable at trial", whereas *Jenkins* held that there is a continuing obligation to disclose *Brady* evidence known before trial. (*Jenkins*, supra, at 510.) Here, the argument is that misconduct that occurred in 2010 prejudiced Petitioner's trial in 1983, in contrast to *Jenkins*, where evidence was suppressed pre-trial and continued to be suppressed post-trial. Such pre-trial suppression has long given rise to relief.

In-so-far as Petitioner's claim could be construed to raise a *Trombetta-Youngblood* claim regarding destruction of evidence, Respondent urges its denial as well. This court has heard that direct claim before from Petitioner and denied it, holding that:

> "The due process clause imposes a limited duty upon the prosecution not to destroy evidence in its possession if (1) the destruction is in bad faith; and (2) comparable evidence is unavailable. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57—58; *California v. Trombetta* (1984) 467 U.S. 479—488—891; see also *People v. Montes* (2014) 58 Ca1.4th 809, 8374) A close reading of Defendant's pleadings concerning this initial motion to dismiss reveals that he has foiled to assert, let alone establish, the destruction of any of the six items underlying the motion, in bad faith or otherwise. Defendant offers absolutely no evidence of a Trombetta—Youngblood due process violation. Innuendo surrounding events from the 1978 guilt phase trial, including the interview with Defendant's former cellmate; the word choice of the prosecutor when-making the interview tape available to defense counsel; the prosecutor's tactical decision to use the Meraz incident in the penalty phase only; and argument from a pretrial motion to sever do not constitute proof of bad faith or destruction of evidence."
>
> (CF 78227015, Dec. 20, 2017 Order Denying Motion to Dismiss, p. 12)

Even assuming that Petitioner does have some post-conviction right, his five profferred sub-claims are not misconduct on their face.

Claim 11-A alleges that the prosecution failed to file discovery rules, but their own accounting suggests that they filed a request for discovery under Cal P.C. 1054.9 and received responsive discovery. Respondent alleges that they have been in compliance with 1054.9, and notes Petitioner does not allege that an order to compel pursuant to P.C. 1054.5 has been issued and not been complied with, the remedy provided for under this chapter. Moreover, under PC 1054.9(f), the code "does not require the retention of discovery materials not otherwise required by law or court order."

Claim 11-B alleges that the prosecution lost the case file. This has been previously raised in Petitioner's Claim 4(A)(5) and denied by respondent in section IX(B)(1) of this Return. Additionally, as noted above, PC 1054.9(f) imposes no duty to retain the file on the prosecution.

Claim 11-C1[42] restates the height discrepancy argument advanced in the trial context in their Claim 2(A) and denied by Respondent in section VII(B)(1). Respondent maintains that the victim's father's estimate of 5'7" was reasonable to rely upon at trial and still reasonable today, especially given the unclear, written-over measurement on the autopsy report.

Claim 11-C2[43] argues misconduct based on the Meraz case. This appears to rely solely on Ms. Pebet's statement that "the appropriate remedy would be to do exactly what we are doing here, and it is to retry the penalty phase perhaps with or without that Meraz factor." (RT 5534, Post Reversal Proceedings Vol. XXVI p. 378.) Even assuming post-conviction misconduct could occur, the government here made no representation about what it would do or whether it would be appropriate at a retrial to include the Meraz case.[44] Nothing about that statement was deceptive, egregious, or reprehensible, and a misconduct claim should be denied.

---

[42] Petitioner advances two 'sub-claim Cs' in a Claim 11. For clarity, Respondent has labeled the first as Claim 11-C1 and the second as Claim 11-C2.

[43] Petitioner's second sub-claim C in Claim 11.

[44] Despite the mismatch in shell casings, the Meraz case did have connections to the instant crime: Meraz' pay stub was found in the victim vehicle and Meraz IDed some of Petitioner's co-participants as involved in his robbery. Whether that connection would be too attenuated to be admissible or would be valuable at re-trial were it admissible was mooted by the government's decision to no longer seek death.

Claim 11-D, finally, argues misconduct because no notice of aggravation was filed "prior to the penalty re-trial." Petitioner seems to overlook that there was no penalty re-trial, because the government chose not to seek the death penalty. Petitioner is entitled to notice of aggravation under Cal P.C. 190.3 only in cases where the defendant "may be subject to the death penalty." In the instant case, because of the government's notice that it was not seeking death, P.C. 190.3 did not apply.

XVII. CLAIM 12: ALLEGATION OF INEFFECTIVE 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

In his Claim 12, Petitioner alleges ineffective assistance of counsel during the guilt phase of his 1983 trial by Hugh Goodwin, his appointed counsel. (Pet. 175) Respondent denies this claim.

Petitioner alleges that "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." (Pet. 176) Petitioner proffers two declarations from Goodwin in support of this proposition. In the first, 1989 declaration, Pet. Ex. 12b at para. 6, Goodwin says "I did not hire an investigator in this case, either at the guilt phase or the penalty phase." In the second, 1995 declaration, Pet. Ex. 12c at para. 5, Goodwin says "I did not consult with his prior attorneys, either from the trial or from the appeal, or obtain from them their files from the prior trial."

This court should view Goodwin's declarations with great suspicion. Always, "[a]fter an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course that reflection, to magnify their own responsibility for an unfavorable outcome." (*Harrington v. Richter* (2011), 562 U.S. 86, 109.) In this case, evaluation of the record suggests Goodwin's memory may have undergone such magnification.

In his 1989 declaration, Goodwin asserts that he did not hire an investigator, but in his 1983 application for attorney's fees, Goodwin requests money for 60 hours of work on the case, including "reading voluminous material, research, investigation, interviews, jail visits." (RT 4659, Clerk's Transcript T2 Vol. I p. 63.) While the billing is unclear as to whether Goodwin hired an investigator or performed the investigation himself, the application – granted by the court – indicates that investigation was done. (RT 4690, Clerk's Transcript T2 Vol. I p. 94.)

In his 1995 declaration, Goodwin asserts that he never received the file from prior counsel, either trial or appellate. However, in his March 24, 1983 motion to continue, Goodwin declares that "the State Public Defender represented the defendant on his appeal and that said attorney had to await receipt of the trial transcripts as part of his preparation. That since receipt of the material from the State Public Defender which consisted of two medium sized cardboard boxes of material, counsel has diligently attempted to read and digest the information therein contained but it is obvious to counsel that he will not be able to read all the material prior to trail(sic) time and not to mention digest it. There is hardly a day passes that counsel doesn't read some of this material. There still remains to be read the materials which counsel received from the Fresno County Public Defender's Office[45] which is also voluminous." (RT 4963-4964, Clerk's Transcript T2 Vol. II p. 373-374.)

Also in the March 24 motion was a representation that Goodwin needed time to consult with an expert witness on mental conditions who resided in North Carolina. (RT 4964, Clerk's Transcript T2 Vol. II p. 374.)

In a subsequent motion to continue on May 20, 1983, Goodwin no longer raised the need to go through discovery but indicated that that he had met with Petitioner and based on that meeting needed to interview at least seven witnesses.(RT 4729-4730, Clerk's Transcript T2 Vol. I p. 134-135) As discussed previous, Goodwin also filed a discovery motion in the case which was granted, apparently without any subsequent need for an order to compel. (RT 4675, Clerk's Transcript T2 Vol. I p. 79.)

[45] Sal Sciandra, Petitioner's prior counsel, was employed by the Fresno County Public Defender. (Pet. Ex. 4i.)

Taken as a whole, the record on appeal seems to contradict Goodwin's later declarations. While it is possible that Goodwin did not hire an investigator as described in the 1989 declaration, he represented to the court that he was investigating, and the trial court found him credible such as to grant both his request for fees and his motions to continue. His later assertion that he did not receive any sort of file seems plainly contradicted by the record.

A. Legal Standard

The United States Constitution and the California Constitution grant criminal defendants the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685 (*Strickland*); *In re Fields* (1990) 51 Cal.3d 1063, 1069.) To establish a claim that he was deprived of the effective assistance of counsel so that reversal is required, Petitioner bears the burden of showing both that counsel's performance was deficient and that he was prejudiced thereby. (*Strickland, supra*, 466 U.S. at p. 687; *People v. Weaver* (2001) 26 Cal.4th 876, 925.)

To succeed on the first component, deficient performance, Petitioner must overcome a strong presumption that counsel's performance fell within the "wide range of reasonable professional assistance," that counsel's actions and omissions were part of "sound trial strategy," and that all significant decisions were the result of "reasonable professional judgment." (*Strickland, supra*, 466 U.S. at pp. 689-690; see also *Harrington v. Richter* (2011), 562 U.S. 86, 104.) The reasonableness of counsel's actions must be evaluated in light of "prevailing norms of practice." (*Strickland, supra*, at p. 688.) Prevailing norms of practice may be reflected in American Bar Association standards. (*Ibid.*) They may be determined from the standard practices at the particular time and place where the petitioner was tried. (See *Wiggins v. Smith* (2003) 539 U.S. 510, 524.) But "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." (*Strickland, supra*, 466 U.S. at pp. 688-689.)

Strategic decisions made after a thorough investigation are "virtually unchallengeable." (*Strickland*, *supra*, 466 U.S. at p. 690.) Strategic decisions based on less than a complete investigation "are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (*Id.* at pp. 690-691.) "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (*Id.* at p. 691.)

The reasonableness of counsel's actions must be determined in light of his client's actions:

> The reasonableness of counsel's actions may be determined or substantially influenced by the petitioner's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the petitioner and on information supplied by the petitioner. In particular, what investigation decisions are reasonable depends critically on such information.

(*Strickland*, *supra*, 466 U.S. at p. 691.)

Finally, "[j]udicial scrutiny of counsel's performance must be highly deferential." (*Strickland*, *supra*, 466 U.S. at p. 689.)

> It is all too tempting for a petitioner to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

(*Strickland*, *supra*, at p. 689.) Accordingly, a court must "view and assess the reasonableness of counsel's acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act." (*People v. Ledesma* (1987) 43 Cal.3d 171, 216; see also *In re Scott* (2003) 29 Cal.4th 783, 812.)

To demonstrate prejudice, the second component of a claim of ineffective assistance, a petitioner must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, 466 U.S. at pp. 693-694; see also *Harrington v. Richter*, *supra*, 562 U.S. at p. 103.) In the context of the guilt phase, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (*Strickland*, *supra*, at p. 695.) In the context of the penalty phase of a capital case, the question is whether there is a reasonable

probability that, absent the errors, the "sentencer" would have concluded that the balance of the aggravating and mitigating factors did not warrant death. (*Ibid.*) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

The reviewing court should assume that "the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." (*Strickland*, *supra*, 466 U.S. at p. 695.) Any error must be evaluated in the context of all of the evidence before the judge or jury. (*Ibid.*) An error may have little effect where the verdict or conclusion finds overwhelming support in the record. (*Id.* at p. 696.) Similarly, an error in not presenting evidence is not prejudicial when that evidence "would barely have altered the sentencing profile presented to the sentencing judge." (*Id.* at pp. 699-700.)

A reviewing court need not always "determine whether counsel's performance was deficient before examining the prejudice suffered by the petitioner as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697.)

Always, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." (*Strickland*, *supra*, 466 U.S. at p. 696.) There is no constitutional violation unless counsel made "errors so serious as to deprive the petitioner of a fair trial, a trial whose result is reliable." (*Id.* at p. 687.)

The United States Supreme Court has explained that a reviewing court plays an exceedingly deferential role when reviewing inadequacy of counsel claims:

> Surmounting *Strickland's* high bar is never an easy task.' [Citation.] An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post—trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation.] Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' [Citations.] The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom.

(*Harrington v. Richter*, *supra*, 562 U.S. at p. 105.)

B. Analysis of Petitioner's Sub-Claims

1. Claim 12-B-1: "Goodwin did not competently prepare for trial"

Petitioner advances a claim that Goodwin did not competently prepare, including that he did not review reports, investigate the events of the murder, or hire experts. Respondent denies. Goodwin's own declarations indicate that he was engaged in (Goodwin's billing statement, RT 4689, Clerk's Transcript T2 Vol. II p. 93), reviewing material (Goodwin motion to continue, RT 4693, Clerk's Transcript T2 Vol. II p. 97), consulting with experts (Goodwin motion, RT 4694, Clerk's Transcript T2 Vol. II p. 98), and conducting interviews with potential witnesses (Goodwin motion, RT 4729, Clerk's Transcript T2 Vol. II p. 133). Goodwin also was obviously familiar with the previous trial transcript, since he questioned witnesses based on it. Petitioner helpfully compiled a list of times Goodwin used the first trial to question Brown in his Pet. Ex. 12h.

As *Strickland* held, decisions following a thorough investigation are "virtually unchallengeable." (*Strickland,* supra, at 690.) Here, the record reflects a thorough investigation on Goodwin's part – not only did he have the benefit of Sciandra's investigation in the first trial, but he also engaged in investigation himself, continuing the trial twice towards that end. IAC judgments under *Strickland* are to be judged under the prevailing standards of the time, which is particularly relevant when Goodwin had access to Sciandra's file. In Pet. Ex. 5j at 9, James Ardaiz described Sciandra as "the best criminal defense attorney around," and said Sciandra "was a difficult defense attorney to go up against because he left no stone unturned." Because he had access to Sciandra's files, Goodwin's investigation was necessarily confined to those rare stones Sciandra left unturned, but despite that Goodwin consulted with experts, engaged in investigation, interviewed witnesses and reviewed material for months. Taking the record as a whole, this court should reject an IAC claim based on the performance prong alone.

However, the record leaves ample evidence that even were Goodwin deficient, his performance would not cause prejudice. As discussed above, Sciandra, who represented petitioner in his first trial, had a reputation as a tenacious investigator. While Petitioner's 1978 trial was overturned, it was on due process grounds related to the court's failure to hold a competency hearing on counsel's request, not on ineffective assistance of counsel. (*People v. Stankewitz* (1982), 32 Cal.3d 80) Petitioner himself acknowledges that Sciandra was duly diligent at least where discovery is concerned. (Pet. 80, fn 4.) However, despite Sciandra's reputation, diligence, and competence, Petitioner was convicted in the 1978 trial just as he was in the 1983 trial, demonstrating that any ineffectiveness on Goodwin's part did not change the ultimate result for his client.

2. Claim 12-B-4[46]: "Goodwin Did Not Perform Competently During the Trial"

Petitioner further claims that Goodwin failed to perform competently during the guilt phase of the second trial on two grounds.

First, Petitioner claims that Goodwin failed to perform competently because he did not file a motion in limine to prevent the government from using the Meras crimes during the guilt phase.

Second, Petitioner claims that Goodwin failed to object to witnesses in the second trial refreshing their recollection or being impeached with testimony from the first trial.

Respondent urges both of those claims be denied.

a. Motion in limine on the Meraz crimes

As has been discussed extensively elsewhere in this Return, the Meraz crimes were not used in the guilt phase of Petitioner's second trial. The record does not capture what communications about evidence occurred between counsel, but Respondent alleges that whether it is because Goodwin had specific knowledge that the government was not planning to introduce the Meraz case in the guilt phase or whether he knew based on his experience that it would not be

[46] Petitioner skips from sub-claim 1 to 4 in his Petition.

admissible for guilt given the record[47], he was not deficient in his performance for not filing a spurious motion.

Even was Goodwin's failure to file a motion in some fashion deficient, it would not be prejudicial. As has been discussed elsewhere, the Meraz crimes were not introduced in the guilt phase, and so the failure to file that motion constituted no prejudice.

b. Objecting to witnesses using testimony from the first trial

Petitioner next claims that Goodwin was deficient for failing to object to witnesses refreshing their recollection or otherwise being impeached with their testimony from the first trial. He offers no authority in support of this proposition. In fact, impeachment of witnesses by prior testimony is the common practice in California courts. (See Cal. E.C. 780(h), Cal E.C. 770, Cal E.C. 771) Moreover, were Goodwin not to impeach Brown, he would be abandoning one of his opportunities to attack Brown's credibility. (E.C. 780)

Even were Goodwin somehow deficient for this failure to object, Petitioner does not explain how this prejudiced him. Brown, as has been discussed extensively above in section XI, consistently testified as to Petitioner's guilt at preliminary hearing, 1978 trial, and 1983 trial. He also testified largely consistently with his pre-trial interviews. While there were some differences between Brown's accountings, he was always consistent as to Petitioner's guilt. Removing one of Brown's several prior statements from the realm of impeachment and recollection would not materially change the outcome of his testimony.

3. Claim 12-B-5: "As a Result of His Failure to Competently Handle the Guilt Phase, Petitioner Was Prejudiced."

Petitioner raises multiple sub-sub-claims related to prejudice, all of which Respondent denies. The standard on IAC for prejudice is that there be a reasonable probability that the proceeding would have had a different outcome but for the deficiency of counsel. (*Strickland*, supra, 466 U.S. at 693-694)

[47] The Meraz crimes were severed in 1978, prior to the first trial. (RT 721)

a. Blood on co-defendant's clothing

Petitioner asserts that Goodwin was unaware of the blood on codefendant's clothing. (Pet. 177.) He attaches no declaration or other evidence in support of this proposition, but regardless, the prejudicial value is merely speculative.[48] Petitioner asserts that "had the 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." (Pet. 178) No evidence is proffered in support of this claim, and Respondent denies it. It is the burden of the Petitioner to offer evidence in support of his claims on habeas by a preponderance of the evidence, and this claim should be denied. (*In re Cox* (2003), 30 Cal.4th 974, 997.)

b. Height evidence

Petitioner asserts that Goodwin did not discover the "true height" of the victim, leaving him unable to cross-examine the expert effectively. (Pet. 178) In fact, Goodwin did cross-examine Det. Boudreau about height in the context of distance. (RT 2947, Second Trial Vol. I p. 169, ln 19: "So according to what you're saying, how tall – how tall the girl was or anything like that would be completely immaterial...") This is, in essence, a restatement of Petitioner's Claim 2(A), couched in the language of IAC. (See section VII(B)(1) of this Return for a complete factual response to that claim.) "An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve." (*Harrington*, supra, 562 U.S. at 105.) Petitioner is seeking exactly that escape with this and other claims. Boudreau's testimony at trial was based on statements by the victim's father about her height. Goodwin was aware of the so-called conflict between the autopsy report and the live testimony. Given all the circumstances,

[48] Once again, Petitioner asserts here that there was no visible blood on his clothing, perhaps in hopes that the length of his petition will make a reviewing tribunal forget his claims about the testing of that clothing elsewhere. See Claim 2(A)(2) (Pet. 66), Pet. Exh. 31 at 3, and Cal. R. Prof. Cond. 3.3, "Candor Towards The Tribunal."

counsel can "make a reasonable decision that makes particular investigations unnecessary." (*Strickland*, supra, 466 U.S. at 691.) Questioning the veracity of a father's memory of his daughter is the sort of risky tactic that can trouble a jury, especially when the only countervailing evidence is an autopsy report with a number scratched out and written over.

Even assuming Goodwin's performance was deficient, it's not at all clear it was prejudicial. Boudreau, as discussed above, testified that in distance calculations, height was "immaterial." An eye-witness saw Petitioner kill the victim. Petitioner advances no compelling argument that this issue was a crucial one for the jury, and that had Boudreau been cross-examined differently there is a reasonable probability that there would be a different result.

c. Gun evidence

Much as Petitioner did above, he also re-raises the "gun was planted" argument from his Claim 1 as an IAC claim. (Pet. 178.) Petitioner argues that because Goodwin did not "realize that the gun in evidence was not the murder weapon", he was unable to effectively cross-examine witnesses, including Officer Rodriguez and Officer Bonesteel. (*Id.*)

As is discussed fully in section VI of this Return, Petitioner's "planted gun" theory has no basis in fact or in their proffered evidence. He implicitly acknowledges this in his Third Supplement, but makes no effort to correct this claim. Because the "planted gun" theory has no basis in fact, Goodwin was not deficient for failing to pursue it.

Moreover, because the "planted gun" theory is outrageous, its presence at trial would not have changed the outcome. When Petitioner retested the ballistics in 2020, the casing from the murder scene still matched the weapon. (Pet. Exh. 23a, p. 2/no 000003) No amount of testimony would have changed the essential facts or moved the jury on Petitioner's conviction.

d. Zeifert Records

Petitioner alleges (Pet. 179) that Goodwin was constitutionally defective because a subset of mental health records were not subpoenaed or used for trial to support a diminished capacity

defense in the guilt phase. However, Petitioner has been steadfast that he did not want to pursue a diminished capacity defense. (Pet. Ex. 12b, 1989 Goodwin declaration, para. 2; see also *People v. Stankewitz* (1982), 32 Cal.3d at 89.) Defendants have a right to prevent their counsel from pursuing a defense that requires admitting guilt, even if counsel believes it is in their best interest. (*McCoy v. Louisiana* (2018), 138 S.Ct. 1500, 1504; see also *People v. Bloom* (2022), 12 Cal.5th 1008, 1038)

In light of Petitioner's desire to not pursue a diminished capacity defense, it is not deficient for Goodwin to not seek out records in order to pursue that defense. In fact, Petitioner's personal decision made that "particular investigation unnecessary" within the meaning of *Strickland.* (466 U.S. at 691.)

Moreover, even had Goodwin had those records, their presence would not have changed the outcome. Because Petitioner was opposed to a diminished capacity defense, and because Goodwin was obligated under these circumstances to respect that decision, the records would have had no impact on the outcome at trial.

e. Alibi Witnesses

Petitioner claims without proffered evidence that Goodwin failed to interview alibi witnesses. (Pet. 179.) In fact, the record suggests that Goodwin sought and received a continuance for exactly that purpose. (RT 4729, Clerk's Transcript T2 Vol. II p. 133.) No evidence is proffered about the content of those witnesses' statements or their credibility; the burden lies with Petitioner on habeas, and he fails to establish that Goodwin's decisions in regards to these unknown witnesses were in any way deficient or outcome-determinative.

f. Third-Party Culpability

Petitioner claims "[n]o evidence of third-party culpability was ever presented at the second trial." This is the entirety of the claim. "Conclusory allegations made without any explanation for the basis of the allegations to do not warrant relief." (*People v. Karis* (1988), 46 Cal.3d 612, 656.)

g. Failure to file a motion to dismiss

Petitioner finally claims that Goodwin was deficient for failing to object and failing file a motion to dismiss after closing because "the court allowed DDA Robinson to argue in his closing statement that Petitioner was guilty of the Meras crimes." (Pet. 179.) Petitioner has recounted this assertion multiple times, and each time his description of it gets more fanciful. As discussed in section VII(B)(1)(a) of this Return above, no credible reading of Robinson's closing supports this conclusion. An assertion that Goodwin should have objected on that basis is correspondingly without merit.

Petitioner makes a related argument that when Goodwin filed his motion to reconsider modifying the jury verdict of death, his performance was deficient because his argument "fell short of convincing the court." Petitioner cites no authority for the proposition that counsel is ineffective when it makes an argument and a court disagrees, and were this court to adopt that reasoning the *Harrington* concern of "intrusive post-trial inquiry" would be realized on a grand scale. (562 U.S. at 105.)

C. Timely and Successive Petition Analysis

The applicable legal standards for timely and successive petition analysis under the *Reno*, *Waltreus*, *Dixon, Miller* and *Clark/Horowitz* rules are described in section VI(C)(1).

Ineffective assistance of counsel at the guilt phase was raised during Petitioner's federal habeas proceeding on several grounds. (*Stankewitz v. Woodford*, CIV F-91-616-AWI-P, Final Memorandum and Order, throughtout).[49] Respondent concedes that the specific guilt phase claims advanced in this petition were not advanced in the federal habeas petition; however, this is exactly the sort of "piecemeal" presentation disapproved of by the law. (*In re Horowitz* (1949), 33

[49] Because Judge Ishii's order is not contained in publicly accessible databases such as Westlaw or Lexis, Respondent attaches a courtesy copy from PACER as Respondent's Exhibit E. Respondent's citation is to the certified court document, however, not the exhibit.

Cal.2d 534, 547, citing to *In re Drew* (1922), 188 Cal 717, 722.) Any alleged incompetence could have been raised then and so is barred by *Clark/Horowitz*.

Petitioner further articulates no *Clark* exception that applies, and Respondent cannot identify an exception: there is no error of constitutional magnitude, there is not a showing of actual innocence based on new evidence such that no reasonable juror could convict, this is not a death penalty case, and the statute is not invalid. Petitioner's claim is untimely and should be denied.

XVIII. CLAIM 13: ALLEGATION OF 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

In Claim 13, Petitioner argues that his appellate counsel failed to properly investigate his factual innocence, including discovering the "planting of the murder weapon", "the realization that the Meras shell casings were not the same caliber as the alleged murder weapon", and a "failure to interview law enforcement officers who prepared reports and testified to material facts." (Pet. 181-182.) Respondent denies this claim in its entirety.

A. Legal Standard

The *Strickland* test is the proper standard for evaluating claims of ineffective assistance of appellate counsel based on allegations of appellate counsel's failure to raise a particular point on appeal. (*Smith v. Robbins* (2000) 528 U.S. 259, 285-289.) The basic standard of performance is whether the conduct of counsel—including counsel in capital cases—"fell below an objective standard of reasonableness," "under prevailing professional norms." (*Strickland*, supra, 466 U.S. at p. 688; *In re Reno*, supra, 55 Cal.4th at p. 464.) Thus,

> [t]he petitioner must ... allege with specificity the facts underlying the claim that the inadequate presentation of an issue or omission of any issue reflects incompetence of counsel, i.e., that the issue is one which would have entitled the petitioner to relief had it been raised and adequately presented in the initial

> petition, and that counsel's failure to do so reflects a standard of representation falling below that to be expected from an attorney engaged in the representation of criminal defendants.

(*In re Reno*, supra, 55 Cal.4th at p. 464, quoting In re Clark, supra, 5 Cal.4th at p. 780.) There is no authority for the proposition that appellate counsel renders ineffective assistance by raising some but not all arguable issues on appeal. Rather, as the U.S. Supreme Court has observed:

> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts-often to as little as 15 minutes-and when page limits on briefs are widely imposed. [Citations.]

(*Jones v. Barnes* (1983) 463 U.S. 745, 752-753.)[50] "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." (*Id.* at pp. 751-752.) "This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. [Citation.]" (*Smith v. Murray* (1986) 477 U.S. 527, 536 [deliberate choice by defendant's counsel not to pursue particular constitutional claim on direct appeal did not constitute ineffective assistance where counsel decided that claim was not worth pursuing under current nature of state law].) "[A]ppellate counsel . . . performs properly and competently when he or she exercises discretion and presents only the strongest claims instead of every conceivable claim. [Citations.]" (*In re Robbins* (1998) 18 Cal.4th 770, 810, fn. omitted.)

As discussed above in section VI(A)(3), the existence of a constitutional relief for actual innocence is unclear. If such a right exists, due process claims under such a theory would mirror

---

[50] 66 In *Jones v. Barnes*, supra, 463 U.S. at p. 752, the United States Supreme Court, quoting former Justice Jackson, observed:

> One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one. [Citation.]

the California statutory standard for new evidence under Cal PC 1473(a)(3) and require that "in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." (*House v. Bell* (2006), 547 U.S. 518, 537, citing *Schlup v. Delo* (1995) 513 U.S. 298, 327.)

Importantly for appellate analysis, "because of the very disruptive effect that entertaining claims of actual innocence would have on capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." (*Herrera v. Collins* (1993), 506 US 390, 417.)

B. Analysis of Petitioner's Claimed Deficiencies by Appellate Counsel

Petitioner broadly claims a failure on the part of his appellate counsel to assert actual innocence. Petitioner does not specify where, exactly, appellate counsel was deficient or what prejudice he believes was caused, including which claims would have caused a different result at which hearing. As a threshold matter, Respondent urges this be denied because of Petitioner's failure to state a claim. The burden in habeas relief lies with petitioner. (*In re Cox*, supra, 30 Cal.4th at 997.)

In-so-far as Petitioner can be construed to make individual claims, he focuses on three issues, including the "planting of the alleged murder weapon" theory, the "Meraz shell casings" dispute, and a generalized "failure to interview" complaint about appellate counsel. (Pet. 181-182.)

Respondent has denied extensively the "planting" theory in section VI of this Return, and notes that Petitioner, in his Third Supplemental Filing, also backed away from this theory. Briefly, the evidence of a "planted" weapon is extremely speculative, and as discussed above the burden for relief based on actual innocence is very high. Here, appellate counsel acts appropriately when it "presents only the strongest claims" described by *Robbins*, supra. (18 Cal.4th at 810.) Moreover, as discussed extensively in section VI, the planted gun theory is

factually incorrect, and so even if appellate counsel was deficient in failing to present it there would be no different result.

Respondent has also denied extensively the "Meraz shell casings" theory throughout this Return, including in sections VIII and XII, and in the ineffective assistance of counsel context in section XVII. Respondent incorporates those denials here; in short, the Meraz evidence was introduced only at Petitioner's penalty phase in 1983, and that penalty trial was overturned, resulting in no prejudice to consideration of Petitioner's guilt trial.

Finally, Respondent denies generally the "failure to interview" theory. Habeas and appellate relief is intended to address legal deficiencies rather than factual deficiencies in trials.[51] Defendants are entitled to "a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) As discussed above, the requirement for claims on actual innocence is very high, and counsel has an obligation to pursue only theories that are likely to bear fruit. As discussed throughout this Return, none of Petitioner's actual innocence theories hold merit, and so appellate counsel was not deficient in failing to advance them, and even if they were deficient, no prejudice occurred because the underlying theories of innocence are meritless.

C. Analysis of Individual Appellate Counsel's Performance

Petitioner attaches declarations from several appellate counsel, none of which demonstrate deficient performance.

In Pet. Exh. 13d, Steven Parnes, counsel on Petitioner's first appeal, writes in his declaration he did not pursue factual innocence because he was successful on appeal in overturning Petitioner's conviction. Petitioner does not allege how this performance was effectivee, and on its face counsel appears to have performed competently based on the result of the appeal.

In Pet. Exh. 13e, John Ward, associate counsel on Petitioner's second appeal and designated counsel for presentation of state habeas claims, writes in his declaration that he

[51] Note, though, that Respondent denies throughout this Return that there were factual deficiencies in Petitioner's trial.

focused on competence and mental defense based on his evaluation of Petitioner. He explains that his decision was tactical based on the time and resources at hand. Petitioner proffers no evidence why such a tactical decision was not the result of "reasonable professional judgment." (*Strickland*, *supra*, 466 U.S. at pp. 689-690.)

In Pet. Exh. 13h, Katherine Hart, assistant counsel on Petitioner's federal habeas petition, wrote in her declaration that her responsibility on the case was to argue penalty phase IAC to the 9th circuit. She was successful in that effort, and Petitioner does not explain how this was incompetent or how had she not been successful Petitioner would be prejudiced. Hart also writes that certiorari expired in the case because of a mis-calculation of time on her part, but Petitioner does not allege why or how he would have had a different outcome were cert granted by the U.S. Supreme Court.

In Pet. Exh. 13i, Harry Simon, counsel on Petitioner's federal habeas petition from 2007 on, wrote in his declaration that he was focused on the penalty phase and was barred from raising new guilt phase claims. Petitioner does not proffer that Simon's legal judgment was correct or insufficient, and in fact he was successful in overturning Petitioner's death sentence.

In Pet. Exh. 13j, Joseph Schlesinger, supervisor of the federal defender habeas unit, wrote in his declaration that he conferred with Simon and concurred in his judgment that they were legally barred from raising guilt claims. Petitioner does not offer any argument that this judgement was in error or prejudicial.

None of the declarations attached by Petitioner to the petition show a violation of IAC under the *Strickland* standards. The declarations also do not cover all of the counsel who represented Petitioner, and many declarations refer to the limited scope of their assignment from other counsel about whom there is no proffered evidence.

Because there has been no showing of prejudicial ineffective assistance of counsel, Respondent urges these claims be denied.

D. Timely and Successive Petition Analysis

The applicable legal standards for timely and successive petition analysis under the *Reno*, *Waltreus*, *Dixon, Miller* and *Clark/Horowitz* rules are described in section VI(C)(1).

Petitioner offers no explanation for the substantial delay in raising this claim; the earliest counsel was operating in the 1980s, while the last counsel cited as insufficient by Petitioner ceased representation in 2012. No good cause or *Clark* exception is proffered by Petitioner, and Respondent cannot identify an exception: there is no error of constitutional magnitude, there is not a showing of actual innocence based on new evidence such that no reasonable juror could convict, this is not a death penalty case, and the statute is not invalid. Petitioner's claim is consequently untimely and should be denied.

XIX. CLAIM 15: ALLEGATION OF PETITIONER HAS NOT, AND CAN NEVER, RECEIVE A FAIR TRIAL, IN VIOLATION OF HIS RIGHTS UNDER BRADY V. MARYLAND, HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7

Petitioner's Claim 15 is a general conclusory claim that incorporates by reference Petitioner's Claims 1, 2, 3 4, 5, and 6. Respondent denies this claim in its entirety, which does not appear to state any additional substantive claims beyond those raised elsewhere in the Petition[52]. As stated elsewhere in this Return, "[c]onclusory allegations made without any explanation for the basis of the allegations to do not warrant relief." (*People v. Karis*, supra, 46 Cal.3d at 656.)

XX. CLAIM 17: ALLEGATION OF PETITIONER WAS WRONGLY CONVICTED AND IS ACTUALLY INNOCENT HIS CONVICTION VIOLATED HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, SECTION 7; AND HIS RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHT AMENDMENT

[52] Respondent's denial includes its denial elsewhere as appropriate that claims are substantially delayed or barred by the successive petition rules in *Waltreus*, *Clark*, and *Reno*.

Petitioner's Claim 17 raises an actual innocence claim; in Petitioner's own words, "Petitioner realleges the allegations of Claims 1-13 and 15 above and asserts he is factually innocent of the charges of first degree pre-meditated murder with special circumstances." (Pet. 198.)

Respondent denies this claim here as it has individually in sections VI – XIX of this Return[53]. As discussed above, the threshold required for relief on actual innocence must "necessarily be extraordinarily high." (*Herrera v. Collins*, supra, 506 US 417.) As demonstrated throughout this Return, Petitioner has failed to meet that.

Here, he repeats claims about the "planted gun" theory, debunked in section VI and implicitly conceded by Respondent in his Third Supplemental filing; the "blood evidence" theory, repeating his claim (denied in section X) that there was no blood on his clothing despite claims elsewhere in his filing discussing that blood; and the "height disparity" theory, denied in section VII, despite the presence in the record as to credible evidence about the victim's height. (Pet. 196.)

He further repeats his claims about inconsistent witness statements, including those of Brown (denied in section XI), Lewis (denied in section IX, among other places), and Hammett (denied in section X). New to this section, he alleges that Christina Menchaca's statement to police (Petitioner does not proffer an exhibit reference, but one statement is attached as Pet. Exh. 4x) implies that Petitioner was not with them at the time of the murder, though Petitioner then immediately acknowledges that "she told police that Petitioner was in Calwa when the victim was shot." (Pet. 197.) None of these claims meet the "extraordinarily high" threshold for relief, especially because habeas relief is not appropriate for disputed questions of fact from the time of trial. (*Scoggins*, supra, 9 Cal.5th at 673.)

[53] Just as above, Respondent's denial includes its denial based on the timeliness and successive petition rules as outlined appropriately elsewhere in this Return.

XXI. CLAIM 19: ALLEGATION OF PETITIONER'S CONVICTIONS AND LWOP SENTENCE MUST BE VACATED BECAUSE OF THE CUMULATIVE EFFECT OF ALL OF THE ERRORS AND CONSTITUTIONAL VIOLATIONS AND THE PREJUDICE ARISING THEREFROM, ESTABLISHED IN THIS PETITION

Finally, Petitioner argues that he was prejudiced by the cumulative impact of the alleged errors set forth in the preceding arguments and was deprived his due process right to a fair trial and penalty phase and related constitutional rights. (Pet. 201.) He seeks habeas corpus relief as a result of the cumulative prejudice of these errors.

However, he cannot show that he was denied a fair trial or penalty phase because he failed to show any error or that he suffered prejudice as a result of any particular error or combined errors. (See sections VI through XX, above.)[54]

Because Petitioner has failed to show error or that he suffered prejudice as a result of any particular error or combined error in either the guilt or penalty phase, he has failed to show he was denied a fair trial or otherwise prejudiced as a result of any cumulative error. (See, e.g., *People v. Martinez* (2010) 47 Cal.4th 911, 968 [finding cumulative impact of two arguable errors in prosecutor's argument, which were harmless when considered separately, did not result in prejudice to defendant in penalty phase] (Martinez); *People v. Panah* (2005) 35 Cal.4th 395, 479-480 [no cumulative error in penalty phase where court identified few errors and such errors are harmless].)

Defendants are entitled to "a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, overruled on another ground in *Martinez*, supra, 47 Cal.4th at p. 948, fn. 11; *People v. Barnett*, supra, 17 Cal.4th at p. 1182; see also *People v. Horning*, supra, 34 Cal.4th 871, 913 [no denial of right to fair trial where there was "little, if any error to accumulate"].) There is no reasonable possibility of a result more favorable to Petitioner in the absence of any of the alleged errors and their cumulative impact was

[54] Including Respondent's denial of timeliness under *Waltreus*, *Clark*, *Reno* and their related cases as stated fully in each individual section.

harmless beyond a reasonable doubt. (*People v. Brown* (1988) 46 Cal.3d 432, 448; *Chapman v. California* (1967) 386 U.S. 18, 24.)

Finally, Petitioner claims cumulative error. "In theory, the aggregate prejudice from several different errors occurring at trial could require reversal even if no single error was prejudicial by itself." *(Reno, supra,* 55 Cal.4th at p. 483.) Because there was no single error here; there can be no cumulative error. *(Ibid.)* And even assuming there were multiple errors, they did not combine to prejudice Petitioner or render his trial fundamentally unfair. This claim therefore should be denied.

CONCLUSION

The amended petition for writ of habeas corpus should be denied and the order to show cause discharged.

Dated: July 21, 2023

Respectfully Submitted,

LISA A. SMITTCAMP
Fresno County District Attorney

ROBERT L. VENEMAN-HUGHES
Sr. Deputy District Attorney

RESPONDENT'S EXHIBIT A

Sr. DAI Isaac's 8/20/2021 Report

Report # 78DA000001 - Supplemental - 1 Report

REPORT DATE / TIME	EVENT START DATE / TIME - EVENT END DATE / TIME	PRIMARY REPORTER
Aug 20, 2021 11:46	Aug 20, 2021 09:00 - 09:30	Danielle Isaac #Z004

SUPPLEMENT TYPE

Assisting narrative

NARRATIVE

Source:

On 8/20/2021, at 0900 hours, Deputy District Attorney Amythest Freeman and I viewed evidence at the Exhibits Clerks Office on the 4th floor of the main courthouse.

Investigation:

DDA Freeman wanted to view in person an item of evidence that she only had photographs of. The item or exhibit number is 5-A. It is a black leather holster with a silver colored metal clip. There are markings on the back of the metal clip that include a date and some initials. There is a question about the date on the clip not matching the date it was booked in to evidence or the date of the crime.

I contacted the Exhibits Clerks Office and made arrangements to view the exhibit on 8/20/2021 at 0900 hours. DDA Freeman and I arrived and met with Juan Menses, the Exhibits Clerk. Menses also made arrangement to have a court deputy assist us in viewing the evidence. Deputy Yoshida arrived and we all went in to a conference room. Deputy Yoshida and I were the only two to touch the evidence and we did so with latex gloves on our hands.

The metal clip appeared to be etched with the initials TL III and the date 2-10-7 and the last number is the questionable date. It is very light compared to the TL III. On 2/21/2019, I interviewed retired Detective Tom Lean. He said in 1978 it was common to using an etching tool or sharpie to mark evidence. His normal format for marking evidence was his initials TL III.

I looked at the metal clip and initially could not tell what the last number was. Deputy Yoshida looked at the metal clip for a while and said he could see that it was an 8, which is what matches the year of the crime and the date other items of evidence were booked and the evidence tags. I looked and the metal clip again, holding it a eye level and tilting it towards my face and I was also able to see that the number was an 8. I was able to take 3 photographs while holding the metal clip in this position and was able to capture reasonably clear photos that show the number is in fact an 8. I printed the photographs and provided them to DDA Freeman.

On 8/20/2021, DDA Freeman also asked me to look at a CLETS hit of a handgun and interpret some of the abbreviations and information contained in the CLETS hit. I'm familiar with this type of document from my 22 years as a sworn law enforcement officer and prior to being sworn I worked for the Fresno County Sheriff's Office as a records clerk and dispatcher.

The CLETS hit is addressed to Christensen and Lean which were detectives on this case. It is dated 2-10-78, which would be the date they received the CLETS hit. The first portion of the hit says the gun was reported stolen and to

REPORTING OFFICER SIGNATURE / DATE	SUPERVISOR SIGNATURE / DATE
Danielle Isaac #Z004 Aug 20, 2021 16:08 (e-signature)	CLARK CRAPO Aug 23, 2021 11:05 (e-signature)
PRINT NAME	PRINT NAME
Danielle Isaac #Z004	CLARK CRAPO

confirm the stolen status with the agency that took the stolen gun report. Near the bottom of the hit it indicates the gun was reported stolen to Sacramento PD on 6-7-73 and their case number is 7317877. The hit also has all of the identifying information for the gun, such as the serial number, make, caliber, type and the date of transaction, which for the stolen gun is 6-7-73. FCN is the file control number and the first three numbers indicate the agency and the rest of the numbers are specific to this log entry. ORI is the originating agency number, which each agency has their own designated number. OCA is the original case agency, this is the crime report number for the stolen gun. MIS is a miscellaneous field and indicates the stolen firearm was a 6 shot.

The second portion of the hit is the DROS*, which stands for dealer record of sale. All of the handgun identifiers are the same as the first portion of the hit. The date of transaction is 5-26-73. This indicates the date the gun was sold. It also includes the name and address of the person that purchased the gun, Pat L Crow at 347 S San Joaquin, Stockton.

Based on this CLETS hit Pat L Crow bought the gun on 5-26-73 in Stockton and then reported it stolen to Sacramento PD on 6-7-73.

INVOLVED PERSONS

INVOLVED PERSON-1 NAME (LAST FIRST MIDDLE)			DOB / ESTIMATED AGE RANGE
P-1 Stankewitz, Douglas Ray			1958-05-31
SEX	RACE / ETHNICITY	PHONE NUMBER	EMAIL ADDRESS
Male	American Indian / Unknown		
HOME ADDRESS			BEEN AT LOCATION SINCE
INVOLVEMENT TYPE			
Other - Suspect			

REPORTING OFFICER SIGNATURE / DATE	SUPERVISOR SIGNATURE / DATE
Danielle Isaac #Z004 Aug 20, 2021 16:08 (e-signature)	CLARK CRAPO Aug 23, 2021 11:05 (e-signature)
PRINT NAME	PRINT NAME
Danielle Isaac #Z004	CLARK CRAPO

RESPONDENT'S EXHIBIT B

Sacramento PD Records
Produced 5/16/2023

DECLARATION OF CUSTODIAN OF RECORDS

I, SENTA PEIRSOL, do solemnly declare as follows:

1. I am a Supervisor of the Records Division of the Sacramento Police Department. I have personal knowledge of the facts set forth in this declaration and, if called upon to do so, I could and would testify to the following facts.

2. I have custody of or controlled access to, records of the Sacramento Police Department prepared during the normal course of business at or near the time of the act, condition or event recorded therein.

3. That the attached copies of report 1973-17877 and 1973-1877 are true and exact duplications of the original documentation on file with this Department.

4. That no Personnel records could be located identifying a Sacramento PD officer with badge number 351 in 1973.

5. This declaration is submitted in response to a Superior Court of California, County of Fresno subpoena issued in the matter of *The People of the State of California v Douglas Stankewitz*, case number CF78227015.

I declare under penalty of perjury according to the laws of the State of California that the foregoing is true and correct.

Executed on May 16, 2023, in Sacramento, California.

S. Peirsol
SENTA PEIRSOL
Supervisor
Sacramento Police Department

[redacted]

OFFENSE/CASUALTY REPORT

[redacted]

CRIME DEFINITION: Grand Theft [illegible]

[redacted]

REFERRED TO: Perry

[redacted]

Pat [redacted] | 15 ADDRESS: 347 S. San Joaquin | 17 TELEPHONE: 462-9905

[redacted]

20 RES. PHONE: 462-9905

21 BUS. PHONE:

OCCUPATION: [illegible]

[redacted]

28 VICTIM'S CONDITION, EXTENT OF INJURY

[redacted] ☐ S.M.C. ☐ CITY EMERGENCY ☐ PRIVATE CARE ☐ OTHER | 31 VICTIM TAKEN BY | 32 VICTIM ATTENDED BY

[redacted] ☐ CITY JAIL ☐ PRIVATE CARE ☐ COUNTY JAIL ☐ OTHER ☐ JUVENILE HALL | 34 DATE TRANS. / /

[redacted] 3 ☐ SERVICE STATION 4 ☐ CHAIN STORE 5 ☐ RESIDENCE 6 ☐ BANK 7 ☑ OTHER

east side of park

DESCRIBE BRIEFLY HOW OFFENSE WAS COMMITTED: IF BURGLARY - POINT OF ENTRY, METHOD OF ENTRY, ETC.

removed pistol from bag

1 ☐ FORCIBLE ENTRY
2 ☐ ATTEMPTED FORCE
3 ☑ UNLAWFUL ENTRY

37 MEANS OF ATTACK, WEAPONS, TOOLS, TRICK, DEVICE, FORCE USED: 1 ☐ GUN 2 ☐ KNIFE 3 ☐ OTHER WEAPON 4 ☑ HANDS/FEET

38 OBJECT OF ATTACK: Pistol

39 TRADEMARK OR PECULIARITY

40 WHAT DID SUSPECT SAY

41 VEHICLE USED (LICENSE NO., STATE, YEAR, MAKE BODY STYLE COLOR, PECULIARITIES)

[redacted]	2 JEWELRY	3 FURS	4 CLOTHING	5 MISC.	TOTAL
	$	$	$	$ 44.63	$ 44.63

43 PERSONS ARRESTED	44 CHARGE	45 DATE	46 SPD NUMBER	47 ENTERED BY
				48 SIGNATURE

DETAILS: SUSPECTS - NA ☑ PROPERTY TAKEN - NA ☐ PHYSICAL EVIDENCE - NA ☑ VICTIM'S STATEMENTS - NA ☐ WITNESS STATEMENTS - NA ☑ OBSERVATIONS - NA ☑

TAKEN: Titan automatic pistol, .25 ca, 13 oz, length 4-7/8",
6 shot ser# 146425
1530, 6-7-3 R.P. Pat Crow came to counter to report
theft of the above pistol taken from a sm. overnight
bag. Victim fell asleep on [illegible] Plaza Park
Culprit removed pistol & left. There were no
witnesses [illegible]

49 REPORTING OFFICER	50 BADGE	51 DIV.	55 APPROVING SUPERVISOR	56 BADGE
Perry	6044	4		
52 ASSISTING OFFICER	53 BADGE	54 DIV.	57 CONNECT-UP NUMBERS	

SPD 100 (6-72)

GUN/FIREARM

SER/ 1[illegible]485 MAK/ T/A CAL/ 25 TYP/ PA DOT/ 060723
Serial # Make Caliber Type Date of Theft

OCA/ 731777 MIS/ 6 shot
Orig Ag Case # Miscellaneous (Limit to 22 spaces.)

ARTICLE/PROPERTY

File Control # 43073158174

Category (CAT/) For TT use only. _____

Article (ART/) _____

Serial # (SER/) _____

Brand (BRA/) _____

Model # (MOD/) _____

Date of Theft (DOT/) _____

Agency Case # (OCA/) _____

Document Code (DOC/) _____

(E – Evidence, S – Stolen, F – Found, L – Lost, O – Observation, P – Pawn, B – Buy)

Entry Code (ENT/) _____

(#1 – Calif. only. #2 – Calif. and NCIC.)

Officer Name & Detail (REF/) _____

Miscellaneous (MIS/) _____

Miscellaneous (Limit to 42 spaces.)

(If any entries required on boats and/or securities, contact Teletype Operator.)

DIRECT _____ APB _____ NUMBER _____ PDS

TO: _____

ATTN: _____

RE: _____

Our Case # _____ By Officer _____ Division _____ Date & Time _____

WM. J. KINNEY, COP, SACRAMENTO

SACRAMENTO POLICE DEPARTMENT

SUPPLEMENTARY INVESTIGATION REPORT

CLASS. GT REPORT NO. 23-12827

COMPLAINANT OR VICTIM	Crow, Pat		
ADDRESS	347 S San Joaquin	PHONE: Res.	Bus. 744-1623

2230 6-17-73. Deputy Daniel Conto, Yolo Sheriff's Office, Badge 152, transferred to ctr by Det Div to relate the following information.

Deputy Conto received phone call from victim Crow at approx 2106, 6-17-73. Crow told Conto he had some info regarding stolen gun as Conto met him at La amistad Bar on Jefferson Blvd. & Clarksburg Rd. Conto arrived at Bar at approx 2110.

Crow, who works at Labor camp in Clarksburg, said a fellow-worker at camp saw Jesus Cisneros, DMA 5-2, long blk hair, with a gun that resembled one taken from Crow. Cisneros was also shooting gun near Camp and Conto ran him out of camp today, 6-17-73.

Crow said Cisneros usually hangs around Plaza Park here in Sacramento and has been known to make a living rolling drunks.

REPORTING OFFICER/S	STAR	UNIT	DATE	TIME
REVIEWED BY:				

SPD 155 (11-72)

SACRAMENTO POLICE DEPARTMENT

SUPPLEMENTARY INVESTIGATION REPORT

CLASS 487.3 PC

REPORT NO. 73-17877

COMPLAINANT OR VICTIM			
ADDRESS	CROW, PAT 347 S. SAN JOAQUIN	PHONE: Res.	Bus. 944-1673

1415 6-18-73 THE VICTIM CONTACTED PO IN THE METRO DETAIL OFFICE. AT THIS TIME THE VICTIM TOLD PO THAT THE PASS. SUSPECT IN THIS OFFENSE WAS IN PLAZA PARK. PO. SST. JORGENSEN AND THE VICTIM WENT TO PLAZA PARK AND LOCATED JESUS CESROS DOB 11-19-37. A SEARCH OF CESROS WAS MADE FOR THE STOLEN PROPERTY WITH NEG RESULTS. CESROS TOLD PO THAT HE did NOT HAVE THE STOLEN COIN AND does NOT KNOW WHO MAY HAVE IT OR who may HAVE TAKEN IT.

REPORTING OFFICER/S AYRES	STAR 179	UNIT METRO	DATE 6-18	TIME 1431
REVIEWED BY:				

SPD 156 (11-72)

73-1877

73-1877

SACRAMENTO POLICE DEPARTMENT

REPORT FILE FACE SHEET

TO BE ATTACHED WHEN A JUVENILE

IS NAMED AS DETAINED, ARRESTED, OR SUSPECT

Any time this report is duplicated

this face sheet must be attached.

JUVENILE

THIS REPORT IS CONFIDENTIAL

As per T.N.G. vs SUPERIOR COURT

SPD 125 .6-72

INDEXED

CLEARED

SACRAMENTO POLICE DEPARTMENT

OFFENSE/CASUALTY REPORT

REQUESTED: YES [ ] NO [X]

73-1877

PAGE 1 OF

5 CRIME DEFINITION: PETTY THEFT-SHOPLIFT

LOCATION: ... PASO BET ELCAMINO & PLAZA

12 REPORTED TO

13 DATE REPORTED: 1-17-73

15 REPORTING PERSON: ... TOM J 27

16 ADDRESS: 1708 12th St

17 TELEPHONE: 446 2692

19 VICTIM'S ADDRESS: 2421 DEL PASO

20 RES. PHONE

22 CITY AND STATE: SACTO CALIF

ZIP CODE: 95815

23 BUS. PHONE: 9258006

... #155

VICTIM'S OCCUPATION | 25 SEX | 26 DESCENT | 27 AGE | 28 BIRTHDATE | 29 VICTIM'S CONDITION: EXTENT OF INJURY

VICTIM TAKEN TO: [ ] SMC [ ] CITY EMERGENCY [ ] PRIVATE CARE [ ] OTHER

31 VICTIM TAKEN BY

32 VICTIM ATTENDED BY

VICTIM TRANSFERRED TO: [ ] CITY JAIL [ ] COUNTY JAIL [ ] JUVENILE HALL [ ] HOSPITAL [ ] PRIVATE CARE [ ] OTHER

34 DATE TRANS. / /

WHERE OFFENSE OCCURRED (PROPERTY ATTACKED): 2 [ ] COMMERCIAL HOUSE 3 [ ] SERVICE STATION 4 [X] CHAIN STORE 5 [ ] RESIDENCE 6 [ ] BANK 7 [ ] OTHER

STORE S...

36 DESCRIBE BRIEFLY HOW OFFENSE WAS COMMITTED. IF BURGLARY - POINT OF ENTRY, METHOD OF ENTRY, ETC.

WENT TO ...

WALKED ...

1 [ ] FORCIBLE ENTRY
2 [ ] ATTEMPTED FORCE
3 [ ] UNLAWFUL ENTRY

37 MEANS OF ATTACK, WEAPONS, TOOLS, TRICK, DEVICE, FORCE USED: 1 [ ] GUN 2 [ ] KNIFE 3 [ ] OTHER WEAPON 4 [X] HANDS/FEET

38 OBJECT OF ATTACK: Poss ...

39 TRADEMARK OR PECULIARITY

40 WHAT DID SUSPECT SAY

41 VEHICLE USED (LICENSE NO., STATE, YEAR, MAKE, BODY STYLE, COLOR, PECULIARITIES)

PROPERTY STOLEN VALUE	1 MONEY	2 JEWELRY	3 FURS	4 CLOTHING	5 MISC.	TOTAL
	$	$	$	$	$ 3.38	$

PERSONS ~~ARRESTED~~ CITED: Collar, E...

CIT. # 5244...

CHARGE | 45 DATE: 1/17/... | 46 SPD NUMBER | 47 ENTERED BY

48 SIGNATURE

DESK

DETAILS: SUSPECTS - NA [ ] PROPERTY TAKEN - NA [ ] PHYSICAL EVIDENCE - NA [ ]

VICTIM'S STATEMENTS - NA [ ] WITNESS STATEMENTS - NA [ ] OBSERVATIONS - NA [ ]

Mo... Bl...

Tak...

1 Pi...

49 REPORTING OFFICER: D. H. ...

50 BADGE | 51 DIV. | 55 APPROVING SUPERVISOR | 56 BADGE

52 ASSISTING OFFICER | 53 BADGE | 54 DIV. | 57 CONNECT-UP NUMBERS

SACRAMENTO POLICE DEPARTMENT

SUPPLEMENTARY INVESTIGATION REPORT

CASS 484 P.C. REPORT NO 23-1877

COMPLAINANT OR VICTIM SAFEWAY #155

ADDRESS 2421 DEL PASO | PHONE: Res. | Bus 925 8006

REPORTING PERSONS STATEMENTS

WHO HES I-M CONTACTED CHELES TOM J MWZ7
RES 1708 12TH ST 916 2697 AT THE SAFEWAY
STORE WHERE HE IS EMPLOYED AS A CLERK

HE STATES THAT [illegible] PICK UP A WINE
BOTTLE OF [illegible] AND PLACED IT INTO THE
FRONT OF HIS [illegible] AROUND TO THE
NEXT COUNTER.
STATES WHEN [illegible] APPROACHES HE HAS
NO ATTEMPT [illegible]
STATES HE [illegible] AND
HE SAID [illegible]
BACK WITH THE BOTTLE IN HIS POSSESSION.

WHILE [illegible]
OF INK [illegible]
W[illegible]
WAS TAKEN [illegible] 2421 T.

THE B[illegible]

REPORTING OFFICER/S	STAR	UNIT	DATE	TIME
D.A. [illegible]				
REVIEWED BY: [signature]	402			

PAGE [illegible] OF [illegible]

RESPONDENT'S EXHIBIT C

Sr. DAI Isaac's 3/14/2023 Report

Report # 78DA000001 - Supplemental - 3 Report

REPORT DATE / TIME	EVENT START DATE / TIME - EVENT END DATE / TIME	PRIMARY REPORTER
Apr 11, 2023 15:23	Mar 14, 2023 08:00 - 08:00	Danielle Isaac #Z004

REPORT DESCRIPTION

Follow-up PC187

SUPPLEMENT TYPE

Assisting narrative

NARRATIVE

SOURCE:

On 3/14/2023, DDA Peterson forwarded the following email to me.

Dear Kelsey,

FACL has verbally informed us that the holster has an engraving of 7-25-73 with '351' next to it. Can you please provide us with the Fresno Police Dept and Fresno County Sheriff's Dept officers who had badge number 351 in 1973?

Thanks

Alexandra

Alexandra Cock, Paralegal

Stankewitz Legal Team

www.justiceforchief.org

415-250-3008

P O Box 7225

Cotati, CA 94931

VICTIM STATEMENT:

None.

WITNESS STATEMENT:

None.

INVESTIGATION:

I contacted Fresno County Sheriff's Department, human resources and spoke to Rita Gonzalez. I explained that I was looking for who had badge number 351 in 1973. Rita Gonzalez advised me that they only had records of badge numbers back to 1988 and there was no way to know who had badge number 351 in 1973.

REPORTING OFFICER SIGNATURE / DATE	SUPERVISOR SIGNATURE / DATE
Danielle Isaac #Z004 Apr 11, 2023 16:00 (e-signature)	CLARK CRAPO Apr 11, 2023 16:42 (e-signature)
PRINT NAME	PRINT NAME
Danielle Isaac #Z004	CLARK CRAPO

I contacted Fresno Police Department, prosecution liaison office and spoke to Melissa Flores. She checked their records to see who had badge number 351 in 1973. She advised that badge number did not exist.

I was unable to determine who if anyone had badge 351 in 1973.

EVIDENCE:

None.

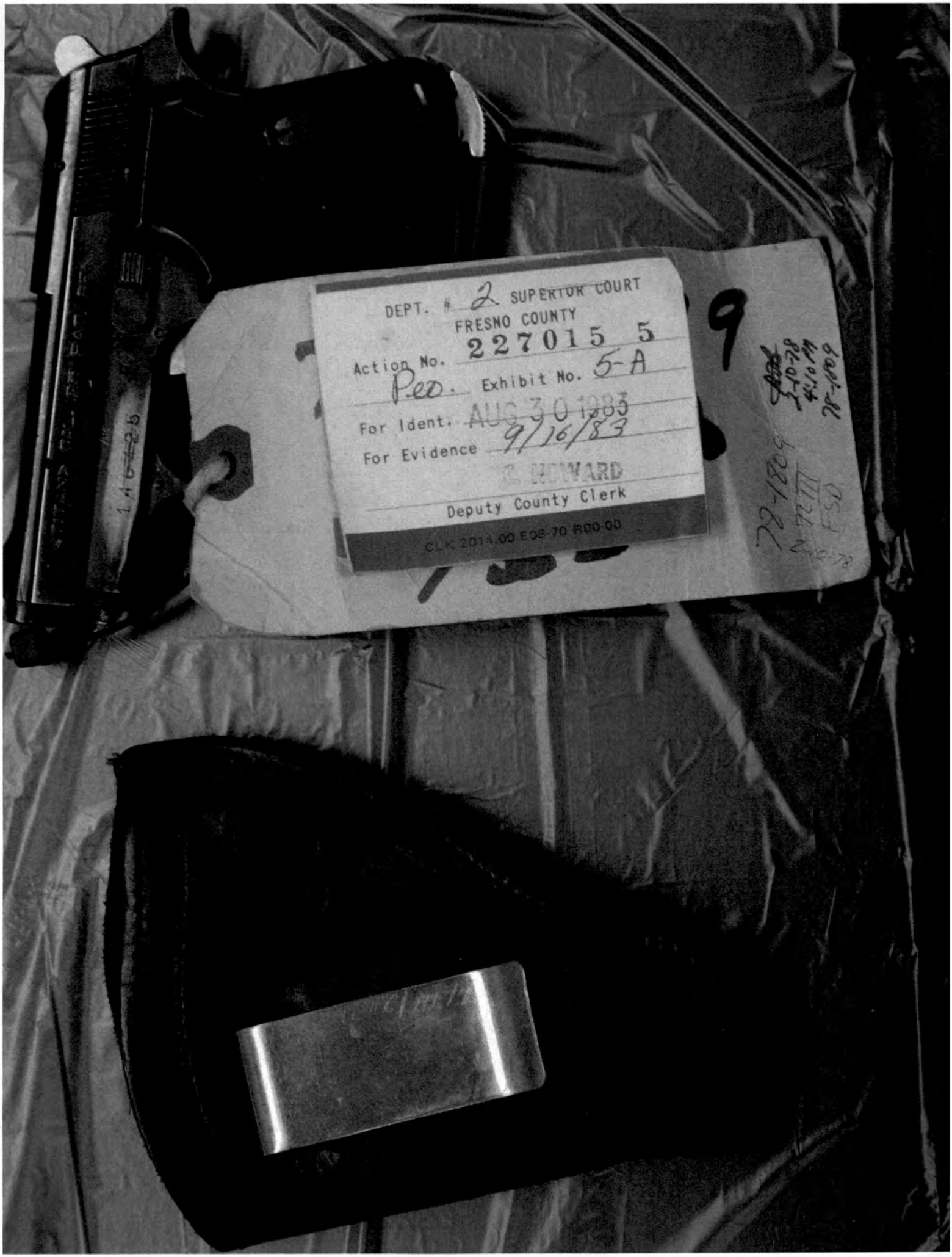
ADDITIONAL INFORMATION:

None.

REPORTING OFFICER SIGNATURE / DATE	SUPERVISOR SIGNATURE / DATE
Danielle Isaac #Z004 Apr 11, 2023 16:00 (e-signature)	CLARK CRAPO Apr 11, 2023 16:42 (e-signature)
PRINT NAME	PRINT NAME
Danielle Isaac #Z004	CLARK CRAPO

RESPONDENT'S EXHIBIT D

Photo of Court Exhibit 5-A


DEPT. # 2 SUPERIOR COURT
FRESNO COUNTY
Action No. 227015 5
Peo. Exhibit No. 5-A
For Ident. AUG 30 1983
For Evidence 9/16/83
Deputy County Clerk
CLK 2014.00 E08-70 R00-00

RESPONDENT'S EXHIBIT E

Final Order, 1:91-cv-00616-AWI
Issued 12/22/2000