SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

In re

DOUGLAS R. STANKEWITZ,

On Habeas Corpus.

Case No.
21CRWR685993

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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STATEMENT OF THE CASE

On February 8, 1978, Petitioner Douglas Stankewitz (hereinafter "Stankewitz"), along with several accomplices, was arrested for the robbery, kidnapping, and murder of Theresa Graybeal. Stankewitz's trial in the Fresno County Superior Court began in August of 1978 and concluded the following month. James Ardaiz was the prosecuting attorney. Stankewitz was found guilty of murder, kidnapping, and robbery and two special circumstance allegations were found true. Stankewitz was sentenced to death at the conclusion of the punishment phase.

In 1982, Stankewitz's conviction and sentence were overturned by the California Supreme Court after they held the trial court erred when it failed to conduct a pretrial competency hearing after substantial evidence had been presented regarding Stankewitz's lack of mental competency at the time of the trial. The California Supreme Court also held the lower court erred when it failed to address the irreconcilable conflict between Stankewitz and his counsel. The case was remanded back to the trial court for a new trial. (*People v. Stankewitz*, 32 Cal.3d 80.)

In 1983, Stankewitz was tried a second time after the issue of competency was fully addressed, the Public Defender was relieved, and a private attorney was appointed. The prosecutor during the second trial was Warren Robinson. Stankewitz was again found guilty of murder, kidnapping, and robbery, with the special circumstance allegations being found true. The jury again sentenced Stankewitz to death. The California Supreme Court affirmed the guilt, special circumstances, and penalty findings. However, in 2012, after extensive litigation, the Ninth Circuit Court of Appeals affirmed

the District Court's grant of habeas relief and directed the State of California to vacate and set aside the death sentence unless the State of California initiated proceedings to retry Stankewitz's sentence or to resentence Stankewitz to life without the possibility of parole. (*Stankewitz v. Wong,* 698 F. 3d 1163.)

On April 19, 2019, the Fresno County District Attorney's Office requested that the court resentence Stankewitz to life without the possibility of parole. The court did so on May 3, 2019, also denying a request by Stankewitz to continue the case for a motion to dismiss and Trombetta motion. On October 2, 2020, Stankewitz filed a Writ of Habeas Corpus in the Fifth District Court of Appeals which was dismissed without prejudice in order for Stankewitz to exhaust his remedies in the Superior Court. On March 8, 2021, Stankewitz filed an Amended Emergency Petition for Writ of Habeas Corpus in the Superior Court. On June 2, 2021, this Court requested an informal response from the Attorney General's Office. On June 17, 2021, the Attorney General's Office filed a letter declining to respond, deferring the informal response to the District Attorney's Office. The People in turn requested an extension of time to September 1, 2021, to respond. That request was granted by this Court.

STATEMENT OF FACTS

On the evening of February 7, 1978, Stankewitz, then 19 years old, left Sacramento driving a white Oldsmobile. He was headed to Fresno. In his company were his mother and brother, an older man named J.C., and three young companions, Marlin Lewis, Tina Topping, and fourteen-year-old Billy B.

The group reached Manteca about 1 a.m. on February 8, and stopped at a 7-Eleven store to buy oil for the car. Manteca police observed the car irregularly parked and ran a check on the license plate. Information was received indicating that the car had been stolen. Several officers then approached the car and frisked several of the occupants. One of the passengers who identified herself as "Tina Lewis" stated that the car had been borrowed from her uncle in Sacramento. Based on that information the officers contacted Sacramento police, but were unable to determine whether the car had in fact been stolen. The officers asked the group to follow them to the police station. Another attempt was made to contact the vehicle's owner without success. After about an hour and a half, they were allowed to leave, but the vehicle was impounded. Before departing, the group obtained directions to the local bus depot.

The bus depot was not open when they arrived, so they waited in a nearby donut shop. After several hours, Stankewitz, Tina Topping, Marlin Lewis, and Billy B. decided to hitchhike. Stankewitz's mother and brother and J.C. remained at the station. Stankewitz and his three companions succeeded in hitchhiking as far as Modesto. Unable to get a ride any farther, the four walked to a nearby Kmart, where Stankewitz announced that they were "going to look around for a car." Stankewitz and Tina Topping proceeded to look for a car — apparently to steal — in the parking lot; Billy eventually went inside the Kmart. When Billy exited, he saw Topping pointing toward a woman walking to her parked car. Stankewitz, Marlin Lewis, and Topping followed the woman; as she opened her car door, Topping pushed her inside and entered the car herself. Marlin Lewis then jumped in the backseat and opened the passenger side door, admitting Stankewitz. Topping honked the car horn. Billy, in response, started to walk back toward the store; Topping shouted "come on" and Billy reversed field, ran to the car, and got in the backseat with Marlin Lewis. In the meantime,

Stankewitz had produced a pistol, and Marlin Lewis produced a knife. They exited the Kmart parking lot, Tina Topping driving, the victim — Theresa Graybeal — seated on the console, and Stankewitz seated next to her in the passenger seat; Billy B. and Marlin Lewis were seated in the back. The group proceeded to the freeway and turned south toward Fresno. Once on the freeway, Ms. Graybeal stated that none of this would have happened if she'd had her dog with her. Stankewitz responded by pulling out his gun and stating, "This would have took care of your dog." After several miles, Tina Topping asked Ms. Graybeal for money and Ms. Graybeal took $32 from her purse and handed it to Marlin Lewis. She also gave Topping her wristwatch, with the comment that she could put in an insurance claim for the loss.

When the group arrived in Fresno they drove directly to a bar called the "Joy and Joy." Tina Topping went into the bar and returned after a few minutes with a woman named Christina Menchaca. Menchaca joined the group, now totalling six, and they drove around the corner to the Olympic Hotel. Topping and Menchaca went into the hotel. A few minutes later they returned to get Stankewitz and all three then reentered the hotel. Several minutes later Stankewitz returned to retrieve the pistol from Marlin Lewis. Shortly thereafter, Stankewitz, Topping and Menchaca returned to the car. They appeared to be moving more slowly; their eyes were glassy. Tina Topping then suggested they go to Calwa to "pick up," a slang expression meaning to obtain heroin. They drove to Calwa, stopping near a house with a white picket fence. Topping told everyone to get out, she did not want a lot of company when they went to "pick up." Several of the group exited the car, including Billy B., Marlin Lewis, Stankewitz, and the victim, Ms. Graybeal. Billy asked the victim for a cigarette; she gave him one and took one for herself. After two or three minutes, Topping told Billy to get back in the car. Billy reentered the car along with Marlin Lewis. From inside the

car, Billy saw Stankewitz walk toward Ms. Graybeal, who was standing five or six feet away. Ms. Graybeal was facing away from the car. Stankewitz raised the gun in his left hand, braced it with his right hand, and shot her once in the head from a distance of about one foot. Ms. Graybeal fell to the ground, fatally wounded. Stankewitz returned to the car and said, "Did I drop her or did I drop her?" Marlin Lewis responded, "You dropped her." Both were giggling. As the car pulled away, defendant cautioned Tina Topping to drive slowly so they would not get caught. Marlin Lewis observed that the victim's purse was not in the car and concluded, "we made a bad mistake."

After returning to Fresno, the group drove to the Seven Seas Bar and Christina Menchaca went inside to try to sell the victim's watch. Stankewitz asked her to try to get $60 for it. While Menchaca and Marlin Lewis were inside the bar, two police officers approached the car. Tina Topping told Billy B. to give a false name. He did so and after some brief questioning the officers left. Menchaca returned saying that she had not succeeded in selling the watch and Stankewitz suggested they move on and try to sell it in Clovis. Stankewitz 's efforts to sell the watch, however, were also unsuccessful. In Clovis a girl informed Billy that his mother had filed a missing person's report on him. Billy asked to be driven home to Pinedale. When he arrived home, Billy B. began to cry and told his mother what had happened. His mother called the police and an investigator came to the house and took a statement from Billy. Later that evening, Fresno police apprehended Stankewitz, Tina Topping, and Marlin Lewis, still in possession of the victim's car. The pistol that had been used to kill Ms. Graybeal was found in the car. Her watch was recovered from the jacket of Christina Menchaca, who was arrested nearby.

Although the foregoing account of the murder came primarily from Billy B., other witnesses corroborated various portions of the account in

their statements to investigating detectives. Ms. Graybeal's father confirmed that she had left his residence on the evening of the murder to pick up some cigarettes at Kmart; she was driving her father's car, the vehicle in which Stankewitz was later apprehended. He also testified that the victim owned two dogs. The officers who arrested Stankewitz were called as witnesses, as well the officers who found the victim's body and examined the crime scene. A ballistics expert confirmed that the victim had been shot from a distance of six to twelve inches; an expended shell case found in the vicinity of the body was determined to have been fired from the gun recovered from the victim's car. The victim's handbag and an unlit cigarette were also found near the body. The coroner who performed the autopsy confirmed that the victim had been killed by a single gunshot wound to the neck, severing the spinal cord and causing immediate paralysis and death.

Also introduced at the guilt phase were five yellow sheets of paper seized from Stankewitz 's cell during a routine search for contraband. The handwriting on the papers was identified as Stankewitz's. The papers contained narrative scripts for Tina Topping, Marlin Lewis, and Christina Menchaca indicating how the kidnapping, robbery and homicide had supposedly occurred. These fictional accounts blamed the killing on Lewis.

SCOPE OF HABEAS CORPUS RELIEF

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.) 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. (*Ibid.*) The state devotes considerable resources to criminal trials and appeals. (*Ibid.*)

Habeas corpus, on the other hand, " 'is an extraordinary, limited remedy against a presumptively fair and valid judgment.' [Citation.]" (*In re Reno* (2012) 55 Cal.4th 428, 450; accord, *In re Robbins, supra,* 18 Cal.4th at p. 777; *People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Clark* (1993) 5 Cal.4th 750, 764, 776.) 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,* at pp. 766-767.) "For purposes of a collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence." (*Duvall,* at p. 474; *In re Reno,* at p. 451.) A petitioner thus bears "a heavy burden" to plead sufficient grounds for relief. (*Duvall,* at pp. 474-475; see also *In re Visciotti* (1996) 14 Cal.4th 325, 351.) " '[T]he petitioner must show that the defect so fatally infected the regularity of the trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice. [Citation.]' [Citation.]" (*In re Harris* (1993) 5 Cal.4th 813, 826.)

"Courts presume the correctness of a criminal judgment, for before the state may obtain such a judgment, a defendant is afforded counsel and a panoply of procedural protections, including state-funded investigation expenses, in order to ensure that the trial proceedings provide a fair and full opportunity to assess the truth of the charges against the defendant and the appropriate punishment. Following a conviction, the defendant has the right to an automatic appeal, assisted by competent counsel. If a criminal defendant has unsuccessfully tested the state's evidence at trial and appeal and wishes to mount a further, collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended." (*In re Reno* (2012) 55 Cal.4th 428, 450-451 [internal quotation

marks & citations omitted].) "This limited nature of the writ of habeas corpus is appropriate because use of the writ tends to undermine society's legitimate interest in the finality of its criminal judgments, a point [the California Supreme Court] has emphasized many times." (*In re Reno* (2012) 55 Cal.4th 428, 451.) "One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. Without finality, the criminal law is deprived of much of its deterrent effect. And when a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time, prejudice the government and diminish the chances of a reliable criminal adjudication." (*In re Reno* (2012) 55 Cal.4th 428, 451 [internal quotation marks & citations omitted].) "[T]the availability of the writ properly must be tempered by the necessity of giving due consideration to 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." (*In re Morgan* (2010) 50 Cal.4th 932, 944.) "As one legal scholar put it: A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands punishing criminal acts. There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility." (*In re Reno* (2012) 55 Cal.4th 428, 451 [internal quotation marks & citations omitted].) "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." (*In re Reno* (2012) 55 Cal.4th 428, 451 [internal quotation marks & citations omitted].)

Except for claims of newly discovered evidence (which itself is subject to strict limits) – evidence not presented at trial, claims that the evidence presented at trial was insufficient to support the judgment are not cognizable in a writ of habeas corpus. (*In re Reno* (2012) 55 Cal. 4th 428, 505; *In re Lindley* (1947) 29 Cal.2d 709, 723.)

An informal response is designed to perform a "screening function" and assist this Court in its determination of whether any claims in a post-conviction habeas corpus petition state a prima facie basis for relief or are procedurally barred. (*People v. Romero* (1994) 8 Cal.4th 728, 737, 743.) To plead a prima facie case for relief, a petitioner must "state fully and with particularity the facts on which relief is sought" and "include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." (*Duvall, supra*, 9 Cal.4th at p. 474.) "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." (*People v. Karis* (1988) 46 Cal.3d 612, 656.)[1]

Courts, however, will not assume all factual allegations to be true. (See, e.g., *In re Swain* (1949) 34 Cal.2d 300, 301.) In other words, a petitioner may not simply allege a conclusion of fact or an ultimate fact; rather, he must allege the specific underlying facts that show or establish the ultimate fact itself. (See *Duvall, supra*, 9 Cal.4th at p. 474; see, e.g., *In re Seaton* (2004) 34 Cal.4th 193, 206; *In re Swain, supra*, 34 Cal.2d at pp. 301-302.) In addition, a petitioner's obligation to provide specific factual allegations in the petition itself is not satisfied by generally

[1] This is especially true when counsel prepares a petition. (*Karis, supra,* 46 Cal.3d at p. 656.)

"incorporating by reference" the facts set forth in the exhibits to the petition. (*In re Gallego* (1998) 18 Cal.4th 825, 837, fn. 12.)

If no prima facie case for relief is stated, the reviewing court must summarily deny the petition. (*Duvall, supra,* 9 Cal.4th at p. 475.) 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." (*Ibid.*)

Procedural bars exist which limit the availability of habeas corpus relief. (*In re Reno, supra,* 55 Cal.4th at p. 452.) "[C]ollateral review by habeas corpus is not a reiteration of or substitute for an appeal." (*Marks v. Superior Court* (2002) 27 Cal.4th 176, 188.) " 'Habeas corpus will not serve as a second appeal.' " (*In re Harris, supra,* 5 Cal.4th at p. 825.) Nor will it serve as a forum for claims that "could have been presented at trial." (*In re Seaton, supra,* 34 Cal.4th at p. 200.) The "imposition of procedural bars substantially advances important institutional goals," such as protecting the integrity of our appellate and habeas corpus process and vindicating the important public interest in the finality of judgments. (*In re Robbins, supra,* 18 Cal.4th at p. 778, fn. 1; *In re Reno,* at p. 452.) Among the procedural bars which this Court imposes are bars on claims that should have been raised on appeal (*In re Robbins,* at p. 814, fn. 34; *In re Dixon* (1953) 41 Cal.2d 756, 759), and bars on claims that were raised and litigated on appeal (*In re Robbins,* at p. 814, fn. 34; *In re Waltreus* (1965) 62 Cal.2d 218, 225). Such claims may be considered only where a petitioner shows: (1) a claimed constitutional error which is both clear and fundamental, and which strikes at the heart of the trial process; (2) a lack of fundamental jurisdiction; (3) the trial court committed acts in excess of jurisdiction that do not require a redetermination of the facts; or (4) a post-

appeal change in the law that affects the petitioner. (*In re Harris,* at pp. 829, 834-843.)

As will be shown, Stankewitz's claims all fail to state a prima facie case for relief. Accordingly, the Petition should be denied without the issuance of an order to show cause.[2]

RESPONSE TO CLAIMS FOR RELIEF

The People assert that Stankewitz fails to state a prima facie case for relief as to each claim, deny each and every allegation of the Petition, and deny that any of Stakewitz's statutory, regulatory, or constitutional rights are being or have been violated in any way. Therefore, the People request this Court to deny the petition without any further evidentiary hearings.

Actual Innocence Claim

California law allows for a habeas petitioner to bring a "freestanding" claim of factual innocence. In other words, newly discovered evidence of innocence need not be presented in connection with a claim of constitutional error. (See *In re Clark* (1993) 5 Cal.4th 750, 766; compare *Herrera v. Collins* (1993) 506 U.S. 390 [an independent substantive claim of innocence is not itself a cognizable federal habeas corpus claim].) Prior to 2017, common law provided that a habeas petitioner seeking relief for a claim of actual innocence based on the discovery of new evidence was required to show that the newly discovered evidence pointed unerringly to

[2] If this Court summarily denies the Petition, the People respectfully request that this Court do so both on procedural grounds, with citations to the applicable procedural bars and claims, and on the merits. Such an order would facilitate deference to this Court's application of procedural bars in any subsequent federal habeas corpus litigation in this case as well as other California cases. (See *Harris v. Reed* (1989) 489 U.S. 255, 264, & fn. 12 [109 S.Ct. 1038; 103 L.Ed.2d 308][simple one-line statement by state court invoking state procedural bar is sufficient].) Such an order would also minimize the possibility of subsequent de novo review on federal habeas corpus, as federal habeas courts must defer to a state-court merits determination. (28 U.S.C., § 2254, subds. (d)(1)-(2).)

innocence. (*In re Lawley* (2008) 42 Cal.4th 1231, 1239 [newly discovered evidence "must undermine the entire prosecution case and point unerringly to innocence or reduced culpability"] abrogated by Penal Code section 1473.) As of January 1, 2017, a habeas petitioner's burden of proof for claims alleging newly discovered evidence changed significantly when the Legislature's amendment to section 1473 became effective. Now, a petitioner is entitled to habeas corpus relief 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." (Penal Code § 1473 (b)(3)(A).) "New evidence" 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." (Penal Code § 1473 (b)(3)(B).)

In the present case, there has been no new evidence presented, only new opinions and new statements from people who were involved in prior proceedings. Many of the declarations made by people who were involved in the case from 1978 to 1983 included statements that they no longer remember some details about the case, yet the Petitioner extracts portions of statements that were made by these people that support his conclusory theories (Exhibit 1e-Lean interview transcript; Exhibit 1gg-Ardaiz interview transcript). That is not new evidence. The evidence proving Stankewitz's guilt was in fact available at both trials. New opinions about evidence that has been available for decades is also not new evidence (Exhibit 1b-Declaration of Roger Clark).

General Claims of Constitutional Violations

Generally, a petitioner must "affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion

of legal authority." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685.) "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief . . . ." (*Karis, supra*, 46 Cal.3d at p. 656; *People v. Cooper* (1992) 7 Cal.App.4th 593, 597 [regarding conclusory allegations made in a habeas corpus proceeding].) As such, this Court should deny relief on the general claims suggesting constitutional violations. To the extent that Stankewitz has alleged specific constitutional violations supported by factual allegations and legal authority, the People will address each argument as presented in the Petition. However, many of the claims that are raised in the petition refer to the conduct of trial counsel or witnesses during the 1978 trial and/or the penalty phase of the 1983 trial which have both been overturned. In light of the fact that after reversal the parties return to their status before trial (Penal Code §1261), the People assert that all claims based upon those proceedings are moot.

ARGUMENT

I. CLAIM ONE: THE GUN USED TO CONVICT PETITIONER OF MURDER AND SPECIAL CIRCUMSTANCES IS NOT THE MURDER WEAPON IS FACTUALLY INACCURATE

Stankewitz claims that the firearm that was found in Ms. Graybeal's vehicle at the time of Stankewitz's arrest and marked as evidence in both trials was planted by FSO Detective Thomas Lean. This claim is not based upon new evidence, but upon opinions and conclusory statements about evidence that has been in existence since the 1978 murder.

Stankewitz claims that the gun was in Detective Lean's possession before the murder occurred based upon the opinion of Roger Clark regarding the trace report and the engraving on the holster of the murder weapon. However, after inspecting the holster in question, Senior District

Attorney Investigator Danielle Isaac and Fresno County Deputy Sheriff Seth Yoshida both disagree with Mr. Clark's conclusion regarding the engraving (Exhibit A). It is clear that Detective Lean's initials are engraved on the holster, but the corresponding date reads "2-10-1978" (EXHIBIT B). It is noteworthy that the same date is written on the tag attached to the gun itself (EXHIBIT C). Furthermore, Investigator Isaac, who was previously employed as a records clerk and dispatcher with the Fresno Sheriff's Department, was asked to interpret the information contained on the CLETS of the handgun (trace report). Her interpretation of that report is that the gun was reported stolen on 6-7-73 under Sacramento Police Department case number 7317877 and was not recovered until the date of the murder which is consistent with all of the evidence presented at trial.

Stankewitz claims that conflicting descriptions given by law enforcement support his conclusion that the gun was planted. This is an illogical leap. It is not uncommon for witnesses, including law enforcement, to give inconsistent descriptions. There was clearly an attempt to conceal the serial number on the gun (Exhibit C) which isn't uncommon when guns are stolen. When the reports were authored describing the gun as having the serial number removed, officers may not have yet made a determination of what the numbers were prior to being scratched through. Eventually Bonesteel or Lean took the time to make a determination regarding the serial number and determined that it was 146425, which warranted a supplemental note to their reports. Further, the fact that the CLETS report for the gun was ran on 2-10-78 (Petitioner's Exhibit 1a), is consistent with this theory. It was necessary for Detective Lean to make a determination regarding the serial number in order to run the CLETS.

Stankewitz contends that discrepancies in the descriptions about where the gun was found support his theory that the gun was planted. This

opinion is also unsupported. The fact that Bonesteel said he could see the firearm under seat, but pictures only show part of the firearm are not contradictory. It is possible that he took the photographs and later removed and inspected the firearm in order to determine its model and serial number. The Petitioner's statement, however, is contradictory. He states that the photos "don't clearly show a gun" but that the "part of a gun that is visible" does not show a serial number. Bonesteel did not testify that he could see the serial number when the gun was in the vehicle. The fact that the photos show a portion of the gun are consistent with Bonesteel's testimony. The stolen vehicle report authored by Callahan and Rodriguez (Petitioner's Exhibit 1v) also corroborate Bonesteel's testimony. The procedures used for vehicle storage are irrelevant.

The verbage that is used on the internal weapon disposition reports describing Stankewitz's possession of the gun is also irrelevant. Any testimony regarding the firearm being "in Stankewitz's possession" is not necessarily contradictory, as constructive possession has been well established by law (*People v. Scott* (1951) 108 Cal.App.2d 231, 234). However, since the first trial was overturned in its entirety, nothing about that preliminary hearing is relevant.

The fact that .25 caliber shell casings were found near the body of Ms. Graybeal's body are circumstantial evidence that she was shot with a .25 caliber firearm. The shell casings at the scene matching the test fired shell casings are circumstantial evidence that Ms. Graybeal was shot with the weapon with the serial number 146425. Regarding the distance of the casings from Ms. Graybeal's body, as stated previously, statements from human beings, even law enforcement, may sometimes be inconsistent. Nothing that was printed by the media before the 1978 trial that was ultimately overturned is relevant to this action (Petitioner's Exhibit 1ii).

In support of this claim and several others Stankewitz relies upon recent statements from James Ardaiz and Thomas Lean. It is noteworthy that during each of their statements Ardaiz and Lean said several times that they don't remember some facts about the case. They both stated that the case happened a long time ago and implied that their memories have faded. Yet Stankewitz would like to extract portions of the statements that they made to a defense investigator, with none of the reports or notes available to them, in support of his theory that they manufactured evidence. Their foggy recollections about evidence that was collected over forty years ago when caught off guard and unprepared is not new evidence.

II. CLAIM TWO: THE STATE KNEW THAT PETITIONER DID NOT COMMIT THE MURDER, FAILED TO DISCLOSE EVIDENCE, AND PRESENTED FALSE EVIDENCE HAS NO MERIT

It's the People's position that any claims based upon evidence presented in the first trial or during the penalty phase of the second trial are moot as they have since been overturned. During the guilt phase of the 1983 trial, there was sufficient evidence presented for a jury to find Stankewitz guilty beyond a reasonable doubt. The fact that Billy Brown used the word "head" when Ms. Graybeal was shot in the neck does not negate that. Billy Brown consistently stated that he saw Stankewitz shoot Teresa Graybeal which was consistent with the statements of the other co-defendants. Inconsistencies in Brown's statements over time are not uncommon, especially given the fact that he was fourteen years old at the time of the extremely traumatizing incident. Brown pointing out to James Ardaiz that he misunderstood a question at the preliminary hearing and therefore answered it incorrectly, is not false testimony. It is human error.

In addition to Brown's eyewitness testimony, other evidence presented at trial is consistent with Stankewitz's guilt. According to the

autopsy report, Teresa Graybeal was 160 centimeters or 5 feet and 2.99 inches (Petitioner's Exhibit 2b). However, her father, Gerald Pawlowski testified that she was approximately 5 feet, 7 inches (T2 Vol. I, RT 8). Dr. T.C. Nelson testified that the bullet angle was about five or ten degrees (T2 Vol. I, RT 68). Alan Boudreau testified that given Ms. Graybeal's height, the height of the entrance wound and five-degree angle of entry (T2 Vol. I, RT 154), Stankewitz's shoulder height of sixty inches (T2 Vol. I, RT 155) was consistent with the injury.

Mr. Robinson's hypothetical scenario presented to Boudreau in which he stated that Ms. Graybeal was 5 feet, 7 inches was not evidence. The jury was instructed by the judge not to consider an attorney's hypothetical question as evidence (T2 Vol. III, RT 651). Although it was incorrect, it is obvious that it was based upon her father's testimony and it was not an act of intentional deceit by Mr. Robinson. Inconsistencies in the evidence are common given that they are subject to human error. They should not all be given the sinister characterization of "false and misleading". The jury was instructed generally that statements made by the attorneys are not evidence (T2 Vol. III, RT 643). They were also instructed about how to treat inconsistencies in evidence (T2 Vol. III, RT 648) and how to gauge the credibility of witnesses (T2 Vol. IIII RT 647). They followed those instructions and decided that Stankewitz was proven guilty beyond a reasonable doubt.

III. CLAIM THREE: THERE IS NO NEW EVIDENCE THAT WOULD HAVE CHANGED THE OUTCOME OF THE TRIAL

Stankewitz's involvement in the Meraz robbery and kidnap on the night of February 8, 1978, was one of nine aggravating factors used in the penalty phase of the trial. Both the report and property sheet regarding the casings recovered three days after the kidnap and robbery of Mr. Meraz

indicate that the recovered casings were .22 caliber. The People agree this information would be inconsistent with the recovered firearm located in Ms. Graybeal's vehicle, which was a ballistics match to the casing recovered at her murder scene. Since the penalty phase of the second trial was overtured and the Meraz robbery was not presented as evidence during the guilt phase of that trial, the fact that there were two different guns used during those crimes have no bearing upon Stankewitz's guilt for the murder of Ms. Graybeal.

As Stankewitz has been consistent in his "steadfast proclamation of his innocence of the murder", an audio tape of him denying involvement is not new evidence.

Marlin Lewis's statement to Laura Wass is inadmissible hearsay. To conclude that the People had knowledge that Lewis was the murderer solely based upon the fact that they went to interview him in prison is baseless.

Expert opinions that there may be blood on the co-defendants clothing is not new evidence. They are opinions. Furthermore, evidence of blood on the co-defendants clothing does not negate Stankewitz's guilt.

IV. CLAIM FOUR: THE STATE ENGAGED IN MISCONDUCT VIOLATING STANKEWITZ'S CONSTITUTIONAL RIGHTS IS FALSE

Mr. Clark's opinion that processing the car for blood, gunshot residue, and the bullet were "standard practice" in Fresno in 1978 do not make them so. The fact that certain items are missing after more than 40 years and that certain tests were not done that Stankewitz believes should have been done, do not negate the overwhelming evidence that was produced at trial supporting Stankewitz's guilt. Investigators interviewed each of the subjects that were involved in the kidnap of Ms. Graybeal and ultimately concluded based upon those statements that Stankewitz was the shooter.

The physical evidence was consistent with that conclusion. The fact that Ardaiz was involved in the investigation and that he asked detectives to document certain things in reports does not mean that they were fabricated or manipulated. It is not uncommon for witnesses to refer to documents that are not admitted into evidence. It is also not uncommon for witness testimony to have inconsistensies. Contrary to Stankewitz's claim, Mr. Robinson did not address the Meraz incident during the guilt phase of the trial.

V. CLAIM FIVE: THE STATE WITHHELD EVIDENCE IN VIOLATION OF BRADY AND MANUFACTURED FALSE TESTIMONY IN VIOLATION OF STANKEWITZ'S CONSTITUTIONAL RIGHTS IS BASELESS

Prosecutors have an affirmative duty under the due process clause of the Fourteenth Amendment to turn over evidence that is exculpatory and material to a defendant's guilt or punishment. (*Brady v. Maryland* (1963) 373 U.S. 83, 87; *United States v. Bagley* (1985) 473 U.S. 667, 674-678; *In re Sassounian* (1995) 9 Cal.4th 535, 543-545.)

There are three elements of a *Brady* violation: the evidence must be favorable to the accused; the evidence must have been suppressed by the state; and the suppression must have caused prejudice. (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282; *People v. Salazar* (2005) 35 Cal.4th 1031, 1042-1043.)

For the first element of a *Brady* violation, evidence is favorable if it exculpates the defendant or can be used to impeach a government witness. (*In re Sassounian, supra,* at p. 544; *People v. Williams* (2013) 58 Cal.4th 197, 256.)

As to the second element of a *Brady* violation, the prosecution's withholding of favorable and material evidence violates due process irrespective of the good faith or bad faith of the prosecution. (*Brady, supra,*

at p. 87; *In re Bacigalupo* (2012) 55 Cal.4th 312, 333.) "Moreover, the duty to disclose exists regardless of whether there has been a request by the accused, and the suppression of evidence that is materially favorable to the accused violates due process regardless of whether it was intentional, negligent, or inadvertent. (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1225; *People v. Bowles* (2011) 198 Cal.App.4th 318, 325.) "Evidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery." (*People v. Morrison* (2004) 34 Cal.4th 698, 715; *People* v. *Verdugo* (2010) 50 Cal.4th 263, 281.)

As to the third element, "a *Brady* violation requires not only the suppression of evidence that is favorable to an accused, but also that the evidence is material to guilt or punishment." (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th at p. 52.) "Put another way, the defendant must show 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' (*Kyles v. Whitley* (1995) 514 U.S. 419, 435.)" (*People v. Lewis* (2015) 240 Cal.App.4th 257, 263.)

" 'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' [Citation.]" *People v. Fauber* (1992) 2 Cal.4th 792, 829, quoting *United States v. Agurs*, *supra*, 427 U.S. at pp. 109-110.) As we have described it in terms of posttrial analysis of nondisclosure, " '[m]ateriality ... requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction "more likely" [citation], or that using the suppressed evidence to discredit a witness's testimony "might have changed the outcome of the trial" [citation]. A defendant instead "must show a 'reasonable probability of a

different result.' " [Citation.]' [Citation.] Thus, '[e]vidence is "material" "only if there is a reasonable probability that, had [it] been disclosed to the defense, the result ... would have been different." [Citations.] The requisite "reasonable probability" is a probability sufficient to "undermine [ ] confidence in the outcome" on the part of the reviewing court. [Citations.] It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. [Citation.] Further, it is a probability that is, as it were, "objective," based on an "assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision," and not dependent on the "idiosyncrasies of the particular decisionmaker," including the "possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." [Citation.]' [Citations.]" (*In re Sodersten* [(2007)] 146 Cal.App.4th [1163] at pp. 1226-1227.)

In other words, a defendant must show the favorable evidence would undermine the outcome of the case. (*Kyles v. Whitley* (1995) 514 U.S. 419, 435; *People v. Lewis, supra,* at p. 263.) The mere possibility that undisclosed information might have helped the defense does not establish materiality. (*People v. Fauber* (1992) 2 Cal.4th 792, 829.) The standard of materiality is best summarized in *Kyles*:

"[The] touchstone of materiality is a 'reasonable probability' of a different result. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (*Kyles, supra,* at p. 435.)

Supreme Court case law makes it clear that the materiality of an item of evidence in a murder prosecution depends on whether the case is in the guilt phase or the penalty phase. In *Brady*, the court found the prosecution's failure to turn over an admission of a co-conspirator was a violation of due process. (*Brady*, *supra*, at p. 88.) While the petitioner admitted to participating in the murder, the co-conspirator indicated in his statement that it was his idea to shoot the victim. The court found this was material to the issue of the jury's choice between life or death, but not material to the underlying guilt of petitioner. (*Ibid.*)

There is no doubt that evidence storage procedures have improved over the past forty years, however, there has been no showing by Stankewitz that any of the items listed in claim five would provide a reasonable probability of a different result with respect to Stankewitz's guilt. All interviews with co-defendants were transcribed and turned over. All evidence pertaining to the penalty phase of the second trial is no longer relevant.

VI. CLAIM SIX: THERE IS NO EVIDENCE THAT THE STATE COERCED THE TESTIMONY OF BILLY BOB BROWN

There is no evidence that Billy Brown's testimony was coerced. His statement to police shortly after disclosing to his mother what had taken place was fundamentally consistent with all statements that he made through the second trial. His immunity agreement was disclosed at trial. Stakewitz continues to point to a statement from Mr. Brown in 1993 as reason to call into question the information he provided law enforcement officers in 1978 as well as his trial testimony in 1978 and 1983. However, given that the People are unable to cross-examine such a statement, the People request the Court disregard said statement as inadmissible hearsay. As previously stated, inconsistencies in Brown's statements over time do

not equal false testimony. Any misconduct on the part of Mr. Robinson is pure speculation.

VII. CLAIM SEVEN: EVIDENCE RELATED TO THE MERAZ ATTEMPTED MURDER CHARGE HAD NO BEARING UPON THE GUILTY VERDICT

Defendant's involvement in the Meraz robbery and kidnap later on the night of February 8, 1978, was one of nine aggravating factors used in the penalty phase of the trial. Both the report and property sheet regarding the casings recovered three days after the kidnap and robbery of Mr. Meraz indicate that the recovered casings were .22 caliber. The People agree this information would be inconsistent with the recovered firearm located in Ms. Graybeal's vehicle, which was a ballistics match to the casing recovered at her murder scene. However, since this evidence was not used in the guilt phase of Stankewitz's second trial, it is irrelevant to this proceeding. The theory that evidence was presented that the magazine would hold seven bullets so that the jury would conclude that it was the same gun used in both crimes is preposterous, as they reached a guilty verdict before they even knew about the crime involving Jesus Meraz.

VIII. CLAIM EIGHT: THE STATE KNEW THAT STANKEWITZ WAS UNABLE TO FORM THE INTENT REQUIRED FOR FIRST DEGREE MURDER DUE TO A MENTAL DEFECT IS INCORRECT

Stankewitz's temporal lobe damage does not necessarily negate the ability to form the intent to kill nor to premeditate and deliberate. Penal Code §29 provides that an expert testifying about a defendant's mental illness "shall not testify as to whether the defendant had or did not have the required mental states." (Pen. Code, § 29.) In *People v. Coddington* (2000) 23 Cal.4th 529, 582–583 "An expert's opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence *vel non* of the

mental states of premeditation and deliberation regardless of whether the expert believed appellant actually harbored those mental states at the time of the killing." (*Id.* at pp. 582–583) [italics original].

IX. CLAIM NINE: THE STATE DID NOT WITHHOLD EVIDENCE; EVIDENCE SUPPORTED THE TRUE FINDINGS OF THE SPECIAL CIRCUMSTANCES ALLEGATIONS

See responses to claims one and eight.

The jury heard evidence suggesting possible drug use by Stankewitz. Concluding that they believed that he was not under the influence because they found him guilty is speculation.

X. CLAIM TEN: EVIDENCE SUPPORTED THE ALLEGATION OF PERSONAL USE OF A FIREARM

See response to claims one, two and six.

XI. CLAIM ELEVEN: THE PROSECUTION ENGAGED IN MISCONDUCT BEGINNING IN 2010 IS SPECULATIVE

The People can not attest today to the actions of all prosecutors that have been assigned to the case for the past decade, but to claim that they did not conduct "a thorough search for all materials in their possession" is speculative at best. Considering that the evidence is in several different locations and that the records which need to be reviewed for each assigned prosecutor to be familiar with all proceedings are voluminous, prosecutors have complied with all defense requests that they possibly could have in a timely manner. Discussions regarding the retrial of the penalty phase are now irrelevant.

XII. CLAIM TWELVE: STANKEWITZ'S TRIAL COUNSEL AT BOTH TRIALS WAS INEFFECTIVE IS BASELESS

To prevail on his claims of ineffective assistance, Stankewitz must demonstrate both that trial counsel's performance was deficient in that it fell below an objective standard of reasonableness under professional norms, and he must show a reasonable probability that, but for the complained of act or omission by his counsel, the result would have been more favorable. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.)

To succeed on the first component, deficient performance, Stankewitz 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,* 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 when the petitioner is 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,* 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.)

Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel (see *People v. Wright* (1990) 52 Cal.3d 367, 412, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459), and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*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*, 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.)

A petitioner's ineffective assistance of counsel claim must be supported by something more than speculation. (*Karis, supra*, 46 Cal.3d at p. 656.) A petitioner must demonstrate deficient performance by showing his counsel had no tactical reason for his actions. (See *People v. Zapien* (1993) 4 Cal.4th 929, 980; *People v. Williams* (1998) 44 Cal.3d 883, 936.) This obligation, in the context of a petitioner's burden to plead a prima facie case for relief and include reasonably available documentary evidence in the petition (*Duvall, supra*, 9 Cal.4th at p. 474), requires the petitioner to provide, or explain his failure to provide, a sworn statement from counsel disclosing whether counsel had tactical reasons for his or her actions or omissions. Otherwise, petitioner is unable to overcome the strong presumption that counsel acted as a matter of tactics as opposed to sheer neglect. (*Richter, supra,* 562 U.S. at p. 109; *Yarborough v. Gentry* (2003) 540 U.S. 1, 8; *Duvall,* at p. 474.)

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 *Richter, supra,* 562 U.S. at p. 104.) 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,* 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 facts warranted death. (*Ibid.*) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

In assessing prejudice from the failure to conduct a thorough investigation, a court examines whether there was available evidence that

counsel reasonably failed to discover, the strength of that evidence, and the strength of the evidence of guilt presented at trial. (*In re Hardy* (2007) 41 Cal.4th 977, 1021-1022; *In re Thomas* (2006) 37 Cal.4th 1249, 1265.) To establish prejudice from inadequate investigation, a petitioner must demonstrate that counsel knew or should have known that further investigation was necessary and must establish the nature and relevance of the evidence that counsel failed to present or discover. Ultimately, a petitioner must show that, had the omitted evidence been presented, the result of the guilt phase would have been more favorable to him. (*In re Cox* (2003) 30 Cal.4th 974, 1016.)

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 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.) "The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." (*Ibid.*) 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.)

Recently, the United States Supreme Court has observed that a reviewing court plays an exceedingly deferential role when reviewing ineffective assistance 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. [Citation.] (*Richter, supra,* 562 U.S. at p. 105.)

"The spectacle of a series of attorneys appointed at public expense whose sole job, or at least a major portion of whose job, is to claim the previous attorney was, or previous attorneys were, incompetent discredits the legal profession and judicial system, often without benefit in protecting a defendant's legitimate interests." (*People v. Smith* (1993) 6 Cal.4th 684, 695.) When a convicted defendant claims his attorney's assistance was so defective as to require a reversal of a conviction or sentence of death, it is incumbent upon the defendant to show both a deficient performance and prejudice. Errors must be so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment to the United States Constitution. Even if deficient performance is shown, a defendant has not met his burden unless he also shows actual prejudice resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Marquez* (1992) 1 Cal.4th 553, 574-575.) "[C]ounsel does not render ineffective assistance by choosing one or several theories of defense over another." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1007.) "[R]easonably competent counsel also could have determined that in view of the strong evidence linking defendant to the murders, a guilty verdict was virtually a foregone conclusion, and that defendant's prospects of avoiding the death penalty would be improved if the defense refrained from placing its 'credibility' at

risk by suggesting an implausible defense." (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.)

Stankewitz alleges claims of ineffective assistance of counsel on several different issues and generally. In 2004, the Ninth Circuit addressed several claims of ineffective assistance of counsel with respect to the guilt and penalty phases of the 1983 trial. It is the People's position that any and all claims of ineffective assistance during the 1983 trial should have been brought at that time and, by failing to do so, he is now barred (*In re Robbins,* at p. 814, fn. 34; *In re Dixon* (1953) 41 Cal.2d 756, 759). At that time Stankewitz claimed that his attorney was ineffective by failing to disclose prior representation of Stankewitz's brother, failing to investigate Stankewitz's competency, failing to investigate Stankewitz's diminished capacity, and failing to move for a change of venue. The Court found each of the claims of ineffective assistance during the guilt phase to be without merit. In response the the claim regarding Stankewitz's drug use, the court specifically stated that his attorney's "failure to raise Stankewitz's drug use at the guilt phase was a tactical decision," and that, "(a)n attorney's performance is not deficient where, as here, it reflects a reasonable strategic choice that aligns with his client's wishes." Nothing has changed with respect to counsel's performance since that decision. There is no evidence before this court today that trial counsel's performance fell below an objective standard of reasonableness under professional norms nor that counsel's actions were anything other than a "strategic choice". Furthermore, there has been no evidence presented of any probability that but for the complained of act or omission by his counsel, the result would have been more favorable.

XIII. CLAIM THIRTEEN: STANKEWITZ'S APPEALLATE COUNSEL WAS INEFFECTIVE IS ALSO BASELESS

There was no evidence tampering (see Claim One). There has been no showing that appellate counsels' performance fell below an objective standard of reasonableness nor that any alternative performance would have resulted in a more favorable outcome for Stankewitz (see Claim Twelve).

XIV. CLAIM FOURTEEN: STANKEWITZ'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE PROSECUTION REMOVED THE ONLY NATIVE AMERICAN JUROR HAS ALREADY BEEN REJECTED

Both the California Supreme Court and the District Court have already ruled on this issue and found Stankewitz's claim to be without merit. At the time of each of these rulings, the courts were aware of the holdings in *Baston* and *Wheeler*. As Mr. Goodwin did not raise the issue at trial, Mr. Robinson did not have the burden of placing his race neutral reasons on the record. Nonetheless, the District Court found that race neutral reasons were present. Contrary to Stankewitz's claim, Mr. Robinson did not ask the juror whether or not she knew the Stankewitz family. Ms. Moreno volunteered that information. Further, Stankewitz position that Ms. Moreno was the only Native American juror on the panel is speculative at best.

XV. CLAIM FIFTEEN: STANKEWITZ DID NOT RECEIVE A FAIR TRIAL IS FALSE

Stankewitz received a fair trial in 1983, the result of which has been upheld by several higher courts.

XVI. CLAIM SIXTEEN: STANKEWITZ HAS REHABILITATED IS IRRELEVANT

Stankewitz's rehabilitation is irrevevant to this proceeding.

XVII. CLAIM SEVENTEEN: STANKEWITZ IS INNOCENT IS UNTRUE

Stankewitz was found guilty of the kidnap, robbery, and murder of Teresa Graybeal based upon sound evidence.

XVIII. CLAIM EIGHTEEN: THE PUNISHMENT FOR THE CRIMES STANKEWITZ HAS BEEN FOUND GUILTY OF IS LIFE WITHOUT THE POSSIBILITY OF PAROLE BY STATUTE

See responses to claims one through seventeen. The life without the possibility of parole sentence imposed by this court for committing murder during a kidnap and robbery is authorized by statute.

XIX. CLAIM NINETEEN: THE CUMMULATIVE EFFECT OF ALL ERRORS REQUIRES DISMISSAL LACKS FOUNDATION

See responses to claims one through eighteen.

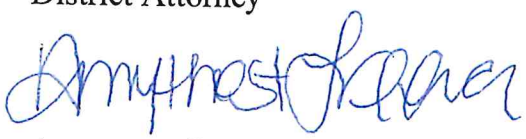
CONCLUSION

Because there has been absolutely no new evidence presented which would have materially affected the outcome of the guilt phase of Stankewitz's 1983 trial, his Petition for writ of habeas corpus should be denied without the issuance of an order to show cause.

Dated: September 1, 2021

Respectfully submitted,

LISA A. SMITTCAMP
District Attorney



AMYTHEST FREEMAN
Deputy District Attorney

EXHIBIT A

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

EXHIBIT B

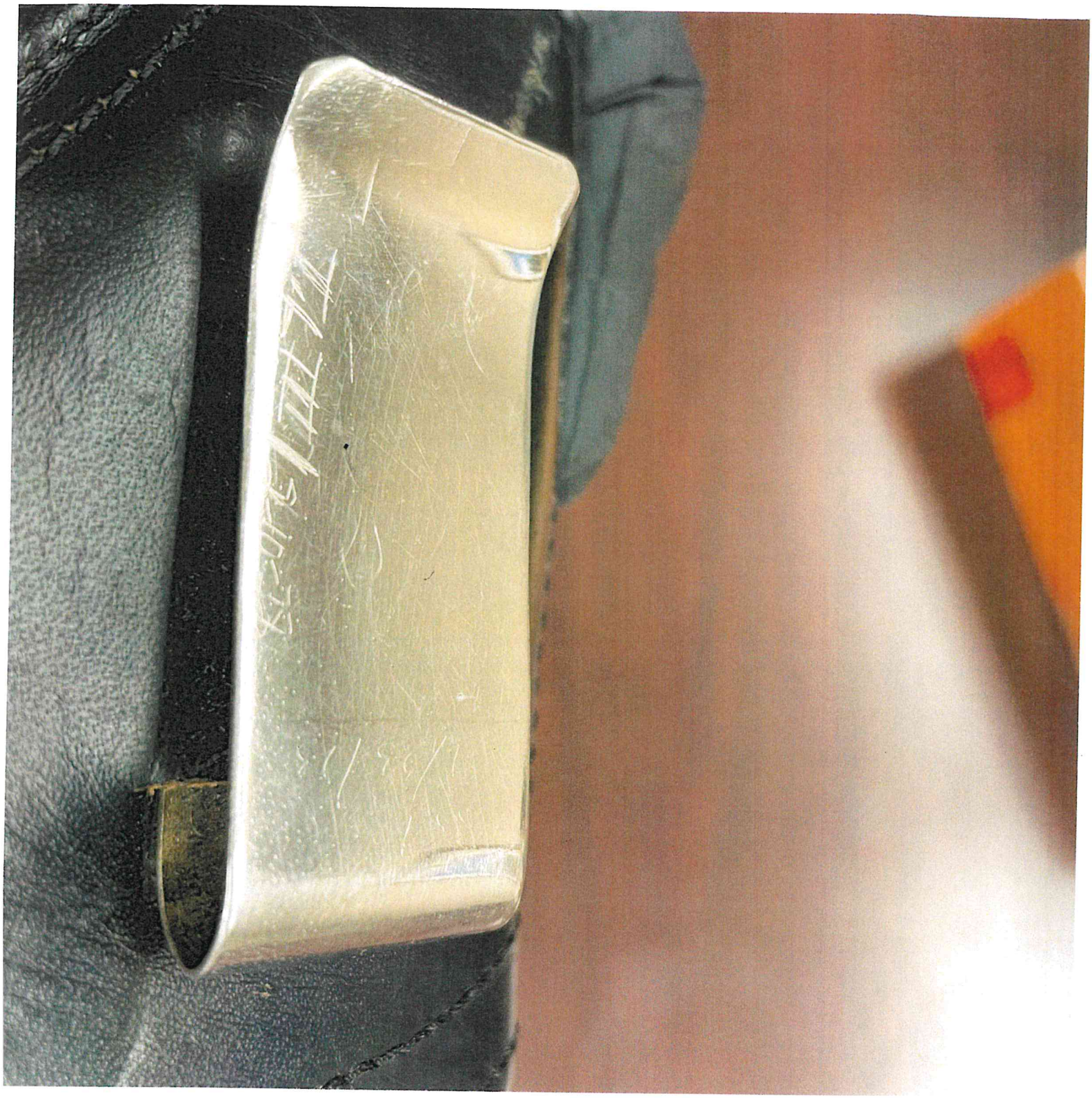


EXHIBIT C


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