J. TONY SERRA, SBN 32639
CURTIS L. BRIGGS, SBN 284190
3330 Geary Blvd, 3rd Floor East
San Francisco, CA 94118
Tel 415-986-5591
Fax 415-421-1331

MARSHALL D. HAMMONS, SBN 336208
1211 Embarcadero #200
Oakland, CA 94606
Tel (510) 995-0000

Attorneys for Defendant
DOUGLAS R. STANKEWITZ

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

DOUGLAS R. STANKEWITZ,

Petitioner,

On Habeas Corpus.

Case No. 21CRWR685993

PETITIONER'S DENIAL TO RETURN TO ORDER TO SHOW CAUSE

(Related Case: Fresno Superior Court Case #CF78227015)

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TO THE HONORABLE ARLAN L. HARRELL, SUPERIOR COURT FOR THE COUNTY OF FRESNO AND TO THE DISTRICT ATTORNEY FOR THE COUNTY OF FRESNO:

Petitioner Douglas R. Stankewitz, by and through his attorneys J. Tony Serra, Curtis L. Briggs, and Marshall D. Hammons hereby replies to the Return filed by Sr. Deputy District Attorney Robert L. Veneman-Hughes (hereinafter DDA Hughes) on behalf of Respondent State of California on August 19, 2023. By this verified pleading, Petitioner responds as follows:

INTRODUCTION

Petitioner, an aging inmate with health issues, confined for 45 years, waited anxiously for a detailed, fact driven Return consistent with true notions of Due Process. However, the Respondent doesn't bring any declarations, new evidence, or information from law enforcement.[1] They don't meet their burden under *Duvall/Lucas/Jenkins*.[2] They omit key facts raised in the Amended Emergency Petition (Petition) which give context to the claims. They cite cases which have been superseded by statute or other cases. They relies on bald assertions and uses previously filed reports that are not under penalty of perjury.

The Return, as outlined, misses the forest for the trees because it reads the claims, subclaims or sub-subclaim too narrowly. Each claim heading of the Petition, (in bold) includes the conduct which violated Petitioner's rights and contains the relevant constitutional or statutory grounds for relief. The subclaims of each were meant to read together and were drafted to explain and document the claim itself and only drafted in this manner for ease of reading. Petitioner is not saying that each subclaim and sub-subclaim, in and of, itself, is sufficient to grant the Petition.

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[1] Further, the Return brings no experts or declarations from key witnesses. Specifically, no declarations of key witnesses like Ardaiz, Lean, Robinson, Boudreau. There is no declaration from CDDA Ardaiz stating under penalty of perjury that he would not have plied a 14-year-old with alcohol. There is no declaration from Det. Lean saying that he would not have planted the gun. The district attorney has been in contact with all relevant homicide team members. However, Respondent does not provide any lab reports or documentation of their efforts to obtain declarations from them. See Exh 24 a, FCDA Investigator Isaac Interview notes of Lean dated 2/21/2019 and Boudreau dated 2/27/19, from Exhibit A, People's Opposition Motion to Compel Specified Discovery, dated 12/6/22, p.2, first provided in said document. These interviews preceded the dropping of the death penalty by the District Attorney by two months.

[2] *People v Duvall* (1995) 9 Cal.4th 464; *People v. Lucas* (1995) 12 Cal.4th 415; *In re Jenkins* (2023) 14 Cal. 5th 493.

Nonetheless the actions outlined within these subclaims and sub-subclaims constitute unlawful conduct. Because so much of the evidence and conduct is interwoven, the Petition often referred to conduct in more than one place. Likewise, Petitioner used some exhibits in more than one claim. For the court's convenience, exhibits were included with each separate claim so each one could be read independently with the relevant supporting exhibits readily available to the reader.

Throughout the Return, the Respondent omits important information. For example, they fail to mention that their lab refused to test the ballistics evidence (HP 2-2-23 RT 10, Lines 8-13). The reason for this refusal was never explained. They ignore the fact that the ballistics evidence was examined by an independent certified lab, with two scientists reporting what they saw on the firearm and holster. Instead, they make up their own narrative about what the holster shows. These forays should be dismissed outright by the court. This alone is a clear general denial within the *Duvall/Lucas/Jenkins* analysis as Respondent not only didn't seek their own evidence to support their position, but try to provide their own interpretations contrary to actual experts or witnesses.

The prosecution misunderstands some of Petitioner's claims and arguments. Petitioner hasn't changed his claims. Rather Petitioner has gathered additional evidence.[3]

The Return states throughout that Petitioner is arguing the sufficiency of the evidence.[4] Respondent continues to cite cases throughout the Return regarding sufficiency of the evidence. However, we're not saying that it was a weak case in the sense that there was little testimony, but instead we are saying that Petitioner was framed in violation of his rights. Petitioner understands that the focus of a habeas writ is not to examine the sufficiency of the evidence. We are saying that the jury did not have material evidence and Petitioner was prejudiced as a result.[5] They proved their case before a jury, but they did so using unlawful means.

[3] The investigation into the fabrication of evidence began in 2017 and has been ongoing, including significant recent development as to the potential source of the firearm.
[4] See Return, p. 23, lines 11 – 16; Return, p. 35, line 6; Return, p. 41, line 9; Return, p. 45, line 3.
[5] See Exhibit 1b, Declaration of Roger Clark, dated 12/4/19, at 5-6.

The Return primarily makes general denials because it does not provide specific facts to controvert the facts in the Petition. Further, it does not contain substantive proof of denial, does not provide documentary evidence and is conclusory See *Duvall,* supra at 477. Affirmed, *Jenkins,* supra at 519-20.

The Petition, Reply to Informal Response and Supplemental Filings 1 – 4 and this Denial rely on facts, supported by declarations from experts which are scientific in nature. This is contrasted with the Return which relies on speculation, with no scientific backup for the speculation. This court should rely on scientific evidence, not approximations. Scientific evidence is the best evidence. Petitioner has made the requisite showing using scientific evidence.

DENIAL

Petitioner Douglas R. Stankewitz is the party for whose relief this petition is intended and prosecuted. Petitioner is confined pursuant to a judgment of imprisonment of forty-five years, six months rendered on May 3, 2019 in Fresno County Superior Court, No. CF78227015, the Hon. Arlan L. Harrell, Judge.

Petitioner incorporates his verified Amended Emergency Petition for Writ of Habeas Corpus, Exhibits 1a – 18b, and its accompanying Memorandum of Points and Authorities (hereinafter collectively referred to as "Petition"). He also incorporates Petitioner's Reply to Informal Response and Exhibits 19a – 19g, dated 10/12/20 (hereinafter referred to as "Reply"); Supplemental Filing to Emergency Petition for Writ of Habeas Corpus and Exhibit 21, filed 1/12/21 (hereinafter referred to as "Supp."); Second Supplemental Filing to Emergency Petition for Writ of Habeas Corpus and Exhibit 21b, filed 1/26/2022 (hereinafter referred to as "Second Supp."); Third Supplemental Filing to Amended Emergency Petition Regarding Claim 1: The Gun in Evidence is not the Murder Weapon and Exhibits 23a – 23g, filed 3/24/2023 (hereinafter referred to as "Third Supp.") ; and Fourth Supplemental Filing – Re: *In Re Jenkins*, Decided

3/27/2023, filed 4/29/2023 (hereinafter referred to as "Fourth Supp."). *People v. Romero* (1994) 8 Cal. 4th 728, 739; *In re Sixto* (1989) 48 Cal. 3d 1247, 1252, *In re Lewallen* (1979) 23 Cal. 3d 274, 277. Additionally, Petitioner incorporates into this Denial the accompanying Memorandum of Points and Authorities. *In re Gay* (1998) 19 Cal. 4th 771, 781 n.7.

The People of the State of California, through the Office of the District Attorney for the County of Fresno, are responsible for initiating and continuing the prosecution against the Petitioner described in paragraph 1 above, and have an interest in the outcome of this writ proceeding. Thus, the People of the State of California are the Real Party in Interest.

EXPLANATORY NOTES RE: DENIAL CONTENT

As of 5/3/2019, this is no longer a death penalty case. CA Proposition 66, passed in 2017, only applies to death penalty cases. This case is not an appeal, so the rules regarding appeals do not apply.

Denial with a capital "D" refers to Petitioner's Denial. Return with capital "R" refers to Respondent's Return.

Habeas proceedings transcripts are cited as HP [date of hearing] RT [page no.].

All of Petitioner's declarations are submitted under penalty of perjury and pleadings are verified. Contrast this to Respondent's reports, Exhibits A and C of the Return, which are not under penalty of perjury and not prepared by experts in the field and whose pleadings are not verified. Ardaiz and Lean refused to sign declarations regarding the content of their interviews.[6] Even when Respondent states that a document, like co-defendant statements, supports their position, they don't give specifics as to where in the statements so there is no actual fact driven analysis that is helpful to Petitioner or this Court.

[6] See Exh. 5c, Transcript of Lean Voicemail, dated 3/2020 and Exh 1e, Transcript of Lean Interview, p. 6; and see Exh 24c, Email from James Ardaiz to defense investigator Jonah Lamb, dated 4/28/20

Whenever possible, Petitioner's declarations are corroborated by other declarations or reports. For example, regarding Goodwin's ineffective assistance of counsel, both Snow and Boudreau stated that Goodwin never interviewed them.[7]

Where a subclaim applies to more than one claim, we have covered it just once and refer to that discussion, rather than repeat the argument.

DENIAL OF ALLEGATIONS IN RETURN TO ORDER TO SHOW CAUSE

Preliminary Statements

For sake of drafting and reference, in this section Petitioner will be referring the Return's paragraph numbers.

1. Petitioner denies that he is lawfully held in custody, pursuant to the Petition, his Reply to Informal Response and all supplemental filings.

2. Petitioner admits that the judgment was affirmed.

3. Petitioner admits and states that his first state habeas was denied without a hearing or findings.

4. Petitioner denies that his first federal habeas was filed in 1990. Petitioner states that it was filed on November 15, 1991. Petitioner denies that it was denied in Eastern District, CA on December 12, 2000. Petitioner states that it was denied on December 22, 2000.

5. Petitioner admits.

6. Petitioner admits.

7. Petitioner admits.

8. Petitioner admits.

[7] See Exh. 2g, Declaration of Allen Boudreau, dated 3/14/20, page 6, para 16; Exh. 2o, Declaration of Garry Snow, dated 2/20/20, page 2, para 8.

9. Petitioner admits that the Fifth District remanded the case back to the Superior Court for resentencing. However, the Fifth District stated that the court is "entitled to consider the entire sentencing scheme." Petitioner admits that the case was remanded so the court could determine whether or not to impose special circumstances or the gun enhancement.

10. Petitioner denies that the instant writ was first filed on March 8, 2021. The instant writ was first filed in the Fifth District Court of Appeal on October 20, 2020. On January 7, 2021, the Fifth District dismissed the writ without prejudice with the instruction for Petitioner to exhaust his remedies in Fresno Superior Court. Petitioner then filed this writ in Fresno Superior Court on January 28, 2021. On February 23, 2021, this court dismissed the Petition without prejudice for a lack of a physical signature. On March 8, 2021, Petitioner filed this Amended Emergency Petition for Writ of Habeas Corpus.

Specific Denials And Admissions

I. Procedural History

11. Petitioner admits.

12. The court is able to take judicial notice of the proceedings, as listed in the chart.

13. Petitioner admits.

14. Petitioner denies sentence #1 and #2. Return does not contain substantive proof of denial, provides no factual basis for contesting information, does not provide documentary evidence and is conclusory. See *People v. Duvall* (1995) 9 Cal. 4th 464, 477. Affirmed, *In re Jenkins* (2023) 14 Cal. 5th 493, 519-20. Petitioner denies sentence #3. Respondent refers to the *Trombetta* Motion filed on December 20, 2017; however, Petitioner referred to the Second Amended Motion to Dismiss Pursuant to *Trombetta* and *Brady*[8], filed on December 6, 2018, in which the District Attorney never responded after 70 days and the court failed to rule.

15. Petitioner admits.

[8] *Brady v. Maryland* (1963) 373 U.S. 83; *California v. Trombetta* (1984) 467 U.S. 479

16. Petitioner denies. This is a general denial because the return did not contain substantive proof of denial, does not provide documentary evidence and is conclusory. See *Duvall,* supra at 477. Affirmed, *Jenkins,* supra at 519-20.

17. Petitioner admits.

II. Statement of Facts

18. Petitioner admits.

19. Petitioner denies that the statements in petition are inaccurate. Petitioner agrees that Paragraphs 23-24 standing alone would not sustain the petition. Respondent says that our allegation that facts of the case previously presented were inaccurate are inaccurate. This is a general denial because the return does not contain substantive proof of denial, does not provide documentary evidence and is conclusory. See *Duvall,* supra at 477. Affirmed, *Jenkins,* supra at 519-20. The petition states facts upon which relief is sought. See *People v. Karis* (1988) 46 Cal.3d 612, 656.

III. Jurisdiction

20. Petitioner admits that this court has jurisdiction; however, Petitioner continues to deny that he is lawfully confined. Regardless of status of sentence, he still in physical custody and habeas applies. *People v. Romero* (1994) 8 Cal.4th 728, 736-737.

IV. Judicial Notice and Incorporation[9]

17-2. Petitioner admits. He believes that pursuant to *In re Reno* (2012) 55 Cal.4th 428, that he can cite and incorporate by reference and separate judicial notice not required.

18-2. Petitioner denies that any claim except Claim 14 has ever been brought before. This is a general denial because the return did not contain substantive proof of denial, does not provide documentary evidence and is conclusory. Respondent cites no reference as to what claims have or

[9] The Return restarts paragraph numbers. For ease of reference, Petitioner is adding a "-2" to note where the second paragraph showing the same number is.

have not been raised before. Absent information regarding specific claims, they fail to adequately respond. See *Duvall,* supra at 477. Affirmed, *Jenkins,* supra at 519-20.

19-2. Petitioner denies the first sentence. The sentencing appeal before the 5th District has been decided and is not a part of this proceeding. Petitioner agrees that the Return addresses the factual basis in the Superior [not Supreme as stated] Court Order to Show Cause. Petitioner is not raising issues from the appeal aside from a pattern and practice of prosecutorial misconduct. Petitioner may incorporate additional facts and law in denial and supplementals; a supplemental filing requires leave of court only if it alleges new claims. *Board of Prison Terms v. Superior Court* (2005 CA6) 130 Cal. App. 4th 1212, 1235. Accord, *In re Kavanaugh* (2021 CA4, Div.1) 61 Cal. App. 5th 320, 342.

In re Friend (2022) 76 Cal.App.5th 623 and *Reno,* supra at 472, talk about successive petitions and what can be included in a denial. A denial can include additional facts and law if not presenting a new claim. *Board of Prison Terms*, supra at 1235. Accord, *Kavanaugh*, supra at 342. The terms "traverse" and "denial" are interchangeable in case law. *Duvall*, supra, at 478, describes the function of a traverse. *In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16, citing *People v. Green* (1980) 27 Cal.3d 1, 43, fn. 28; *In re Connor, supra,* 16 Cal.2d 701, 711.) [Parallel cite omitted]

20-2. Petitioner denies. We deny insofar as Respondent denies our request to incorporate exhibits is not an affirmative establishment of facts. Each claim heading contains the constitutional and statutory basis for that specific claim. Each claim states particular facts that support it, along with documents and declarations from experts and witnesses.

21. Petitioner admits that he cannot raise other claims except by leave of court. However, after an order to show cause is issued, Petitioner is able to raise additional facts and law. The traverse may allege additional facts in support of the claim on which an order to show cause

has issued, but it may not introduce additional claims or wholly different factual bases for those claims. It cannot "expand the scope of the proceeding which is limited to the claims which the court initially determined stated a prima facie case for relief." (*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16.) Cited in *Duvall*, supra at 475. [A traverse is now called a denial. See Calif. Rules of Court Rule 4.551(e).]

22. Trial counsel Hugh Goodwin is deceased and no confidential statements by Goodwin are in existence. This issue is moot as to him. As far as appellate counsel is concerned, Quin Denver and Nicholas Arguimbau are deceased and there are no confidential statements by them in existence. For the remaining appellate counsel, the issue is limited to why they failed to inspect the evidence, to meet certain deadlines, and why they did not challenge the guilt phase of the 1983 trial, which will strengthen Petitioner's position on prosecutorial misconduct, if not ineffective assistance of counsel.

23. Petitioner admits that the statements in Petition paragraphs 35-36 alone do not constitute relief as facts alone without support do not merit relief. *Duvall*, supra, at 474. However, the factual analysis with more than ample support are articulated within the claims themselves cited to the relevant exhibits and further discussed within the Denial. The Return articulates a misstatement of law as a prima facie case only requires facts taken as true meet the relevant standards within Penal Code section 1473 and the United States Constitution of and/or the cognate provisions of the California Constitution. *Duvall*, at 474. The request for relief as articulated in these paragraphs was not intended to stand alone, but to provide an introductory roadmap for the subsequent claims, facts, and exhibits provided within the Petition and supplemental filings.

24. Petitioner denies that this is a blanket claim. It is rather an explanation of the IAC claims (Claims 12 and 13). Petitioner admits that this paragraph in and of itself is not sufficient but is merely a drafting method to signpost evidence and facts demonstrated in the claims themselves.

25. Petitioner denies because this is merely a drafting method to signpost evidence and facts demonstrated in the claims themselves. Petitioner concedes that this paragraph alone would not merit relief, but IAC and procedural bars are contained in and cited later in petition and further discussed within this Denial. However, Petitioner fully denies that Petitioner was not convicted in violation of his due process rights under the 5th, 6th, 9th, and 14th Amendments to the United States Constitution and cognate provisions of the California Constitution.

26. Petitioner reasserts that Petitioner's counsel was ineffective at the guilt, penalty, and appellate phases of Petitioner's proceedings. Petitioner admits that this paragraph alone does not state facts sufficient to grant relief. However, the facts regarding IAC are fully contained in Claims 12 and 13. If there is material only in hands of petitioner, respondent can make general denial, but if access is available but not sought, respondent fails to meet its burden. See *Duvall*, supra at 485. Yet again, Respondent failed to not only provide any declarations contrary or otherwise supporting their denial, but fails to even show any effort made to investigate such information.

V. Scope of Claims and Evidentiary Bases

27. Petitioner denies that he failed to establish claims and that the claims stand on their merits. This is a general denial because the return did not contain substantive proof of denial, does not provide documentary evidence and is conclusory. Respondent cites no reference as to what claims have or have not been raised before. Absent information regarding specific claims, they fail to adequately respond. See *Duvall,* supra at 477. Affirmed, *Jenkins,* supra at 519-20.

28. Petitioner denies that the petition allegations do not rise to illegal confinement or violation of rights. This is a general denial because the return did not contain substantive proof of denial, does not provide documentary evidence and is conclusory. Respondent cites no reference as to what claims have or have not been raised before. Absent information regarding specific

claims, they fail to adequately respond. See *Duvall,* supra at 477. Affirmed, *Jenkins,* supra at 519-20.

PETITIONER'S ARGUMENT

Evidence Problem - Prosecution and the Court

The prosecution and the court have an evidence problem. Although Petitioner stated this in the Petition[10] and Third Supp.,[11] the Return is silent on this point. The court has not kept a log of who has accessed the court exhibits.[12] There are some court exhibits from the first trial that were missing at the second trial.[13] As was discovered when the ballistics evidence was delivered to FACL,[14] the evidence envelopes were opened and the items were in disarray. There was a loose round in the box that cannot be explained.[15] The FACL report states that the evidence was not properly kept and is compromised.[16] Expert Roger Clark concurs with the FACL finding.[17] The evidence being compromised is also demonstrated by the Meras shell casings obfuscation.[18] And further by the over 50 items of missing evidence, both court exhibits and sheriff's evidence, in the case.[19]

Further, until 2017, the District Attorney did not keep a log of evidence discovered to the defense. Petitioner outlined the known discovery dates in his Petition.[20] The District Attorney relies on Ardaiz's statement at the Preliminary Hearing, that everything was turned over. (PH Vol I

[10] Petition Claim 5, page 117 and Exh. 5l, at 4-5.
[11] See Third Supp., page 5-6.
[12] See Exh 23i, Email sent to Dept. 62, dated 1/9/23 asking for copy of the court procedures for keeping court exhibits. access logs and specifically the log kept for the Stankewitz cases. To date, no response has been received.
[13] See Exh. 4o, Table of Missing Evidence – Stankewitz Habeas, Item #22, 23, 37
[14] See Exh. 23a, FACL Report, dated 3/21/23 at 1, first full para.
[15] See Exh. 23a, FACL Report, dated 3/21/23 at 1, chart at top of page.
[16] See Exh. 23a, FACL Report, dated 3/21/23 at 1, first full para.
[17] See Exh 24b, Declaration of Roger Clark, dated 8/26/23, at 5, para 11.
[18] See Exh. 5ii, Declaration of Roger Clark, supra at 4, lines 19 - 22.
[19] See Exh. 4o, Table of Missing Evidence – Stankewitz Habeas.
[20] See Petition Claim 11, page 167-170.

RT 54, lines 6-12). We know for a fact that it was not. Respondent admits as much.[21]

Respondent's New Argument

In the Return, Respondent makes argues for the first time that the holster and firearm are separate from each other. However, they provide no proof regarding this statement. Holsters and firearms are normally purchased separately.[22]

The CA Court of Appeal has held that the People cannot alter their position on appeal. "Indeed, respondent's argument directly contradicts the express position of the prosecution at trial. Respondent argues Daniels's testimony was not offered to prove a second offense but as further evidence of a single count of possession, with discrepancies in the descriptions of the guns simply differences for the jury to consider in weighing the credibility of the witnesses. As discussed above, this simply is not the case: The prosecutor expressly told the jury the evidence showed appellant possessed two different weapons in two separate incidents on January 8, and she and the unanimity instruction informed the jury it could convict on the basis of *either* incident. The People may not so alter their position on appeal. (See, e.g., *People v. Peters* (1950) 96 Cal. App. 2d 671 [defendant who effectively conceded cause of death at trial cannot change position on appeal to argue failure of proof by prosecution]; *Horn v. Atchison, T. & S.F. Ry. Co*. (1964) 61 Cal. 2d 602, 605 [defendant's concession of liability at trial precluded appeal on issues regarding liability]; *Browne v. Superior Court* (1940) 16 Cal. 2d 593, 597] [admission at oral argument that petition for writ of habeas corpus on behalf of incompetent person did not seek to free conservatee from restraint or discharge guardian but in fact was intended only to allow conservatee to move to a different location and ease restraints on her personal liberties with respect to mail and visitors constituted an abandonment of only proper ground for petition].)" *People v Burnett* (CA1, Div 2 1999) 71 Cal.App.4th 151, 172. [Emphasis added; parallel cites omitted]

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[21] See Return, page 50, B.1.
[22] See Exh 24b, Declaration of Roger Clark, supra, at 5, lines 3-4.

Although *People v. Burnett* addresses whether the People may alter their position on appeal, Petitioner would argue that the same rule should apply in a habeas case. These new factual arguments are conflict with evidence presented at second trial, therefore, on this basis, Petitioner is entitled to a new trial.

<u>Rebuttal Declarations in Support of the Denial</u>

- Exhibit 24b, Declaration of Roger Clark re: ballistics evidence, dated August 26, 2023
- Exhibit 24g, Declaration of Robert L. Givens, SPD Officer, Badge #351, in 1973, dated July 28, 2023
- Exhibit 24n, Chris Coleman re: x-rays of victim, dated August 1, 2023
- Exhibit 24p, Laura Wass re: corrections to Resp. argument re: Marlin Lewis, dated August 14, 2023
- Exhibit 24q, Troy Jones, re: Stankewitz statement to law enforcement that he was innocent of the shooting, dated July 30, 2023

<u>Memo of Points and Authorities in Support of the Denial</u>

Respondent's Memorandum of Points and Authorities in support of the Return repeats some of the arguments made in its Informal Response. Petitioner addressed those arguments in his Reply to Informal Response, filed on October 13, 2021, and in his original Petition for Habeas Corpus. Accordingly, he incorporates those responses here. This Memorandum of Points and Authorities only addresses new material in the Return.

I. California Law on Habeas Generally

A. Procedural Law

A supplemental filing requires leave of court only if it alleges new claims. See Third Supp., p 8, wherein we cite *Board of Prison Terms v. Superior Court*. The traverse[23] ("traverse" is now called a "denial" for superior court cases) may allege additional facts in support of the claim on which an order to show cause has issued, but it may not introduce additional claims or wholly different factual bases for those claims. It cannot "expand the scope of the proceeding which is

[23] When the rules of court were amended to include superior court as the court of primary jurisdiction for habeas writs, the previously used term of 'traverse' as the pleading responding to a return was changed to 'denial'. Previously when the courts of appeals had jurisdiction over habeas writs, the term 'traverse' was used. Thus, some of the cases use the term traverse rather than denial; however, they both refer to the same pleading responsive to a return.

limited to the claims which the court initially determined stated a prima facie case for relief." (*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16.)

If the petition states a prima facie case on a claim that is not procedurally barred, appellate courts, because of practical realities, order the custodian to show cause, which directs the custodian to file a return explaining why the court should not grant relief. *People v. Romero* (1994) 8 Cal.4th 728, 738.

1. Order to Show Cause

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

2. Law Regarding Return

Calif. Rules of Court, Rule 4.551(d) provides: Any material allegation of the petition not controverted by the return is deemed admitted for purposes of the proceeding. [Emphasis added]

In order to effectively controvert an allegation, the People must allege specific denials of particular facts, not just generally deny an allegation. "Because the issuance of an order to show cause reflects the issuing court's determination that the petition states facts which, if true, entitle the petitioner to relief [citations], *the respondent should recite the facts upon which the denial of petitioner's allegations is based, and, where appropriate, should provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed*." (*In re Lewallen* (1979) 23 Cal.3d 274, 278, fn.2, italics added.) *Duvall,* supra at 479. Instead, it merely "indicates the People's willingness to rely on the record" set forth in the Petition. *Id.*

To assist the court in making the determination of whether there are facts legitimately in dispute that may require holding an evidentiary hearing], "the return should set forth with specificity: (i) why information is not readily available; (ii) the steps that were taken to try to obtain it; and (iii) why a party believes in good faith that certain alleged facts are untrue." *Duvall,* supra, at 485.

3. Law regarding Denial

Calif. Rules of Court, Rule 4.551(e) provides: Any material allegation of the return not denied is deemed admitted for purposes of the proceeding. [Emphasis added]

"Three important rules govern the [denial].[24] First, as stated above, "[t]he factual allegations of the return *will be deemed true unless the petitioner in his traverse denies the truth of the respondent's allegations* and either realleges the facts set out in his petition, or by stipulation the petition is deemed a traverse." (*In re Lawler,* supra*,* 23 Cal.3d 190, 194, italics added; see also *Karis*, supra, 46 Cal.2d 612, 656; *In re Love* (1974) 11 Cal.3d 179, 183; *In re Saunders* (1970) 2 Cal.3d 1033, 1047-1048 [parallel cite omitted]. Thus, if a habeas corpus petitioner fails to reassert factual allegations in the traverse, stipulate that the petition should serve as a traverse, or except to the sufficiency of the return, "the allegations of the return are deemed admitted, and relief will be denied." (6 Witkin & Epstein, *supra*, § 3377(e), p. 4182; see *In re Guiterrez* (1934) 1 Cal.App.2d 281 [parallel cite omitted].

Second, if the factual allegations in the return are so inadequate that the petitioner cannot answer them, "the petitioner may 'except to the sufficiency' (CA Penal Code Sect. 1484) of the return in his … traverse, thus raising questions of law in a procedure analogous to demurrer." (*Saunders*, supra, at 1048), see also *In re Collins* (1907) 151 Cal. 340; 6 Witkin & Epstein, supra, § 3377(d), p. 4182.) Like the rule requiring the respondent to raise his arguments in the return in

[24] See p. 21, line 22, supra, for an explanation of use of the terms "traverse" and "denial."

timely fashion, however, a petitioner must also timely raise his objections to the return or he will be deemed to have waived them. (*In re Egan* (1944) 24 Cal.2d 323, 330. [objections to return, made for first time at evidentiary hearing, were untimely].) [parallel cites and footnotes omitted]

Third, "[although] the traverse may allege additional facts in support of the claim on which an order to show cause has issued, attempts to introduce additional claims or wholly different factual bases for those claims in a traverse do not expand the scope of the proceeding which is limited to the claims which the court initially determined stated a prima facie case for relief. [Citations.]" (*Clark*, supra, at 781, fn. 16)" *Duvall*, supra, at 479.

4. When Evidentiary Hearing Not Required

If the return and traverse present no disputed material factual issue, the court may dispose of the petition without the necessity of an evidentiary hearing. *People v. Romero* (1994) 8 Cal.4th 728, 739, and cases cited therein. "[W]hen the return effectively acknowledges or 'admits' allegations in the petition and traverse which, if true, justify the relief sought, such relief may be granted without a hearing on the other factual issues joined by the pleadings." (*Saunders,* supra, 2 Cal.3d at p. 1048.) *Duvall*, supra, at 477. There may be an unusual case where the People do not controvert the petition's factual allegations in their return. In this circumstance, an evidentiary hearing is not required. *Duvall*, supra, at 480.

In *People v. Ledesma*, the court granted a habeas writ due to IAC. In discussing counsel's IAC regarding a *Wheeler* challenger, the court stated "In any event, the Attorney General frankly admits that Bagnod "presented no apparent reasons for his challenge" and declines even to attempt to suggest any. In so doing, he effectively concedes that the prosecutor improperly struck Bagnod and thereby violated the *Wheeler* rule. *People v. Ledesma* (1987) 43 Cal.3d 171, 231 (Mosk, J., concurring) [emphasis added]

Thus, "[w]hen the return effectively admits the material factual allegations of the petition and traverse by not disputing them, we may resolve the issue without ordering an evidentiary hearing." (*Sixto* (1989) 48 Cal.3d 1247,1252) *Duvall*, supra, at 479. "Put simply, because the People did not file a return here, they did not dispute the material factual allegations in the petition. And because they did not produce pleadings in response to those allegations, there was no need for the lower court to conduct an evidentiary hearing. (Cf. *Sixto, supra, 48 Cal.3d at p. 1252* ["When the return effectively admits the material factual allegations of the petition and traverse by not disputing them, we may resolve the issue without ordering an evidentiary hearing"]; *Romero, supra, 8 Cal.4th at p. 739* [if the return admits allegations in the petition that, if true, justify the relief sought, the court may grant relief without an evidentiary hearing].) *In re Duvall* (2020) 44 Cal. App. 5th 401, 408.[25]

5. Entitlement to Evidentiary Hearing

Calif. Rules of Court, Rule 4.551(f) provides that within 30 days after the filing of any denial, or if none is filed, after the expiration of the time for filing a denial, the court must either grant or deny the relief sought by the petition or order an evidentiary hearing. An evidentiary hearing is required if, after considering the verified petition, the return, the denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact… [Emphasis added].

In *Earp v. Ornoski* (2005 9th Cir.) 431 F.3d 1158, 1165, a federal habeas case, the court remanded after finding that the petitioner was entitled to an evidentiary hearing on his claims of prosecutorial misconduct and ineffective assistance of counsel, and had never had such a hearing. "Where the petitioner makes a colorable claim and has never been afforded a state or federal

[25] It is confusing but there are two habeas cases named "Duval/l", one with one "l", the other with two "l"s. Petitioner has cited both.

hearing on this claim, we must remand to the district court for an evidentiary hearing. At 1167. [Internal Citations omitted]

6. Habeas Burdens of Proof

Petitioner's burden of proof at this stage of the proceedings is to make a prima facie showing that if the facts alleged are true, he is entitled to relief. Calif. Rules of Court, Rule 4.551(c) (1).

At an evidentiary hearing, the burden is on Petitioner to establish facts under a preponderance of the evidence. Petitioner "bears burden of alleging facts to preponderance of evidence to support claims," citing *People v. Ledesma* (1987) 43 Cal.3d 171. *In re Sassounian* (1995) 9 Cal.4th 535, 546.

7. Procedural Bars

Petitioner previously addressed procedural bars in the Petition[26] and his Reply to the Informal Response,[27] Petitioner builds on his previous argument as follows.

Regarding procedural bars as to death penalty cases, *Clark*, supra, has been superseded by Prop 66, which went into effect on November 24, 2017. A habeas writ can be used to attack the guilt phase in death and non-death sentence cases. CA Penal Code Sect. 1473. A habeas writ provides a safety value or escape hatch when an argument is not available for appeal, *Reno,* supra, at 450 citing *In re Sanders* (1999) 21 Cal.4th 967.

An analysis of current California law on procedural bars is contained in *Reno*, supra at 760 – 770), citing *Robbins* and *Clark*. These cases state that the petition needs to allege specific facts. Petitioner alleges specific facts which are supported by prosecution reports, expert and witness declarations.

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[26] See Petition, Section C, p. 204,

[27] See Petitioner's Reply to Informal Response, p. 7 – 8.

The *Waltreus* Rule[28] also applies. It provides that claims raised and rejected on appeal can still be brought under the Clark factors. Here, none of Petitioner's claims were raised and rejected on appeal.

The *Dixon* rule also applies to the analysis of procedural bars. This rule provides that facts that are cognizable that could have been raised on appeal but were not are generally barred. *In re Dixon* (1953) 41 Cal.2d 756, 759. However, claims that could have been raised on appeal but were not can still be brought if (1) there is a clear and fundamental constitutional error that strikes at the heart of the trial, (2) a court was lacking in fundamental jurisdiction where a court had no jurisdiction [inapplicable to this case], (3) a court was acting in excess of jurisdiction [likewise not applicable], or (4) there was a change in the law effecting the defendant. *Reno*, supra at 490-91 citing *In re Robbins* (1998) 18 Cal. 4th 770, 814, fn 34.

Here, although there were several claims that could have been raised on appeal and were not, they fall under the exceptions as outlined in *Reno* and *Robbins*. The claims that could have been raised on appeal but were not include but are not limited to issues regarding prosecutorial misconduct, ineffective assistance of counsel, and other grounds based on exonerating facts. See *In re Sanders,* supra, *Robbins*, supra. Notably, however, ineffective assistance of counsel claims are better brought in a habeas proceeding because, unlike an appeal where the information before the court is limited to the record, a habeas proceeding allows the petitioner to provide facts outside the record. *People v. Ledesma* (1987) 43 Cal.3d 171, 218.

The claims are not procedurally barred, namely due to the ineffective assistance of counsel of Petitioner's previous post-conviction counsel. Ineffective assistance of counsel is a well-recognized fundamental constitutional right. *Strickland v. Washington* (1984) 466 U.S. 688. *People v. Ledesma* (1987) 43 Cal.3d 171. All appellate counsel in California are not limited to

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[28] *In re Waltreus* (1965) 62 Cal.2d 218

exploring appellate issues, but also have a duty to explore collateral attacks. *In re Hampton* (CA3 2020) 48 Cal.App.5th 463. While the full analysis of post-conviction counsel was ineffective and therefore demonstrates why the claims are not barred by the *Dixon* rule is outlined in claim 13, in sum, Petitioner alleges that despite his repeated request to each and every post-conviction counsel to demonstrate innocence, namely by personally inspecting the evidence, each and every one provided ineffective assistance of counsel by either failing to provide any litigation, missing key deadlines and/or only addressing penalty phase issues or sentencing. Therefore, the claims are not barred under the *Dixon* rule.

The *Miller* rule[29] also applies. The *Miller* rule, as cited in *Reno*, provides that a claim is procedurally barred if it raises a claim that was denied in a previous habeas proceeding. Here, the only part of a claim that was raised on a previous habeas petition was Hugh Goodwin's effective assistance of trial the penalty phase of the second trial.[30] However, Petitioner's attack on the guilt phase of the second trial has never been brought before this Petition.

Finally, the *Clark/Horowitz* rule provides that claims that could have been brought before on habeas but were not are generally barred from being raised in a subsequent petition. *Reno*, supra 448, citing *Clark* at 774-75; *In re Horowitz* (1949) 33 Cal.2d 534, 546-47. The same four exceptions to the *Waltreus* and *Dixon* rules apply. *Reno* @ 490 – 491.

Here, Petitioner renews his arguments from the paragraph outlining the application of the *Dixon* rule.[31] Fundamentally due to these issues, the Petition is not procedurally barred.[32]

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[29] *In re Miller* (1941) 17 Cal.2d 734

[30] See *Stankewitz v Woodward*, USDC ED CA, Case #CIV F-91-616-AWI-P. The Ninth Circuit ultimately decided this case, reversing and remanding the penalty phase in 2012.

[31] See supra, p. 27, line 5.

[32] For analysis on IAC, see Claims 12 & 13.

8. Claims Relating to a First Trial

Reno provides that if there was a second trial, claims can be cognizable if they relate to the first trial if there were errors that affected the fairness of the second trial. *Reno*, supra, at 509-510. However, *Reno*, supra, found that at 509-510, due to the overwhelming evidence against the defendant, failure to appoint different counsel in the first trial did not violate the defendant's constitutional rights at the second trial. Here, by contrast, we have a continuation of constitutional violations, including *Brady*, starting with the initial investigation. Despite the fact that Petitioner's first trial, guilty and penalty phases, was reversed, the adverse effect of that trial carried forward into the second trial.[33]

Nearly all of the prejudicial misconduct against Petitioner originated before the first trial, with some occurring at the first trial. Examples include planting the murder weapon, CDDA Ardaiz lying to a judge about the Graybeal murder weapon being the Meras robbery weapon, withholding of the weapon tracing report, withholding of the Meras ballistics report, coercing Billy Brown's testimony, misleading the jury about the height of the shooter, using testimony from the first trial which had not been subject to cross examination by an effective lawyer, nor done in consultation with a competent client and the introduction of false evidence and false testimony.

9. Successive Petitions

A successive petition is not a second or subsequent petition, but is instead a petition raising the same claims again. *Reno*, supra, at 448-49. As provided for in the *Horowitz* analysis, this is not a successive petition.

10. Time Bars

The current CA law on time bar analysis is found in *In re Reno*, supra, at 460, which generally provides that claims not otherwise barred procedurally are still barred if they are not brought

[33] See Petition, p. 14, first full paragraph, p. 177, #4, p. 178.

timely. Id, at 460. The first part of the analysis is when the claims were known or should have been known to Petitioner, which starts the measuring time. Id, at 460, 461. Then, there is a safe harbor of about 180 days from that point. Id, at 461. If a claim is not brought within that time it is deemed to have been done with substantial delay. Id, at 462-63. In order to overcome this substantial delay, there must be good cause. Good cause can include ineffective assistance of counsel. Id, at 497. Ineffective assistance of counsel needs to be proven to the *Strickland* standard Id, at 464. Even if there is substantial delay and no good cause, the *Clark* exceptions, articulated above, apply. Id, at 472.[34]

Petitioner concedes that the time for many of the claims, aside from those regarding new evidence, were either known or should have been known to Petitioner as he had asked every single of his post-conviction counsel to look into the guilt phase and issues surrounding his framing.[35] However, as outlined in Claim 13, there was appellate ineffective assistance of counsel. This is discussed in Petitioner's Reply to Informal Response at 14, which cites the ABA standards for representing a death penalty client, including pursuing both the guilt and mental defenses. It was objectively unreasonable for appellate counsel to fail to pursue guilt claims, especially in light of Petitioner's consistent request over the decades for them to do so.[36]

Petitioner concedes that there has been delay but that there is good cause for delay due to appellate ineffective assistance of counsel. Decades of delay and lack of communication with defense attorneys has been Petitioner's primary source of frustration on Death Row. However, some of the delay is a result of the People's obstructionist tactics and failure to provide discovery from 2010 – 2012.[37] Despite filing discovery requests starting in 2010, a significant amount of

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[34] *Clark* was overruled in part by the passage of Proposition 66 for death cases. However, since this is not a death penalty case, the *Clark* factors still apply.

[35] See Exh 13a, Declaration of Douglas R. Stankewitz, dated 4/27/20.

[36] See Exh 13a, Declaration of Douglas R. Stankewitz, dated 4/27/20.

[37] See Claim 11.

discovery was received by appellate counsel in 2012, on the eve of the 9th Cir. decision reversing the penalty phase. Further, the prosecution falsely repeated told the court that it had turned over all evidence. As documented in the Petition, new evidence was produced by the People in August, 2017. The People have also failed to answer substantive motions since 2018, when they failed to respond to Petitioner's Second Amended Trombetta Motion.[38]

Petitioner's delays are not due to his counsel being lackadaisical. As this court knows, Petitioner's counsel in his underlying criminal case worked with the prosecution regarding discovery for most of 2017. Further, counsel and his staff spent thousands of hours investigating, researching and drafting the Petition during 2019 – 2020.[39] Petitioner's counsel has been hampered by the necessity of paying for investigation and expert costs, or obtaining such services pro bono.

B. Substantive Habeas Law

In the Return, a lot of their discussion, along with the cases they cite, is about federal habeas standards, including AEDPA, which are different from California standards. Therefore, it is not relevant to the Petition.

1. New Evidence

One court has noted the amendment to section 1473 lowered the standard required for bringing a successful habeas writ. *In re Sagin* (2019) 39 Cal.App.5th 570, 579. A petitioner no longer has to prove innocence but rather must show that the new evidence – viewed in relation to the evidence actually presented at trial – would raise a reasonable doubt as to guilt.[40] Since the standard requires that a court engage in the retrospective analysis of deciding whether the new evidence would have changed the trial outcome, the court considers only the new evidence identified by the petitioner and the trial record. The court does not consider other evidence outside

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[38] See Exhibit 11i, FCSC Second Motion to Dismiss For Failure To Preserve, Or Destruction Of Evidence, dated 12/5/2018

[39] See Petitioner's Confidential Motion for Appointed Counsel, filed 2/24/23.

[40] *In re Miles* (2017) 7 Cal. App.5th 821,828 citing In re Johnson (1998) 18 Cal.4th 447, 462 [overturned by statute].

the record such as exhibits attached to the return to order to show cause. Such effort misapprehends the nature of the court's inquiry, which is to determine whether the new evidence proffered by petitioner entitles him/her to a new trial, not to predict the outcome of a future trial or to determine the ultimate issue of culpability. (*Sagin*, supra, at 579, fn. 2.)

The statute creates a sliding scale: in a case where the evidence of guilt presented at trial was overwhelming, only the most compelling new evidence will provide a basis for habeas corpus relief; on the other hand, if the trial was close, the new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner. (*Id*. at pp. 579-580.)

The court also explains that under the 2016 amendments to Sect. 1473, the change in the law allows for an overall lower tolerance of wrongful convictions. The definition "significantly that definition does not require an acquittal, but also encompasses a hung jury." *Sagin*, supra, at 579, citing *People v. Soojian* (2010) 190 Cal. App. 4th 491, 521.

2. False Evidence

In contrast, a claim of *false evidence* under Penal Code section 1473, subdivision (e) raises a question of "materiality" – whether the false evidence was of such significance as to create a reasonable probability it may have affected the outcome of the trial. *In re Richards* (2016) 63 Cal.4th 291, 312. This standard is the same as the one for *Watson* prejudice. *Id.* at pp. 312-313, referring to *People v. Watson* (1956) 46 Cal.2d 818, 836. It is lower than the preponderance burden. See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [under *Watson* a reasonable "'probability' . . . does not mean more likely than not, but merely *a reasonable chance*, more than an *abstract possibility*," italics original]; see also *Watson*, 46 Cal.2d at p. 837.

3. Brady

In what is an almost comical error given the claims before the court, Respondent provides an incorrect citation for *Brady v. Maryland*. Respondent provides the citation as "378 U.S. 83"

when it is instead "373 U.S. 83."

For evidence known to the state at the time of the trial, the duty to disclose extends throughout the legal proceedings that may affect either guilt or punishment, including post-conviction proceedings. *Jenkins*, supra, at 511. Put differently, the taint on the trial that took place continues throughout the proceedings, and thus the duty to disclose and allow correction of that taint continues. *Jenkins*, supra, at 507. We cannot accept the implicit premise of the state's position here, which is that *Brady* leaves state officials free to conceal evidence from reviewing courts or post-conviction courts with impunity, even if that concealment results in the wrongful conviction of an innocent person. *Jenkins*, supra, at 506. It is worth recalling, in this connection, that the *Brady* rule was derived from the Due Process Clause of the Fourteenth Amendment. 'Society wins,' the Court wrote, 'not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.' *Brady,* supra, 373 U.S. at 87." *Steidl v. Fermon* (2017) 494 F.3rd 623, 630. *In re Jenkins* (2023) 14 Cal. 5th 493, 506.

When Respondent argues that all of the evidence was turned over, as they have starting with the preliminary hearing, (PH Vol. 1 RT 54), they concede that it existed at the time of trial.

The People cite incorrect law, stating that *Brady* does not apply to post-conviction proceedings, citing *Osborne.*[41] However, *Jenkins* is the most recent Supreme Court of California decision which applies the standards set forth above.

The prosecution's disclosure obligation extends beyond the contents of the prosecution case file. See Inquiry re Judge Michael F Murray, citing other cases.[42]

4. Misconduct

Respondent's cited law regarding misconduct is not incorrect. However, Petitioner is not

[41] Return, p. 63; *DA's Ofc v. Osborne* (2009) 557 U.S. 52.
[42] See Second Supp., p. 2.

saying that a particular statement at opening or closing was the only misconduct committed. Far from it. Misconduct throughout this case was much more vast. Petitioner was framed and every false statement made to a court, jury or to defense counsel, is a glimpse at a nefarious and secret framework that built this case. The prosecution planted a gun to make it seem that Petitioner was the shooter. Prosecutorial misconduct comes in many forms, and it is unlawful for the prosecution to act in such a reprehensible manner.

The definition of prosecutorial misconduct is intentional wrongdoing, a deliberate violation of a law or standard especially by a government official or malfeasance. It requires egregious, deceptive or reprehensible conduct that undermines courts confidence in conviction. *In re Masters* (2016) 7 Cal.5th 1054, 1085. As cited by the People, "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.]

Although the misconduct here includes actions at trial, is not limited to *Masters*[43] type misconduct. As cited in the Petition, the Reply and Supplemental Filings, there are a number of types of prosecutorial misconduct which apply to this case. They include: *Brady* violations: *People v Fultz;*[44] Use of coerced testimony: *People v Medina;*[45] False reports by law enforcement: Penal

[43] See *In re Masters* (2016) 7 Cal.5th 1054.
[44] Reply, p 18
[45] Reply, p. 18

Code Sect 118.1;[46] Manipulation of evidence: Penal Code Sect. 141(c);[47] Outrageous government misconduct interferes with right to counsel: *People v Valasco-Palacios;*[48] False evidence deliberately fabricated by the government: *Devereaux v Abbey,*[49] *Brown v City of Ontario*, citing *Devereaux,*[50] *Halsey v Pfeiffer,*[51] *Whitlock v Brueggemann,*[52] *Lanuza v Love*, citing *Napue* and other authorities;[53] Failure to correct false testimony: *Dennis v Pennsylvania;*[54] Failure to Preserve Evidence – *In re Jenkins.*[55]

"'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'"'" (*People v. Friend* (2009) 47 Cal.4th 1, 29) Conduct constitutes prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" (*People v. Benavides* (2005) 35 Cal.4th 69, 108) [Parallel cites omitted]

A court may also take into account the following factors in determining whether misconduct rises to a level of a due process violation: (1) the weight of evidence of guilt, *United States v. Young,* 470 U.S. 1, 19, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985); *United States v. Schuler,* 813 F.2d 978, 982 (9th Cir. 1987); (2) whether the misconduct was isolated or part of an ongoing pattern, *Lincoln v. Sunn,* 807 F.2d 805, 809 (9th Cir. 1987); (3) whether the misconduct related to a critical part of the case, *Giglio v. United States,* 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); and (4) whether a prosecutor's comment misstated or manipulated the

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[46] Reply, p. 18
[47] Reply, p. 18
[48] Supp., p. 2
[49] Supp., p. 3
[50] Supp., p. 3
[51] Supp., p. 3
[52] Supp., p.3-4
[53] Supp., p.4
[54] Supp., p.3
[55] Fourth Supp.

evidence, *Darden v. Wainwright,* 477 U.S. 168, 181, 182, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). *Barnes v. Evans*, No. C 04-0148 CW, 2007 U.S. Dist. LEXIS 8490 (N.D. Cal. Jan. 17, 2007) at 43.

In this case, the prosecution's misconduct violated Petitioner's due process in each of the ways outlined above. Although it requires careful reading of the trial transcripts and is difficult to show, both DDAs Ardaiz and Robinson manipulated the evidence presented by avoiding problematic issues. One example is how they set up the one-gun theory for both the Graybeal and Meras crimes during the guilt phase for use in the penalty phase. These tactics, used throughout both trials, require the court to see through the manipulation. These tactics were exacerbated by the prosecution withholding and covering up exculpatory evidence. Misconduct also created ineffective assistance of counsel, especially here where without the Meras reports, no defense attorney would know what discovery was missing and the importance of the evidence. Further, when all these instances are taken together,[56] it amounts to a pattern and practice of misconduct.

5. Ineffective Assistance of Counsel (IAC)

California courts have held that counsel's failures require reversal because they "resulted in the withdrawal of a potentially meritorious defense" *People v. Pope* (1979) 23 Cal.3d 412, 425 and "it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings." *Strickland v. Washington*, supra, 466 U.S. at 694; *People v. Ledesma*, supra, 43 Cal.3d 171, 215-218. The Strickland standard requires a "significant but something-less than-50 percent likelihood of a more favorable verdict," which is met here. *People v. Carter* (2003) 30 Cal.4th 1166, 1211.

In *Holt v. Smith* (USDC ED CA) 2023 U.S. Dist. LEXIS 73568, the court granted a habeas petition on the grounds of IAC due to failure to investigate the defendant's mental competence.

[56] Fourth Supp. and Petition

Goodwin did not object to the Meras testimony. In *People v Turner,*[57] the court ordered a new trial where jury was improperly influenced by evidence of a second crime committed by defendant, even though the cases were severed. Here, although done circuitously, testimony pertaining to the Meras crime was used by the prosecution to paint Petitioner as a serial killer, which likely influenced the jury. In addition, Petitioner was also robbed of his right to confront the witnesses against him.[58]

II. Candor to the Court

Because there are so many misstatements and omissions by Respondent, detailing every misstatement and omission would mean creating a voluminous Denial. Therefore, Petitioner has documented only the most egregious examples of prosecution misstatements.

Respondent repeatedly states that Petitioner has failed in his ethical obligation of candor to the court. Petitioner states that any omissions were unintentional. Further, that he has consistently included potentially inculpatory evidence, i.e. co-defendant statements.

In the People's Return, in several places they state that Petitioner omitted Exhibits in order to mislead the court. However, upon review, Petitioner determined to have previously filed those Exhibits, i.e. Exh 1a and Court Exhibit photos 8-F & 8-H. Some of these allegations against Petitioner are incorrect and Respondent is guilty of violating candor to the court.

The People's Return also misleads that court by citing to Petitioner's investigator's interviews with DDA Ardaiz and Lean in using statements favorable to their position but neglects to mention that the interviews were not taken under penalty of perjury.

Respondent argues that because Petitioner failed to reconcile the facts regarding Petitioner's blood samples and testing at various times in these proceedings, that he violated

[57] Supp. p 4
[58] See Petition, p. 178, last paragraph.

candor to the court.[59] The explanation is that at the time of the DNA testing of Petitioner's, co-defendants and victim's clothing in 2020, there was no blood on Petitioner's clothing. The other reference to blood on his clothing is from the prosecution report which states that the blood sample that was cut from his clothing was too small to test.[60] Like over 50 items of other evidence that has been lost, the small piece of his shirt was lost by the prosecution. These are not incompatible nor lacking in candor.

Claim by Claim Analysis

As explained in the claim-by-claim analysis section below, Respondent misunderstands or misstates some of our claims. The legal standards which we sought to apply are contained in the claim headings.

Claim 1 – The Gun in Evidence is Not the Murder Weapon

Petitioner's Position

The Titan pistol in evidence is not the murder weapon. Our theory is substantial and supported by a police practices expert and a report from an independent lab, FACL. We are hampered by the destruction and/or lack of evidence. Further, the false gun narrative goes to the entire investigation being compromised.[61]

Our theory, as supported by police practices expert Roger Clark, is that the firearm and holster were planted.[62] Therefore, the firearm itself is false evidence.[63] The information regarding the markings on the holster was suppressed and is still being covered up by the prosecution. Under *Brady*, evidence presented at trial is not suppressed. However, because *Brady* stems from

[59] Return, p. 75 - 76, fn 31.
[60] See Exh 2f, FSO Lean Boudreau Request for Evidence Exam, dated 2/10/78
[61] See Exh. 1b, Declaration of Roger Clark, dated 12/4/19, at 4, lines 3–21 and See Exh 5ii, Declaration of Roger Clark, dated 10/15/22, at 2, line 19.
[62] See See Exh.1b, Declaration of Roger Clark, dated 12/4/19, at 5, lines 1 - 15; Exh 19c, Declaration of Roger Clark, dated 10/8/21, at 13, line 6-9, Exh 24b, Declaration of Roger Clark, dated 8/26/23, at 3, lines 21 – 27.
[63] See Exh 24b, Declaration of Roger Clark, dated 8/26/23, at 6, line 11.

constitutional protections, providing false evidence and covering it up is a constitutional violation. Here, the ballistics evidence was presented in a false and misleading way which led to Petitioner being wrongfully convicted. They could not have proven the case without the firearm. It is against the law to frame someone for a crime.[64]

Despite the prosecution's protestations, the serial number on the firearm in evidence is not obliterated. This is confirmed by the report of John Ciaccio, Retired DA Investigator, FACL Ballistics Report and Declaration of Roger Clark.[65] In addition, the prosecution has not produced any reports showing that the procedure for uncovering a firearm serial number was ever used on the firearm.[66]

For evidence marking purposes, a badge number is the equivalent of an officer's initials.[67] Although an officer with Badge #351 could have been from any police department, Petitioner confirmed that Retired Sacramento Police Officer Robert Givens had badge #351 in 1973.[68] Return Exhibit C states that FCSD only has records of badge numbers back to 1988; and that FPD badge #351 did not exist. CA Peace Officer Standards and Training manual (POST) includes references to badge numbers on their forms. Specifically, it has a place for ID number on the Evidence Property Record Field Receipt.[69]

A review of various FPD reports from 1978 lists officers with badge numbers in the 300 range,[70] so it is surprising that FPD did not assign that badge number to an officer. For example, Fresno PD Badge numbers were assigned to: Rodriguez, Robert H #342 and Callahan, J. #386.

[64] See *Mooney v. Holohan* (1935) 294 U.S. 103, 112–13 (per curiam).
[65] See Exhibit 24d, DAI Ciaccio notes, dated 5/25/18, second para; Exh 23a, FACL report, supra, at 1, bottom para., Exh 24b, supra, at 4, para 8.
[66] Exh 24e, FCSD Policy 804, Restoration of Firearm Serial Numbers
[67] Exh 24b, Declaration of Roger Clark, dated 8/26/23, at 4, lines 23–25.
[68] Exh 24g, Declaration of Robert Givens, dated 7/28/23, and Exh 24h, Sacramento Public Records Act Response, dated 8/9/23
[69] See Exh 3o, CA POST Manual, specifically Exhibits pp. 646, 658, 674, 682
[70] Exhibit 1ff. See also Exh 24h, list of FPD officer badge numbers prepared by counsel from police reports.

Both FPD and SPD have procedures which refer to officers' badge numbers.[71]

As explained in the Third Supp.,[72] Det. Lean inspected the firearm in FPD case #75-41415[73]. This report was obtained through a CPRA request.[74] This is new evidence and a *Brady* violation because this report was never discovered to the defense.

On May 16, 2023, pursuant to a subpoena duces tecum, the Sacramento PD produced a report from a 1973 case showing that Titan had been stolen. The logical conclusion, given the engraving on the holster, is that the Titan was in the possession of law enforcement prior to trial.[75] Per Exh 1a, Fresno law enforcement had knowledge that the Titan in evidence was stolen. Under *Jenkins*, they were under a duty to disclose the report. The report is exculpatory because it shows that the Titan had been stolen. The report is material because the suppression of the report allowed the People to get a conviction using the firearm as false evidence.

Despite CDDA Ardaiz's statement otherwise,[76] there is no expended slug in evidence.[77]

<u>People's position, including concessions and admissions</u>

The People admitted five claims regarding Claim 1. The most significant of these are: that no expended slug was recovered and that the autopsy could not conclude the caliber of the gun that caused the wound.[78] Respondent mischaracterizes that Petitioner changed his position on the planting of the gun. The People's position is that Petitioner's theory that gun was planted is speculative. Further, that the holster is separate from firearm. Last, that the serial number is obliterated on firearm in evidence.

<u>Petitioner's rebuttal</u>

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[71] Exhibit 24i SPD General Orders, references to Badge #s highlighted and Exhibit 24j, FPD policy Manual, references to Badge #s highlighted
[72] p. 7
[73] See Exh 23h, FCSD Request for Examination #273, dated 2/10/1978
[74] See Exh 24l, Petitioner's CPRA request to FPD, dated 12/7/2019.
[75] See Exh 24b, Declaration of Roger Clark, dated 8/26/23, at 4, para 8.
[76] See Exh 1gg, Transcript of Ardaiz interview with Jonah Lamb, dated 3/14/20, at 6, para 7.
[77] See Return, at 34, line 12.; See also Exh 24b, Declaration of Roger Clark, supra, at 2, para 4.
[78] This is despite a .25 caliber being listed on the death certificate. See Exh 4vv, Graybeal Death Certificate.

The DA did not rebut any of the evidence, especially expert declarations and reports regarding the holster and firearm. As they have in the past, they attached a non-scientific, not under penalty of perjury report from DA Investigator Isaac regarding her viewing of the holster and gun.[79] They also attached the Sacramento PD report regarding the theft of the firearm on 6/7/1973.[80] Return Exh C is a not under penalty of perjury report from DA Investigator Isaac, dated 3/14/23, which states that FCSD only had badge numbers back to 1988 and that FPD Badge #351 did not exist. Return Exh D is a photo of Court Exhibit 5-A the holster and firearm, as one exhibit.

Petitioner's position is that given their unsworn and non-scientific nature, these reports should not be given any consideration. Better photos of the holster and firearm are found in the FACL report addenda[81]. Despite Respondent's contrary statement in paragraph 1D, the photo of the wheel well behind the driver's seat is Court Exhibit 8-H, Exhibit 4h to the Petition. It is also included in Third Supp. Exhibits at p. 4. Court Exh 8-F, a photo of the same area of the car, is also an exhibit to Third Supp. at p. 6. It shows a holster and what appears to be the barrel end of a gun with no identifying marks or identification. The photos are simply photos of the floorboard.[82]

They could have acquired their own lab test – instead they have an unsupported theory of what the evidence shows. They accepted FACL's qualifications to perform ballistics testing.

They offered no explanation regarding Det. Lean's comparison report with the gun in FPD Case #75-41415. If law enforcement already had the murder weapon, then why did Lean need to look at the gun in Gary Stankewitz case[83] and compare it to a shell casing from the Graybeal

[79] See Return, Exh A.
[80] Petitioner obtained this report with a SDT. Note: Exhibit B includes a report from a juvenile case which is unconnected to the firearm theft).
[81] Third Supp., Exh 23a – Addendum 2
[82] See Exh 24b, Declaration of Roger Clark, supra, at 5, line 13.
[83] See Exh 24b, Declaration of Roger Clark, supra, at 5, para. 13.

case?[84] They also don't offer any explanation regarding all the reports regarding a firearm with serial number removed. There are two reasonable inferences that can be drawn: either those reports are false or they are accurate.[85]

Intentionally framing someone and wrongfully convicting them is a constitutional violation *Mooney v. Holohan* (1935) 294 U.S. 103, 112–13 (per curiam) and meets the *Clark* exception of an error of constitutional magnitude which led to a trial so fundamentally unfair that no reasonable judge or jury would convict. *Clark* at 759.

Claim 1 Conclusion

If the court is not persuaded that Petitioner has proven Claim 1, there is at least a material factual dispute regarding whether the gun was planted.

Claim 2 – False Evidence

Petitioner's position

The People used false evidence, to secure a conviction including but not limited to: the Titan firearm, the height of the victim and the trajectory of the bullet.

People's position, including concessions and admissions

The People's argument is that errors do not constitute misconduct.

The People concede that the blood sample from Petitioner's shirt was lost and that it did not admit Petitioner's GSR test results; however, that said failure was not a *Brady* violation or false evidence. Nothing in the 4/27/78 report says that Billy did not witness the shooting. They concede that Brown testified to more than one version of where on her body the victim was shot. Petitioner is complaining about the sufficiency of the evidence. "A great deal of other evidence existed, including eyewitness testimony of the murder." They argue that Petitioner would still be

[84] Exh 23h, FCSD Request for Examination #273 re: case #75-41415, dated 2/10/78.
[85] See Exh 24b, Declaration of Roger Clark, supra, at 3, para. 7.

1 guilty under the felony murder statute.[86]

2 Victim was 5'7" based on approximations; Petitioner said 5'2.5".[87] Petitioner was 6'0".
3 However, they argue that height doesn't matter. The victim's height is a foundational part of the
4 prosecution's theory of the case. Without it, their theory of the trajectory of the bullet doesn't
5 work. In seeking to establish Petitioner as the shooter, the People have emphasized the importance
6 of the victim's height relative to Petitioner's height. Given the testimony of prosecution witnesses
7 and argument made by DDA Robinson, on this point, it is material.

8 DDA Pebet argued that the autopsy report was 'a draft notes document' PRH Vol. XXVII
9 RT 372 - 373, used to prepare a report. And that Mr. Pawlowski's testimony was that she was
10 5'7".

11 Citing *Seumanu*[88], Respondent argues that DDA Robinson did not mislead the jury in
12 closing or opening. Further, citing *Smithey* and *Martinez*, that DDA Robinson's opening was
13 neither egregious or reprehensible.

14 Petitioner's rebuttal

15 Petitioner does not disagree with the law cited re: opening statement. However, here, the
16 opening statement was given after the prosecution's case in chief. Therefore, it discussed the
17 evidence presented. As Respondent now concedes, DDA Robinson's statement regarding an
18 expended bullet being found near the victim was a lie.[89] It is part of the pattern and practice of
19 misconduct.

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[86] As the CA Supreme Court stated in *In re Figueroa* (2018) 4 Cal.5th 576, 592 upon vacating the conviction, "We decline to posit a radically different trial than the one petitioner received, then try to discern what a jury might have concluded had untainted evidence, argued under a different legal theory, been presented. Nor would it be productive to order an evidentiary hearing on this question. A referee would be in no stronger position than we to divine what a jury might have determined. Whether the inquiry is conducted here or before a referee, the level of speculation required cautions against modification of this verdict." Similarly here, Petitioner argues that this court should not now perform the role of a jury and convict Petitioner of a lesser crime.

[87] See Exh 24b, Declaration of Roger Clark, supra, at 5, line 25, wherein he admits that the victim's height was 5'2.99".

[88] *People v. Seumanu* (2015) 61 Cal.4th 1293.

[89] Return, at 34, line 12.

Petitioner agrees that this claim is based on DDA Robinson's information about the facts at the time of trial.

False evidence was used with an intent to deceive. Despite their protestations that the height of the victim and the shooter don't really matter, not only did they elicit testimony about both at trial, they used the height of the victim and shooter, to corroborate the testimony of their only alleged eyewitness to the shooting, Billy Brown.

The People used false evidence to say that the gun was tied to Petitioner, which went unchallenged by second trial defense counsel. Therefore, Petitioner was prejudiced by the fact that they did not introduce his negative GSR results. That the false evidence went unchallenged strengthens our IAC claim.

At the second trial, in order to make their theory work, DDA Robinson did not ask Dr. Nelson about his measurement of Ms. Graybeal. Rather than using scientific documentation, they said that she was 170 cm tall, relying solely on the victim's father's estimate of 5'7". Boudreau also testified falsely that there was a 5-degree upward angle of the bullet.[90] In his autopsy report Dr. Nelson drew a picture of the angle and wrote it was a 10 degree angle.[91] If we take the objective forensic pathologist's autopsy report as most accurate, a 72" or 73" tall individual[92] holding a gun straight out from their shoulder that is approximately 60" or 61" from the ground would deliver a bullet that would strike the victim about 3-4 inches higher than Ms. Graybeal was struck, and there would be no upward angle.[93] In fact, the point at which she was struck would probably have a downward angle to the point of exit, had Petitioner been the shooter. The 5'3" Marlin Lewis, on the other hand, firing only slightly upward, would discharge a bullet that would

[90] T2 Vol. II RT 154, lines 3-5.

[91] Exh 2b, FSO Nelson, Dr Graybeal Postmortem Record, dated 2/9/78; See also Exh 2d, Declaration of Dr. Jerry Nelson, dated 3/19/19.

[92] Exhibit 24m, FCSD Jail Booking Report, dated 7/3/23, showing Petitioner's height as 6'1"

[93] See Exh 24b, Declaration of Roger Clark, supra, at 2, lines 20-23.

make its entrance where the homicide bullet struck if he fired it from 9”-12” at an upward angle of around 10 degrees.

The curious way the prosecution contrived this evidence is consistent, however, with all the other due process issues, including the missing x-rays. As expert Chris Coleman stated, x-rays could have helped, “If the x-rays were in existence, they might be used to tell whether the victim was shot with a small caliber firearm or a large caliber firearm. The x-rays could determine whether the bullet path was consistent with the caliber of the firearm in evidence. The x-rays would show the path of the bullet through the skull, including the entrance and exit. The x-rays would show whether there were bone fragments in her skull. The x-rays would show any pieces of lead fragments or copper fragments which would give information to determine what type of bullet the victim was shot with. The x-rays would also show whether the entire bullet went through her skull or whether some of the bullet remained in her skull”.[94] This information would help to determine whether the firearm in evidence is the correct firearm and assist in reconstruction of the actual damage to the victim, including determining the trajectory of the bullet.[95]

DDA Robinson further misled the jury by giving Boudreau a hypothetical example of the victim being 5’7”. Boudreau acknowledged that the hypothetical was used to meet DDA Ardaiz’s theory of the case.[96] The defense failed to catch the discrepancy, in spite of the fact that it was the only independent evidence offered to corroborate an often inconsistent Billy Brown. Just on the height/angle/trajectory evidence alone, there are many other examples of IAC: counsel did not hire an independent pathologist, object to the testimony or the prosecution statements at trial or request the autopsy report nor present any evidence to rebut it.

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[94] See Exh 24n, Declaration of Chris Coleman, dated 8/1/23, at 1.
[95] See Exh 24n, Declaration of Chris Coleman, dated 8/1/23, at 2–3.
[96] See Exh 2g, Declaration of Allen Boudreau, dated 3/14/20, at 4, para 15.

Regarding the 4/27/78 report,[97] Respondent does not address Billy's incorrect reenactment. If you read the report, Billy's reenactment of the actual shooting was false because he pointed the gun straight at the back of DA Investigator Spradling's head, not on the side of his neck.

DDA Pebet's statement on the record that the autopsy report was 'a draft notes document'. If so, where is the actual postmortem/autopsy report, no such report has been produced.

Again, Petitioner is not complaining about the sufficiency of the evidence. He is saying that the prosecution used false evidence to convict him. He is not talking about errors, he is talking about knowing misconduct.

Smithey and *Martinez,* cited by Respondent, support our position. *Smithey* held that a prosecutor violates state law if conduct involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury, at 960, citing *People v. Samayoa* (1997) 15 Cal.4th 795. *Martinez* held that "[u]nder our state law, prosecutorial misconduct is reversible error where the prosecutor uses "deceptive or reprehensible methods to persuade either the court or the jury" *Martinez*, supra, at 955-956, citing (*People v. Pric*e (1991) 1 Cal.4th 324, 447 and " 'it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct' " (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071 [parallel cites omitted].

In *Dickey v Davis* (9th Cir. 2023) 69 F.4th 624, a Fresno death penalty, felony murder case, habeas was granted for failure to correct false testimony of star witness and using that testimony in closing. For nearly ninety years, it has been established Supreme Court precedent that a conviction violates due process if it is obtained through knowing presentation of perjured testimony. *See Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935) (per curiam). In 1957, the Supreme Court held that a prosecutor's failure to correct a material false impression also violates due process. *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curiam).

[97] Exh 2v, FCDA Spradling Ardaiz Investigation Report, dated 4/27/78.

Claim 2 Conclusion

If the court is not persuaded that Petitioner has proven Claim 2, there is at least a material factual dispute regarding whether the People used false testimony and evidence to convict Petitioner.

Claim 3 – New evidence

Petitioner's position

As stated in the Petition, there are four items of new evidence. As of January, 2023, Petitioner now alleges that the failure of the court to keep a log of court exhibits is additional new evidence.

People's position, including concessions and admissions

Respondent concedes that the Meras reports were discovered after 1983 trial and therefore were suppressed. Further that the Meras shell casings report was favorable. However, it denies that the reports are admissible or would have changed the outcome of the trial. Meras reports are not admissible nor material because they were used in penalty phase.

Despite Det. Snow's declaration that he interviewed Petitioner, Respondent concedes that Det. Snow attempted but did not actually interview Petitioner. Respondent argues that this is not new evidence, saying that Petitioner already knew. Also that if it was taped, Respondent denies that the tape was not turned over. Tapes of other interviews and usual practice point to the tape existing. States that the evidence in the habeas is insufficient to conclude by a preponderance of the evidence that Petitioner denied that he did the shooting.

Marlin admission is not admissible and not new evidence because the defense knew about it years earlier. Respondent makes up its own version of events regarding the timing of Marlin's meeting with Laura Wass. Apparently to show bias, Respondent also states that Ms. Wass is a member of the Stankewitz legal team. Unfortunately, Marlin Lewis cannot be questioned because

1 he was deceased in 2009.[98]

2 Respondent concedes that DNA testing is admissible but says that it should have been done
3 sooner. It could have been done starting in 2001. Respondent admits the significance of the
4 presence of blood on the clothing in evidence. Respondent states that the prosecution did not make
5 argument regarding blood stains at trial. DNA evidence would not outweigh eyewitness and other
6 testimony.

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8 Petitioner's rebuttal

9 The failure to provide the Meras reports was a *Brady* violation because with the knowledge
10 of what was in the reports, they could have been used by defense to put the alleged murder weapon
11 caliber into question. We now know that the ballistics evidence has been compromised. Although
12 the Meras crime was not brought up in name at the second guilt phase trial, the prosecution theory
13 regarding the murder weapon, including the number of bullets and how they were expended was
14 brought up in testimony by Criminalist Boudreau and DDA Robinson in his opening statement.
15 Therefore, the Meras reports would have gone to impeach the credibility of the investigation, the
16 testimony about the gun, to show that the gun was false evidence and would have changed the
17 outcome of the trial.

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19 The assertions regarding the Det. Snow interview are made with no declarations or proof of
20 any kind, including a new declaration from Det. Snow rebutting his prior declaration. If second
21 trial defense counsel knew about the interview, he did not cross examine Det. Snow about it. The
22 fact that the tape is missing is supported by Claim 4, specifically Exhibit 4o, which lists over 50
23 items of evidence missing, including almost every interview tape. The fact of Petitioner's denial of
24 the shooting is corroborated by other evidence. Respondent relies upon CDDA Ardaiz's statement

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[98] See Exh 24o, Ciaccio case management report notes: note dated 9/13/17.

at the preliminary hearing that all reports were turned over.[99] However, no logs or prosecution documentation of what discovery was turned over has been provided except the log prepared in 2017. Respondent again brings no declarations or proof to back up its assertions.

The correct standard at this stage of the habeas is whether, assuming that the factual allegations are true, Petitioner is entitled to relief. Det. Snow's testimony that Petitioner denied the shooting would have changed the outcome is not hearsay and would be admissible. Petitioner's statement to Det. Snow denying shooting Mrs. Graybeal is not hearsay for several reasons. First, it is not hearsay because there is no specific hearsay statement being offered. The exact information being offered by Petitioner is that Det. Snow said that the Petitioner denied the shooting (different than "I did not shoot her"). In criminal trials, the prosecution routinely chooses not to admit evidence of a defendant's denial. Criminal defense attorneys are always allowed to elicit that 1) the client gave a statement, and 2) that they denied the criminal act. No specific hearsay statement is elicited because the defendant's denial is a series of acts, movements, tone of voice, words and body language that is observed by the interviewing officer which leads them to the conclusion that the defendant is denying the crime.

Further, the police reports regarding the Meras crimes do not need to fit a hearsay exception because we have preliminary hearing testimony from Meras and arguments on the record by CDDA Ardaiz. Therefore, these reports corroborative and contextual to the misconduct claim.

Respondent again brings no declarations or proof to back up its assertions. At the time that the article appeared in the Fresno Bee in 2013, Petitioner was represented by Richard Beshwate, who was subsequently released pursuant after a Marsden hearing. Soon after becoming counsel in the underlying criminal case in 2017, Petitioner's counsel started to pursue lingering doubt as to

[99] See Return, p. 53.

guilt. The sequence of events proffered by the People is not based on any declarations or evidence. Laura Wass, who witnessed Marlin's admission, explains that Marlin was already a member of the Mono Chukchansi tribe at the time of his admission. Further, that he had no need to curry favor with her[100]. His admission is a declaration against interest[101] and therefore admissible under Evidence Code Sect. 1230. Ms. Wass is not a member of the Stankewitz legal team.

Given the admission of all appellate counsel that they did not consider or investigate guilt, no DNA testing was done.[102] DNA testing was done because in March, 2019 the defense consulted experts who examined the evidence and said that they saw what could be blood on the clothing in evidence. DNA evidence could have outweighed the other evidence at trial because it could have shown that Petitioner was not present at the time of the shooting, much less the actual shooter.

Claim 3 Conclusion

If the court is not persuaded that Petitioner has proven Claim 3, especially given Respondent's concession that the Meras report was not turned over prior to the 1983 trial, there is at least a legal question regarding whether the Meras report was material to Petitioner's guilt.

Claim 4 – Prejudicial misconduct

Petitioner's position

The prosecution's misconduct, starting with the initial investigation, violated Petitioner's due process rights and prejudiced him.

People's position, including concessions and admissions

The People deny the claim in its entirety. However, they admit that CDDA Ardaiz directed the investigation. They acknowledge that misconduct might render a subsequent trial violative of someone's due process; however, Petitioner makes no such claim. Relying on *Masters*,

[100] See Exh 24p, Declaration of Laura Wass, dated 8/14/23.
[101] See Exh 24p, Declaration of Laura Wass, dated 8/14/23.
[102] See Claim 13, Petition, and discussion of Claim 13, infra.

Respondent tries to narrow the definition to misconduct at trial. However, *Masters* cites *Vines* which held that due process rights are violated if a prosecutor presents false testimony knowingly and fails to correct it. *Masters*, at 1089, citing *People v. Vines* (2011) 51 Cal.4th 830. They state that Petitioner doesn't cite any case law that prosecution must re-test evidence before a second trial. Petitioner doesn't explain what testing was done in 1978 and how that would have been different in 1983. It's not misconduct to fail to have exhibits admitted into evidence. *Brady* is not applicable, citing old and inapplicable case law, including *Scoggins.* Citing no case law, they state that there is no duty to preserve their file or evidence post-trial, stating that this court so ruled in 2017.[103]

<u>Petitioner's rebuttal</u>

The fact that Respondent admits that CDDA Ardaiz directed the investigation exponentially increases the need to have an evidentiary hearing with Ardaiz on the stand to answer questions about withholding evidence, deceiving the preliminary hearing judge and the judge who heard pretrial motions, and much more.

As it turns out, beyond what is stated in the Petition[104], Robinson told a double lie to the court, including the jury, about whether an expended bullet/slug was found. In his opening statement, he stated that Boudreau said that the expended bullet found near the victim had been fired from the gun found in the car when the arrests were made.[105] (T2 Vol. 1 RT 1-L) However, Boudreau did not testify to that. Boudreau testified that "<u>the only evidence exhibit to be compared with the gun was the cartridge case. There was no bullet</u>". T2 Vol. I RT 160, line 11. Stating that an expended bullet was found was a material statement because it made the jury believe that there

[103] Respondent refers to this court's Order Denying Motion to Dismiss under *Brady* and *Trombetta*, entered on 12/20/2017; however, that motion and Order did not address the extensive preservation of evidence that is documented in the Petition.

[104] Petition, p. 147.

[105] It's also just as likely that Robinson told the truth and a slug was recovered but it was later removed from evidence because the Titan .25 is not the murder weapon. It's more than a coincidence that in 1983, DDA Robinson said a slug was recovered, and that Ardaiz tells a defense investigator in 2021 that a slug was recovered.

was no doubt that the bullet came from the gun in evidence. However, we now know that there was no expended bullet/slug found. Respondent so admits.[106] The lack of finding an expended slug at the scene demonstrates that the slug that caused the fatal injury was never recovered and therefore never matched to the Titan pistol.[107]

In another act of misconduct, the prosecution withheld exculpatory evidence regarding Petitioner's denial of his guilt in the shooting. While he was in the Fresno jail at the same time as Petitioner in 1978, a prosecution investigator interviewed Troy Jones.[108] The interview was tape recorded and extensive notes were taken.[109] Mr. Jones told the investigator that Petitioner denied doing the shooting in the Graybeal case. To date, none of this evidence has ever been discovered to the defense.

Defense counsel were entitled to rely on Ardaiz statements that he turned over all the evidence. PH Vol. I RT 51, 54. However, even he admitted that not everything was turned over, specifically the Field Interrogation card for Christina Menchaca. PH Vol. I RT 417.

As stated in previous habeas pleadings, as a matter of proper police procedure, and verification purposes, the evidence should have been retested before the second trial.[110]

Although it may not be misconduct to fail to admit evidence, it is misconduct when the content of the exhibits or evidence is contrary to a witness's testimony. One example in this case was eliciting false testimony about the height of the victim, while failing to introduce the autopsy report which had the scientific measurement of the victim's height. In the Petition, citing *People v. Hitch* (1974) 12 Cal.3d 641, the prosecution has a duty to preserve evidence. *Trombetta/Youngblood*[111] also recognizes a duty on the part of the prosecution to preserve

[106] Return, at 34, line 12.
[107] Exh 24b, Declaration of Roger Clark, dated 8/26/23, at 2, lines 23-25.
[108] See Exh 24q, Declaration of Troy Jones, dated 7/30/23, at 1–2.
[109] See Exh 24q, Declaration of Troy Jones, dated 7/30/23, at 1–2.
[110] See Exh 24b, Declaration of Roger Clark, supra, at 6, para.15.
[111] *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988)

evidence. *Scoggins* does not apply because Petitioner is not arguing that the jury got it wrong or that there was conflicting evidence or testimony. Under *Hitch* and *Jenkins,* the prosecution has a duty to preserve and turn over evidence. They neglect to mention that Petitioner raised the missing DA's files in 2018, not 2017.[112] If the evidence has not been lost, which Respondent denies, then they could produce it now. The prosecution has a duty to rectify false testimony. *Dennis v. Pennsylvania* (3rd Cir. No. 19-23902021), citing *Mooney v. Holohan* (1935) 2974 U.S. 103 and *Pyle v. Kansas* (1942) 317 U.S. 213, 216.

In another example of misconduct, during the penalty phase, DDA Robinson had Meras look at a photo of Petitioner. Despite being unable to identify Petitioner, Meras testified that the man who held a gun to his head had similar length hair.[113] DDA Robinson admitted that photo of Petitioner[114] with shoulder length long hair to connect him to Meras's testimony that one of his assailants had that length of hair.[115] However, Marlin Lewis also had the same length of hair in his photo, but his photo was received,[116] but not admitted into evidence. Goodwin did not object to Petitioner's photo being admitted.[117]As a result, the jury had only Petitioner's photo in the jury room, making it easy for the jury to assume that he was guilty.

Claim 4 Conclusion

If the court is not persuaded that Petitioner has proven Claim 4, there is at least a material factual and legal dispute as to whether the prosecution committed prejudicial misconduct.

Claim 5 – State withheld Material Exculpatory Evidence

Petitioner's position

Starting with the initial investigation, the People withheld material exculpatory evidence.

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[112] See Second Amended Motion to Dismiss under *Brady* and *Trombetta.*
[113] T2 Vol IV RT 814, Line 8, p. 815, Line 2.
[114] Petition p 148 – Exh 24r – Second Trial Exhibit List
[115] T2 Vol IV RT iv (Includes Court Exhibit 2–Stankewitz photo).
[116] See T2 Vol I RT 205, Line 9-13, Court Exhibit 4.
[117] See T2 Vol IV RT 1029, Line 8–22.

DNA evidence not discoverable before the first trial because technology was not available; it was in use at the time of the second trial.

People's position, including concessions and admissions

Respondent denies all of Claim 5, arguing that Petitioner doesn't meet the *Brady* standard. Det. Lean denies interviewing Petitioner. Respondent denies that the physical evidence was suppressed and that the defense had access to it. *Brady* does not require the government to gather evidence, citing *Tadros*[118]. Evidence of tapes of interviews is merely suspected, so no *Brady* violation, citing *Erickson*[119]. Through omission, Respondent concedes that the Troy Jones interview was suppressed. Admits there was a Richardson tape but says that it was made available per Ardaiz letter.

Respondent admits that the Meras report was suppressed. Return, p 73.

Respondent admits that the x-rays of the victim are lost. The x-rays were not useful regarding caliber. Physical evidence could have been tested by the defense. Richardson tape was made available.

Petitioner's rebuttal

Petitioner does not agree that the holdings in *Tadros* and *Erickson* apply here. Petitioner is not saying that the People were required to gather evidence. They already had the evidence. Further, the existence of the tapes is confirmed by police reports and co-defendant interview statements[120]. The existence of notes taken or used during Billy Brown's 2/11/78 interview is verified by listening to the interview tape.[121] Respondent cites old case law regarding *Brady*. Det. Lean has been unclear about whether he interviewed Petitioner.[122] Troy

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[118] *United States v. Tadros* (7th Cir. 2002) 310 F.3d 999
[119] *United States v. Erickson* (10th Cir. 2009) 561 F.3d 1150
[120] See Exh 5l, Table of Missing Evidence – Stankewitz habeas, Items ## 27, 31, 32, at 9-11.
[121] Exh 2h, Declaration of Alexandra Cock, at 3, f.
[122] See Exh 5b, Transcript of Lean Interview, dated 3/27/20.

Jones interview was favorable, material and suppressed.[123]

As mentioned throughout this Denial, x-rays of the victim would have helped disprove the prosecution's theory that Petitioner was the shooter, and x-rays would have helped impeach Billy Brown on what he allegedly witnessed. [124] [125]

Petitioner told Troy Jones that he didn't do the shooting and Jones informed the prosecution of this during his jailhouse interview.[126] This was never disclosed to defense counsel.

CDDA Ardaiz stated in a letter to defense counsel that the Richardson tape was made available. However, Ardaiz has made other statements, not under penalty of perjury, that are untruthful.

Withholding the Meras report for over 39 years is another example of pattern and practice of misconduct. That report is material because it shows that a person other than Petitioner discharged a firearm in the course of a robbery and it shows that the firearm was not the same weapon used to kill Graybeal.

The loss of the DA case files for Petitioner and the co-defendants makes Respondent unable to produce any documents that they have and cripples the defense from considering what was known and when. Petitioner is prejudiced because he cannot prepare a defense to his conviction.

<u>Claim 5 Conclusion</u>

If the court is not persuaded that Petitioner has proven Claim 5, there is at least a material factual dispute as to whether the prosecution committed *Brady/Jenkins* violations.

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[123] See Exh 24q, Declaration of Troy Jones, supra at 1 – 2.
[124] See Page 45, starting at line 3, supra, for greater discussion.
[125] The fact that the x-rays are missing is confirmed by Exh 24f, FCDA, Ciaccio Chart of Stankewitz Evidence Viewed. The highlighted section at p. 5 – 6 is evidence not viewed and therefore missing.
[126] See Exh 24q, Declaration of Troy Jones, dated 7/30/23, at 1-2.

Claim 6 – Billy Brown[127]

Petitioner's position

Billy Brown's testimony was coerced and not reliable.

People's position, including concessions and admissions

The People deny the truth of Billy's recant statement. Billy didn't lie at preliminary hearing. Coercion and alcohol allegations come from recant, therefore viewed with suspicion, citing *Weber*. Pre-trial coercion does not give relief if no showing of impropriety at trial, citing *Douglas*[128], a case where a witness was beaten by law enforcement prior to trial. CDDA Ardaiz denies that Billy was coerced. No coercion if testifying pursuant to an immunity agreement which specifies that he will testify truthfully. Billy's statements were substantially consistent. Court said so in 2017 order. Regarding the 4/27/78 report – all reports were disclosed to defense, so could have cross examined Billy about it. VMC request was not for all records. They deny truth of recant. Delay from 1993 to now – why wasn't it raised in federal habeas? The five-year delay between the first trial and second trial eliminated the influence of the prosecution, citing *Boyer*.[129]

Newly discovered evidence is not grounds unless it undermines the entire structure of the case to which the prosecution rests. *In re Weber* (1974) 11 Cal.3d 703, 724, citing *Lindley* and *Branch.*[130] Even if extrajudicial statements are admitted, they would not be newly discovered evidence under *Lindley* or *Branch* because they are being introduced by a snitch with declaration. *Weber*, supra, at 724.

Petitioner's rebuttal

Respondent submitted no declaration from CDDA Ardaiz or DDA Robinson refuting our claim that Billy's testimony was coerced. As discussed in Claim 6, throughout his testimony, Billy

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[127] Respondent incorrectly refers to Billy Brown as Billy Bob, see Return, p.81.
[128] *People v. Douglas* (1990) 50 Cal.3d 468
[129] *People v. Boyer* (2006) 38 Cal.4th 412
[130] *Ex parte Lindley* (1974) 29 Cal.2d 709; *In re Branch* (1969) 70 Cal.2d 200

testified falsely. He was a reluctant witness. He was under extreme duress and worried about being charged with first degree murder.[131] He was only 14 years old during the initial investigation and interviews, when his testimony was set. He was only 20 years old at the time of the second trial, when he was again coerced to testify, this time by DDA Robinson.[132] The Michigan Supreme Court recently decided a case regarding whether a confession was coerced from a youthful offender. The defendant in *Stewart*, similar to Billy Brown, who was 18 years old, also had previous encounters with law enforcement which the court held made him more vulnerable. The court found that age is a relevant circumstance to be considered and that the cumulative effect of the circumstances on defendant's free will was such that defendant's statements were not freely and voluntarily made. *People v. Stewart* (2023) Supreme Court of Michigan Mich. LEXIS 1151. Although the actions of the prosecution in Stewart are a bit different than those used against Billy Brown, the ultimate effect was the same.

Douglas, cited by Respondent, where the court held that beating the witness pretrial is not considered unlawful because it did not happen during trial. Petitioner argues that *Douglas* shouldn't be good law. *Boyer* was superseded by statute enacted in 1995 Amendment 22 that removed diminished capacity as defense. See *Barber v. Barnes*, 2012 US Dist. LEXIS 179867.

Despite *Boyer*, the five-year delay between trials did not eliminate the influence of the prosecution. As Billy stated in his recantation and interview, he was a reluctant witness.[133] The fact that he testified similarly at the second trial five years later doesn't cure the fact that his testimony was coerced because he was still under pressure to testify the way that DDA Robinson told him to[134], just as DDA Ardaiz did at the first trial. Here, Billy was the prosecution's main witness at

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[131] See Exh 6w, Declaration of Billy Brown, dated 9/29/1993, at 3, para 17 and Exh 6c, Def. Investigator Kochuba Interview with Billy Brown, dated 9/20/1993, at 27–29.

[132] See Exh 6w, Declaration of Billy Brown, dated 9/29/1993, at 3, para 17.

[133] See Exh 6w, Declaration of Billy Brown, supra, at 3, para 17; and Exh 6c, Def. Investigator Kochuba Interview of Billy Brown, dated 9/20/93, at 27-28

[134] See Exh 6w, Declaration of Billy Brown, supra, at 3, para 17; and Exh 6c, Def. Investigator Kochuba Interview of

trial and the only alleged witness to the shooting. Therefore, his recantation should be given great weight because his testimony was critical to getting a conviction.

Although Respondent argues that Goodwin had a copy of Billy's immunity agreement, the testimony regarding the agreement is unclear. The way in which Goodwin questioned Billy about it, it appears that Goodwin did not have a copy.[135]

Claim 6 Conclusion

If the court is not persuaded that Petitioner has proven Claim 6, there is at least a material factual dispute regarding whether Billy's testimony was coerced.

Claim 7 – State presented false and misleading evidence - Meras case

Petitioner's position

Petitioner's position regarding the second trial testimony regarding Meras is explained in the Petition at page 147.

People's position, including concessions and admissions

Fails to state a claim about Petitioner's guilt trial. Denies *Brady* violation. Preliminary hearing was not the cause of Petitioner's confinement. Meras did not testify to the guilt phase jury, therefore that evidence cannot undermine the confidence in the outcome.

Petitioner's rebuttal

The same jury heard the evidence for both the guilt and penalty phases. The false evidence introduced at the preliminary hearing is another example of the pattern and practice of prosecutorial misconduct. The prosecution argued at the preliminary hearing and in pretrial motions, that the "evidence was strong" that the same gun was used in both crimes. Respondent

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Billy Brown, supra, at 27– 8.

[135] The phrasing of Goodwin's objection indicates that he didn't have a copy of the immunity agreement. T2 Vol. II RT 354, lines 10-16. See also T2 Vol II RT 549, at line 18, where he questions Billy about what statements he made and T2 Vol. II RT 551, lines 16-23. DDA Robinson also asked about the immunity agreement in redirect; however, there was no reference to the written immunity agreement. See T2 Vol. II RT 562, starting at line 6.

admits that there was no expended slug. Return, p. 34, line 12.

Respondent does not refute Meras's statement that the attempted robbery crime occurred in either 1975 or 1976.

Claim 7 Conclusion

If the court is not persuaded that Petitioner has proven Claim 7, there is at least a material factual dispute regarding whether the prosecution presented false testimony in the second trial guilt phase regarding the one-gun theory and that Petitioner was prejudiced by that testimony.

Claim 8 – Unlawfully Charged with Premeditated Murder

Petitioner's position

The State unlawfully charged Petitioner with first degree murder when it knew that he could not form the necessary intent for premeditation and deliberation.

People's position, including concessions and admissions

The case was properly charged. Mental health issues were previously raised on appeal federal habeas, and are therefore barred, citing Judge Ishii's order. No *Clark* exception stated by Petitioner. The issue of competency was a ground of reversal in the first trial.

Petitioner's rebuttal

This specific issue was not raised on appeal or in any previous habeas petition, therefore it is not procedurally barred. Further, it meets one *Clark* exception: there is a clear and fundamental constitutional error that strikes at the heart of the trial. Respondent's position is that if prosecutors have to determine whether a defendant is mentally incapacitated, they will be unduly burdened. Judge Ishii's order was for a federal habeas, not an appeal. Respondent does not point to where this specific issue was previously raised and raises only general "mental health issues". The fact that Petitioner's first trial was reversed due to the lack of competency to assist counsel, put the People further on notice that Petitioner's mental competency should have been evaluated. At a

minimum, this is a *Brady* violation because the Zeifert EEG report was not discovered to the defense.[136]

Claim 8 Conclusion

If the court is not persuaded that Petitioner has proven Claim 8, there is at least a material factual dispute regarding whether the prosecution knowingly charged Petitioner with premeditated murder, despite the existence of medical reports which showed that he could not form the requisite intent.

Claim 9 – Special Circumstances would have been rejected by the jury

Petitioner's position

Special circumstances would have been dropped, given prosecutorial misconduct and ineffective assistance of counsel. Further, Petitioner is not guilty of the murder; therefore there is no underlying murder finding, which is necessary for special circumstances.

People's position, including concessions and admissions

Petitioner fails to identify *Brady* or IAC. The jury considered whether Petitioner was high on heroin. Raised in federal habeas.

Petitioner's rebuttal

A *Clark* exception applies: there was ineffective assistance of counsel and prosecutorial misconduct.

Claim 9 Conclusion

If the court is not persuaded that Petitioner has proven Claim 9, there is at least a material factual dispute regarding Petitioner was present at the time of the murder.

[136] See Petition Claim 8.

Claim 10 – Firearm conviction was obtained through false evidence

Petitioner's position

There is no physical evidence that ties the firearm to the Petitioner. The People used false evidence to get the firearm enhancement.

People's position, including concessions and admissions

Under timely and successive petition analysis, Petitioner's claim is untimely. Petitioner concedes in Third Supp. Co-defendant statements are inculpatory. Petitioner asks for reevaluation of evidence submitted to the 1983 jury which is not appropriate for habeas.

Petitioner's rebuttal

Petitioner outlined why his Petition allowed under timeliness and is not a successive petition. See Section: Procedural Bars, supra, p. 26-28. Petitioner did not concede his argument that the gun was planted. See Claim 1, infra. Again, Petitioner is not arguing sufficiency of the evidence; he is arguing that the jury was presented with false and misleading evidence. The co-defendants did not testify, their testimony was not subject to cross examination, so the jury did not hear their versions of events. Further, the statements of Lewis, Topping and Menchaca do not say that Petitioner was the actual killer.

Claim 10 Conclusion

If the court is not persuaded that Petitioner has proven Claim 10, there is at least a material factual dispute regarding whether the prosecution presented false evidence regarding the firearm.

Claim 11- Prosecutorial Misconduct from 2012 – present

Petitioner's position

As outlined in the Petition, the pattern and practice of misconduct in this case spans its entire 45 ½ years duration.

People's position, including concessions and admissions

Respondent concedes that this claim is not barred by *Waltreus* and *Clark*. However, Respondent states that it may be substantially delayed under *Reno*.

Petitioner hasn't shown how without this misconduct, there would have been a more favorable result. No discovery violations alleged. Under 1054.9(f) the prosecution is not required to preserve evidence. The lost case file issue was already litigated and denied in 2017. Height discrepancy was already denied. DDA Pebet's statement was not deceptive. Regarding the notice of aggravation, it is not applicable because this is not a death penalty case. Deny *Trombetta/Youngblood* claim regarding destruction of evidence. Petitioner's claim regarding destroyed evidence was already decided on Dec 20, 2017.

Petitioner's rebuttal

As discussed above in Claim 4 above, infra, Respondent tries to limit the definition of misconduct to only that which occurred in the prosecution's opening and closing at trial, citing *Martinez*. However, *Jenkins* and the other cases cited in Supplemental filings, listed above in Claim 4, infra, give the full range of prosecutorial misconduct. The *Brady* violation of the Meras case reports just occurred in 2017. Just within the last two months, we found exculpatory reports and information in the possession of the Sacramento Police Department, an agency under the control of the prosecution. That evidence was known, or should have been known by law enforcement in 1978 but was withheld.[137] (see above discussion)

This claim cannot be delayed under *Reno* because it is still happening. A more favorable result would have been that Petitioner would have had grounds for release years ago. They cite *Osborne*, which is superseded by *Jenkins*. Under *Jenkins*, the prosecution has had a duty throughout this case, from pretrial through post-conviction to follow the ethical rules and disclose

[137] See Exh 24h, SPD CPRA response, dated 8/9/23; Return Exh B, supra; See also Exh 24s, SPD, second SDT return, dated 7-3-23

evidence. It has not done so. The second *Trombetta* motion to dismiss, which added the fact of the entire prosecution file and co-defendants files, was never responded to nor ruled on.

People admitted that the Meras file documents were suppressed.[138] They also admitted in 2017 that they lost the case files.[139] Now they say that they are not obligated to retain the case files.[140] The People have a duty to preserve evidence. See *Jenkins,* supra. CA Penal Code Sect. 1054.9(f) does not release them from the obligation to preserve evidence, it provides "This section does not require the retention of any discovery materials not otherwise required by law or court order." [Emphasis added] In this case, the discovery motion and order from 1978[141] as well as *Jenkins* make it clear that the prosecution must retain discovery materials. Further, if the prosecution is obligated to turn over evidence, including post-conviction, then it follows logically that they must preserve it. *Duvall/Lewis/Jenkins*. These are all instances of misconduct. The Return is yet another example of misconduct, given its many misstatements and misleading arguments of law and fact.

They mislead the court regarding the Meras evidence. Petitioner admits that the Meras paycheck was found in the victim's car by her family. That occurred after it had been inventoried and the contents photographed by FPD, without the paycheck being found. Further, they say that Meras IDed 'some of Petitioner's co-defendants as involved in his robbery. However, they do not cite where or when he did.[142]

The height discrepancy issues are discussed in Claim 2 above, as well as in Petition Claim 2.

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[138] See Return, p.50, line 21.
[139] PRH Vol XXVII RT page 404, Line 25 through Page 405, Line 11
[140] See Return, p. 62, lines 21-22 and p. 97, lines 10 – 12.
[141] See Clerk's Transcript T1 CR Vol. I CT 26-34 and Clerk's Transcript T1 CR Vol. I CT 108.
[142] See Petition, Claim 7.C.2. Meras was unable to identify Topping or Lewis.

Claim 11 Conclusion

If the court is not persuaded that Petitioner has proven Claim 11, there is at least a material factual dispute regarding whether the prosecution committed acts of misconduct from 2012 - present.

Claim 12 – IAC Second Trial Counsel (IAC)

Petitioner's position

Until May 3, 2019, this was a death penalty case. Petitioner's second trial counsel rendered ineffective assistance of counsel.

People's position, including concessions and admissions

Goodwin's declarations should be viewed with suspicion. He requested payment for 60 hours of work. His billing shows that he consulted with experts, conducted interviews with potential witnesses. He filed a discovery motion and apparently there was no need for an order to compel. Trial performance met the Strickland standard. The record contradicts his later declarations.

The People cite *Strickland* and its progeny as the legal principles for IAC. The People concede that the specific guilt phase claims advanced in the Petition were not advanced in Petitioner's federal habeas petition. However, they cite *In re Horowitz*, a writ of error coram nobis case, for the proposition that bringing them now is a piecemeal approach, which is disfavored. *Horowitz,* relied on *In re Drew* (1922) 188 Cal. 717, a civil case, for the proposition that if it should have been raised on appeal, it cannot be raised in a habeas petition.

Petitioner's rebuttal

Petitioner does not disagree with Respondent's legal argument regarding *Strickland*. However, *Horowitz* was decided in 1949 and *Drew* was decided in 1917. The law regarding successive petitions has evolved considerably since then. See discussion on successive petitions

and *Clark* exceptions: Procedural Bars, infra, at p. 26-28. As discussed in *People v. Gorman,*[143] California has a two-part IAC test. First, the defendant must show counsel acted below the standards of professional competence. "[T]he defendant can reasonably expect that in the course of representation his counsel will undertake only those actions that a reasonably competent attorney would undertake. But he can also reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. [Citations omitted.] If counsel fails to make such a decision, his action—no matter how unobjectionable in the abstract—is professionally deficient."(*People v. Ledesma* (1987) 43 Cal.3d 171, 215, (*Ledesma*).) [Parallel citations omitted.]

Second, the defendant must show there is a reasonable probability he would have obtained a more favorable result in the absence of counsel's failings. (*Id.* at pp. 217-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra,* 466 U.S. at p. 694 [80 L.Ed.2d at p. 674]; see *In re Marquez* (1992) 1 Cal.4th 584, 603, 3 Cal. Rptr. 2d 727, 822 P.2d 435 (*Marquez*).) But, "[t]he likelihood of a different result must be substantial, not just conceivable." (*Harrington v. Richter* (2011) 562 U.S. 86 [131 S. Ct. 770, 178 L.Ed.2d 624, 647] (*Harrington*).)

Here, Goodwin's failures including but not limited to failure to investigate, talk to law enforcement witness or hire any experts meet the *Ledesma* test. Further, under Strickland, there is at least a reasonable probability that Petitioner would have obtained a more favorable result but for Goodwin's failings.

By omission, Respondent concedes that Goodwin rendered IAC in Troy Jones's murder defense. The court found there that Goodwin rendered IAC in both the guilt and penalty phases. In

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[143] *People v. Gorman* (3DCA 2014) Cal. App. Unpub. LEXIS 1577 at 21 (unpublished).

Jones's case, both guilt and penalty were reversed.[144]

Respondent cites RT 4659 stating that is an application for attorneys fees. However, it is actually a Hearing on Trial Resetting, including a reference to a Marsden hearing. RT 4689 – 90 is an application for attorneys fees showing 60 hours of work over a four month period, which shows no expenses paid out. It raises questions including, how can investigation be done without hiring an investigator? In comparison, during approximately the same time period, attorney Gomes billed 50 hours to represent Frank Richardson on a relatively minor charge.

Respondent represents RT 4963- 4964 as a motion to continue; however, it is the transcript of Findings and Ruling on Application for Modification under Penal Code Section 190.4 (e).

On RT 4729-4730, Petitioner admits that this is a motion for continuance. Respondent fails to mention that in it, Goodwin states due to his trial schedule, he is physically exhausted, lines 13 – 20. It acknowledges seven witnesses, which corresponds to seven alibi witnesses, which Petitioner states were not interviewed. The doctor referred to, from North Carolina, did not testify. In fact, Goodwin called no witnesses in the guilt phase.[145] He presented only two Exhibits at trial.[146] The record, especially the trial record, supports Goodwin's later declarations.

The trial record does not reflect through investigation. Despite Respondent's statements to the contrary, there is no proof that Sciandra investigated and it brings none. Petitioner concedes that Sciandra was diligent in <u>requesting</u> discovery. In one of his declarations, Goodwin acknowledges that he had did not consult with Petitioner's first trial counsel, nor did he review the case file.[147] This alone establishes that Goodwin was ineffective.

The fact of Petitioner's 1983 conviction being a confirmation that both his convictions

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[144] See Exh 24q, Declaration of Troy Jones, dated 7/30/23, at 2.

[145] This is verified by the list of witnesses called in the second trial: T2 Vol. I RT iv – xiii lists only four defense witnesses called in the penalty phase.

[146] See Exh 24r, list of Second Trial Exhibits.

[147] See Exh 12c, Declaration of Hugh Goodwin, dated 11/15/95, at 1.

were valid is an invalid argument. Petitioner was convicted in 1978; however, that conviction should not be considered since the case was reversed in its entirety due to his incompetence to assist counsel. Therefore, the process and results of the trial are meaningless. Further, the defenses presented at each trial were totally different. The defense presented at the first trial was a mental incapacity defense.

On RT 4675, Petitioner admits that it is a discovery motion. However, the document states that the People had no objection and that the motion was granted as stipulated to. Therefore, it stands to reason that the defense would not have filed a motion to compel.

The People's Return provides additional examples of IAC beyond those presented in the Petition. See for example, Return, p. 43, line 9; p. 46 line 16; p. 48, lines 20 – 26-27.

Second trial counsel Goodwin spent 60 hours on this death penalty case, a wholly inadequate amount of time; by comparison, attorneys Cox[148] and Smurr[149] spent 50 hours in their representations of co-defendants. The co-defendants pleaded guilty without a trial. Attorney Gomes spent 50 hours on Richardson case, a non-murder case.[150] Goodwin's failure to investigate and hire experts, much less interview law enforcement was especially egregious because Petitioner wanted an innocence defense[151]. Goodwin died in 2004 (he retired in 1996), so the signing the declarations in 1989 & 1995 was the equivalent of signing statements against interest.

Under *Strickland, Stankewitz, and McCoy v. Louisiana (2018)* 583 US 1, a defendant has the right to choose his own defense.

In some cases IAC is caused by misconduct or they are so intertwined it is difficult to sort out the IAC from the misconduct.[152]

[148] See Exh 4v, Attorney Cox Billing Rpt, dated 10/16/79.
[149] See Exh 4u, Attorney Smurr Billing Rpt., dated 10/16/79.
[150] See Exh 5ff, Richardson Ardaiz Plea Agreement, dated 4/26/78.
[151] See Exh 12b, Declaration of Hugh Goodwin, dated 12/28/89, p. 1-2.
[152] See for example Claims 2, 4, 5, 7, and 11.

In *Foster v Wolfenbarger* (6th Cir. 2012) 687 F.3d 702, the court granted a conditional writ of habeas for IAC, specifically failure to investigate alibi witnesses. rational and informed decisions based on strategy and investigation.

In *Bradford v. Smith* (USDC Cent. Dist. CA, Western Div. CV 97-06221 TJH 2023), a federal law application, the court granted habeas relief due to prejudice from *Brady* and IAC. Specifically, the court found that counsel failed to investigate and present exculpatory information regarding the defendant's intoxication and mental disorders.

Claim 12 Conclusion

If the court is not persuaded that Petitioner has proven Claim 12, there is at least a material factual dispute regarding whether Petitioner's second trial counsel was ineffective for *inter alia*, failing to investigate, hire experts and interview law enforcement officers.

Claim 13 – IAC Appellate Counsel

Petitioner's position

The declarations of appellate counsel show that Petitioner has met the *Strickland* standard. Appellate counsel prioritized the most significant issues when faced with briefing size and time limitations. Further, an appeal is generally an inadequate method to raise IAC because there is usually insufficient information in the record. By contrast, a habeas writ can go into facts outside of the record. *People v Ledesma* (1987) 43 Cal.3d 171, 218. Petitioner's appellate counsel rendered ineffective assistance of counsel.

People's position, including concessions and admissions

The People state that the declarations from counsel don't cover all attorneys. The People concede by omission the content of Exhibit 13f, Declaration of attorney Maureen Bodo. Her declaration covers Petitioner's remaining appellate counsel. They also concede that appellate

counsel's IAC was prejudicial if they were barred from raising guilt claims.[153] They contend failure to state a claim because Petitioner doesn't show that pursuing guilt would have caused a different result.

Petitioner's rebuttal

General denial which has no declarations, evidence presented nor documents the People's efforts to obtain them. After pursuing the death penalty from 2012 – 2019, after current counsel pursued guilt, the People dropped the death penalty in 2019. This alone shows that pursuing guilt would have caused a different result. Petitioner's former attorneys' ineffective assistance of counsel is to blame for the defense not having certain exculpatory material, and Petitioner has paid a heavy price for their lack of due diligence.

The IAC of appellate counsel is documented with declarations of all of Petitioner's counsel. None of these lawyers investigated guilt, despite Petitioner's repeated requests over the years that they do so.[154]

Claim 13 Conclusion

If the court is not persuaded that Petitioner has proven Claim 13, there is at least a material factual dispute regarding whether Petitioner's appellate counsel were ineffective for failing to investigate guilt.

Claim 15 – Fair Trial Impossible

Petitioner's position

Petitioner has never received, nor is he able to receive a fair trial.

People's position, including concessions and admissions

The People state that is a conclusory claim. Does not state substantive claims beyond those

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[153] See Exh 13e, Declaration of John Ward, dated 11/20/94 and Exh 13j, Declaration of Joseph Schlesinger, dated 4/23/20.

[154] See Exh 13a, Declaration of Douglas R. Stankewitz, dated 4/27/20.

raised elsewhere in Petition.

Petitioner's rebuttal

Due to the pattern and practice of prosecutorial misconduct associated with both of Mr. Stankewitz's guilt phase trials, and throughout both penalty phases, the only equitable remedy to "prevent severe and manifest injustice[]" is to dismiss this case in its entirety. *In re Clark*, 5 Cal.4th 750, 803 (1993) (conc. & dis. opn. of Kennard, J.) The amount of prosecutorial misconduct resulted in the wrongful conviction of an innocent man. The mountain of suspicious incidents – from the missing .22 casings, to the .25 casings being in their place, to Billy Brown's inconsistencies, to Marlin Lewis being placed inside the Graybeal car in 1978, to the District Attorney's Office failure to preserve over 50 items of evidence, to the false testimony elicited by the D.A. about the bullet's trajectory and the height of Theresa Graybeal, and to the District Attorney's Office over forty-five year reluctance to conform with court orders to produce evidence – all demonstrates the fundamental unfairness that Mr. Stankewitz has been forced to live with, in prison, for over 45 years. This court should dismiss the case.

Claim 15 Conclusion

If the court is not persuaded that Petitioner has proven Claim 15, there is at least a material factual dispute regarding many factors, including, *inter alia*, the pattern and practice of prosecutorial misconduct and witness unavailability, prevent Petitioner from getting a fair trial.

Claim l7 – Actual Innocence

Petitioner's position

Petitioner has alleged many indisputable facts that point to his innocence. These include, the firearm has nothing tying it to Petitioner, the firearm not being the murder weapon, the height, angle and trajectory of the victim's gunshot wound does not match the prosecution's theory of the case, the false testimony of the People's main witness, Billy Brown, which does not match the

physical evidence, including no fingerprints on the gun and no GSR on Petitioner's hands.

People's position, including concessions and admissions

Threshold for relief on innocence must be "extraordinarily high" and Petitioner failed to meet it. They cite *Herrera v. Collins* (1993) 506 U.S. 390, which was superseded by AEDPA, and *Scoggins*.

Petitioner's rebuttal

General denial[155] which cites inapplicable cases.

In re Scoggins (2020) 9 Cal. 5th 667, is felony murder special circumstances case and does not talk about habeas relief not being appropriate under the circumstances of that case.

In *Scoggins*, supra, which Respondent cites nine times, the California Supreme Court reversed a special circs case stating that the sufficiency of the evidence is not cognizable on habeas. However, there are exceptions that were considered in *Scoggins*.

Claim 17 Conclusion

If the court is not persuaded that Petitioner has proven Claim 17, the many factors documented in the Petition and his other habeas pleadings create material factual disputes regarding his actual innocence.

Claim 19 – Cumulative Error

Petitioner's position

In *Alcala*, infra, the court found that "the cumulative impact of these errors goes to the heart of the prosecution's theory of the case and undermines every important element of proof offered by the prosecution against Alcala. Indeed, after reviewing the errors in this case, we are left

[155] This is a general denial because the return did not contain substantive proof of denial, does not provide documentary evidence and is conclusory. See *People v. Duvall* (1995) 9 Cal.4th 464, 477. Affirmed, *In re Jenkins* (2023) 14 Cal. 5th 493, 519-20.

with the unambiguous conviction that the verdict in this case was not the result of a fair trial. *Alcala v. Woodford*, (9th Cir. 2003) 334 F.3d 862, 893.

Petitioner has demonstrated a pattern and practice of prosecutorial misconduct, including *Brady* violations, false testimony, misrepresenting the evidence to the court and ethical violations starting from the initial investigation through the present. The evidence cumulatively shows that he was prejudiced by the misconduct.

People's position, including concessions and admissions

The People concede that under *Reno,*[156] supra, at 483, aggregate prejudice from several errors at trial would require reversal even if no single error was prejudice by itself. However, they say no single error, and therefore no cumulative error. Even if there were multiple errors, they did not combine to prejudice Petitioner. The People state that Petitioner failed to show error or prejudice in trial. Therefore, he failed to show that he was denied a fair trial. Even if there were multiple errors, they did not combine to prejudice Petitioner. They cite *People v Martinez*, which held that two errors, considered separately, were harmless and did not result in prejudice.

Petitioner's rebuttal

General denial which points to error, not misconduct.

Claim 19 Conclusion

If the court is not persuaded that Petitioner has proven Claim 19, there is at least a material factual dispute regarding the many errors which led to his wrongful conviction.

CONCLUSION

Respondent has failed to rebut petitioner's prima facie case of ineffective assistance of counsel. Given that the People failed to refute any of factual claims with facts supported by expert opinions, witness declarations or other substantive evidence, this court should grant the habeas and

[156] See Return, p. 118, lines 3 -5.

vacate the judgment. As explained in the Memo of Points and Authorities, supra, if the court finds no factual disputes, it can grant the habeas without an evidentiary hearing.

The court has several ways to resolve this case:

1. Grant habeas on one or more claims. Order a new trial and give the People 60 days to retry the case.
2. Given the level of misconduct, dismiss the case with prejudice.
3. If the court finds that the People refuted any factual claims, thereby creating a factual dispute, it should order an evidentiary hearing on those claims.

Dated: September _____, 2023 Respectfully Submitted,

J. TONY SERRA
CURTIS BRIGGS
MARSHALL D. HAMMONS

Attorneys for Defendant
DOUGLAS RAY STANKEWITZ

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By CURTIS L. BRIGGS

DECLARATION OF COUNSEL IN SUPPORT OF PETITION, SUPPLEMENTAL FILINGS AND DENIAL

On or about 2017, I viewed the evidence at the Fresno Sheriff's Department and the court. I immediately saw that evidence was tampered with and fabricated. On behalf of Petitioner, I filed motions to dismiss, including a *Trombetta*. Those motions utilized the new evidence and the discrepancies that came to light with the evidence. After these motions were denied, or not ruled on, I continued to do more investigation and brought in experts to view the evidence in 2019. Given the age of the original crime and initial investigation, the volume of prosecution reports, and perplexing evidence to sort out, it took approximately eighteen months to draft a habeas writ.

Starting in approximately mid-2019, I began drafting the Petition. Throughout the process, due to conflicting police reports and lack of evidence presented at the second trial, counsel determined that there was a lot of information and records that were needed from Fresno law enforcement agencies. In search of those records, I had my staff prepare numerous CA Public Records Act (CPRA) requests. While some agencies provided the requested records in a reasonable time, some did not. One request that was made to the FCSD in 2020 was just acknowledged in August, 2023[157]. I am still waiting to receive responsive records. When Fresno agencies have stated that they don't have a particular record, I or my staff has gone to the CA DOJ to request it. My staff is waiting for a response to a CA Department of Justice (DOJ) PRA request regarding part of the information on Exh 1a, the Recovery Report.[158]

As part of his continued effort to document the facts regarding the firearm and holster in evidence, I issued two subpoenas duces tecum (SDTs) to Sacramento Police Department (SPD). The return of the first SDT stated that SPD did not have information pertaining to badge #351.[159] This was despite giving a reporter the requested information pursuant to a CPRA request. So I

[157] See Exh 24t, FCSD, email to Alexandra Cock re: CPRA request, dated 8/24/23
[158] See Exh 24u, CPRA request to CA DOJ re: CLETS Code #0340400
[159] See Return Exh B, SPD, SDT return dated 5/16/23.

issued a second SDT to SPD and my staff also submitted a CPRA request. The second SDT still did not provide information regarding which officer had badge #351 in 1973.[160] It was only through the CPRA that counsel got the badge number confirmed.[161] Counsel also contacted retired SPD officer Robert L. Givens, Badge #351 in 1973 to get confirmation directly from him.[162]

The need for continued persistence is because some of information received from the agencies makes no sense. For example, through discovery, FCSD stated that they only have badge number records going back to 1988.[163] Again through discovery, FPD stated that they didn't have any officers with badge #351; however, FPD reports from 1978 list officers who had badge numbers close in number to 351.[164][165] FPD procedures received pursuant to a CPRA request contain 23 references to the word "badge" in the context of report writing and evidence handling and gathering.[166] However, they do not have a procedure for how to assign badge numbers.

The withholding of evidence by agencies, including Respondent, has meant repeated requests for information and documents. Examples include the delay in getting Det. Lean and Boudreau interview notes from 2019; submitting California Public Records Act (hereinafter CPRA) requests and subpoena duces tecum to Sacramento Police Department; submitting informal discovery requests to Respondent for FPD and FCSD badge number information; and CA Department of Justice CPRA requests re: CLETS system information and state badge number regulations.[167] As I said back in 2018, "this case … is essentially unlike any other criminal case I've ever seen, where we're not dealing with just a snapshot of evidence, and a body of evidence in time. We're trying to get on a running train." PRH Vol. XXVV RT 431. This remains true even

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[160] See Exh 24s, SPD, SDT return dated 7-3-23.
[161] See Exh 24h, SPD, supra.
[162] See Exh 24g, Declaration of Robert L. Givens, supra.
[163] See Return Exh C, FCDA, DA Investigator Isaac report, dated 3/14/23 at 1.
[164] See for example Exhs 1aa, 1ff and 1w.
[165] See Exh 24v, Declaration of Alexandra Cock, dated 9/5/23.
[166] See Exh 24j, FPD Policy Manual Excerpts referencing use of badge numbers.
[167] See Exh 24w, CA DOJ Response re: CA badge number retention, dated 8/17/23.

now.

Regarding the Declaration of Troy Jones, the declaration has an incorrect year in the date. My investigator, Jonah Lamb, witnessed him sign the declaration on July 30, 2023. However, the declaration has 2022. Efforts to contact Mr. Jones to correct the date are ongoing.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration was executed on September ____, 2023, at San Francisco, California.

____
CURTIS L. BRIGGS

VERIFICATION

State of California, County of San Francisco:

I, the undersigned, being first sworn, say:

I am an attorney licensed to practice law in the State of California and have my professional office located at 3330 Geary Blvd., 3rd Floor East, San Francisco, CA 94118. I am one of the attorneys of record for Douglas R. Stankewitz, in this action.

I have read the foregoing Denial and know the contents thereof to be true based on my representation of the Petitioner.

I am authorized to file this Denial to Return to Order to Show Cause on Petitioner's behalf.

All facts alleged in the above document not otherwise supported by citations to the record, exhibits, or other documents are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September _____, 2023, at San Francisco, California.

____
Curtis L. Briggs

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CERTIFICATE OF COMPLIANCE

I, Alexandra Cock, certify and declare that according to the word processing program that created it (M/S Word), the attached Denial to Return to Order to Show Cause, inclusive of Table of Contents and Table of Authorities, contains 23,182 words. I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration was executed on September ____, 2023, at Sebastopol, California.

____
Alexandra Cock

PROOF OF SERVICE

The undersigned declares:

I am a citizen of the United States. My business address is P. O. Box 7225, Cotati, CA 94931. I am over the age of eighteen years and not a party to the within action.

On the date set forth below, I caused a true copy of the within

PETITIONER'S DENIAL TO RETURN TO ORDER TO SHOW CAUSE

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

Mail _X___ Overnight mail ____ Personal service ____ Fax ____

Office of District Attorney
2220 Tulare Street, Suite 1000
Fresno, CA 93721

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on September _____, 2023, at San Francisco, California.

____
Alexandra Cock