NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JOAQUIN CIRIA,

Petitioner,

VS.

STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOAQUIN CIRIA
CDCR#: E-89966/Fac: 1-A5-28-L
F.S.P. - Folsom State Prison
Post Office Box 950
Folsom, California 95763

QUESTIONS PRESENTED.

I.

IF A FEDERAL RULES OF CIVIL PROCEDURE, RULE 60(b) MOTION ("Rule 60(b") THE CORRECT PROSEDURE FOR RAISING CLAIMS OF FRAUD COMMITTED UPON THE COURT?

II.

DID THE DISTRICT COURT'S DETERMINATION THAT PETITIONER'S RULE 60(b) WAS UNTIMELY AND/OR A SECOND SUCCESSIVE PETITION COMPORT WITH HIS CLAIM OF ACTUAL INNOCENCE DUE TO FRAUD UPON THE COURT?

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Constitution.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 21, 2017.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 25, 2017, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Sixth Amendment-Trial by Jury.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial; by an impartial jury of the State and the District wherein the crime shall have been committed, and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the assistance of counsel for his defense.

Fourteenth Amendment-

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

UNITED STATES CODE

28 U.S.C. § 2254. State Custody; remedies in Federal Courts.

(a) The Supreme Court, a Justice thereof, a Circuit Judge, or a District Court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that-

(A) The applicant has exhausted the remedies available in the Courts of the State; or

(B)(i) There is an absence of available State corrective process; or

(ii) Circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the Courts of the State.

(3) A State shall not be deemed to have waived the exhaustion

requirement or be stoppel from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the Courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim-

(1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of the State Court, a determination of a factual issue made by a State Court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State Court proceedings, the Court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) The claim relies on-

(i) A new collateral review by the Supreme Court, that was previously unavailable; or

(ii) A factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) The facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State Court proceeding to support the State Court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of sufficiency of the evidence to support such determination. If the applicant, because of his indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal Court shall direct the State to do so by order directed to an appropriate State Official. If the State cannot provide such pertinent part of the

record, then the Court shall determine under the existing facts and circumstances what weight shall be given to the State Court's factual determination.

(g) A copy of the official records of the State Court, duly certified by Clerk of such Court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State Court shall be admissible in the Federal Court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the Court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appoint of counsel under the section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under Section 2254.

STATEMENT OF THE CASE

On April 19, 1990, Petitioner was arrested and charged with the murder of Felix Bastarrica, which occurred on March 25, 1990. Trial commenced on February 6, 1991, and the jury returned its verdict of guilty on February 20, 1991.

On March 29, 1991, a timely Notice of Appeal was executed and appeal of the aforesaid conviction was denied. On August 31, 1992, the California Court of Appeals issued its opinion upholding the conviction of Petitioner [Cause #: A053042].

On March 29, 1993, Petitioner filed a Petition For Writ Of Habeas Corpus with the California Supreme Court [Cause #: S031893]. On May 26, 1993, the California Supreme Court issued its order denying Habeas relief.

On April 21, 1997, Petitioner filed a subsequent Petition For Writ Of Habeas Corpus with the California Supreme Court [Cause #: S060690]. On October 29, 1997, the California Supreme Court issued its order denying Habeas relif.

On March 13, 1998, Petitioner filed a Petition For Writ Of Habeas Corpus with the United States District Court, Northern District of California [Cause #: 3:98-cv-01021-MJJ]. On November 10, 1998, the Northern District granted Respondents Motion to Dismiss. Petitioner filed Notice of Appeal on December 7, 1998. Petitioner sought a Nunc Tunc Writ Of Mandamus, which was filed with the Northern District on August 25, 1999. On March 24, 2000, the District Court denied Petitioner requests for reconsideration, and on June 21, 2000, the District Court denied Petitioner application for Certificate of Appealability.

On August 2001, Petitioner filed a Petition For Writ Of Habeas Corpus with the California Court of Appeals [Cause #: 4278]. On August 15, 2001, California Superior Court issued its order denying relief.

On October 12, 2001, Petitioner filed a Petition For Writ Of Habeas Corpus with the California Court of Appeals [Cause #: A096429]. On October 18, 2001, the Court of Appeals issued judgment from the bench denying Habeas relief.

On June 17, 2002, Petitioner filed subsequent Petition For Writ Of Habeas Corpus with the U.S. District Court, Northern District of California [Cause #: 3:02-cv-02900]. On July 8, 2002, the Northern District dismissed the Writ Petition without perjudice. Petitioner filed Notice of Appeal of the District Court order on July 16, 2002. On January 22, 2003, the U.S. Court of Appeals denied the appeal filed by Petitioner.

On May 27, 2003, Petitioner filed a Petition For Writ Of Habeas Corpus with the U.S. District Court, Northern District of California [Cause #: 3:03-cv-02499]. On August 4, 2003, the U.S. District Court dismissed the Writ Petition.

In January 2005, Petitioner filed a subsequent Petition For Writ Of Habeas Corpus with the California Superior Court [Cause #: 4981]. Though the Court did not conduct an evidentiary hearing, it did acknowledged that "[t]here were some discrepancies as to the exact timeline of Petitioner activities leading up to the murder, as well as descriptions of Petitioner hairstyle and jacket" and that"...there were holes in the prosecutions case that it did not fill". On January 25, 2005,

the California Superior Court gave judgment from the bench denying Habeas relief to Petitioner without conducting evidentiary hearing.

On June 10, 2005, Petitioner filed a Petition For Writ Of Habeas Corpus with the California Court of Appeals [Cause #: A110400]. On June 28, 2005, the California Court of Appeals issued its order denying Habeas relief.

On September 9, 2005, Petitioner filed a Petition For Writ Of Habeas Corpus with the California Supreme Court [Cause #: S137125]. On June 28, 2006, the California Supreme Court issued its order denying Habeas relief.

On September 17, 2007, Petitioner filed an 42 U.S.C. § 1983 action with the U.S. District Court, Northern District [Cause #: 3:07-cv-04770]. The U.S. District Court, Northern District dismissed the civil action.

On October 16, 2008, Petitioner filed a Notice of Appeal in the U.S. Court of Appeals, Ninth Circuit [Cause #: 08-17300]. On September 2, 2010, the U.S. Court of Appeals, Ninth Circuit affirmed the U.S. District Court dismissed of the civil action.

On April 18, 2016, Petitioner filed a Petition For Writ Of Habeas Corpus in the California Superior Court [Cause #: 7044]. On May 13, 2016, the California Superior Court denying Habeas Corpus relief.

On June 9, 2016, Petitioner filed with the California Superior Court a Motion For Reconsideration. On June 24, 2016, the California Superior Court claiming it lacked jurisdiction to entertain the request by Petitioner.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

The instant motion for relief from judgement is timely for two reasons. The continuing violation doctrine applies to the instant petition as the fraud upon the court, the jury, and upon Petitioner has persisted to continue to deny him, an innocence man, of his liberty in violation of law. (See Fed. R. Civ. P., Rule 60(b)(3) or (6).)

The United States Supreme Court has held that "actual innocence" could be an exception to any timeliness bar. (McQuiggins v. Perkins (2013) 569 U.S. ___, 133 S.Ct. 1924, 185 L.Ed.2d 1015 ["we hold that actual innocence, if proved, serves as a gateway through which a Petitioner may pass..."], citing Shulp v. Delo (1995) 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808)

The Ninth Circuit Court of Appeals has followed this reasoning holding that a credible claim of actual innocence constitutes an equitable exception to any timeliness bar through which an innocent Petitioner may pass through the Shulp gateway and have his otherwise time barred claims heard on the merits. (Lee v. Lampert (9th Cir. 2011) 653 F.3d 929)

Additionally, as Petitioner has diligently conducted ongoing investigations into his meritorious claims, which has exposed the fraud perpetrated against the court, the fact finder, and against Petitioner, and as he did so under disability of incarceration there exists good cause for any delay in bringing the instant petition. (In Re Robbins (1998) 18 Cal.4th 770, 780 [good cause for substantial delay is found when Petitioner is

conducting an ongoing investigation into at least one potentially meritorious claim])

Following his conviction, Petitioner continued to conduct his own investigation into the facts of this case intent on proving his innocence. Due to the disability of incarceration Petitioner has been challenged to discover the facts and evidence presented herein, including evidence that he was under surveillance at the time Felix Bastarrica was murdered. However, over time and with persistent effort Petitioner has been able to amass the evidence, presented here, to demonstrate that he is factually innocent.

In 2003, Petitioner contacted the San Francisco, California Innocence Project and shared with them the discrepancy found in the timeline presented by the District Attorney. Upon their review of this evidence Mr. Paul Myslin contacted Petitioner and decided to visit him in prison. Following the review of the evidence and the interview with Petitioner, the Innocence Project chose to tentatively accept the case and assist him.

After several months of communication with Petitioner, when he called Mr. Myslin, he was advised that the Innocence Project could no longer pursue the case bacause it had been discovered that the Public Defenders Office was representing George Varela. Due to the Innocence Project and the Public Defenders Office being partnered, a concern of a potential conflict of interest arose and Petitioner was advised that the Innocence Project elected to abandoned him to his own capabilities.

Though the loss of the legal assistance from the Innocence Project left Petitioner was without guidance as to what evidence

to look for, or where such evidence could be found, Petitioner continued to struggle to investigate his own case and to find whatever evidence he could find.

Through these efforts, witnesses who had previously been unavailable or lost; evidence of scientific testing proving the corrosion theory of the District Attorney Office; as well as discovery of the fraud committed against the court, the jury, and Petitioner was uncovered by his investigation.

GROUND ONE:
THERE WAS FRAUD IN FACT WHICH TAINTED THE ENTIRE PROCEEDING COMMENCED AGAINS PETITIONER.

It is an ancient principle in law that fraud vitiates the most solemne of acts. This is no more profound a realization as when the agents of the state, trustees and keeper of the public trust, not only allow fraud to invade the processes commenced in the name of justice, but actively court it. This is just such a case.

Here, the agents for the District Attorney actively engaged in the acts of concealment of facts known to them; actively engaged in tailoring their investigation to develop only those pieces of evidence that would support their theory of Petitioner guilt, while actively refusing to discharge the fiduciary duty reposed in them to investigate and gather all facts, regardless of the effect such evidence would have on their theory of the crime; and above all else, to ensure that no innocent man be made to suffer.

The public trust was breached by Crowley and Gerrans, who are agents for the state, in their office as investigators of crime, and keepers of the public trust; as well as by Arlo Smith, by and through his delegate Louis Lipset, who were also agents for the state, in their office of public Attorney, and keepers of the public trust.

The above described breach was manifest by the willful suppression of evidence by Crowley, Gerrans, and Lipset both by an apparent active suppression, as well as suppression of evidence by failing or refusing to develop all evidence relevant to the murder of Bastarrica. This suppression tainted the investigation, the collection of other evidence, the proffering of testimony by Varela, and numerous other respects. This breach and suppression by Crowley, Gerrans, and Lipset resulted in a consistent and persistent obtruction of the discovery process.

Evidence of surveillance

As relates to the investigation conducted by Crowley and Gerrans, as well as presenting their investigative findings to the District Attorney, the record contains circumstantial evidence Petitioner was under surveillance by Rubino; and that the fact of this surveillance was known to Crowley and Gerrans.

The firts indication Crowley and Gerrans knew of the surveillance of Petitioner is the fact during the interview with him on April 19, 1990, Crowley and Gerrans asked several times about a red firebird he used to own. (See Rule 60(b) motion, Exhibit 21) This vehicle was never described or otherwise

documented on the reports by Rubino on December 27, 1989 and this vehicle was traded for a Mitsubishi truck shortly after Rubino made the unlawful arrest of Petitioner during the operation Rubino was involved in the Amazon Hotel on December 27, 1989. Petitioner notice Rubino and other people were following him and there is no report in the record of any witness telling Crowley or Gerrans of the red firebird, the only way they could know about the vehicle is from Rubino.

The second indication Crowley and Gerrans knew of the surveillance of Petitioner is the fact that on April 18, 1990, the day before he was arrested and charged with the murder of Felix Bastarrica, Crowley secured a search warrant only for the residence at 159 Sickles Street. (See Rule 60(b) motion, Exhibit 29) The county probation department had the residence of Petitioner listed as 1508 Sunnydale Avenue, and the Department of Motor Vehicles had his residence listed as 2266 Cayuga Street, the only reason Crowley would secure a search warrant only for 159 Sickles Street is because it was known through the surveillance conducted by Rubino that he did not reside at, or frequent, any other location.

The fact Crowley secured a search warrant only for 159 Sickles Street, and no other location, coupled with the fact that the investigators were searching for the weapon, and other evidence linked to the murder of Felix Bastarrica, there simply is no alternative reasoning for why this lone location was the focus of the search to the exclusion of the others.

The third indication Crowley and Gerrans knew of the

surveillance of Petitioner is the fact that on April 19, 1990, Crowley and Gerrans met with Rubino on the corner of Sickles and Huron streets, near his home (See Rule 60(b) motion, Exhibit 29.1) As Rubino was not an agent of the homicide detail, and was not assigned to investigate the murder of Felix Bastarrica with Crowley and Gerrans, the only reason Rubino would meet with Crowley and Gerrans, and meet at the corner of Sickles and Huron streets, is because Crowley and Gerrans knew of the surveillance by Rubino.

In addition to circumstantial evidence that Petitioner was under surveillance by Rubino, he had filed a suit pursuant to section 1983 of Article 42 of the United States Code. The purpose and scope of this suit was to uncover the records of the surveillance by Rubino. During the course of the suit, at no time was the fact of the surveillance ever denied.

Taken together, the above facts show that Petitioner was under surveillance by Rubino at the time of the murder of Felix Bastarrica, and that the fact of this surveillance was withheld from the defense. Also withheld from the defense is all of the exculpatory evidence the surveillance, and records therefrom, would yield up.

At the very least, the surveillance would have shown that on March 25, 1990, Petitioner arrived back home at 8:25 pm and did not leave his home the rest of the evening. The surveillance records, or the testimony of Rubino, potentially would have corroborated every aspect of the account given by Petitioner as his defense. It potentially would have shown the drug feud and revenge motives advanced by Crowley and Gerrans, and adopted by

Lipset, were pure fiction.

Further, as it is standard practice for investigators to confer with the District Attorney throughout the course of an investigation, before seeking a search warrant, before seeking a warrant for arrest, as well as other key points in such an investigation, it is simply unbelievable that Lipset was not aware of the surveillance conducted on Petitioner by Rubino. However, any doubt as to what Lipset knew is resolved by the maxim of law, Idem est scire aut scire debere aut potuisse.

The maxim of law, and its principles were embraced by the United States Supreme Court in Kyles v. Whitley, 514 U.S. 419, 433-434 (1995), where the high court declared, "the individual presecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." (Kyles, supra, citing Strickler v. greene (1999) 527 U.S. 263, 280-281) The courts of the State of California have embraced this same principle. (Hill v. Superior Court (1974) 10 Cal.3rd 812; Pitchess v. Superior Court (1974) 11 Cal.3rd 531; In Re Brown (1998) 17 Cal.4th 873; People v. Robinson (1995) 31 Cal.App.4th 494)

In addition to the above, the fact Rubino was, by all outward appearances, divorced from every aspect of the prosecution of Petitioner by Lipset, lends further insight into the fact Lipset knew of the surveillance and meant to conceal it from the court, the jury, and Petitioner. Whether this was a choice Lipset made to purposely deceive the court and jury, or if this was simply the result matters not at all.

As the arresting officer, Rubino could offer testimony with regard to the advisement of rights given to Petitioner, the circumstances of his arrest, and what statements may have been made by him while awaiting a marked transport vehicle. All of which were points of inquiry for any prosecution.

As the State's theory of the case and motive for the murder of Felix Bastarrica was feud over drug turf, with the alternative theory being that Bastarrica was murdered in revenge for the murder of Alfonso. Rubino could potentially offer insights and observations regarding the State's theory of the case and motive for the murder of Bastarrica, verification of Petitioner's meeting Mercedes Cabrera Mora, going with George Varela, the time he arrived back home, his being involved with drugs, and going to the San Francisco Bay. All of this were central points of the State's case against Petitioner. All of which could be proved or rebutted by the evidence gathered during the suveillance of Petitioner by Rubino.

However, the State did not call Rubino, or in any way suggest Rubino possessed any material evidence, even where Rubino, a narcotics agent, could potentially provide the evidentiary support for the State's claims that Petitioner was involved in drugs and this being his motive. The willful concealment of this evidence, given its wide ranging effect shows the persistent and consistent obstruction of the discovery process by Lipset. (See Rule 60(b) motion, Exhibit 52)

The fact Lipset knew, or should have known, of the fact of the surveillance, and given the fact of the surveillance

potentially undermined the entire case aaingt Petitioner, the suppression of this evidence by Lipset was a clear fraud upon the court, the jury, and Petitioner.

The fact Crowley sat at the prosecution table during Petitioner's trial, and the fact Crowley knew of the surveillance conducted by Rubino, compounds the fraud committed upon the court, the jury, and Petitioner by his apparent acquiescence in the suppression of the evidence of the surveillance from the court, the jury, and Petitioner. This also shows the consistent and persistent obstruction of the discovery process that infected every aspect of the case against Petitioner, from investigation to prosecution.

Timeline inconsistency

As relates to the timeline of events offered to Crowley and Gerrans by George Varela, and the events which were independently corroborated, the account given by Varela and testified to by Varela simply could not have occurred tha way Varela claims. This fact goes to the fraud upon the court, the jury, and Petitioner as the court and jury were factually led to believe the timeline was accurate. Or worse, were asked to determine the truth of the timeline while having material evidence actively suppressed from their view and consideration.

As first principles in establishing a timeline is to locate the first or beginning point of the timeline, and given the points in a timeline help to separate factual accounts by witnesses and suspect from fictional accounts, it is not reasonable to posit

that Crowley and Gerrans did not conduct from investigation with observation of this first principle.

Petitioner had advised Crowley and Gerrans he and Varela had gone to arcade on South Market. (See Rule 60(b) motion, Exhibit 23) The presence of the Monte Carlo in the area of the arcade, at the approximate time stated by Petitioner, and driven by Varela was independently corroborated by Duff. This fact was also initially admitted by Varela. (See Rule 60(b) motion, Exhibit 28) By this beginning point that demonstrates Petitioner was truthful with Crowley and Gerrans during his interview on April 13, 1990. It is also this beginning point that frames the false nature of the statements and testimony by Varela, and the tailoring of the investigation to omit any evidence which did not point to the guilt of Petitioner.

As Crowley and Gerrans assured Petitioner that if they are given a story, they are going to check it out, it is not reasonable to believe Crowley and Gerrans neglected this beginning point on the timeline. However, there is nothing in the record to indicate Crowley and Gerrans went to the arcade, spoke with the manager or patrons of the arcade, as they had at Galan's Bar, or secured whatever evidence that was discoverable at the arcade.

Given this aspect of the timeline offered a plethora of evidence encompassing the potential of undermining or corroborating claims by Petitioner, offering a potential location for him to change his appearance, contradiction or corroboration of the Petitioner description, as well as other potential evidence, it is simply not worthy of belief that Crowley and Gerrans left this

investigative lead undeveloped.

Varela claimed that he picked Petitioner and drove atraight to Galan's Bar where Petitioner had gotten into a fight with Roberto Hernandez. From Galan's Bar, Varela claims Petitioner directed him to Clara Alley without making any stops. By Petitioner's investigation he was able to learn that the time needed to travel the route claimed by Varela from Galan's Bar to Clara Alley is (8) minutes. (See Rule 60(b) motion, Exhibit 50 and 51; compare with id., Exhibit 28)

The time Petitioner was involved in the fight is independetly corroborated as having ocurred at between 8:00 and 8:10 pm, the latest time he and Varela would have arrived at Clara Alley, by the account of Varela, is at 8:23 pm. This accounts for the arrival at Galan's Bar at the latest time of 8:10 pm, the fight ending and departure from Galan's Bar five (5) minutes later, and driving the eight (8) minutes to Clara Alley. This would place Petitioner and Varela at Clara Alley and put the time of the murder of Bastarrica some thirty seven (37) minutes before the murder actually occurred. This is physical impossibility.

Likewise, if the timeline is traced backwards from the time of the murder of Bastarrica, the visit to and fight in Galan's Bar would have had to occur at 8:47 pm for the timeline of events offered by Varela to be accurate. This is impossible as Petitioner was home at approximately 8:30 pm. (See Rule 60(b) motion, Exhibit 5,6,7,8,9,10,) This is not to mention all evidence in the record shows these activities to have occurred between 8:00 and 8:10 pm.

The impossibility of the timeline becomes more obvious and offensive when viewed in light of the testimony of Varela. At trial, Varela testified he picked up Petitioner at 7:00 pm. He drove straight to Galan's Bar where Petitioner had gotten into a fight with another patron. From Galan's Bar they drove straight to Clara Alley without making any stops, where the murder of Bastarrica then followed. By this account, given by Varela under oath and agreement to tell the truth, Varela and Petitioner would have arrived at Galan's Bar at approximately 7:14 pm, and assuming the same departure five (5) minutes after arriving, Varela and Petitioner would have arrived at Clara Alley at approximately 7:27 pm, or a full 1.5 hours before the murder of Bastarrica would occur. (See Rule 60(b) motion, Exhibit 50 and 51)

Here, the timeline inconsistency could not have been overlooked by Crowley and Gerrans, who boasted as having over two decades experience as officers. They gave on admonishment to Petitioner that if he gives them a story they are going to check it out. (See 60(b) motion, Exhibit 29) However, when they confirmed the time the fight at Galan's Bar occurred, and realizing the timeline set out by Varela did not coincide with known event times, neither Crowley nor Gerrans confronted Varela about this inconsistency. They did not ask Varela to clarify the timeline, or to explain the apparent gap that existed in his account.

The fact Varela was never confronted by Crowley or Gerrans about this inconsistency demonstrates that Crowley and Gerrans tailored their investigation toward Petitioner. Any evidence contrary to the theory Petitioner had committed the murder of

Bastarrica was either not subjected to any meaningful scrutiny or, worse, was concealed from the court, the jury, and the defense. In either respect, tailoring the investigation by suppressing evidence not consistent with their theory of the case, or actively concealing evidence, the result is the same: fraud committed by Crowley, Gerrans, and Lipset choosing to weave a web of deceit.

Weapon recovery

As relates to the weapon recovered from the San Francisco bay near Candlestick Park. On May 29, 1990, Varela was receiving benefits from the Witness Relocation Program, and had met with Joanne Welsh to discuss his relocation and expenditures with Welsh. (See Rule 60(b) motion, Exhibit 40)

During this meeting with Welsh, Varela for the first time indicated he knew where the weapon used in the murder of Bastarrica was. Varela told Welsh that Petitioner had thrown the weapon in the San Francisco bay near Candlestick Park.

On May 30, 1990, Varela met with Crowley and Gerrans to discuss with them the revelation Varela made to Welsh the previous day. (See Rule 60(b) motion, Exhibit 41) Based on the information provided by Varela, Crowley and Gerrans arranged to have a dive team search the bay where Varela would ultimately direct them.

On July 10, 1990, Dirk Beijen and the San Francisco Police Department dive team went into the bay in the area previously indicated by Varela. After some time, Beijen was able to recover a weapon from the bay. (See Rule 60(b) motion, Exhibit 42)

On November 21, 1990, the report on the examination results

of testing performed on the weapon recovered from the bay on July 10, 1990, was executed by Terry Coddington. (See Rule 60(b) motion, Exhibit 46) Coddington opined the weapon recovered from the bay was similar make, model, and caliber as the weapon used in the murder of Bastarrica. However, ballistic comparisons were not able to be made with any reliability with either test fired bullets, nor the bullet recovered from the murder of Bastarrica. There is no evidence that any microscopic or microprobe analysis were conducted on the weapon, which may have revealed the cause of the inability to get a reliable test pattenr from the weapon. The report on the examination results simply contributed this to "the poor condition of the rifling in the revolvers barrel." The report on the examination results also noted that the weapon recovered had not be exposed to fire, which became a point of inquiry due to Varela claiming Petitioner had allegedly attempted to burn the weapon before allegedly disposing of it in the bay.

At the trial of Petitioner for the murder of Bastarroca, Coddington testified ha was able to identify the caliber, make, and model of the weapon used in the murder of Bastarrica by consulting the data complilation of rifling characteristics maintained by the Federal Bureau of Investigations. (See Rule 60(b) motion, Exhibit 53, at 646:19-26)

As relates to the weapon used in the murder of Bastarrica, Coddington was able to narrow the weapon type down to a .44 caliber Charter Arms "Bulldog" revolver manufactured by Smith and Weson. (See id., Exhibit 46) This information was conveyed to Crowley and Gerrans some time after April 5, 1990, and before May 29,

1990.

As relates to the weapon recovered from the San Francisco bay where Varela had indicated it could be found, Coddington cleaned the weapon for several days to remove the mud encrusted on it (See id., Exhibit 53, at 654:21-28), soaked the weapon in lubricant to free up the moving parts of the weapon (id., at 655:1-7), and replaced the missing cylinder. (id., at 655:18-28) After Coddington performed all of these maintenance steps, the test fired the weapon to obtain test bullets and learned these could not be reliably matched to the weapon. (id., 647:1-27)

When asked by Louis Lipset, the County District Attorney, to opine why the test bullets could not be reliably matched to their known source, Coddington attributed this to the poor condition of the barrel which he opined could have been caused by the weapon being in salt water. (id., at 658:15-659:3)

Beyond the mere caliber, make, and model there was no evidence the weapon recovered from the bay, and the weapon used in the murder of Bastarrica were in fact the same weapon. (id., at 659:11-25)

At no time during the examination of Coddington by Lipset did Lipset attempt to illicit any evidence regarding how long a weapon, such as the one recovered from the San Francisco bay, would need to be in salt water to cause the extent of degradation of the barrel as was seen in the recovered weapon. Nor did Lipset attempt to illicit any evidence regarding what effect would result where, as with the recovered weapon, the weapon was encrusted with mud.

The mere fact the recovered weapon could not be positively linked to the murder of Felix Bastarrica makes the exhibition of it to the jury highly prejudicial. However, where, as here, there were several elements of fraud upon the court, the jury, and Petitioner, the use of this highly prejudicial evidence takes on a sinister posture.

The recovered weapon had a serial number, ballistic records could have been utilized to confirm the weapon, and all of the above could have been easily discovered by a non-biased investigation.

They opted to tailor their investigation to include only that evidence which incriminated Petitioner and exclude all other evidence that exonerated him.

This tailoring of their investigation itself perpetrated a fraud upon the court, the jury, and Petitioner in that the duty to investigate crime, and to ensure, as agents of the prosecution, that guilt not go unpunished nor innocence suffer, was not faithfully discharged by either Crowley or Gerrans or Lipset. Though investigators are not required to perform an "error-free investigation", the United States Supreme Court had held that neglecting a claim of innocence would violate due process. (Baker v. McCollan (1979) 443 U.S. 137)

Tailoring of Investigation

In addition to the failure to investigate or otherwise review the timeline in any meaningful way, Crowley and Gerrans chose to tailor their investigation to incrinate Petitioner everyone

else. Then chose not to develop evidence with was contradictory to their theory Petitioner committed the murder of Bastarrica. The evidence of this is clear and present.

Crowley and Gerrans knew about Petitioner's whereabouts, but did not confirm his alibi, the description of the gunman, photographic line-ups identification and consideration of false or unrealiable statements of the investigation to Petitioner's prejudice. They deliberately excluded exculpatory evidence which would have exonerated Petitioner, preferring to tailor the investigation in order to inculpate him by excluding evidence of his innocence.

As stated above, this failure to investigate violated due process. This is because though investigators are not required to perform an "error-free investigation", the United States Supreme Court had held that neglecting a claim of innocence would violate due process. (Baker v. McCollan, supra)

Further evidence of the tailoring of their investigation is the fact that on April 19, 1990, Petitioner told Crowley and Gerrans who he knew to be "Manolo". Petitioner freely address to the hotel room of Alvarez, whom he knew to be "Manolo", and the bar Alvares could be found in. Crowley and Gerrans followed up on this information, and located Alvarez. (See Rule 60(b) motion, Exhibit 8) However, upon meeting with Alvarez, and learning both that this was not the "Manolo" they we're looking for in connection with the murder of Alfonso, that there were two (2) different men known to be using the nickname of "Manolo", Crowley and Gerrans chose to suppress the interviews they had with Alvarez,

and which provided factual support for what Petitioner had told them of his activities on March 25, 1990.

The fact Crowley and Gerrans were aware of the two (2) different men known to be using the nickname of "Manolo" is also proven by the fact that once Valdez was found, and interviewed by Crowley and Gerrans on May 7, 1990, at no time during this interview did Crowley or Gerrans ask about any information regarding Petitioner. (See Rule 60(b) motion, Exhibit 37)

False testimony by Varela

As more fully set out in Ground Two, infra, the State's key witness, George Varela, testified falsely before the court and jury.

Here, not only is it a rasonable conclusion that Lipset knew, or should have known, of the surveillance conducted on Petitioner by Rubino, but that Lipset allowed Varela to testify falsely, and elicited testimony identifying him as the gunman where it is clearly impossible that he could have been the gunman. Not only was Varela permitted to defraud the court and the jury with his false testimony, but he was rewarded with immunity for doing so to the court and jury.

The record here shows Varela was at the center of every aspect of this case. Varela drove the car used in the murder of Bastarrica. Varela drove the gunman to intercept Bastarrica. Varela drove the wrong way down Clara Alley, showing Varela was aware of the sinister intent of his passeger and actively supported it. Varela possessed and disposed of the murder weapon. Varela

guided the investigators to the murder weapon after he disposed of it, and directed them toward Petitioner. Varela knew Petitioner did not commit the murder of Bastarrica, yet actively protected the person who did by thrusting culpability upon Petitioner to conceal his own involvement and the identity of the true gunman.

Varela gained immunity through fraud, negating that grant. Varela still possesses the knowledge of the true gunman in this case and as the immunity granted to Varela was conditioned upon his being truthful, the interest of justice would be served by the immunity granted to Varela being withdrawn and the murder of Bastarrica reopened and investigated anew.

The demand by Petitioner to have an evidentiary hearing, and upon proof of his innocence to be set at liberty, should be granted. This great Writ should issue.

GROUND TWO:
PROSECUTING ATTORNEY KNEW, OR SHOULD HAVE KNOWN STATE KEY WITNESS TESTIFIED FALSELY.

In the instant case, the State's entire case against Petitioner rested on the testimony of one witness, George Varela. (Hereinafter Varela) Though there was ample evidence proving the role Varela played in the murder of Felix Bastarrica was much more substantial than Varela cared to admit, the State elected not to charge Varela for any violation of law, provided that Varela testified against Petitioner. In exchange for his testimony, the State offered Varela immunity with the one caveat being that Varela testify truthfully. However, there was ample evidence Varela had

been false in his statements to Crowley and Gerrans. He was false in his account of the murder of Bastarrica. He was false in his knowledge of the murder weapon and in his claims following the arrest of Petitioner, as well as his testiminy to the court and jury.

The critical question the court must address is if the District Attorney knew, or should have known, Varela was testifying falsely. (Giglio v. United States (1975) 405 U.S. 150) In the decision in Mooney v. Holohan, 294 U.S. 103 (1935) the United States Supreme Court recognized the fraud that the use of false testimony commits against the court and jury. Though the high court called this a "deliberate deception of court and jury" the fact the court was addressing a fraud upon the court and jury is clear. In Mooney the high court spoke to the presentation by the prosecutor of "testimony known to be perjured", or put in other words a knowing and intentional fraud.

In 1953, the United States Supreme Court expanded Mooney to instances where this same fraud upon the court and jury was made, but not intentionally proffered by the prosecutor. (Alcorta v. Texas (1953) 355 U.S. 28) In so holding, the High Court acknowledged both the maxim dolus et fraus nemini patrocinentur, and the maxim Bonae fidei non conqruit de apicibus juris disputare.

The lawful support for the view the use of false testimony is a fraud upon the court and jury, whether known to the prosector, or merely a fact the prosecutor should have known finds its basis in the fact that the witnesses are guide by the prosecutor and, as such, are a quasi-agent of the prosecutor who is sworn to

provide only the truth. However, to be guide, the prosecutor must necessarily known in what way the witness is to be guided.

Additionally, the prosecutor has the exceptional duty to ensure that the guilty be punished while the innocent are not made to suffer. This duty requires the prosecutor to make himself knowledgeable in all factuals aspects of the cause he elects to prosecute.

In the instant cause, at the least the prosecutor should have known Varela had been false in his statements to Crowley and Gerrans, and by extension was being false in his testimony to the court and jury. Instead of correcting this fraud, as Giglio requires, Louis Lipset chose to allow the fraud to occur, and then capitalized on that fraud during his closing summations to secure a "win" for his office.

The evidence of the false claims and testimony by Varela is both plain and obvious, making the failure of Lipset, and the apparent "win at any cost" strategy of Lipset, that much more offensive.

The first obvious conflict in the cause, and which a diligent prosecutor acting to ensure the duty set out in the Mooney, Napue, Giglio line of cases is faithfully discharged, is the fact the description of Petitioner on the night of the murder of Bastarrica did not match the description of the gunman given by eyewitnesses. This confict in the description of the gunman, compared to the description of Petitioner, encompasses nearly every aspect of the description. From hair style to clothing.

Witnesses who saw the gunman during the murder of Bastarrica,

and whom Lipset subpoenaed for his case in chief, described the gunman as having an afro hair style, and described the gunman as wearing dark pants and a long, dark trench coat. In astark contrast to the description of the gunman, Petitioner was described as wearing his hair in a jeri curl style, and wearing blue jeans and a waist length red and black jacket with "Commando" on the back in white letters.

As these conflicts were never resolved, and as Lipset simply claimed, without any evidentiary support, that Petitioner must have changed his appearance demonstrates Lipset knew, or should have known, of the false nature of this restimony and had a duty to corrected it as opposed to capitalizing on it as Lipset has done.

The second obvious conflict in the cause is the fact that the timeline provided by Varela does not match the independently verified events that occurred the evening of March 25, 1990.

The State must reasonably prove that Petitioner was at the scene of the murder of Bastarrica. Lipset would have had to have been cognizant of the timing of events, or timeline, and any conflicts between the timeline and the theory of the case. Varela was the only witness on the State's timeline and it was obviously a clear error to rely on this false testimony by Varela.

Varela claimed that he picked Petitioner up and drove straight to Galan's Bar where he had gotten into a fight with Roberto Hernandez. From Galan's Bar, Varela claims Petitioner directed him to Clara Alley without making any atops. By the investigation into this element of the case, Petitioner was able to learn that

the time needed to travel the route claimed by Varela from Galan's Bar to Clara Alley is eight (8) minutes. (See Rule 60(b) motion, Exhibit 50)

Petitioner was involved in the fight is independently corroborated as having occurred at 8:00 and 8:10 pm, the latest time Petitioner and Varela would have arrived at Clara Alley, by the account of Varela, is at 8:23 pm. This accounts for the arrival at Galan's Bar at the latest time of 8:10 pm, the fight ending and departure from Galan's Bar five (5) minutes later, and driving the eight (8) minutes to Clara Alley. This would place Petitioner and Varela at Clara Alley, and put the time of the murder of Bastarrica some thirty seven (37) minutes before the murder actually occurred. This is a physical impossibility.

Likewise, if the timeline is traced backwards from the time of the murder of Bastarrica, the visit to and fight in Galan's Bar would have had occur at 8:47 pm for the timeline of events offered by Varela to be accurate. Again, this is impossible as Petitioner was home at approximately 8:30 pm. (See Rule 60(b) motion, Exhibit 5,6,7,8,9,10) The known time of the fight is between 8:00 and 8:10 pm requiring Petitioner to be in two places at one time.

The impossibility of the timeline becomes more obvious and offensive when viewed in light of the testimony of Varela . At trial, Varela testied he picked up Petitioner at 7:00 pm, then they drove straight to Galan's Bar where Petitioner got into a fight with another patron. From Galan'Bar they drove straight to Clara Alley without making any stops where the murder of

Bastarrica then followed. By this account, given by Varela under oath and agreement to tell the truth, Varela and Petitioner would have arrived at Galan's Bar at approximately 7:14 pm, and assuming the same departure five (5) minutes after arriving, Varela and Petitioner would have arrived at Clara Alley at approximately 7:27 pm, a full 1.5 hours before the murder of Bastarrica would occur. (See Rule 60(b) motion, Exhibit 50) No matter which method is used to define the timeline, there is simply no way to reconcile these glaring gaps and inconsistencies with the evidence and accounts maintained by the State.

The false statements and testimony provided by Varela regarding the events of the murder of Bastarrica, as well as the false claims regarding Petitioner disposing of the murder weapon, are drawn into clear perspective when the fact that Petitioner was under surveillance is considered.

Here, Crowley and Gerrans being the investigative arm of the Office of the District Attorney, would seek legal advice and direction by Lipset, or one if his colleagues in the District Attorney Office. Crowley and Gerrans sought and received guidance from the Office of the District Attorney, if not from Lipset personally, regarding the murder of Bastarrica. It is beyond doubt that Crowley and Gerrans recived guidance from the Office of the District Attorney regarding securing a search warrant for the 159 Sickles Street address, and securing a warrant for the arrest of Petitioner. Lipset would have also been advised of the evidence in the case and had the final decision to charge Petitioner, or to direct his investigative arm to gather more ivedence. It is

in overseeing the evidence gathering and in invoking this charging power that the fact Lipset knew, or should have known, of the surveillance conducted on Petitioner is found.

The record shows Crowley and Gerrans secured a search warrant only for the 159 Sickles Street residence, and no other. (See Rule 60(b) motion, Exhibit 29) It is beyond doubt Lipset, or another agent in the District Attorney Office, were consulted about the wisdom in securing such a warrant. As well as to ensure there was lawful and probable cause to executed such a warrant. The fact the murder weapon, and other evidence related to the murder of Bastarrica was still being sought, Lipset would have needed justification for limiting the search to the 159 Sickles Street address alone. This justification could only come from the fact Petitioner was under surveillance from December 28, 1989, to April 19, 1990, and by this surveillance Petitioner was known to only reside at the 159 Sickles Street address, and none other.

Who had Petitioner under surveillance at the time of Bastarrica's murder? Did the eyewitness descriptions of the gunman match the descriptions of Petitioner? We know that the only reasonable conclusion is that Lipset knew, or should have known of the surveillance conducted on Petitioner by Rubino. From this we know that Lipset allowed Varela to testify falsely, and elicited testimony identifying Petitioner as the gunman where it is clearly impossible that he could have been the gunman. Not only was Varela permitted to defraud the court and the jury with his false testimony, but he was rewarded for doing so. He was granted immunity for testifying falsely. This, the law simply cannot abide.

As is clearly shown, Petitioner's discovery of Varela's false testimony and grant of immunity for this testimony, is an extraordinary circumstance that justified relief under Federal Rules of Civil Procedure, Rule 60(b). (Gonzalez v. Crosby (2005) 545 U.S. 524, 535.)

GROUND THREE:

THE FRAUD COMMITTED BY AGENTS OF THE STATE DENDIED PETITIONER THE RIGHT TO CONFRONT HIS ACCUSER IN VIOLATION OF THE SIXTH ARTICLE OF AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the instant cause, the fundamental right to confront one's accusers, and to confront witnesses was violated by Louis Lipset, District Attorney, when Lipset, during closing summations to the jury stated that the motivation for the murder of Felix Bastarrica was due to "a war". (See Rule 60 (b) motion, Exhibit 56, at 934:23-28.) The D.A.'s theory was that Petitioner was looking for Roberto Socorro and when Bastarrica would not tell Petitioner where Socorro was, Petitioner shot and killed Bastarrica, (id. at 935:15-22); the D.A.'s theory was that Petitioner changed his hair style (id, at 936:3-12); and that Petitioner had another coat with him at the time, (id, at 937:15-18; Kirby v. United States (1895) 174 U.S. 47. Cf. Pointer v. Texas (1965) 380 U.S. 400, 404-05.)

Not only were these claims and statements by Louis Lipset improper and highly prejudicial, given they were made at a time, and during a point in the proceedings when Petitioner could not rebut or even respond to the claims made against him. Instead

Lipset chose to interject into the trial a theory of the case held by investigators but never presented in the state's case in chief.

The fact the claims and statements by Louis Lipset were made at a time, and during a point in the proceedings when Petitioner could not rebut or even respond to the claims made against him alone denied the right to confrontation retained by him and required by the Constitution of the United States of America and the Constitution of California.

However, this fundamental right was further denied to Petitioner by Lipset, where Lipset actively suppressed from the court and jury the single witness that could offer testimony of the alleged "war" Lipset referred to. This witness was Nicholas Rubino, who was an agent for the state, and who had Petitioner under surveillance. If there was any evidence to support the claim by Lipset that there was a "war", that Petitioner was involved in narcotics trafficking, that he was looking for Roberto Socorro Lastra, or that her had changed his appearance to commit the murder it was with Rubino. However, Rubino was not listed on the witness list submitted by Lipset (See Rule 60 (b) motion, Exhibit 47), nor was he called or presented as a witness.

As Lipset made it clear at the beginning of the trial of Petitioner that he planned to introduce evidence of his theory that he was involved with narcotics, and though the court admonished Lipset he could not make such claims without first putting on a witness that could provide reliable testimony of

the alleged narcotics trafficking. (See Rule 60 (b) motion, Exhibit 520, Lipset chose to ignore the order by the court, and intimate that he had knowledge of Petitioner's involvement in narcotics trafficking and a "war" which was never proved. Not only did this violate the order by the court, but it further perpetrated a fraud upon the court and jury without adversarial testing or confrontation to test the truth of these claims.

Lipset claimed that Petitioner had changed his clothes and hair without first putting on a witness that could provide reliable testimony of when and where he could have changed. This evidence clearly was not provided by Varela, as Varela claimed he had not known the intent of the gunman. It is reasonable to believe that had Petitioner actually changed his clothes and hair the night of the murder of Bastarrica, then Varela would have been asked exactly when Petitioner had changed. Yet this was never asked of Varela, and no witness was called on by Lipset to provide testimony on this allegation. This was a clear and deliberate violation of the right to confrontation retained by Petitioner, and a clear intent to defraud this court, the jury, and Petitioner.

This fraud is exacerbated by the fact that Lipset knew, or reasonably should have known, that Rubino could verify the whereabouts of Petitioner if, when, and where Petitioner had changed his clothes and hair. Rubino had Petitioner under surveillance and Lipset elected to ensure Rubino did not appear as a witness, but relied on this defect to gain the conviction of Petitioner.

As Lipset claimed that the motive of Petitioner to commit the murder of Bastarrica was due to "war", and that he had changed his clothes and hair, without first putting on a witness or winesses that could provide reliable testimony on these allegations, it was a violation of the fundamental right to confrontation which added to the fraud that was committed against the court and jury.

GROUND FOUR:

COUNSEL FOR PETITIONER ABANDONED PETITIONER COMPLETELY AND ALLOWED FRAUD TO BE COMMITTED UPON THE COURT, THE JURY, AND PETITIONER.

Typically, claims of failure by Defense Counsel are reviewed under the now clearly established rule announced in Strickland v. Washington (1984) 466 U.S. 668. However, the same day the Strickland standard was announced, an exception to the Strickland standard was also announced by the United States Supreme Court. (United States v. Cronic (1984) 466 U.S. 648.) The Cronic exception is also a clearly established rule.

As set out in the Statement of the Facts, supra, as well as under Ground One, supra, Louis Lipset, who was the designee of the office of the District Attorney, and his agents Crowley and Gerrans, perpetrated a fraud upon the court; a fraud upon the jury asked to determine the facts of the cause, and the guilt of innocence of Petitioner; and a fraud upon him.

Counsel failed to call exculpatory witnesses (See Rule 60 (b) motion, Exhibits 9 & 10), failed to investigate the surveillance on Petitioner by the police (Rubino) which would

have exonerated him and failed to investigate the recovered weapon (id., Exhibits 42, 46, 49 and 53) and failed to investigate the timeline inconsistency where Petitioner was completely exonerated by the police surveillance and other testimony. (See id, Exhibits 28, 48, 50 and 51.)

RULE 60(b) MOTION WAS CORRECT PROCEDURE.

The Supreme Court held that a Rule 60 (b) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction. A motion that, like Petitioners, challenges only the District Courts failure to reach the merits does not warrant such treatment and can therefore be ruled upon by the District Court without precertification by the Court of Appeals pursuant to § 2244 (b)(3). A prisoner must also set forth "extraordinary circumstances" justifying relief.

Petitioner's Rule 60(b) Motion must be equitably and liberally applied to achieve substantial justice. Doubt should be resolved in favor of a judicial decision on the merits of a case, and a technical error or a slight mistake by Petitioner's attorney should not deprive Petitioner of an opportunity to present the true merits of his claims. The countervailing factors are the Respondent's and society's interests in the finality of judgments and avoidance of prejudice. (Roberts v. Rehoboth Pharmacy, Inc. (5th Cir. 1973) 574 F.2d 846, 847-848; Fackelman v. Bell (5th Cir. 1977) 564 F.2d 734, 735-736; cf. Blois v. Friday (5th Cir. 1980) 612 F.2d 938, 940.)

When circumstances beyond Petitioner's control and other factors, such as his prison transfer make it difficult or impossible for a Petitioner to contact his attorney to determine the disposition of the case them relief should be granted to prevent injustice as excusable neglect. (Ellingsworth v. Chrysler (7th Cir. 1981) 665 F.2d 180; Leong v. Railroad Transfer Serv., Inc. (7th Cir. 1962) 302 F.2d 555; Butner v. Neustadter (9th Cir. 1963) 324 F.2d 783.)

Federal Rules of Civil Procedure, Rule 60 (b) (5) provides relief by this court if the judgment has been satisfied, released, discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Petitioner believes that this Honorable Court, in fact, has jurisdiction to vacate the judgment closing his case.

Courts have the power and duty to correct judgments which contain clerical errors or judgments which have been issued due to inadvertence or mistake. (American Trucking Ass'ns v. Frisco Transp. Co. (1958) 358 U.S. 133, 145.)

Federal Rules of Civil Procedure, Rule 60 (b) governs relief from judgments or orders. Specifically, "Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case under a limited set of circumstances including fraud, mistake, and newly discovered evidence." (Gonzalez v. Crosby (2005) 545 U.S. 524, 528.) As the Supreme Court has stated, "Rule 60 (b) has unquestionably valid role to play in habeas cases." (Id., at pp. 535-536....) In doing so,

the Court noted that "[i]n some instances...it is the State, not the habeas Petitioner, that seeks to use Rule 60 (b), to reopen a habeas judgment granting the writ." (Harvest v. Castro 9th Cir. 2008) 531 F.3d 737, 744-745; citing Ritter v. Smith (11th Cir. 1987) 811 F.2d 1398, 1400.)

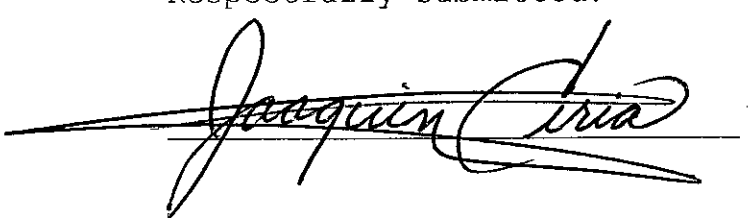
A habeas petitioner's post-judgment pleading is properly characterized as a motion for relief from judgment if it does not assert, or reassert, claims of error in the movant's state conviction. (Abdur'Rahman v. Bell (6th Cir. 2007) 493 F.3d 738.)

Federal procedural rule allowing for a motion for relief from judgment creates an exception to the finality of a district court's judgment in a habeas proceeding so that, if neither the motion itself nor the Federal judgment form which it seeks relief substantively addresses Federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statutes or rules. (Ward v. Norris (8th Cir. 2009) 577 F.3d 925.)

CONCLUSION.

The petition for writ of certiorari should be granted.

Respectfully submitted.



Date: December 21, 2017