

18-7597

ORIGINAL

No. CV16-5834 JGB(MRW)

IN THE

SUPREME COURT OF THE UNITED STATES

CARLOS PONCE, PETITIONER

v.

W.L. MONTGOMERY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE NINTH CIRCUIT COURT OF APPEALS

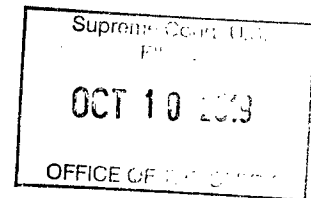
PETITION FOR WRIT OF CERTIORARI

CARLOS PONCE - AS 7789
CALIPATRIA STATE PRISON

05-223 PO BOX 5006

CALIPATRIA CA 92233

IN PRO-SE



QUESTIONS FOR REVIEW

THE NINTH CIRCUIT COURT OF APPEALS DENIED THE ISSUANCE
OF A CERTIFICATE OF APPEALABILITY BASED UPON THEIR DECISION
THAT PETITIONER DIDNT HAVE SUBSTANTIAL EVIDENCE TO MAKE A
PRIMA FACIE SHOWING.

DID THE NINTH CIRCUIT COURT ERR IN THEIR DENIAL? AND DID THAT
DENIAL VIOLATE PETITIONERS SIXTH AND FOURTEENTH AMENDMENT
RIGHTS OF THE UNITED STATES CONSTITUTION?

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LIST OF ALL PARTIES

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ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE

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TABLE OF AUTHORITIES

CASES

MILLER V. COCKRELL, 537 U.S. 322, 123 S.Ct. 1029 (2003)

SLACK V. McDANIEL, 529 U.S. 473, 484 (2000)

BARRETT V. ESTELLE, 463 U.S. 880 (1983)

SULLIVAN V. FAIRMAN, 819 F.2d 1382 (CA7 1987)

SIMMONS V. UNITED STATES, 390 U.S. 377, 88 S.Ct. 967

MOREY V. DOUD, (1957) 354 U.S. 457

REED V. REED (1971) 404 U.S. 71

PLYLER V. DOE (1982) 457 U.S. 202, 217

IN RE GRIFFITHS (1973) 413 U.S. 717, 721-722

BERNAL V. FAINTER (1984) 467 U.S. 216, 219, 227

STATUTES

28 U.S.C. § 1254

U.S. CONSTITUTION, AMEND. VI

U.S. CONSTITUTION, AMEND. XIV SEC. 1

28 U.S.C. § 2254 (a) (b) (1) (2) (3) (c) (d) (1) (2), (e) (1) (2) (f), (g), (h), (i)

PEN. CODE § 186.22 (b)

PEN. CODE § 12022.53 (b) - (d)

28 U.S.C. § 2253 (c)

EVIDENCE CODE § 1221

CALIFORNIA CONSTITUTION ART. I § 7 (a)

OPINIONS BELOW

PETITIONER RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO
REVIEW THE JUDGMENT BELOW.

THE NINTH CIRCUIT COURT OF APPEALS OPINION APPEARS AT APPENDIX "A" TO
THE PETITION AND IS UNPUBLISHED.

THE OPINION OF THE UNITED STATES DISTRICT COURT APPEARS AT
APPENDIX "B" TO THE PETITION AND IS UNPUBLISHED.

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JURISDICTION

THE DATE ON WHICH THE UNITED STATES COURT OF APPEALS, FOR THE
NINTH CIRCUIT DECIDED MY CASE WAS JULY 12, 2018.

NO PETITION FOR REHEARING WAS TIMELY FILED IN MY CASE.

THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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2 § 1254 - CASES IN THE COURT OF APPEALS MAY BE REVIEWED BY THE SUPREME
3 COURT BY THE FOLLOWING METHODS: (1) BY WRIT OF CERTIORARI GRANTED UPON THE
4 PETITION OF ANY PARTY TO ANY CIVIL OR CRIMINAL CASE, BEFORE OR AFTER RENDERING
5 OF JUDGMENT OR DECREE; (2) BY CERTIFICATION AT ANY TIME BY A COURT OF
6 APPEALS OF ANY QUESTIONS OF LAWS IN ANY CIVIL OR CRIMINAL CASE AS TO WHICH
7 INSTRUCTIONS ARE DESIRED, AND UPON SUCH CERTIFICATION THE SUPREME COURT MAY
8 GIVE BINDING INSTRUCTIONS OR REQUIRE THE ENTIRE RECORD TO BE SENT UP FOR
9 DECISION OF THE ENTIRE MATTERS IN CONTROVERSY.

10 U.S. CONST., AMEND. VI: IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY
11 THE RIGHT TO A SPEEDY TRIAL, BY AN IMPARTIAL JURY OF THE STATE DISTRICT
12 WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE
13 BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND
14 CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM,
15 TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR; AND TO
16 HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

17 U.S. CONST., AMEND. XIV, SEC. 1: ALL PERSONS BORN OR NATURALIZED IN THE
18 UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE
19 UNITED STATES AND OF THE STATES WHEREIN THEY RESIDE. NO STATES SHALL
20 MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES
21 OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON
22 OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO
23 ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

24 28 U.S.C. § 2254: (a) THE SUPREME COURT, A JUSTICE THEREOF, A CIRCUIT JUDGE, OR
25 A DISTRICT JUDGE SHALL ENTERTAIN AN APPLICATION FOR A WRIT OF HABEAS CORPUS
26 IN BEHALF OF A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE
27 COURT ONLY ON THE GROUND THAT HE IS IN CUSTODY IN VIOLATION OF THE
28 CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES.

1 (b)(1) AN APPLICATION FOR A WRIT OF HABEAS CORPUS ON BEHALF OF A PERSON IN CUSTODY
2 PURSUANT TO THE JUDGMENT OF A STATE COURT SHALL NOT BE GRANTED UNLESS IT
3 APPEARS THAT -- (A) THE APPLICANT HAS EXHAUSTED THE REMEDIES AVAILABLE
4 IN THE COURTS OF THE STATE; OR (B)(i) THERE IS AN ABSENCE OF AVAILABLE STATE
5 CORRECTIVE PROCESS; OR (ii) CIRCUMSTANCES EXIST THAT RENDER SUCH PROCESS
6 INEFFECTIVE TO PROTECT THE RIGHTS OF THE APPLICANT.

7 (2) AN APPLICATION FOR A WRIT OF HABEAS CORPUS MAY BE DENIED ON THE MERITS,
8 NOTWITHSTANDING THE FAILURE OF THE APPLICANT TO EXHAUST THE REMEDIES
9 AVAILABLE IN THE COURTS OF THE STATE.

10 (3) A STATE SHALL NOT BE DEEMED TO HAVE WAIVED THE EXHAUSTION REQUIREMENT
11 OR BE ESTOPPED FROM RELIANCE UPON THE REQUIREMENT UNLESS THE STATE,
12 THROUGH COUNSEL, EXPRESSLY WAIVES THE REQUIREMENT.

13 (C) AN APPLICANT SHALL NOT BE DEEMED TO HAVE EXHAUSTED THE REMEDIES
14 AVAILABLE IN THE COURTS OF THE STATE, WITHIN THE MEANING OF THIS SECTION,
15 IF HE HAS THE RIGHT UNDER THE LAW OF THE STATE TO RAISE, BY ANY AVAILABLE
16 PROCEDURE, THE QUESTION PRESENTED.

17 (d) AN APPLICATION FOR A WRIT OF HABEAS CORPUS ON BEHALF OF A PERSON IN
18 CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT SHALL NOT BE GRANTED
19 WITH RESPECT TO ANY CLAIM THAT WAS ADJUDICATED ON THE MERITS IN STATE
20 COURT PROCEEDINGS UNLESS THE ADJUDICATION OF THE CLAIM -- (1) RESULTED IN
21 A DECISION THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF,
22 CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT
23 OF THE UNITED STATES; OR (2) RESULTED IN A DECISION THAT WAS BASED ON AN
24 UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED
25 IN THE STATE COURT PROCEEDING.

26 (e)(1) IN A PROCEEDING INSTITUTED BY AN APPLICATION FOR A WRIT OF HABEAS CORPUS
27 BY A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT, A
28 DETERMINATION OF A FACTUAL ISSUE MADE BY A STATE COURT SHALL BE PRESUMED

1 TO BE CORRECT. THE APPLICANT SHALL HAVE THE BURDEN OF REBUTTING THE PRESUMPTION
2 OF CORRECTNESS BY CLEAR AND CONVINCING EVIDENCE.

3 (2) IF THE APPLICANT HAS FAILED TO DEVELOP THE FACTUAL BASIS OF A CLAIM
4 IN STATE COURT PROCEEDINGS, THE COURT SHALL NOT HOLD AN EVIDENTIARY HEARING
5 ON THE CLAIM UNLESS THE APPLICANT SHOWS THAT -- (A) THE CLAIM RELIES ON --
6 (i) A NEW RULE OF CONSTITUTIONAL LAW, MADE RETROACTIVE TO CASES ON COLLATERAL
7 REVIEW BY THE SUPREME COURT, THAT WAS PREVIOUSLY UNAVAILABLE; OR (ii) A
8 FACTUAL PREDICATE THAT COULD NOT HAVE BEEN PREVIOUSLY DISCOVERED THROUGH
9 THE EXERCISE OF DUE DILIGENCE; AND (B) THE FACTS UNDERLYING THE CLAIM
10 WOULD BE SUFFICIENT TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT
11 BUT FOR CONSTITUTIONAL ERROR, NO REASONABLE FACTFINDER WOULD HAVE
12 FOUND THE APPLICANT GUILTY OF THE UNDERLYING OFFENSE. (F) IF THE APPLICANT
13 CHALLENGES THE SUFFICIENCY OF THE EVIDENCE ADDUCED IN SUCH STATE COURT
14 PROCEEDING TO SUPPORT THE STATE COURTS DETERMINATION OF A FACTUAL ISSUE
15 MADE THEREIN, THE APPLICANT, IF ABLE, SHALL PRODUCE THAT PART OF THE RECORD
16 PERTINENT TO A DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE TO
17 SUPPORT SUCH DETERMINATION. IF THE APPLICANT, BECAUSE OF INDIGENCY OR OTHER
18 REASON IS UNABLE TO PRODUCE SUCH PART OF THE RECORD, THEN THE STATE
19 SHALL PRODUCE SUCH PART OF THE RECORD AND THE FEDERAL COURT SHALL
20 DIRECT THE STATE TO DO SO BY ORDER DIRECTED TO AN APPROPRIATE STATE OFFICIAL.
21 IF THE STATE CANNOT PROVIDE SUCH PERTINENT PART OF THE RECORD, THEN THE
22 COURT SHALL DETERMINE UNDER EXISTING FACTS AND CIRCUMSTANCES WHAT
23 WEIGHT SHALL BE GIVEN TO THE STATE COURTS FACTUAL DETERMINATION.

24 (9) A COPY OF THE OFFICIAL RECORDS OF THE STATE COURTS, DULY CERTIFIED
25 BY THE CLERK OF SUCH COURT TO BE A TRUE AND CORRECT COPY OF A FINDING,
26 JUDICIAL OPINION, OR OTHER RELIABLE WRITTEN INDICIA SHOWING SUCH A FACTUAL
27 DETERMINATION BY THE STATE COURT SHALL BE ADMISSIBLE IN THE FEDERAL COURT
28 PROCEEDING. (h) EXCEPT AS PROVIDED IN SECTION 408 OF THE CONTROLLED SUBSTANCE

1 ACT, IN ALL PROCEEDINGS BROUGHT UNDER THIS SECTION, AND ANY SUBSEQUENT
2 PROCEEDINGS ON REVIEW, THE COURT MAY APPOINT COUNSEL FOR AN APPLICANT
3 WHO IS OR BECOMES FINANCIALLY UNABLE TO AFFORD COUNSEL, EXCEPT AS
4 PROVIDED BY A RULE PROMULGATED BY THE SUPREME COURT PURSUANT TO
5 STATUTORY AUTHORITY. APPOINTMENT OF COUNSEL UNDER THIS SECTION
6 SHALL BE GOVERNED BY SECTION 3006 A OF TITLE 18.

7 (i) THE INEFFECTIVENESS OR INCOMPETENCE OF COUNSEL DURING FEDERAL OR
8 STATE COLLATERAL POST-CONVICTION PROCEEDINGS SHALL NOT BE A GROUND FOR
9 RELIEF IN A PROCEEDING ARISING UNDER SECTION 2254.

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1 STATEMENT OF THE CASE

2 ON APRIL 24, 2008, RICHARD 'SNEAKY' VERA WAS FOUND SHOT TO DEATH IN AN ALLEY
3 IN A RESIDENTIAL NEIGHBORHOOD IN LONG BEACH. VERA WAS A LONG TIME MEMBER
4 OF THE STREET GANG - WEST SIDE LONGO. IT WAS THE PROSECUTORS THEORY THAT
5 VERA WAS KILLED BY ANOTHER WESTSIDE LONGO MEMBER, ERIC 'EAGLE' REVELES,
6 AND THAT REVELES WAS ACTING AT THE DIRECTION OF, AND IN ASSOCIATION
7 WITH, PETITIONER CARLOS 'LIL PELON' PONCE - A LEADER OF WEST SIDE LONGO.
8 THE PROSECUTIONS THEORY WAS BASED UPON TWO SOURCES OF EVIDENCE. FIRST,
9 WAS THE TESTIMONY FROM A HIGH SCHOOL STUDENT, NAMELY MARCO CORONEL,
10 WHO FEIGNED A VIRTUALLY TOTAL LOSS OF MEMORY IN 2013, BUT, WHO HAD TOLD
11 POLICE SHORTLY AFTER THE SHOOTING THAT ON TWO OCCASIONS HE HAD HEARD
12 REVELES AND PETITIONER DISCUSSING, ON THE STREET, PLANS TO HARM VERA.
13 THE SECOND UNDERPINNING FOR THE PROSECUTIONS CASE CONSISTED OF 20
14 EXCERPTS FROM A SURREPTITIOUSLY RECORDED CONVERSATION PETITIONER
15 HAD WITH TWO OTHER MEMBERS OF WEST SIDE LONGO; WHILE THEY WERE BEING
16 HELD IN LOCK UP, AWAITING A COURT APPEARANCE ON AN UNRELATED CASE,
17 AT THE LONG BEACH COURT HOUSE.

18 PETITIONER CARLOS PONCE WAS CONVICTED AT A JURY TRIAL OF ONE COUNT OF
19 FIRST-DEGREE MURDER. IN ADDITION, THE JURY FOUND TRUE (1) THAT THE
20 OFFENSE WAS COMMITTED FOR THE BENEFIT OF, AT THE DIRECTION OF, AND IN
21 ASSOCIATION WITH A CRIMINAL STREET GANG (PEN. CODE §186.22 (b)), AND (2)
22 THAT A PRINCIPAL IN THE OFFENSE PERSONALLY USED AND DISCHARGED A
23 HANDGUN, CAUSING DEATH (PEN. CODE §12022.53(b)-(d)). AFTER PETITIONER
24 ADMITTED TWO PROOF FELONY CONVICTIONS, HE WAS SENTENCED TO PRISON FOR
25 CONSECUTIVE TERMS OF 6 YEARS, 50 YEARS, TO LIFE, AND 25 YEARS TO LIFE.

26 APPEAL WAS TAKEN TO DIVISION 4 OF THE SECOND DISTRICT COURT OF APPEAL.
27 PETITIONER ARGUED THAT THE TRIAL COURT HAD ERRONEOUSLY DENIED HIS
28 MOTION TO APPOINT ATTORNEY EDMONT T. BARRETT, THE LAWYER WHO HAD

1 REPRESENTED PETITIONER IN A SEPARATE CASE INVOLVING THE SAME KEY
2 EVIDENCE AS IN THIS CASE. PETITIONER'S ARGUMENT WAS THAT THE TRIAL COURT
3 ERRONEOUSLY BELIEVED IT HAD NO DISCRETION TO APPOINT MR. BARRETT AND THUS
4 REFUSED TO EXERCISE ITS DISCRETION. PETITIONER FURTHER ARGUED THAT THE
5 TRIAL COURT'S ERROR REQUIRED REVERSAL BOTH AS A MATTER OF STATE LAW AND AS A
6 MATTER OF EQUAL PROTECTION.

7 THE CALIFORNIA SUPREME COURT DENIED REVIEW ON SEPTEMBER 9, 2015. AND THE
8 UNITED STATES DISTRICT COURT DENIED HABEAS RELIEF AS WELL AS AN ISSUANCE OF
9 COA ON THIS CLAIM ON JANUARY 7, 2018 DECIDING THAT THE STATE COURT'S ANALYSIS
10 WAS SURELY REASONABLE. THE COURT EXPRESSLY CITED SETTLED SUPREME COURT
11 LAW THAT PETITIONER HAD NO CONSTITUTIONAL RIGHT TO ~~THE~~ APPOINTMENT OF AN
12 ATTORNEY OF HIS CHOICE. PETITIONER'S CHALLENGE TO THE STATE COURT'S DECISION
13 POINTS TO NO LAW ESTABLISHING SUCH A CLEARLY ESTABLISHED CONSTITUTIONAL
14 RIGHT.

15 A HABEAS CORPUS, CONTAINING TWO CLAIMS OF INEFFECTIVE ASSISTANCE OF
16 COUNSEL, WAS TAKEN TO DIVISION 4 OF THE SECOND DISTRICT COURT OF APPEALS.
17 IN THIS PETITION PETITIONER ARGUED THAT TRIAL COUNSEL, NAMELY LEONARD N.
18 GARBER, WAS INEFFECTIVE IN FAILING TO HIRE A PSYCHOLOGIST TO LISTEN TO
19 THE IN-JAIL RECORDINGS AND THEN TESTIFY AS AN EXPERT TO THE VALIDITY OR
20 LACK OF MY STATEMENTS MADE IN THE LONG BEACH COURT HOUSE HOLDING
21 CELL. SECONDLY, TRIAL COUNSEL WAS INEFFECTIVE IN HIS RELUCTANCE TO INTERVIEW
22 AND CALL POTENTIAL WITNESS ALEXANDER RIVERA TO REBUT THE LONE
23 PROSECUTION'S WITNESS', MARCO CORONEL, IDENTIFICATION OF PETITIONER. THE
24 APPELLATE COURT DENIED THE PETITION ON MARCH 26, 2016 DECIDING THAT
25 PETITIONER FAILED TO PRODUCE FACTS AND SUBSTANTIAL EVIDENCE TO MAKE A
26 PRIMA FACIE SHOWING FOR RELIEF. SHORTLY AFTER, PETITIONER TOOK THE CLAIMS
27 TO THE SUPREME COURT OF CALIFORNIA. CONSEQUENTLY, THE STATE SUPREME COURT
28 DENIED REVIEW ON JUNE 22, 2016.

1 ON AUGUST 5, 2016, PETITIONER FILED AN AMENDED PETITION IN THE UNITED STATES
2 DISTRICT COURT - CENTRAL DISTRICT. DEPUTY ATTORNEY GENERAL, DAVID MADEO, FILED
3 HIS ANSWER ON NOVEMBER 8, 2016; APPROXIMATELY A MONTH LATER PETITIONER
4 FILED HIS TRAVERSE, HOWEVER, BEFORE MAGISTRATE JUDGE MICHAEL R. WILNER
5 CAN MAKE HIS FINDINGS AND RECOMMENDATIONS, PETITIONER FILED A STAY AND
6 ABEYANCE MOTION DATED 11-8-16; IN ORDER TO EXHAUST HIS STATE REMEDIES
7 PERTAINING NEW FOUND INFORMATION (I.E., ALEXANDER RIVERA AND MARCO CORONELS
8 POLICE REPORT STATEMENTS AS WELL AS SINGLE PHOTOS ARRAYS OF PETITIONER)
9 ATTACHED TO HABEAS CORPUS AS EXHIBITS "A" AND "B". WHICH THE DISTRICT COURT
10 PERMITTED. FURTHER MORE, ON JULY 19, 2017 THE DISTRICT COURT SERVED PETITIONER
11 WITH AN ORDER LIFTING THE STAY AND THE PROCEEDINGS RESUMED WITH THE
12 PETITION HAVING BEEN AMENDED WITH THE NEWLY EXHAUSTED INFORMATION.

13 SUBSEQUENTLY, THE MAGISTRATE JUDGE FILED HIS FINDINGS AND RECOMMENDATIONS
14 ON DECEMBER 5, 2017 (DOC. #38). WHERE ON JANUARY 7, 2018 UNITED STATES
15 DISTRICT JUDGE, JESUS G. BERNAL, ACCEPTED THE FINDINGS AND RECOMMENDATIONS,
16 ENTERED HIS JUDGMENT TO DENY THE PETITION, AND DENIED AN ISSUANCE OF COA.
17 PETITIONER THEN PERSUADED TO THE NINTH CIRCUIT COURT OF APPEALS
18 WITH THE FILING OF A NOTICE OF APPEAL AND A CERTIFICATION OF APPEALABILITY
19 DATED JANUARY 21, 2018. COLLECTIVELY, THE NINTH CIRCUIT COURT OF APPEALS
20 DENIED THE ISSUANCE OF A COA WITH A CONCISED DECISION - PETITIONER FAILS
21 TO MAKE A SUBSTANTIAL SHOWING - DATE: JULY 12, 2018.

1 REASONS FOR GRANTING THE WRIT

2 THE CALIFORNIA NINTH CIRCUIT COURT OF APPEALS SERVED PETITIONER A COPY
3 OF THEIR POSTCARD DENIAL STATING: PETITIONER FAILS TO PROVIDE SUBSTANTIAL
4 EVIDENCE TO MAKE A PRIMA FACIE SHOWING.

5 HOWEVER, IN THE UNITED STATES SUPREME COURT DECISION IN MILLER EL V. COCKRELL,
6 537 U.S. 322, 123 S. CT. 1029 (2003). THE COURT CLARIFIED THAT STANDARDS FOR ISSUANCE
7 OF A CERTIFICATE OF APPEALABILITY. -- A PRISONER SEEKING A CERTIFICATE OF
8 APPEALABILITY NEED ONLY DEMONSTRATE A "SUBSTANTIAL SHOWING OF THE DENIAL OF
9 A CONSTITUTIONAL RIGHT." A PRISONER SATISFIES THIS STANDARD BY DEMONSTRATING
10 THAT JURISTS OF REASONS COULD DISAGREE WITH THE DISTRICT COURTS RESOLUTION
11 OF HIS CONSTITUTIONAL CLAIMS OR THAT JURISTS COULD CONCLUDE THE ISSUES
12 PRESENTED ARE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER. id.
13 123 S. CT. 911 1034, CITING SLACK V. MCDANIEL, 529 U.S. 473, 484 (2000). REDUCED TO ITS
14 ESSENTIALS THE TEST IS MET WHERE THERE PETITIONER MAKES A SHOWING THAT
15 "THE PETITION SHOULD HAVE BEEN RESOLVED IN A DIFFERENT MATTER OR THAT
16 THE ISSUES PRESENTED WERE 'ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED
17 FURTHER.'" id. 911 1039, CITING BAREFOOT V. ESTELLE, 463 U.S. 880 (1983): THIS
18 MEANS THAT THE PETITIONER DOES NOT HAVE TO PROVE THAT THE DISTRICT COURT
19 WAS NECESSARILY "WRONG" -- JUST THAT ITS RESOLUTION OF THE CONSTITUTIONAL
20 CLAIM IS "DEBATABLE." WE DO NOT REQUIRE PETITIONER TO PROVE, BEFORE THE
21 ISSUANCE OF CERTIFICATE OF APPEALABILITY, THAT SOME JURISTS WOULD GRANT
22 THE PETITION FOR HABEAS CORPUS. INDEED, A CLAIM CAN BE DEBATABLE EVEN THOUGH
23 EVERY JURIST OF REASON MIGHT AGREE, AFTER THE CERTIFICATE OF APPEALABILITY
24 HAS BEEN GRANTED AND THE CASE HAS RECEIVED FULL CONSIDERATION, THAT PETITIONER
25 WILL NOT PREVAIL. AS WE STATED IN SLACK, WHERE A DISTRICT COURT HAS REJECTED
26 THE CONSTITUTIONAL CLAIMS ON THE MERITS, THE SHOWING REQUIRED TO SATISFY
27 § 2253(c) IS STRAIGHT FORWARD: THE PETITIONER MUST DEMONSTRATE THAT
28 REASONABLE JURISTS WOULD FIND THE DISTRICT COURTS ASSESSMENT OF THE

1 CONSTITUTIONAL CLAIMS DEBATABLE OR WRONG.

2 FURTHERMORE, IN REGARDS TO THE FIRST CLAIMS OF INEFFECTIVE ASSISTANCE OF
3 COUNSEL PETITIONER, IN HIS INITIAL HABEAS CORPUS PETITION, ATTACHED TWO
4 CORRESPONDENCES - ONE AUTHORED BY PETITIONER AND THE OTHER BY TRIAL COUNSEL,
5 LEONARD N. GARBER.

6 THE CORRESPONDENCE AUTHORED BY PETITIONER WAS AN ACCUSATORY LETTER WHERE
7 PETITIONER ACCUSED TRIAL COUNSEL, LEONARD N. GARBER, OF MALPRACTICE; ONE OF
8 THOSE ACCUSATIONS CONCERNING THIS CLAIM OF FAILING TO HIRE A PSYCHOLOGIST
9 AS AN EXPERT TO ASSESS THE IN-JAIL RECORDINGS OF PETITIONER. THE SECOND
10 CORRESPONDENCE IS A RESPONSE TO PETITIONERS ACCUSATIONS FROM TRIAL COUNSEL,
11 GARBER; WHERE MR. GARBER COMPLETELY AVOIDS ANSWERING TO THE MALPRACTICE
12 ACCUSATIONS. WHICH I AM, NOW, ASKING THIS COURT TO ACCEPT IT AS AN ADOPTIVE
13 ADMISSION PURSUANT TO EVIDENCE CODE §1221. (SEE DOC. #4; ATTACHED EXHIBITS "A"
14 AND "B"). CONSEQUENTLY, COUNSEL GARBERS INEFFECTIVE ASSISTANCE DENIED
15 PETITIONER OF HIS FUNDAMENTAL RIGHT TO PRESENT A COMPLETE AND ADEQUATE
16 DEFENSE AS WELL AS THE RIGHT TO DUE PROCESS OF LAW GUARANTEED IN THE
17 6TH AND 14TH AMENDMENTS IN THE UNITED STATES CONSTITUTION.

18 ADDRESSING CLAIM TWO OF INEFFECTIVE ASSISTANCE OF COUNSEL, PETITIONER
19 ATTACHED AS EXHIBITS "C" AND "D", A POLICE REPORT CONTAINING ALEXANDER
20 RIVERAS STATEMENT AND A SUPPORTING DECLARATION INSCRIBED BY JESUS GONZALEZ -
21 A SUPPORTING WITNESS - TO MR. RIVERAS INVOLVEMENT... HE IS ONE OF THE INDIVIDUALS
22 ALLEGED TO BE PRESENT WHEN PROSECUTION WITNESS, MARCO CORONEL, SUPPOSEDLY
23 OVERHEARD PETITIONER PLANNING THE CRIME. (SEE DOC. #4 at p. 3-4). PROSECUTIONS
24 WITNESS, MR. CORONELS, POLICE REPORT STATEMENTS IS FOUND IN EXHIBIT "C" IN DOC. #4.
25 PETITIONER CONTENTS THAT TRIAL COUNSEL WAS FULLY AWARE OF MR. RIVERAS
26 STATEMENTS AND THE WORTH OF HIS TESTIMONY AT TRIAL; YET, FOR SOME UNKNOWN
27 REASON HE FAILED TO INVESTIGATE HIS STATEMENT WITH AN INTERVIEW AND A THOROUGH
28 BACKGROUND INVESTIGATION OF SUPPORTING WITNESSES STATEMENTS. (SULLIVAN V. FAIRMAN,

1 819 F.2d 1382 (CA7 1987)). THIS WOULD HAVE PROVEN THE UNDULY SUGGESTIVE PROCESS
2 OF THE IDENTIFICATION OF PETITIONER. (SIMMONS V. UNITED STATES, 390 U.S. 377, 88
3 S. CT. 967). THIS DEFICIENCY IN MR. GARBER'S PERFORMANCE DEPRIVED PETITIONERS
4 6TH AMENDMENT RIGHT. AS MR. RIVERA WOULD HAVE EFFECTIVELY REBUTTED
5 MR. CORONEL'S ASSERTION THAT HE WAS PRESENT AND EVEN THAT THE ALLEGED
6 WITNESSING OF PETITIONERS PLANNING THAT KILLING EVER OCCURRED; BY
7 UNEQUIVOCALLY TESTIFYING THAT HE WAS AT A "QUINCEANERAS" DANCE REHEARSAL
8 IN THE DAY IN QUESTION. ALONG WITH MR. GONZALEZ' CORROBORATION GIVEN THAT
9 HE WAS ALSO A PARTICIPANT ACCOMPANIED WITH NUMEROUS OTHERS VOUCHING FOR
10 MR. RIVERA.

11 IN CLAIM THREE, BOTH THE STATE AND FEDERAL CONSTITUTIONS (CAL. CONST. ART. I
12 § 7 (9) AND FED. CONST. AMEND. 14TH) PROVIDES: 'THE EQUALITY GUARANTEED BY THE
13 EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS IS EQUALITY
14 UNDER THE SAME CONDITIONS AND AMONG PERSONS SIMILARLY SITUATED. THE CLASSIFICA-
15 TION MUST NOT BE ARBITRARY; BUT, MUST BE BASED UPON SOME DIFFERENCE IN THE
16 CLASSES HAVING A SUBSTANTIAL RELATION TO A LEGITIMATE OBJECT TO BE ESTABLISHED.
17 (MOREY V. DOUD (1957) 354 U.S. 457; REED V. REED (1971) 404 U.S. 71). AGAIN, IN DOC. #4-
18 THE INITIAL PETITION FILED AT EXHIBITS "E" AND "F" IT IS CLEAR THAT THE TRIAL
19 COURT ERRED IN NOT EXERCISING ITS DISCRETION TO APPOINT THE ATTORNEYS OF
20 PETITIONERS CHOICE. (PLYLER V. DOE, (1982) 457 U.S. 202, 217; IN RE GRIFFITHS, (1973)
21 413 U.S. 717, 721-722; BERNAL V. FAINTER (1984) 467 U.S. 216, 219, 227).

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CONCLUSION

2 FOR ALL THE ABOVE REASONS PETITIONER HAS PROVIDED SUBSTANTIAL EVIDENCE
3 TO MAKE A PRIMA FACIE SHOWING.

4 THEREFORE, CERTIORARI SHOULD BE GRANTED.

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7 DATED: 1.10.19

RESPECTFULLY SUBMITTED

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C P
CARLOS PONCE - IN PRO SE

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