No. ______________________

____

IN THE

SUPREME COURT OF THE UNITED STATES

____

Jose D. Hernandez — PETITIONER
(Your Name)

vs.

M.E. Spearman — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

9th Circuit Court of Appeal (See Exhibit A) (Appendix A)
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jose D. Hernandez
(Your Name)

H.D.S.P. P.O. BOX 3030
(Address)

Susanville, CA 96127
(City, State, Zip Code)

____
(Phone Number)

QUESTION(S) PRESENTED

1. Did appellate counsel render ineffective assistance on appeal for failing to raise newly presented claims?

2. Is there sufficient evidence to support the conviction for the substantive offense of first degree felony murder, and does the adopted felony murder rule interpretation in petitioner's case conflict with this court's decision in Tison v. Arizona (1987) 481 U.S.?

3. Did the ambiguous jury instruction on felony murder unconstitutionally relieve the State of its burden of proof of an element of the crime?

4. Does the evidence support a finding that the attempted murder is a reasonably foreseeable natural and probable consequence?

5. Did the trial court violate petitioner's constitutional right to Due Process and to prepare a defense for trial by denying the request for a continuance?

6. Did the trial court impose an illegal and excessive restitution fine?

Questions regarding the legal claims raised by counsel on appeal:

1. Did the trial court abuse its discretion and violate petitioner's Sixth Amendment right to counsel when it denied petitioner's February 9, 2007 motion for substitute counsel?

2. Did the trial court's response to a jury question contain a constitutionally infirm explanation of reasonable doubt that violated petitioner's constitutional rights to Due Process and a jury verdict of guilt beyond a reasonable doubt, and further impermissibly direct a verdict on an element of murder that violated petitioner's right to Due Process and to present a defense?

3. Did the evidence support a finding that petitioner acted either with the intent to kill or with reckless disregard for human life?

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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

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

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

[ ] reported at Order Denying Certificate of Appealability; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at Order Dismissing Habeas Corpus; Declining To Issue COA; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix G 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 ____________________ 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.

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JURISDICTION

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

The date on which the United States Court of Appeals decided my case was May 4, 2018 (Appendix A)

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals 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. § 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

1) THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR THE SUBSTANTIVE OFFENSE OF FIRST DEGREE FELONY MURDER; AND EIGHTH AMENDMENT VIOLATION ON CRUEL AND UNUSUAL PUNISHMENT,

2) THE AMBIGUOUS JURY INSTRUCTION ON FELONY MURDER UNCONSTITUTIONALLY RELIEVED THE STATE OF ITS BURDEN OF PROOF OF AN ELEMENT OF THE CRIMES,

3) THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE ATTEMPTED MURDER IS A REASONABLY FORESEEABLE NATURAL AND PROBABLE CONSEQUENCE,

4) THE COURT'S DENIAL TO CONTINUE TRIAL VIOLATED APPELLANT'S CONSTITUTIONAL DUE PROCESS AND TO PREPARE A DEFENSE FOR TRIAL,

5) THE COURT IMPOSED AN ILLEGAL AND EXCESSIVE RESTITUTION FINE,

6) APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ABOVE CLAIMS.

Counsel raised the following claims on appeal:

1) THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL WHEN IT DENIED APPELLANT'S FEBRUARY 9, 2007 motion FOR SUBSTITUTE COUNSEL,

2) THE TRIAL COURT'S RESPONSE TO A JURY QUESTION CONTAINED A CONSTITUTIONALLY INFIRM EXPLANATION OF REASONABLE DOUBT, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A JURY VERDICT OF GUILT BEYOND A REASONABLE DOUBT, ADDITIONALLY, THE RESPONSE IMPERMISSIBLY DIRECTED A VERDICT ON AN ELEMENT OF MURDER, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS AND TO PRESENT A DEFENSE,

3) THE EVIDENCE DOES NOT SUPPORT A FINDING THAT APPELLANT ACTED EITHER WITH THE INTENT TO KILL OR WITH RECKLESS DISREGARD FOR HUMAN LIFE.

STATEMENT OF THE CASE

Petitioner is in custody in the California Department of Corrections and Rehabilitation ("CDCR") serving a sentence of life without the posibility of parole pursuant to a September 26, 2007 judgment of the Superior Court of California, County of Tulare, for the following convictions: (1) first degree felony murder with a robbery/burglary special circumstance (Cal. Pen. Code § 187 (a)); (2) attempted murder of a peace officer, with a special allegation that the offense occurred while the officer was engaged in the performance of his duties (Cal. Pen. Code §§ 187, 664 (e); (3) four counts of second degree robbery with personal use of a firearm (Cal. Pen. Code § 211, 12022.53 (B) PC); (4) three counts of second degree commercial burglary (Cal. Pen. Code § 459); (5) conspiracy to commit robbery (Cal. Pen. Code § 182 (a)(1)); (6) unlawful taking or driving a vehicle (Cal. Veh. Code § 10851 (a)); (7) receiving stolen vehicle (Cal. Pen. Code § 496 (a)).

A direct appeal was filed in the California Court of Appeals, Fifth Appellate District, which, in an unpublished decision, struck a special allegation connected to the attempted murder conviction due to instructional error, vacated the trial court's sentence of life with the possibility of parole, the trial court in an abstract of judgment lowered the life sentence to 9 years, and affirmed petitioner's conviction in all other respects. Petitioner then filed a petition for review in the California Supreme Court, which was denied on September 15, 2009. Petitioner was represented by appellate counsel.

On February 25, 2010, petitioner then filed a habeas corpus petition in the United States District Court, Eastern District. Petitioner, acting in pro per, submitted the presented claims by appellate counsel to the U.S. District Court in the habeas corpus. The Court denied every claim presented. Subsequently, petitioner filed a petition for Certificate of Appealability in the Ninth Circuit Court of Appeal, which was denied on July 24, 2013.

Petitioner had 90 days to file Writ of Certiorari in this Court. Petitioner had filed a timely extension of time, but it was returned due to not attaching the Court Order to verify jurisdiction. The Writ of Certiorari was completed by that time, so instead of re-sending the motion requesting an extension of time with the attached Court Order, petitioner went ahead to file the Writ but by then the 90 day deadline had expired so it was rejected by the Clerk.

After discovering that appellate counsel failed to raise 5 separate claims on appeal, petitioner moved to file habeas corpus in the trial court, superior court, 5th District Court of Appeal, California Supreme Court, United States District Court, Eastern District, then the 9th Circuit Court of Appeal to present the claims, but only to get rejected and denied. See Superior Court ORDER in Appendix E, See 5th District Court of Appeal ORDER in Appendix E, See U.S. District Court ORDER in Appendix B, See 9th Circuit Court of Appeal ORDER in Appendix A.

The United States District Court is in error and unconstitutional for dismissing the writ of habeas corpus as successive when these new claims have not been heard or reviewed on the merits. Petitioner seeks to be heard (heard) on the Ineffective Assistance of Appellate Counsel claim and the 5 claims presented in the writ. The District Court also declined to issue certificate of appealability.

Petitioner filed a notice of appeal and requested a certificate of appealability on all issues presented to the District Court. The 9th Circuit Court of Appeals denied the request for a certificate of appealability.

Petitioner respectfully requests that this Court take this case into consideration and in the interest of justice conducts a review on Certiorari.

STATEMENT OF RELEVANT FACTS:

On May 14, 2002, in the city of Porterville, Ca., two gunmen robbed a Fashion for All clothing store. HERNANDEZ and his brother Carlos Landois were identified as the robbers. (6 RT 159, 130-132, 135, 160-161)

Two days later, on May 16, 2002, sometime after 8:00 a.m., a Dodge van was stolen from the parking lot of the County Government Center, The Wausau Building, on Mooney Boulevard in Visalia, California. (6 RT 228-233; 7RT 323). Around noon that day, two clothing stores, Clothestime and Susie's Deals, both located in the Vons shopping center in Visalia, Ca., were robbed at the same time by different lone gunmen dressed in women's clothing. (7RT 249-252, 264-265, 271, 277; 6 RT 138-140, 181, 143, 201; 7RT 292-293)

HERNANDEZ was identified as the gunman who robbed Clothestime. (7RT 249-252, 264-265, 271, 277) After taking money from the store, he retreated to the same Dodge van that was now parked in the parking lot, changed clothes and escaped. (6RT 192-193) He was apprehended several days later in the State of Utah after he ran out of gas and flagged down a Utah Highway Patrol officer for assistance. He was still driving the same stolen van. (8RT 460-462) A nine-millimeter pistol and some of the property from the Clothestime robbery were discovered inside the van. (7RT 256-260, 275-276, 329-330)

At the same time HERNANDEZ was robbing Clothestime, a second gunman, identified as Landois, was robbing the business next door, Susie's Deals. He was also dressed in women's clothes and armed with a pistol. After getting money from the cash register and taking other personal property, he left the store and retreated to a Buick Regal, with Nebraska license plates, which was parked west of the two stores somewhere in the direction of the Chuck E. Cheese restaurant. (6RT 143, 201, 1154; 7RT 292-293) He attempted to drive through the parking lot along the main driveway, just in front of Vons Market towards the Chinowith Street exit when, for no apparent reason, suddenly jumped out of his moving vehicle and started firing his gun at Visalia Police Officer Greg Byerlee, who was northwest of Landois somewhere in front of Arby's restaurant (7RT 371)

Byerlee and several other officers had been eating lunch at a nearby eatery in the same shopping center when they heard the robbery dispatch alert tone and responded on foot. Landois started shooting at him, Byerlee returned fire killing Landois.

During the shootout with police, one of the shots fired by Landois penetrated the exterior wall of the Arby's restaurant and struck and killed one of the restaurant's patrons, Jeffrey Donaldson. HERNANDEZ never aided and abetted Landois in the Susie's Deals robbery and never participated in the shootout.

with police that resulted in the death of Jeffrey Donaldson and attempted murder of Officer Byerlee. (7 RT 371; 7RT 284, 286, 288-289, 296-299)

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals erred in denying petitioner's request for a certificate of appealability by stating, "appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253 (c)(2); Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012)."

The Antiterrorism and Effective Death Penalty Act (AEDPA) provides that, in order to take an appeal from a final order denying habeas corpus, a Certificate of Appealability must be obtained from a circuit justice or from the district court judge. 28 U.S.C. § 2253, Subd. (c)(1)

In order to obtain a COA, the petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). However, the petitioner need not show that he should prevail on the merits. Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000) (en banc) ["... Obviously the petitioner need not show that he should prevail on the merits. Has has already failed in that endeavor"]. Rather, the petitioner is merely required to make the "modest" showing (Lambright, supra, at 1025) that "reasonable jurists would find the district's court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

As explained by the Ninth Circuit in Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002), the substantial showing standard required for a COA is "relatively low". Id. at 1011, citing Slack, supra. Hence, a COA must issue if any of the following apply: (1) the issues are debatable among reasonable jurists; (2) another court could resolve the issues differently; or (3) the questions raised are adequate enough to encourage the petitioner to proceed further. Finally, "The court must resolve doubts about the propriety of a COA in the petitioner's favor." Jennings, supra, citing Lambright, supra, at 1025."

ARGUMENTS SUPPORTING LEGAL CLAIMS

Reasonable Jurist Could Differ as to Whether Counsel was Ineffective: Appellate counsel Ann Hopkins, state bar No. 129708, was appointed by the court of appeal to represent petitioner. On appeal, 5th District Court No. F05480, appellate counsel was ineffective for failure to raise issues attacking the conviction and other claims that will remedy the miscarriage of justice that petitioner has been inflicted with since the entire proceedings of trial and conviction.

Counsel on appeal failed to raise the following claims:

1) THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR THE SUBSTANTIVE OFFENSE OF FIRST DEGREE FELONY MURDER; AND EIGHTH AMENDMENT VIOLATION AGAINST CRUEL AND UNUSUAL PUNISHMENT,

2) THE AMBIGUOUS JURY INSTRUCTION ON FELONY MURDER UNCONSTITUTIONALLY RELIEVED THE STATE OF ITS BURDEN OF PROOF OF AN ELEMENT OF THE CRIMES,

3) THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE ATTEMPTED MURDER IS A REASONABLY FORESEEABLE, NATURAL AND PROBABLE CONSEQUENCE,

4) THE COURT'S DENIAL TO CONTINUE TRIAL VIOLATED PETITIONER'S CONSTITUTIONAL DUE PROCESS AND TO PREPARE A DEFENSE FOR TRIAL,

5) THE COURT IMPOSED AN ILLEGAL AND EXCESSIVE RESTITUTION FINE.

Petitioner relies on his Constitutional Due Process Clause, on Gray v. Greer, 778 F.2d 350 (CA7 1985), and on Evitts v. Lucey, 469 U.S. 392, 105 S.Ct. 830, 83 L.Ed 2d 821 (1985) "Strickland... establishing the standard for ineffective assistance of counsel.... Had appellate counsel failed to raise a significant and obvious issue, the failure could be viewed as deficient performance. If an issue which was not raised may have resulted in a reversal of the conviction, or an order for a new trial, the failure was prejudicial. [..] p.353"

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)
Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L.Ed. 2d 756 (2000)
Pollard v. White, 119 F. 3d 1430, 1435-37 (9th Cir. 1997)

Ineffective Assistance of Counsel Claim One:

The evidence was insufficient to support the conviction for the substantive offense of first degree felony murder. And in tandem with Eighth Amendment violation for the following reasons:

The substantive offense in this case is Landois' Susie's Deals robbery and subsequent shootout with police that resulted in the death of Jeffrey Donaldson. As mentioned above, HERNANDEZ never aided and abetted Landois in his robbery and never participated in the shootout with police that killed Mr. Donaldson.

The felony murder is inapplicable therefore petitioner's conviction is illegal under an expanded use of the felony murder rule, either as an aider and abettor or a co-conspirator. HERNANDEZ cannot be held legally responsible with the murder of Jeffrey Donaldson in Count one, or with any of the other crimes committed by Landois because the felony murder rule does not apply to this case. HERNANDEZ was involved in his own separate robbery of Clothestime and the resulting get away in his separate vehicle. Furthermore, when Landois engaged Officer Byerlee in a shootout, HERNANDEZ had completed his robbery and had escaped. Petitioner has not found any case on point to support the felony murder rule being stretched to fit the HERNANDEZ fact pattern or any fact patterns close to the HERNANDEZ case.

For the purposes of the felony murder rule, a robbery continues during an attempted escape until the defendant reaches a place of temporary safety. (See People v. Salas (1972) 7 C3d. 812, 821, 103 C.R. 431, 500 P2d. 7; People v. Milan (1973) 9 C3d. 185, 195, 107 C.R. 68, 507 P2d. 956) In Salas, the court affirmed defendant's convictions for first degree murder and first degree robbery. The Court held that a fleeing robber's failure to reach a place of temporary safety was alone sufficient to establish the continuity of the robbery within the felony murder rule. We agree this analysis applies to Landois but not to HERNANDEZ. Landois did not reach a point of safety and engaged VPD Officer Byerlee in a gun battle, and had Landois survived he would be liable for Jeffrey Donaldson's death under the felony murder doctrine. By the time Landois engaged Officer Byerlee in the fatal gun battle, HERNANDEZ had already completed his robbery, changed his clothes in the van and vacated the shopping center. He had reached a point of safety and his "get away" was complete thus breaking the nexus needed in the Salas line of cases.

In the case of People v. Pulido (1997) 15 Cal. 4th 713, 63 Cal. Rptr. 2d 625, 936 P.2d 1235, the issue was whether a person who, after a killing in the course of a robbery, aids and abets the robber in the asportation of the property is guilty of first degree murder. It was held, the person is guilty of robbery but not murder. Although the second person is an accomplice to robbery, People v. Cooper (1991) 53 Cal. 3d 1158, 1165 [282 Cal. Rptr. 450, 811 P.2d 742], such participation in the robbery does not subject the accomplice to murder liability under section 189, because the killer and accomplice were not "jointly engaged at the time of such killing in a robbery", People v. Martin, supra, 12 Cal. 2d at p. 472, the killer in other words was not acting, at the time of the killing, in furtherance of a "common" design to rob, People v. Washington, [672] supra, 62 Cal. 2d at p. 782.

Complicity in a felony murder does not extend to one who joins the felonious enterprise after the killing: That homicide is not committed in furtherance of a common purpose, and the killer and accomplice are not jointly engaged in a felonious enterprise at the time of the killing. "Our cases establishing the complicity of a non-killer in a felony murder have thus required uniformly, at a minimum, that the accomplice have been, at the time of the killing, a conspirator or aider and abettor in the felony".

The conclusion in Pulido suggests that in our case even if an inference could be drawn that HERNANDEZ and Landois intended to meet up at a later time and split the proceeds of their separate robberies, HERNANDEZ would still not be responsible for any killing committed by Landois during his robbery.

Because there was no evidence that petitioner had knowledge that his co-defendant (Landois) was in the shootout with Officer Byerlee that resulted in the death of the victim (Donaldson), establishes sufficient proof of the lack of intent, personal knowledge, and overt acts on HERNANDEZ' part that is required to support finding of attempted murder of Officer Byerlee and murder of Donaldson. Mere participation of a robbery that resulted in the attempted murder and death after the fact is not sufficient to uphold elements required in a felony murder rule case. (People v. Sully, Cal. 3d 1195; and Tison v. Arizona 1987 481 U.S. 137, 150)

Petitioner has been unable to find any case that expands the rule to apply to a defendant, like HERNANDEZ, who is committing a separate independent felony, at the very same time his so-called accomplice or co-conspirator is engaged in his own felony. As is noted above, courts are generally reluctant to expand the felony murder rule unless absolutely necessary. Therefore, the conviction in this case is a result of a miscarriage of justice.

In sum, the evidence was insufficient to support the conviction for the substantive offense of first degree felony murder. Therefore, as a matter of law, the prosecution failed to prove each and every element required in a felony murder law, thereby the conviction must be set aside. (Jackson v. Virginia (1979) 443 U.S. 307, 319) Retrial of the allegation is barred by constitutional protections against double jeopardy (See People v. Garcia (1984) 36 Cal. 3d 539, 553, fn. 13).

A. CONVICTION AND SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT FOR NON-KILLER SERVING EXCESSIVE SENTENCE OF LIFE WITHOUT PAROLE FOR FIRST DEGREE FELONY MURDER

In tandem with the above claim of insufficient evidence to support the conviction for first degree felony murder and attempted, petitioner further contends that the conviction and sentence constitutes cruel and unusual punishment for non-killer in violation of the Eighth Amendment.

Under the circumstances of this case, petitioner is currently suffering from an injustice of an illegal conviction and sentence for a murder and attempted murder he did not commit, in turn, establishing a violation of the Eighth and Fourteenth Amendments "proscription" 'against all punishments which by their excessive length or severity are greatly disproportioned to the offense charged.' (Weems v. United States, 217 U.S. 349, 371, 30 S.Ct. 544, 551, 54 L.Ed. (1910) quoting O'Neill v. Vermont, 144, U.S. 323, 339-340, 12 S.Ct. 693, 699, 36 L.Ed. 450 (1892); Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L. Ed. 2d 982, (1977)

B. THERE IS INSUFFICIENT EVIDENCE TO PROVE ELEMENTS REQUIRED IN AIDING AND ABETTING

In the instant case, the evidence is insufficient to prove that HERNANDEZ aided and abetted a robbery that results in murder and attempted murder as required to support his conviction for first degree murder, under an aiding and abetting theory, pursuant to California law.

The following CALCRIM Jury Instructions were used to indoctrinate the jury on principles of aiding and abetting, and natural and probable consequences language: (See Exhibit H)

Instruction No. 38: 402. Natural and Probable Consequences Doctrine

Instruction No. 39: 415. ~~[illegible]~~ Conspiracy

Instruction No. 41 : 417 Liability for Coconspirator's Acts
Instruction No. 43 : 540 B. Felony Murder : First Degree -- Coparticipant Allegedly Committed Fatal Act
Instruction No. 44 : 549. Felony Murder : One Continuous Transaction -- Defined
Instruction No. 51 : 730. Special Circumstances : Murder in Commission of Felony (Pen. Code § 190.2 (a)(17))
Instruction No. 53 : 1603. Robbery : Intent of Aider and Abettor

All of the above-mentioned jury instructions directs the attention to the elements of aiding and abetting, and natural and probable consequence. Looking into Instruction No. 53, 1603 Robbery: Intent of Aider and Abettor, this instruction alone goes to show that the prosecutor failed to prove the elements required to be an aider and abettor in a robbery based on the lack of evidence. There is no evidence to show that HERNANDEZ aided and abetted Landois' in his separate robbery. It's impossible to meet these requirements in the law when HERNANDEZ was in a different location at the time Landois was engaged in his own robbery.

According to Juan v. Allen 408 F.3d 1262 (2005) regarding elements of aiding and abetting, to obtain a conviction under this theory, the jury must find the elements of aiding and abetting with respect to the target crime, and "(5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted". Prettyman 58 Cal. Rptr. 2d 827, 926, P2d at 1020. There is no evidence to find aiding and abetting with respect to the target crime in HERNANDEZ case.

The Juan H. court stated, which reflects the same for Hernandez, that: "For all that is shown in the record, it appears that Merendon may not have been brought to justice for the shooting death of Ramirez. But, if so, the failure of law enforcement to apprehend a principal does not license the state to impute such serious guilt to an alleged aider and abettor absent evidence that meets the constitutional requirement that every element of a crime be established beyond a reasonable doubt with respect to the accused."

"Such a lack of evidence violates the Fourteenth Amendment guarantee that an accused must go free unless and until the prosecution presents evidence that proves guilt beyond a reasonable doubt". Id citing In re Winship, 397 U.S. 358, 365-68, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)

Petitioner is entitled to the same treatment under the Constitutional Due Process and Equal Protection of the laws as in the case of Juan H., and any other relief that this Court deems legal and Constitutionally appropriate.

<u>Ineffective Assistance of Counsel Claim Two:</u>

The jury was instructed on "549 Felony Murder: One Continuous Transaction -- Defined; Instruction No. 44: In order for the People to prove that the defendant is guilty of murder under a theory of felony murder and that the special circumstance of murder committed while engaged in the commission of Burglary and/or Robbery is true, the People must prove that the Burglary and/or Robbery and the act causing the death were part of one continuous transaction. The continuous transaction may occur over a period of time and in more than one location. (See Appendix H)

In deciding whether the act causing the death and the felony were part of one continuous transaction, you may consider the following factors: 1) Whether the felony and the fatal act occurred at the same place; 2) The time period, if any, between the felony and the fatal act; 3) Whether the fatal act was committed for the purpose of aiding the commission of the felony or escape after the felony; 4) Whether the fatal act occurred after the felony but while one or more of the perpetrators continued to exercise control over the person who was the target of the felony; 5) Whether the fatal act occurred while the perpetrators were fleeing from the scene of the felony or otherwise trying to prevent the discovery or reporting of the crime; 6) Whether the felony was the direct cause of the death; 7) Whether the death was a natural and probable consequence of the felony.

It is not required that the People prove any one of these factors or any particular combination of these factors. The factors are given to assist you in deciding whether the fatal act and felony were part of one continuous transaction."

In the last paragraph, it concludes the instruction by telling the jury it is not required that the People prove any one of these factors or any particular combination of these factors. These seven specified factors that were given to the jury are all elements of the crime that the prosecution has a burden to prove beyond reasonable doubt, yet in this instruction, the jury were told that it is not required that the People prove any one of these factors or any particular combination of these factors.

This instruction lowered the prosecution's burden of proof by naming elements needed proven in a conviction then instructing the jury the prosecution is not required to prove them. These seven factors are elements of the offense charged that need to be proven in a Court of law to uphold a conviction, yet the instruction tells the jury the prosecution does 'not have to prove any one of them'.

The Due Process of the 14 Amendment requires that an accused be protected "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (In re Winship (1970) 397 U.S. 358, 364) and that the "prosecution bears the burden of proving all elements of the offense charge [citation], and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements [citations]" (Sullivan v. Louisiana (1993) 508 U.S. 275, 278). Moreover, "the jury verdict required by the Sixth Amendment is a jury verdict of guilt beyond a reasonable doubt." (Ibid)

Reversal and setting aside of the affected count '1' is required unless "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'." (Yates v. Evatt (1991) 500 U.S. 391, 403, overruled on other grounds in Estelle v. McGuire (1991) 502 U.S., 62, 72, fn. 4, quoting Chapman v. California (1967) 386 U.S. 18, 24); People v. Flood (1998) 18 Cal. 4th 470, 491, citing United States v. Gaudin (1995) 515 U.S. 506, 510-511), and Sandstrom v. Montana, 442

U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979).

Retrial of the allegation is barred under principles of Double Jeopardy. (Burks v United States (1978) 437 U.S. 1, 16-18; Cal. Const., art. I § 15; People v. Hatch (2002) 22 Cal. 4th 260, 271-272)

Ineffective Assistance of Counsel Claim Three:

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE ATTEMPTED MURDER IS A REASONABLE FORESEEABLE, NATURAL AND PROBABLE CONSEQUENCE

In this case, petitioner was convicted of the attempted murder of Officer Byerlee in count 2 under the theory that the attempted murder committed by Mr. Landois was a natural and probable consequence of a burglary or robbery or a conspiracy to commit a burglary or robbery (See RT 523-524, 530-531 [jury instruction], 559-563, 573 [prosecutor's argument] (See Appendix H)

The evidence was insufficient to support a finding that the attempted murder is a reasonable foreseeable, natural and probable consequence. The conspiracy to commit robbery had terminated after completion of the robberies, and for independent reasons not benefitting the robbery or burglary, Landois engaged officer Byerlee in the shootout after the fact. There is no evidence to establish that defendant knew or should have known that the person his brother was shooting at was a peace officer, as it did not establish that defendant ever saw officer Byerlee, or that he was in the vicinity or with Landois when the shooting broke out.

To convict an accomplice defendant under the natural and probable consequence rule, the jury must find that "the offense" committed by the perpetrator was "a natural and probable consequence of the target crime that the defendant aided and abetted" (Prettyman, supra, 14 Cal. 4th at p. 262, italics added). Every offense is made up of factual elements, each of which must be proven by the prosecution to establish the commission of the offense (Richard v. U.S. 813, 817). "The ... question is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable." (People v. Medina (2009) 46 Cal. 4th 913, 920). Thus, under the natural and probable consequences rule, every element must be foreseeable to a reasonable person in the accomplice position. If any element is not reasonably foreseeable, the commission of the offense is not reasonably foreseeable.

Juan H. v. Allen 408 F.3d. 1262 (2005) "Aiding and abetting with respect to target crime".

In reviewing the sufficiency of the evidence under the Due Process Clause of the 14 Amendment to the U.S. Constitution or the Due Process Clause of article I, Section 15 of the California Constitution, the question is "whether viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (Jackson v. Virginia (1979) 443 U.S. 307, 319; People v. Berryman (1993) 6 Cal. 4th 1048, 1083).

Because defendant petitioner never aided and abetted Landois in his robbery, and the attempted murder occurred after the fact, the prosecution failed to prove these elements in order to justify conviction and sentence. The shooting happened independently from the target offense, therefore is an element not reasonably foreseeable. The attempted murder must be set aside. Retrial of the allegation is barred under principles of Double Jeopardy (Burks v. United States (1978) 437 U.S. 1, 16-18; Cal. Const., art. I § 15; People v. Hatch (2002) 22 Cal. 4th 260, 271-272; People v. Garcia (1984) 36 Cal. 3d 539, 558, fn. 13). (See Appendix H)

Ineffective Assistance of Counsel Claim Four:

THE TRIAL COURT'S DENIAL TO CONTINUE TRIAL VIOLATED PETITIONER'S CONSTITUTIONAL DUE PROCESS AND TO PREPARE A DEFENSE FOR TRIAL

On July 31, 2007, the first day of trial, the trial court denied petitioner's request to relieve Mr. Olmos under Marsden, but granted his request for self-representation. The trial court also denied petitioner's request for a continuance (5 CT 1128; Supp. CT 4). Petitioner's Marsden was denied, therefore as a last resort chose to represent himself. Petitioner was forced to take on a capital trial without proper preparation to present a rightful defense for the case in violation of his Constitutional Due Process right and right to prepare a defense for trial (Transcripts Pages 13-20, Appendix I).

The denial of a continuance to prepare a defense for trial violated petitioner's Due Process rights under the U.S. Constitution and right to prepare a defense (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16; Crane v. Kentucky (1986) 476 U.S. 683, 690; Carter v. Kentucky (1981) 450 U.S. 288, 302; Duncan v. Louisiana (1968) 391 U.S. 145; People v. Flood, supra, 18 Cal. 4th at 492).

Griffin v. Illinois (1965) 100 L. Ed 891, 351 U.S. 12, 79 S. Ct. 585, 55 ALR 2d 1055: "holds that everybody is entitled to Due Process at every stage of the proceeding."

The resultant convictions, thus, deprived defendant of his rights to Due Process, Equal Protection, a fair and impartial trial and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 15, 16, 17, and 27 of the California Constitution.

Reversal of all counts is therefore required.

Ineffective Assistance of Counsel Claim Five:

THE COURT IMPOSED AN ILLEGAL AND EXCESSIVE RESTITUTION FINE

On November 9, 2007, the court ordered petitioner to pay $10,542.70 in victim restitution (6 CT 1410). Even though petitioner was handed a life without parole conviction and sentence for felony murder and life with parole for attempted murder on a peace officer, which is injustified, that constitutes a miscarriage of justice. The court further imposed the illegal and excessive restitution fine without considering petitioner's case and his ability to pay under the circumstances.

Because petitioner did not directly commit these crimes of murder and attempted murder, was given an LWOP (Life Without Parole) sentence, and cannot pay under the circumstances, he should not be held responsible for the illegal and restitution fine. The fine must be set aside.

The trial court's order imposing the restitution fine, pursuant to Government Code 13967 subdivision (a), must be stricken because there is insufficient evidence of defendant's ability to pay it, "Sentencing court must consider defendant's ability to pay when it imposes restitution fine". (People v. Wilson, supra, at 537); People v. Wilson (Cal. App. 1 Dist. 1994) 26 Cal. Rptr. 2d 537) West's Annotated Cal. Penal Code §§ 1202.4, 1202.4 (a); West's Annotated Cal. Gov. Code § 13967 (a) People v. Frye (1994) 21 Cal. App. 4th 1983) "$201 - $10,000 REQUIRES an assessment by the trial court of the defendant's ability to pay; an assessment which must be supported by substantial evidence". People v. Serrato (1973) 9 Cal. 3d 753, 763, it was held: "Sentencing errors which go to the Jurisdiction of the Court CAN BE RAISED AT ANY TIME, even though no objections were interposed in the Trial Court".

A sentence which is not authorized by Law exceeds the jurisdiction of the Court (People v. Neal (1993) 19 Cal. App. 4th 1114, 1120). People v. Zeto (1992) 8 Cal. App. 4th 736 "imposing the fine to an unauthorized sentence which was reviewable at any time..."

CONCLUSION

Petitioner respectfully requests that this Court:

1) That upon judicial discretion, and in the interest of justice, considers this case for review;

2) Grant such other and further relief as the Court may find appropriate in the interests of justice.

Date: October 21, 2018

Jose D. Hernandez
JOSE DE JESUS HERNANDEZ
PETITIONER IN PRO PER