IN THE 18-8571

SUPREME COURT OF THE UNITED STATES

ORIGINAL

No. _____

JAVIER PELLECER,
Petitioner,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent(s).

PETITION FOR WRIT OF CERTIORARI

On Petition For a Writ of Certiorari to
the Court of Appeal For the State of California
Second Appellate District
Appeal No. B280333

Javier Pellecer
Pelican Bay State Prison
P.O. Box 7500
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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SPECIAL CIRCUMSTANCE AND GANG EVIDENCE ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE, DENYING PETITIONER DUE PROCESS OF LAW.

II. WHETHER THE COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS ALL FRUITS OF HIS ARRESTS (NOTABLY HIS 2013 STATEMENT TO THE INFORMANT) ON GROUNDS OF UNLAWFUL ARRESTS, WIRETAP VIOLATIONS, DENYING PETITIONER HIS RIGHTS UNDER FOURTH AND FOURTEENTH AMENDMENTS.

III. WHETHER, DESPITE MASSIAH AND PERKINS, THE COURTS FURTHER ERRED IN DENYING PETITIONER'S MOTION TO EXCLUDE HIS ORCHESTRATED JAIL CELL STATEMENT UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS AS WELL.

IV. WHETHER ADMISSION OF EXCESSIVE AND NEEDLESS GANG EVIDENCE ALSO RESULTED IN GROSS TRIAL UNFAIRNESS AND DENIAL OF DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO CONFRONT GANG EXPERT'S TESTIMONIAL HEARSAY.

V. WHETHER THE INSTRUCTION ON THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE FAILED TO CLARIFY THAT THE DEFENDANT MUST KILL OR INTEND TO KILL EACH VICTIM, DENYING PETITIONER DUE PROCESS OF LAW AND THE RIGHT TO A JURY DETERMINATION ON ALL ISSUES.

VI. WHETHER THE COURT ERRED IN DENYING PETITIONER'S MOTION FOR A NEW TRIAL, DENYING APPELLANT DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

VII. WHETHER THE CUMULATIVE EFFECT OF THE ERRORS DISCUSSED ABOVE DEPRIVED PETITIONER OF DUE PROCESS OF LAW AND A FAIR TRIAL BY AN IMPARTIAL JURY AND REQUIRES REVERSAL OF THE JUDGEMENT.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

JAVIER PELLECER,
PETITIONER,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
RESPONDENT(S).

PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California is unpublished and a copy is attached as Appendix A to this Petition. (A.1.) The order of the California Supreme Court denying review is reported at 2018 Cal. LEXIS 9682. A copy is attached as Appendix C to this petition

JURISDICTION

The date on which the highest court decided my case was December 12, 2018. The decision of the Court of Appeal of the State of California was entered on September 18, 2018. An order denying petition For review was entered on December 12, 2018 and a copy of that order is attached as Appendix C to this Petition.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves IV amendment of the United States Constitution which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case involves the V amendment of the United States Constitution which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case involves the VI amendment to the United States Constitution which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State 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 compulsory process for obtaining witnesses in his Favor, and to have the Assistance of Counsel For his defense.

This case involves the XIV amendment to the United States Constitution which provides.

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 laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

Except as noted in the arguments below, appellant adopts and incorporates by reference the statement of the case and Facts set forth in the opinion of the Court of Appeal. However, petitioner stresses the Court of Appeal's summaries and characterizations of the evidence (e.g., supposed "matches" of casings and cars or what petitioner meant or said in his statement), throughout its opinion, largely represent inferences and characterizations -- not the underlying testimony of percipient (and non-percipient) witnesses. (See, e.g., Slip Opn., pp. 16-17 [summarizing interview of Ms. Clay as part of probable cause to arrest even though interview occurred after the arrest; "tentative" casing match described as a match; suggesting Jermaine Watts personally saw the car involved in a unrelated shooting]; cf. Appendix B, RT c11-c41.)

Other misstatement of Facts (See, e.g., Slip Opn., pp. 3-8 [referring to witness Ms. Ramirez being inside of a park; that Ms. Ramirez described the suspect vehicle as a "Nissan of some sort"]; cf. 5 RT 650-651; 5 RT 656-658.), Ms. Ramirez was actually in a parked car and the description she gave of the suspect vehicle was a "Sedan of some sort."

Also witness Crystal Davis' testimony conflicts with the verbatim in the Court of Appeal's opinion; the summarization of petitioner's jail operation statement is sketchy throughout its opinion. (See, e.g., Slip Opn., pp. 3-8; cf. 5 RT 638-648; Appendix D.)

No substantial Facts or evidence was presented against Wayne Gray (alleged shooter) and no evidence of petitioner and Mr. Gray being together.

REASONS FOR GRANTING THE PETITION

The issues set forth above present important questions of law which this Court should resolve. (Rules of the Supreme Court, Rules 10-14.) At a minimum, as regards to Issue One, the Court should address the recurring issue of whether a nonkiller accomplice, unlike a killer, must intend to kill both murder victims in order to establish the multiple murder special circumstance. (Pen. Code §190.2, subd. (d); People v. Banks (2015) 61 Cal.4th 788, 803; In re Miller (2017) 14 Cal.App.5th 960, 971; Edmund v. Florida (1982) 458 U.S. 782, 798-799; Tison v. Arizona (1987) 481 U.S. 137, 148-152.)

Not even the prosecution below contended petitioner intended to kill the second victim -- or even acted with conscious disregard implied malice as to this victim. (6 RT 1503, 1541; 8 CT 1483-1484, 1488-1489, 1496; see also 8 CT 1511-1514; 6 RT 1803) Instead, the prosecution relied solely on natural and probable consequences doctrine to support this second "murder" conviction for the multiple murder special circumstance.

Does a second "natural and probable consequence" murder -- not even prosecuted or supportable as implied malice -- really make a nonkiller accomplice a "multiple murderer" subject LWOP? With respect, the Court of Appeal resolves this issue (which means LWOP for petitioner) based on authorities addressing killers, rather than nonkiller aider and abettors such as petitioner. (Appendix A, Slip opn., pp. 11-12) This Court should, at a minimum, address this recurring ambiguity of application of the multiple murder special circumstance as applied to nonkillers who do not intend to kill the victims.

Should an unreliable statement made to an informant five years after

the alleged murder be able to establish a person's state of mind at the time of an alleged crime (here being 5 years later) to prove the petitioner acted with a reckless indifference to human life? (People v. Banks, supra, 61 Cal.4th at p.794)

In regards to Issue Two, the Court should address the issue whether law enforcement can arrest an individual For the sole purpose of placing him in a jail cell with an informant to elicit information without probable cause? (U.S. Const., IV, XIV; Cal. Const., art. I, §§ 13,15; Dunaway v. New York (1979) 442 U.S. 200, 211-213; Spinelli v. United States (1969) 393 U.S. 410, 417; People v. Campa (1984) 36 Cal.3d 870, 880-881; Kaupp v. Texas (2003) 538 U.S. 626, 630-633.)

Even the trial court expressed their concern regarding the police work in this case. (Appendix B, Motion to Suppress, p. C66) The prosecution Fell Far short of meeting their burden to establish probable cause, when they relied on multiple hearsay, absent any substantial Facts.

Can hearsay, that is not corroborated by substantial facts provide probable cause? Also, can a hearsay statement that was obtained after the unlawful arrest be used in consideration For a ruling on a Motion to Suppress due to an unlawful arrest? (Appendix B, Motion to Suppress, pp. C26-C28; C64-C67) The Court of Appeal resolves this by affirming the trial court's decision. (Appendix A, Slip Opn., pp. 16-17) The Court of Appeal clearly misrepresented the actual evidence. presented, an alleged match of casings and statements regarding a separate shooting.

This Court in needed to bring clarity to the misrepresentations of the Court of Appeal. There was never a match of casings, (Appendix B, Motion, p. C72) and Ms. Clay's statements came after petitioner's arrest and was hearsay. (See, Appendix B, Motion, pp. C26-C28) In warrantless arrest situations, determination

of probable cause are reviewed de novo. (Ornelas v. United States (1996) 517 U.S. 690, 696)

Another 4th amendment issue, this Court should address if law enforcement can, without consent, without judicial authorization, and not within their ordinary course of duties record a conversation between individuals in a jail cell? (U.S. Const., IV, XIV; 18 U.S.C., §§ 2510-2520; Katz v. United States (1967) 389 U.S. 347, 360; United States v. Giordano (1974) 416 U.S. 505, 508; Franklin v. Oregon (9th Cir. 1981) 662 F.2d 1337, 1347; United States v. Van Poyck (9th Cir. 1997) 77 F.3d 285, 291-292; Cal. Const., art. I, § 1; Pen. Code §§ 629.50-629.94)

In regards to Issue Three, this Court is needed to address the issue of whether law enforcement can create a jail operation, involving using an informant, to be placed in a jail cell with a suspect who has invoked his right to counsel under Miranda? (U.S. Const., V, XIV; McNeil v. Wisconsin (1991) 501 U.S. 171, 176-177; Arizona v. Roberson (1988) 486 U.S. 675, 682; Edwards v. Arizona (1981) 451 U.S. 477, 484-485.)

The issues in this petition are presented to this Court to address substantial questions of law, as well as due process of law. This case presents fundamental questions of the interpretation of this Court's decisions in the aforementioned cases. The questions presented are of great public importance because it affects the operations of law enforcement in all 50 states and the District of Columbia, not to mention all the citizens of this country. In addition, the questions are of great importance to prisoners, because it affects their ability to receive fair decisions in proceedings that may result in months or years of added incarceration or harsh punitive confinement.

ARGUMENT

I. THE SPECIAL CIRCUMSTANCE AND GANG FINDINGS ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE, DENYING PETITIONER DUE PROCESS OF LAW.

A conviction of enhancement Finding unsupported by substantial evidence denies a defendant due process of law. (Jackson v. Virginia (1979) 443 U.S. 307, 318; Garcia v. Carey (9th Cir. 2005) 395 F.3d 1099, 1103; U.S. Const., V, XIV; Cal. Const., art. I, §§ 7, 15.)

First, contrary to the Court of Appeal (Appendix A, Slip Opn., pp. 11-12), unlike a killer, a nonkiller accomplice must intend to kill each murder victim for this special circumstance. (People v. Banks (2015) 61 Cal. 4th 788, 803; People v. Clark (2016) 63 Cal. 4th 522, 611; Edmund v. Florida (1982) 458 U.S. 782, 798-799; Tison v. Arizona (1987) 481 U.S. 137, 148-152.) This case presents Fundamental questions of the interpretation of this Court's decisions in Edmund and Tison.

The special circumstances that qualify a defendant convicted of murder For life without the possibility of parole or the death penalty, "every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a Felony enumerated..." (Pen. Code, §190.2, subd. (d).)

Without belaboring the point, there was no contention petitioner intended to kill the Female passenger Ms. Watson -- even acted with conscious disregard implied malice; instead the prosecution only sought a conviction of second degree as to Ms. Watson, and the sole theory was that her murder was the natural and probable consequence of the murder of the driver. Even assuming, arguendo,

multiple murder convictions were otherwise supportable here, the multiple murder special circumstance supporting LWOP cannot stand where appellant did not kill nor intend to kill anyone. (People v. Banks, supra, 61 Cal.4th at p. 803.) In addition, the issue presented is of great importance to prisoners in all 50 states, the District of Columbia, and hundreds of city and county jails because it affects their ability to receive Fair decisions in proceedings that may result in years of added incarceration or harsh punitive confinement.

Second, contrary to the Court of Appeal (Slip Opn., pp. 12-13), the record does not Fairly reflect the charged homicides (or the even more sparsely described accessory activity For disposing of a weapon in 2013) were committed For a gang. The gang expert's opinion by itself cannot prove an actual crime occurred, nor can his opinion alone establish the gang Findings without any Facts to support his opinion. (People v. Ochoa (2009) 179 Cal.App.4th 650, 657 [Nothing in the circumstances of the instant offenses sustains the expert witness's inference that they were gang related].) Reversal of all gang Findings (including the vicarious gang-principal Firearm enhancements) is required as well.

II. THE COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS ALL FRUITS OF HIS ARRESTS (NOTABLY HIS 2013 STATEMENT TO THE INFORMANT) ON GROUNDS OF UNLAWFUL ARREST AND WIRETAP VIOLATIONS, DENYING PETITIONER HIS RIGHTS UNDER 4th AND 14th AMENDMENTS.

As noted, petitioner respectfully notes that the Court of Appeal's summary/conclusory characterizations of the evidence overstate the actual underlying evidence on this and other issues. (See Statement of the Facts, ante.) Contrary to the Court of Appeal (Appendix A, Slip Opn., pp. 14-19), even with the added testimony after the preliminary hearing, the court erred in finding lawful or sufficient probable cause (versus some suspicion) to support full-blown arrests in 2008 and 2013.

A. GENERAL PRINCIPLES OF LAW AND STANDARDS OF REVIEW

A warrantless arrest must be founded upon probable cause. (U.S. Const., IV, XIV; Gerstein v. Pugh (1975) 420 U.S. 103, 111; see also Illinois v. Gates (1983) 462 U.S. 213, 238 [discussing probable cause standard]; Dunaway v. New York (1979) 442 U.S. 200, 211-213 [transportation of robbery-murder suspect to station for interrogation unlawful absent probable cause to arrest].)

Although certain seizures may justified on something less than probable cause (Terry v. Ohio (1968) 392 U.S. 1, 9-10), we have never "sustained against 4th amendment challenge, the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes... absent probable

cause or judicial authorization." (Hayes v. Florida (1985) 470 U.S. 811, 815-816; Florida v. Royer (1983) 460 U.S. 491, 507-508.)

Probable cause based on uncorroborated information of untested witness that provides no information to allow a Court to make informed and--evaluation of witness's reliability and credibility is insufficient as a matter of law. (People v. Campa (1984) 36 Cal.3d 870, 880-881; Spinelli v. United States (1969) 393 U.S. 410, 417; Aguilar v. Texas (1964) 378 U.S. 108, 112.)

The exclusionary rule applies not only to evidence obtained as the direct result of an illegal search or seizure but to evidence found to be deriative of such a search or seizure, including a defendant's police statement following an illegal arrest. (Kaupp v. Texas (2003) 538 U.S. 626, 630-633; Brown v. Illinois (1975) 422 U.S. 590, 602-604; Wong Sun v. United States (1963) 371 U.S. 471, 488.) In warrantless search or seizure situations, determination of reasonable suspicion or probable cause are reviewed de novo. (Ornelas v. United States (1996) 517 U.S. 690, 696.)

Turning to the wiretap violation, upon objection, in Title III, of the Omnibus Crime Control and Safe Streets Act (18 U.S.C., §§ 2510-2520), authorizes both Federal and state law enforcement wiretapping and electronic eavesdropping, under court order, without the prior consent or knowledge of any of the participants. The Act defines a "wire communication" as "any aural transfer... by the aid of wire, cable, or other like connection between the point of origin and the point of reception..." (People v. Otto (1992) 2 Cal.4th 1088, 1100; United States v. Giordano (1974) 416 U.S. 505, 514.) California Wiretap Act. (Pen.Code, §§ 629.50-629.94) In general, California law prohibits wiretapping. (Cal.Const., art I, §1.)

The 4th amendment protects people, not places, and thus the location of a recorded conversation, whether in a jail cell or not, should not be dispositive

of whether it enjoys 4th amendment protection. (Katz v. United States (1967) 389 U.S. 347, 360; Franklin v. Oregon (9th Cir. 1981) 662 F.2d 1337, 1347 ["[A] prisoner does not lose all rights to privacy"]; see also Bell v. Wolfish (1979) 441 U.S. 520.)

Aside from judicial authorization, there are only two exceptions in order to intercept oral communications, which are "consent" and the "ordinary course of duties." (18 U.S.C., § 2510 (5)(a); see also United States v. Van Poyck (9th Cir. 1997) 77 F.3d 285, 291-292.) To deny a right to privacy on the ground that inmates disabused by prior decisions have lost their normal expectations of privacy would defeat the purposes of statute. (United States v. Amen (2nd Cir. 1987) 831 F.2d 373, 379.)

B. THE PROSECUTION FELL FAR SHORT OF DEMONSTRATING PROBABLE CAUSE TO ARREST PETITIONER IN 2008 AND 2013.

There was, and should be, no serious dispute that: these were Full-blown arrests From the start in 2008 and 2013; police had no new evidence since the 2008 interview to support the 2013 arrest; and the 2008 interview could not provide lawful grounds for probable cause in 2013 if the 2008 interviews were the Fruit of an unlawful arrest. This leaves the question of whether the prosecution sustained its burden to show it had probable cause to justify the original Full blown warrantless arrest in 2008 prior to the interview.

The prosecution did not sustain this burden. The court erred in Finding lawful or sufficient probable cause (versus some suspicion) to support Full-blown arrests in 2008 or 2013. As suggested by the ruling at the preliminary hearing, police (at best) had some suspicion to warrant voluntary questioning here, not Full-blown arrests. Contrary to the ultimate determination by judge Kennedy (after

requesting further authorities), no sufficient corroboration was offered to transform rank unattributed hearsay and street rumors into anything more than suspicion either.

As to the charged 2008 homicides, at best police had highly generic descriptions of one suspect by race and hairstyle and equally generic-to-conflicting descriptions of a suspect car, plus unattributed street rumors lacking any meaningful detail. The street rumors with nicknames were completely unattributed and lacking in any significant details (much less inside details) whatsoever. Who knows what these people heard or if they or their sources were just reporting angry suspicions they had about an upsetting shooting?

The evidence about the unrelated shooting just does not raise things beyond speculation (or at best bare suspicion) either. None of this was first-hand either, much less supported by significant details. Even the lone report of an actual "Altima" came from sparse hearsay from a neighbor -- just like the street rumors about the nicknames did. Whether this "neighbor" really saw a car or a shooter clearly is just uncertain. For all we know, the neighbor or Jermaine could, in substance, have been reporting suspicions based on similar cars they had seen on the street.

The fact petitioner's girlfriend lived in the area or police were able to link her to petitioner's generically similar car does not tie petitioner to either shooting. It shows his girlfriend lived by an unrelated shooting, and someone apparently thought her boyfriend's car looked similar to the one they saw. And if police observed paper plates on petitioner's car, how many darkish, blueish, greenish, blackish Impalas/Maximas with paper plates are there in this part of Los Angeles?

Moreover, as the court noted, what a "tentative" casing match means on this testimony is quite unclear as well. Petitioner's girlfriend Ms. Clay lived in the area. But her information about petitioner being in the area around the time of the unrelated

shooting (much less his possible involvement in the double homicide) is extremely sparse; she does not even say if petitioner was with an African-American person that day. In any event, Ms. Clay did not give any of this information to police until (long) after petitioner's original arrest, which the court found was an arrest from the start. This was clear at the time of the ruling and hearing, not just later when petitioner renewed the issue.

In all, police would be able to link petitioner and his car to his girlfriend -- but not to either shooting. People clearly suspected petitioner (or petitioner's car, or a car like it) was involved in these shootings. Whatever a "tentative" match means, the hearsay reports in both shootings were: almost completely unattributed (except for a "neighbor"), posing multiple levels of hearsay as well; and unsupported by any showing of veracity, basis of knowledge, credibility, or meaningful details.

Particularly for rank street rumors, there must be some accounting for multiple hearsay, or fairly strong guilty corroboration, to make out a "substantial basis" for probable cause. Whether internal or external to the hearsay reports, there is no corroboration for reports here. (People v. Love (1985) 168 Cal.App.3d 104, 109-110.) Generic (and unattributed and undetailed) multiple hearsay like this (of uncertain sources and levels), plus generic and equivocal corroboration is not fairly sufficient or substantial to make out probable cause. (People v. Campa (1984) 36 Cal.3d 870, 880-881; Spinelli v. United States, supra, 393 U.S. at p. 417.)

In all, murder case or not; police were free to seek voluntary interviews or conduct further investigation -- but not to arrest and confine petitioner as they did in 2008 and 2013. Two courts expressed concerns about the grounds for these arrests for good reason. Even assuming the 2008 interview could support probable cause, it was the fruit of an unlawful arrest and so cannot provide support the 2013 arrest.

C. THE ERROR WAS PREJUDICIAL

The exclusionary rule applies not only to evidence obtained as the direct result of an illegal search or seizure but to evidence found to be deriative of such a search or seizure, including a defendants police statement following an illegal arrest. (Kaupp v. Texas, supra, 538 U.S. at pp. 630-633; Brown v. Illinois, supra, 422 U.S. at pp. 602-604; Wong Sun v. United States, supra, 371 U.S. at p. 488.) Petitioner's police statements (notably the informant statement orchestrated by police in 2013 and admitted at trial) must all be suppressed because they were the direct products of his illegal arrests unsupported by probable cause. (Dunaway v. New York, supra, 442 U.S. at pp. 211-213.)

Because the error implicates petitioner's Federal constitutional rights, reversal is required unless the People demonstrate beyond a reasonable doubt that the erroneous admission of the evidence did not contribute to the verdict. (Chapman v. California (1967) 386 U.S. 18, 24.) Under this stringent standard, reversal is required. Alternatively, reversal based upon errors of state law is required if it is reasonably probable that a result more favorable to the defendant would have been reached absent the error. (People v. Watson (1956) 46 Cal.2d 818, 836.)

Without belaboring prejudice, the judgement must be reversed under any standard, including Chapman, because the 2013 informant statement orchestrated by police is plainly essential to petitioner's convictions. (In re Tony C. (1978) 21 Cal.3d 888, 899.) Even if the police summary of the 2008 interview at the preliminary hearing was accurate (a serious concern here), the unwarned 2008 interview was ruled inadmissible at trial despite being offered at the preliminary hearing. Other than the 2013 informant statement, no other admissions, forensics, or eyewitness identifications linked petitioner to any of these crimes. Reversal of the judgement is required under any standard.

III. THE COURTS FURTHER ERRED IN DENYING PETITIONER'S MOTION TO EXCLUDE HIS ORCHESTRATED JAIL CELL STATEMENT UNDER THE 5TH, 6TH AND 14TH AMENDMENTS.

Contrary to the Court of Appeal (slip Opn., pp. 19-20), even accepting that some cases have approved these sorts of informant operations, neither *Massiah* nor *Perkins* is a complete answer on the Facts here. Under the totality of the circumstances, admission of the jail cell statement violated petitioner's rights under the 5th, 6th, and 14th Amendments, including his rights to counsel (before and after Formal judicial proceedings), his right against compulsory self-incrimination, his substantive and prophylactic Massiah, Miranda, Edwards rights, his right to confront all witnesses, and his due process rights including the right to a Fair trial and exclusion of involuntary statements at trial. (U.S. Const., amends. V, VI, XIV; Cal. Const., art. I, §§ 7, 15, 16)

A. GENERAL PRINCIPLES OF LAW AND STANDARD OF REVIEW

Statements deliberately elicited From charged defendants by a jail-house informant acting as an agent violate the 6th Amendment and are inadmissible (Massiah v. United States (1964) 377 U.S. 201, 206; United States v. Henry (1980) 447 U.S. 264, 270; Maine v. Moulton (1985) 474 U.S. 159, 177; see also Manning v. Bowersox. (8th Cir. 2002) 310 F.3d 571) Thus, absence of Formal charges or Formal judicial proceedings often defeats a *Massiah* claim, but not always. Even absent Formal charges in the identical case, there is room for exclusion under both the 5th and 6th Amendments if the defense can make out improper charging delay or knowing

circumvention of the right to counsel. (See, e.g., McNeil v. Wisconsin (1991) 501 U.S. 171, 176-177; Arizona v. Roberson (1988) 486 U.S. 675, 682; see also People v. Perkins (Ill. 1993) 248 Ill.App.3d 762, 769 [on remand, motion to suppress granted under 5th amendment right to counsel].)

Turning to the 5th amendment, upon objection, it is the People's burden to demonstrate knowing and voluntary waivers of the Miranda rights (and honoring of invocations of counsel) by a preponderance of the evidence before a defendant's statements made during custodial police interrogation may be admitted. (Miranda v. Arizona (1966) 384 U.S. 436, 471-472; see also Edwards v. Arizona (1981) 451 U.S. 477, 484-485 [after defendant invokes right to counsel, all interrogation must stop unless suspect initiates contact with police].)

Absence of custodial "police" interrogation may allow this sort of orchestrated unwarned informant interview (even with a preceding warned "stimulation" interview conducted by police) to be admitted in some cases. (Illinois v. Perkins (1990) 496 U.S. 292, 294-299.) However, it is clear that any involuntary statements will not be admitted (as set forth below). Further, as with intentional charging delay under Massiah, it is clear that unduly coercive, unfair, or intentional police work-arounds to evade Miranda/Edwards warnings or invocations may also require exclusion under the Federal constitution. (Illinois v. Perkins, supra, 496 U.S. at pp. 301-303 [Brennan, J.] [due process grounds for exclusion posing undue risks of cumulative coercion]; see also Hall v. Lane (9th Cir. 1986) 804 F.2d 79, 83; Missouri v. Siebert (2004) 542 U.S. 600, 615-616; Reyes v. Lewis (9th Cir. 2016) 833 F.3d 1001, 1029-1033 & Fn. 2)

Finally, in addition to review of the voluntariness and intelligence of Miranda waivers, it is axiomatic that use in a criminal prosecution of a statement that is itself involuntary constitutes a denial of due process of law under both the Federal and state constitutions. (Jackson v. Denno (1964) 378 U.S. 368, 385-386; Payne v. Arkansas

(1958) 356 U.S. 560, 561) Absent factual disputes, the totality of circumstances are reviewed independently and the burden is on the prosecution that the confession was voluntary and not the result of any form of compulsion or promise or reward. (Schneckloth v. Bustamonte (1973) 412 U.S. 218, 225-226) The Supreme Court stated in strong language that "coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion." (Blackburn v. Alabama (1960) 361 U.S. 199, 206.)

Importantly, the large majority of historical facts here are undisputed, the courts made few (if any) express fact determinations in denying these motions without hearings, and the ultimate mixed law/fact questions of admissibility are reviewed independently. (Thompson v. Keohane (1995) 516 U.S. 99, 101.)

Turning to the Confrontation Clause, under the 6th amendment, a defendant has the right to confront any and all witnesses. A declaration against penal interest (Evid. Code, §1230.) is not a firmly rooted exception to the hearsay rule and therefore is not admissible on that basis and does not necessarily render a statement trustworthy so as to be admissible. (Lilly v. Virginia (1999) 527 U.S. 116, 126-134; see also Williamson v. United States (1994) 512 U.S. 594, 599-601.) In the opinion of at least a plurality of the United States Supreme Court, appellate courts should independently review whether the government's proffered guarantees of the trustworthiness of a hearsay statement satisfy the Confrontation Clause. (Lilly v. Virginia, supra, 527 U.S. at p. 136)

This Court determined when statements were testimonial and non-testimonial.

(Davis v. Washington (2006) 547 U.S. 813, 822; Crawford v. Washington (2004) 541 U.S. 36, 68-69.) For a statement to come in as a declaration against penal interest it must be based on the indicia of reliability by virtue of its inherent trustworthiness, and the totality of the circumstances. Several courts have determined "'The most reliable circumstance' is 'one in which the conversation occurs between Friends in a non-coercive setting that Factors uninhibited disclosures.'" (People v Arceo (2011) 195 Cal.App.4th 556, 575; People v. Cervantes (2004) 118 Cal.App.4th 162, 169-174; People v. Greenberger (1997) 58 Cal.App.4th 298, 334-338.)

B. THE TOTALITY OF THE CIRCUMSTANCES REFLECT EXCESSIVE INTENTIONAL DELAYS IN CHARGING, UNDULY COERCIVE AND INTENTIONAL POLICE CONDUCT TO EVADE THE RIGHTS TO COUNSEL AND SILENCE, AND THE RIGHT TO CONFRONTATION, RIGHT TO DUE PROCESS OF LAW.

The issues presented is of great public importance because it affects the operations of law enforcement and the rights of all those accused of a crime, during the First critical stages and throughout judicial proceedings.

The courts erred in concluding the prosecution sustained its burden to show admissibility, especially without any hearings. The Four corners of Massiah/Perkins do not resolve these claims in every case, and do not do so here. Perkins does not apply to the facts of this case. In Perkins, this Court addressed the question of, does an undercover agent need to read a suspect his Miranda rights before interrogating him? Here, the question is, once a suspect invokes his right to counsel, under Miranda, to detectives, can the detectives place an informant with the suspect to continue their

interrogation?

When this Court reversed Perkins, supra, 496 U.S. 292, and remanded the case back to the Illinois Courts, Perkins moved to suppress his statements to law enforcement under his 5th amendment right to counsel and prevailed. (People v. Perkins (Ill. 1993) 248 Ill.App.3d 762, cert. denied.) In this very case, the Facts are identical to Perkins 5th amendment right to counsel.

First, even assuming no formal judicial proceedings here, the record reflects unusual, excessive, serial and intentional charging delays as recognized in cases set forth above condemning improper work-arounds of Massiah. Five years had passed without no new evidence against petitioner.

Second, even short of charging delays, the totality of circumstances here reflect unduly coercive, unfair and intentional police manipulations to evade Massiah, Miranda, and Edwards that demand exclusion under due process authorities cited above as well. Indeed, under the circumstances, petitioner believes, "the combined effect of the entire course of the officers' conduct upon the defendant" (Henry v. Kernan (9th Cir. 1999) 197 F.3d 1021, 1027-1028) here resulted in involuntary statements in this jail cell in 2013.

Police did not just stimulate him before they put him in a cell with this informant; they apparently misled him into believing they now thought he was more than a driver when this was not true. Petitioner requested counsel, although police said they lost their "stimulation" interview which was recorded. (5 RT 677-680) In any event, a now confused and stressed petitioner was put into a cell with this informant who claimed to be a killer. The experienced informant was also clearly a deliberate prober and eliciter of information. His probing of petitioner was nothing less than continuation of a police interrogation by a surrogate without a

badge--under cumulative overall circumstances no less coercive than sitting across from a police officer.

In the particular facts of this case, the government's procedure was calculated to deceive the petitioner, so that he would not know to whom he was making statements to. Therefore, the petitioner was not given an opportunity to knowingly and intelligently waive his previously asserted right to counsel. Here, we cannot say the petitioner initiated the conversation with the informant in this case, (see Appendix D) because they concocted the elaborate scheme that put them into contact, the informant spoke first and continued questioning.

Petitioner's statements are not just unreliable due to the cumulative stress of an armed police arrest and confusion sowed by police in a lost stimulation interview. They are not just unreliable due to combined pressures of police custody and jailhouse pressures. (United States v. Henry, supra, 447 U.S. at pp. 270, 274.) They are not just unreliable as potential "jailhouse bravado" (Illinois v. Perkins, supra, 496 U.S. at pp. 302-303 [Brennan, Conc.]) They are inadmissible, "once a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present." (McNeil v. Wisconsin (1991) 501 U.S. 171, 176-177; People v. Perkins, supra, 248 Ill. App. 3d at p. 769.)

Not only are these statements involuntary and unreliable, they fall far short of being admitted as a declaration against penal interest and defeat a Confrontation Clause violation. First off, the informant was intentionally placed in this jail cell to confront petitioner; second, this is not a non-coercive setting, it was a surreptitious interrogation; third, this informant lacks personal knowledge; and last, this informant is not a friend, he is a complete stranger, the petitioner owes him no loyalty or honesty. The totality of the circumstances show unreliability.

(Lilly v. Virginia, supra, 527 U.S. at p.136.)

In sum, the totality of circumstances here demonstrate due process demanded exclusion of these statements under the 5th, 6th and 14th amends., and indeed that the statements in the cell are involuntary. The prosecution Failed to sustain their burden to demonstrate admissibility in the Face of these objections.

The issues' importance are enhanced by the Fact that the lower courts in this case have seriously misinterpreted this Court's aforementioned cases in regards to the 5th, 6th and 14th amendments.

Without belaboring prejudice, the judgement must be reversed under any standard, including Chapman because the 2013 informant statement orchestrated by police is plainly essential to petitioner's convictions. (Chapman v. California, supra, 386 U.S. at p.24.) At a minimum, remand with instructions to conduct a hearing on the issue of intentional charging delay (and any other unresolved Foundational factual matters deemed material to the above claims) is required. (Pen. Code, § 1260.) Plain error review provides courts power to correct errors that were not timely raised in trial court. (United States v. Olano (1993) 507 U.S. 725, 731.)

IV. ADMISSION OF EXCESSIVE AND NEEDLESS GANG EVIDENCE ALSO RESULTED IN GROSS TRIAL UNFAIRNESS AND DENIAL OF DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO CONFRONT GANG EXPERT'S TESTIMONIAL HEARSAY.

The issue presented is of great public importance because it affects all gang members (and others who belong to a particular group) and their ability to receive fair decisions in proceedings that may result in years of added incarceration. The issue's importance is enhanced by the fact that the lower courts in this case have seriously misinterpreted the "For the benefit of, at the direction of, or in association with a criminal street gang" part of the gang allegations statute. (Pen. Code § 186.22, subd. (b).)

Contrary to the Court of Appeal (Slip Opn., pp. 9-10, 20-23), the admission of grossly unfair "gang" evidence was error. The errors further deprived petitioner of his federal and state constitutional rights to due process and a fair trial. (In re Murchison (1955) 349 U.S. 133, 136) This is because improper expansive consideration of irrelevant, unreliable, untested, and inflammatory evidence, especially on issues on which it was irrelevant, improperly reduced the prosecution's burden of proof on key ultimate issues and created a strong risk petitioner would be convicted based upon irrelevant and inflammatory evidence and criminal profile, including authoritative gang expert testimony, rather than upon the facts, denying him a fair trial. (U.S. Const., V, VI, XIV; Cal. Const., art. I, §§ 7, 15; Alberni v. Nevada (9th. Cir. 2006) 458 F.3d 860, 865-866; Michelson v. United States (1948) 335 U.S. 469, 475-476; see also People v. Albarron (2007) 149 Cal.App.4th 214, 222-223 [admission of gang evidence, including excessive prejudicial details, denied defendant due process and a fair trial].)

The errors likewise deprived petitioner of his confrontation rights by permitting jurors to consider expansive testimonial hearsay, examples and criminal anecdotes from the gang expert for substantive purposes on all substantive issues. (U.S. Const., V, VI, XIV; Cal. Const., art. I, §§7, 15; Davis v. Washington (2006) 547 U.S. 813, 822; Crawford v. Washington (2004) 541 U.S. 36, 68-69; see also People v. Sanchez (2016) 63 Cal.4th 665, 686.)

A. DUE TO INAPT "GANG-RELATED CRIME" PHRASING, THE INSTRUCTIONS GROSSLY OVERSTATED THE PURPOSES FOR WHICH GANG EVIDENCE COULD BE CONSIDERED, AND IMPROPERLY PERMITTED SUBSTANTIVE CONSIDERATION OF TESTIMONIAL HEARSAY FROM GANG EXPERT.

First, every crime here would appear "gang-related" for lay jurors, because of the gang enhancements attached to them; thus, the limiting instruction grossly overstates the purposes for which other "gang-activity" (not just bare membership) could be considered on the substantive crimes, notably premeditation, intent to kill and knowledge. The errors in admitting gang evidence were thus compounded by an inapt and overbroad instruction purporting to limit gang evidence to issues like intent, purpose, knowledge, and motive as they bore on any "gang-related crimes" or charged crimes.

For purposes of due process and state law, there is a reasonable probability jurors would interpret the instruction in an incorrect and unconstitutional manner. (Wade v. Calderon (9th Cir. 1994) 29 F.3d 1312, 1320-1321.) Unlike lawyers, lay jurors would hardly understand the inapt "gang-related crimes" language to limit the evidence to gang enhancements or the active gang participation part. (Falconer v. Lane (7th Cir. 1990) 905 F.2d 1129, 1136-1137.) The broad phrasing "gang-related crimes" only opened the door to overly expansive use of the evidence further--notably to

find premeditation, knowledge, planning, and intent to kill. Further, no instruction on substantive similar crime theories (Evid. Code, §1101) was even offered.

Second, the limiting instruction, covering any and all evidence of "gang activity," grossly fails to specify and segregate the various types of gang and other crimes evidence admitted for various purposes. Bare membership and motive are one thing; all the additional expert testimony was quite another. Jurors certainly should not have been led to believe all the criminal street gang evidence, primary activities, expert opinions, and expert examples of murder/assaults on all the substantive intent and mitigation issues beyond the gang allegations. This posed a serious risk of unfair use of tempting but improper evidence to shore up a live murder case.

Third, as noted above, the absence of any adequate instruction limiting expert anecdotes and other hearsay references to nontruth basis of opinion only added to the problem. In particular, California courts have recognized that nontruth/basis of opinion instructions are not realistically effective to combat substantive use of the experts hearsay statements, which is premised upon their truth or their defensibility or deniability in truth, resulting in violations of the Confrontation Clause absent other grounds for admissibility. (People v. Sanchez, supra, 63 Cal.4th at p. 686.)

Without belaboring prejudice, the errors posed a grave risk jurors would fill in the gaps in a live murder liability and identification case based on the general gang evidence as an improper substitute for proof of guilt. (See, e.g., United States v. Garcia (9th Cir. 1998) 151 F.3d 1243, 1247; Mitchell v. Prunty (9th Cir. 1997) 107 F.3d 1337, 1342.) Reversal of the judgement is required whether the errors are judged by the Watson or the Chapman standard.

B. THE TOTALITY OF NEEDLESS GANG EVIDENCE (VIOLATIVE OF THE CONFRONTATION CLAUSE AND OTHERWISE), RESULTED IN GROSS UNFAIRNESS AT TRIAL, REQUIRING REVERSAL.

Instructions aside, the totality of needless gang evidence (testimonial and otherwise) admitted here also resulted in cognizable gross unfairness denying petitioner due process and a fair trial. (People v. Albarron, supra, 149 Cal.App.4th at pp. 228-232; see also Taylor v. Kentucky (1978) 436 U.S. 478, 486-490; U.S. Const., V, XIV.)

California courts have long recognized the potentially prejudicial effect of gang membership. "The word 'gang'... connotes opprobrious implications [and] takes on a sinister meaning when it is associated with activities." Given its highly inflammatory impact, the California Supreme Court has condemned the introduction of such evidence if it is only tangentially relevent to the charged offenses. (People v. Albarron, supra, 149 Cal.App.4th at p.223; People v. Perez (1981) 114 Cal.App.3d 470; People v. Hernandez (2004) 33 Cal.4th 1040.)

This case presents fundamental questions of the interpretation of "prejudicial effect" in regards to gang allegations. It is not a crime to be a gang member. The issue's importance is enhanced by the fact that the lower courts in this case have clearly misinterpreted the gang allegations statute. (Pen. Code, §186.22, subd.(b).) The lower courts interpret the statute as any crime committed by a gang member is automatically for purposes of his/her gang. Not true.

Admission of this cavalcade of gang evidence in what remains and essentially non-gang case resulted in gross trial unfairness, denying petitioner due process, a fair trial, and his 6th amendment right to confront witnesses.

Contrary to the Court of Appeal (Slip Opn., p.21), they state petitioner failed

to identify any "case-specific hearsay" the gang expert relied upon. In this case the petitioner is alleged to have participated in the murder of Mr. Campbell who is a member of his very own gang. The gang expert stated "it has a saying 'You're not a 60 gang member until you kill a 60 gang member.'" (Slip Opn., p.9) Clearly, this hearsay statement was highly prejudicial and inflammatory, as the jurors could have took this statement as the truth. This was clearly a Confrontation Clause violation. (People v. Sanchez, supra, 63 Cal.4th at p.686; Davis v. Washington, supra, 547 U.S. at p.822; U.S. Const., VI, XIV.)

Moreover, even if limited evidence of shared membership were admissible on motive (which petitioner does not concede; Evid.Code, §§352, 1101), this trial could readily have been bifurcated to limit excessive gang evidence relevant only to enhancements. On top of seriously misleading instructions, the gang evidence here denied him any fair chance of doing this. Whether based on objections before and during trial, gross unfairness resulting at trial -- or based on petitioner's new trial motion, or ineffective assistance of trial counsel in failing to seek bifurcation or lodge further objections (Strickland v. Washington (1984) 466 U.S. 668, 689) -- reversal is required to afford petitioner a fair trial.

V. THE INSTRUCTION ON THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE FAILED TO CLARIFY THAT THE DEFENDANT MUST KILL OR INTEND TO KILL EACH VICTIM, DENYING PETITIONER DUE PROCESS OF LAW AND THE RIGHT TO A JURY DETERMINATION ON ALL ISSUES; ALTERNATE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Contrary to the Court of Appeal (slip opn., p. 23), as noted in Argument I, ante, a nonkiller accomplice must indeed intend to kill each victim for purposes of the multiple murder special circumstances. This is exactly the sort of case in which this needs to be clear for jurors. The point goes to LWOP for a defendant who did not kill anyone, much less an innocent woman, even if he or his car were present. Although appropriate for single count murder cases, the instructions here just do not clearly convey this in multiple murder cases, and jurors should not be left guessing.

The error further deprived petitioner of due process of law by seriously reducing the prosecution's burden of proof and denying petitioner a fair trial and his right to a jury determination on all issues beyond a reasonable doubt. (Apprendi v. New Jersey (2000) 530 U.S. 466, 470; In re Winship (1970) 397 U.S. 358, 364; U.S. Const., amends. V, VI, XIV; Cal. Const., art. I, §§ 7, 15, 16.) Under state and federal law, the courts must sua sponte instruct on all elements of special allegations. (*Ibid.*) This includes sua sponte instruction on the added requirements for nonkiller aiders and abettors who are charged with the multiple murder special circumstance. (Bench notes, CALCRIM No. 721; People v. Jones, supra, 30 Cal.4th at p. 1117 [sua sponte instruction required]; People v. Williams, supra, 16 Cal.4th at pp. 689-691.) For reasons just explained, the court here failed to

instruct properly on the elements For nonkillers.

Given the evidence and the prosecution's own accomplice murder liability theories here, the Failure to correctly define the special circumstance elements was prejudicial under any standard, notably *Chapman*. Even if the evidence were sufficient to support a multiple murder circumstance, which it is not, reversal of the special circumstance For this instructional error is required.

Finally, while the court's duties of instruction are sua sponte as stated above, petitioner incorporates the ineffective assistance of counsel standards set Forth above in this brief. (Strickland v. Washington, supra, 466 U.S. at p. 689.) IF somehow defense counsel were required to do more to preserve state or Federal claims, there was no tactical reason not to perfect these claims, particularly outside the presence of the jury. (People v. Asbury, supra, 173 Cal.App.3d at pp. 365-366.) Plain error review applies. (United States v. Olano, supra, 507 U.S. at p. 731.)

VI. THE COURT ERRED IN DENYING PETITIONER'S MOTION FOR NEW TRIAL ON AT LEAST TWO OTHER GROUNDS, DENYING PETITIONER DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Contrary to the Court of Appeal (slip Opn., pp 24-27), the court erred in denying petitioner's motion for a new trial on at least two other salient grounds.

First, the prosecution failed to preserve the "stimulation" interview in 2013, a key facet of several defenses to the 2013 "cell" statement. Unlike for items that merely might lead to exculpatory evidence (Arizona v. Youngblood (1988) 488 U.S. 51), for items of apparent material exculpatory significance the defense need not show bad faith in the loss or destruction. (California v. Trombetta (1984) 467 U.S. 479, 488-489) The constitutional due process rights of a defendant may be implicated when he or she is denied access to favorable evidence. (Brady v. Maryland (1963) 373 U.S. 83) Furthermore, the Supreme Court expanded the definition of favorable to include both exculpatory evidence and impeachment evidence, because "such evidence is 'favorable to the accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." (United States v. Bagley (1985) 473 U.S. 667, 676) Upon a violation, the court is obligated to impose sanctions in its discretion, which may include dismissal, exclusion of evidence, and limiting instructions. (People v. Yeoman (2003) 31 Cal.4th 93, 126; People v. Zamora (1980) 28 Cal.3d 88, 99.)

There can be no dispute that the 2013 "stimulation" interview recording was lost by police -- or jurors asked about this significant interview during trial. As petitioner argued below after trial, loss of the key "stimulation" interview (versus

notes or testimony about it) violated due process. The court made no supportable finding of lack of bad faith. Even if the loss was not intentional, the interview was plainly exculpatory and material. This case presents fundamental questions of the interpretation of this Court's decisions in California v. Trombetta, 467 U.S. 479 and United States v. Bagley, 473 U.S. 667. The issue presented is of great importance to all citizens (in and out of jails) because it affects their ability to receive due process when law enforcement (intentionally or unintentionally) loses evidence in favor of a defendant. The issue's importance is enhanced by the fact that the lower courts in this case have seriously misinterpreted Trombetta and Bagley.

Limiting jury instructions alone would have made a difference for jurors and attorneys arguing the case. Reversal is required under any prejudice standard, including Chapman. At a bare minimum, the cause should be remanded for further findings on the issue. (Pen. Code §1260.)

Second, the defense clearly made a prima facie objection under state statute that this police operation involved improper deliberate elicitation of statements by a paid law enforcement informant. (Pen. Code §4001.1, subd. (b).) It was the prosecution's burden to demonstrate admissibility upon objection, not petitioner's. (Evid. Code, §403, subd. (a).)

This key evidence never should have been admitted without a proper ruling or showing of foundational relevance. The court erred in admitting the evidence without adequate foundational showing, factual or legal. Without belaboring the point, prejudice in admitting this C.I. recording is clear under any standard, including Chapman, for reasons explained above in this brief. Reversal is required.

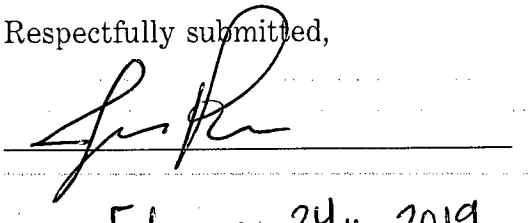
VII. THE CUMULATIVE EFFECT OF THE ERRORS DISCUSSED ABOVE DEPRIVED PETITIONER OF DUE PROCESS OF LAW AND A FAIR TRIAL BY AN IMPARTIAL JURY AND REQUIRES REVERSAL OF THE JUDGEMENT.

The courts of this state recognize their obligation to assess the cumulative effect of errors on a criminal conviction. (See, e.g., People v. Ryner (1985) 164 Cal.App.3d 1075, 1087; People v. Williams (1972) 22 Cal.App.3d 34, 40, 58.) Moreover, the cumulative effect of errors may operate to deprive a defendant of due process and a fair trial, requiring reversal irrespective of any lack of objections on the part of defendant. (See Taylor v. Kentucky (1978) 436 U.S. 478, 486-490; Parle v. Runnels (9th Cir. 2007) 505 F.3d 922, 927 [post-AEDPA]; Darden v. McNeel (5th Cir. 1992) 978 F.2d 1453, 1456; People v. Mills (1978) 81 Cal.App. 3d 171, 176.) In the present case, cumulative effect of the errors discussed above deprived petitioner of a fair trial by an impartial jury, requiring reversal of the judgement, in whole or in part.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: February 24th, 2019