

19-6457
No. _____

ORIGINIAL
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IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT PULLEY — PETITIONER
(Your Name)

vs.

DANIEL PARAMO (Warden) — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For The Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROBERT PULLEY CDC No. AI-3233
(Your Name)

R.J. Donovan, 480 Alta Road
(Address)

San Diego, California 92179
(City, State, Zip Code)

(Phone Number)

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QUESTION(S) PRESENTED

Question number one of five:

Whether newly discovered post-conviction evidence showing trial counsel failed to investigate or take appropriate action to correct knowingly inaccurate material information contained in his legal documents and business records resulting in his failure to interview the only material eyewitness, and resulting in the omission of evidence that corroborated Petitioner's account of the events, is sufficient to invoke the Miscarriage of Justice/ Actual Innocence Exception [The Schlup Gateway] enunciated in Schlup v Delo (513 U.S. 298).

First, trial counsel, David R. Thompson, provided Petitioner with a memorandum alleging that he conducted a telephone interview with Justin Pulley, the sole percipient witness to the alleged criminal threat incident, when Justin called his office on March 1, 2011. (See exhibit A, August 2, 2016, State Evidentiary Hearing, page 74:16 – 75:27). However, new reliable post-conviction testimony by the San Diego District Attorney Investigator declaring that a search warrant issued to trial counsel's telephone service provider found no record of a March 1, 2011, telephone call connecting Justin Pulley's telephone with any of trial counsel's telephones (August 2, 2016, State Evidentiary Hearing, page 149:1-19); the testimony affirms Justin Pulley's state post-conviction testimony declaring that he never called Thompson (August 2, 2016, State Evidentiary Hearing page 29:16-20) and that he was not made aware of Matthew Pulley's allegations (August 2, 2016, State Evidentiary Hearing page 21:11-15, p. 42:4-9, p. 42:15-22, p. 49:13-16).

Second, the record of the state post-conviction evidentiary hearing show trial counsel made no effort to investigate, and took no action to secure Justin Pulley's appearance at Petitioner's criminal proceedings after trial counsel was notified that the subpoena he issued for Justin Pulley contained an inaccurate address different from the address proffered in his memorandum. (August 2, 2016, State Evidentiary Hearing, page 121:5-26).

Third, the record of the state post-conviction evidentiary hearing shows trial counsel made no effort to investigate, and took no action to correct a fraudulent proof of service declaring that Justin Pulley was personally served the incorrectly addressed subpoena after counsel was notified by a handwritten note attached to the returned subpoena stating that a resident at the address stated that Justin Pulley did not live at the address served. (August 2, 2016, State Evidentiary Hearing, page 122:12 - 123:26).

And next, trial counsel, discredited himself by providing state post-conviction testimony admitting that he was medically diagnosed with a condition that causes memory loss (August 2, 2016, State Evidentiary Hearing, page 103:24 - 104:1).

Justin Pulley provided new unequivocal post-conviction testimony declaring that Petitioner did not threaten to shoot, stab or kill Matthew Pulley. (August 2, State Evidentiary Hearing, page 21:1-5, p. 34:22-25, p. 39:25-28, p. 64:13-17). Justin Pulley also provided unequivocal testimony declaring that he never called Thompson. (August 2, 2016, State Evidentiary Hearing, page 29:16-20). Trial counsel's misrepresentation of Justin Pulley's evidence and misrepresentation of an occurrence of an interview to Petitioner warrants equitable tolling. (Doe v Busby, (9th Cir 2011) 661 F.3d 1001).

Question number two of five:

Whether newly presented preliminary hearing testimony by the prosecution's chief eyewitness Matthew Young showing trial counsel failed to present or elicit at trial Young's preliminary hearing testimony declaring that Petitioner was not present in Petitioner's garage to witness the intruder, Jimmy Misaalefua's, entry into the garage attached to Petitioner's house¹ through an open garage door (PH3RT305:13 -306:17) satisfies the requirement as new reliable evidence to invoke the Miscarriage of Justice/Actual Innocence Exception (the Schlup Gateway) where Petitioner consistently stated and testified that the shooting was a result of Petitioner being attacked by surprise when he (Petitioner) entered inside his own garage (3TCT459:8-9, 3TCT465:12-17, 3TCT472:11-15, 3TCT503:1-17, 8TRT1475:7-20) and where the trial court instituted an unconstitutional direct verdict against Petitioner by omitting, or modifying, all jury instructions of law to exclude from the jury's consideration any law justifying the defense of habitation where the unlawful entry into one's dwelling is undetected and not violent, riotous or tumultuous; fortiori, the victim's forcible and atrocious burglary: Petitioner's trial record provides undisputed eyewitness trial testimony that affirms the fact that the intruder, Jimmy Misaalefua, entered the garage attached to Petitioner's house with an apparent design to commit an act of

1/ Attached Garage: Petitioner presents certified government documents proving Petitioner's garage (the location of the shooting) is an attached part of Petitioner's house (See Exh. B); An attached garage is "one of several rooms that compose the inhabited dwelling" and thereby entitled to the same identification and protections of law as "the other rooms that compose the dwelling." (People v Cook, 135 Cal App3d 785, 795 (1985), People v Harris, 224 Cal App 4th 86, 89-90 (2014)).

violence against Petitioner (4TRT555:1-16, 4TRT566:7-20, 4TRT569:6-9, 6TRT979:9-28), uncontroverted eyewitness trial testimony that affirm the fact that the intruder, Jimmy Misaalefua, laid in wait near the interior garage doorway inside Petitioner's garage (4TRT516:14-16, 4TRT570:26 - 571:1, 6TRT981:1-8), uncontroverted trial testimony by the arresting police detective that affirms the fact that Petitioner suffered physical truama to the back of his (Petitioner's) head (7TRT1218:7 - 1218:17), and competent scientific trial testimony by the San Diego Sheriff Criminalist that affirm the fact that the intruder, Jimmy Misaaleafua, was shot once in the chest from a distance of less than six inches (6TRT1024:9-20, 6TRT1042:7-17).

Question number three of five:

Whether the trial court instituted an unconstitutional direct verdict for the State, thereby, denying Petitioner of his Fifth and Fourteenth Amendment right requiring the prosecution to prove every element of the charged offense (In re Winship, (1970) 397. U.S. 358, 364) where the trial court modified, and omitted, the jury instructions to withdraw from the jury's consideration the legally recognized justification of law supported by the undisputed facts and material for the jury's determination of Petitioner's innocence. The record supports Petitioner's claim that the trial court modified the jury instruction CALCRIM 506 - Resisting Harm To Person Within The Home (9TRT1582:2 - 1583:13, 4TCT0751 - 0752) and omitted the jury instructions CALJAC 5.10 - Resisting An Attempt To Commit A Felony and CALJAC 5.16 - A Forcible And Atrocious Crime Defined to remove from the jury's consideration Petitioner's right to use deadly force to resist a threat of

serious bodily injury from a residential intruder whose entry into the dwelling was undetected or secretive, i.e., not violent, not riotous and not tumultuous.

The California Supreme Court defines a 'forcible and atrocious burglary' as an unlawful entry into an occupied dwelling that threatens, or reasonably believed to threaten, the occupant with serious bodily injury. (Cal. Penal Code Section 197(2), People v Ceballos, (1974) 12 Cal 3d 470, 479, 116 Cal Rptr 233, CALJAC 5.16). The California Supreme Court's definition of a forcible and atrocious burglary does not demand an intruder's entry into the resident to be violent, riotous, or tumultuous and does not require the intruder to be armed to satisfy the justification for the use of deadly force. (People v Ceballos at 479).

Justification is an essential element of the charged offense (See Exhibit C, CALCRIM 520 - First Or Second Degree Murder (9TRT1573:8 - 1574:10, 4TCT0736 - 0737). The United States Supreme Court has consistently held that "the Due Process Clause of the Fourteenth Amendment denies the State the power to deprive an accused liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense" (In re Winship at 364); jury instructions relieving the state of this burden violates the accused due process right, since such instructions subvert the presumption of innocence accorded to the accused person and invade the truth-finding task assigned solely to juries in criminal cases..." (Carella v California, 491 U.S. 263, 265, 109 S. Ct. 2419, 105 L. Ed 2d 218 (1989)).

"The jury's constitutional responsibilities is not merely to determine facts, but to apply law to those facts and draw ultimate conclusions of guilt

or innocence." (United States v Gaudin, 515 U.S. 506 (1995)). "The prohibition against direct verdicts for the prosecution extends to instruction that effectively prevent the jury from finding the prosecution failed to prove a particular element of the crime beyond a reasonable doubt." (United States v Gaudin, 515 U.S. 506, 510-511, 522-523).

Question number four of five:

Whether the U.S. District Court's 2015 Order denying Petitioner's motion for stay and abeyance and motion for leave to amend his timely first federal petition for writ of habeas corpus (See Appendix C, Dkt #47) is an abuse of discretion pursuant to the U.S. Supreme Court's holding in Cooter and Gell v Hartmarx Corp (496 U.S. 384, 405 (1990) - finding the application of the wrong legal standard constitutes an abuse of discretion) and requires reversal pursuant to the U.S. Supreme Court's holding in United States v Singer M.F.G. Co. (374 U.S. 174, 193 (1963) - finding the district court's application of the improper standard to evidence requires reversal) where the district court denied Petitioner's motions by replacing the phrase "presented at trial" with the phrase "available at trial" in the U.S. Supreme Court's holding in Schlup v Delo [513 U.S. 298, 324 (1990)]; the district court stating, "to be considered new [for the purpose of applying the Schlup/ Actual Innocence Gateway] evidence must have not been substantially available at trial" (See Appendix C, District Court Order, Dkt #47, page 16:3-4, p. 19:1-3, p. 29:8-10) contrary to the U.S. Supreme Court's holding which requires "Petitioner to support his allegations of constitutional error with new reliable evidence ... that was not presented at trial." Schlup at 324).

The federal district court's wrong legal standard denied Petitioner any opportunity to obtain federal review of the merits of his claims showing that the state denied him of his federally protected constitutional rights; claims supported by new evidence showing "in light of the new evidence, it is more likely than not no reasonable juror would have found him guilty beyond a reasonable doubt." (Schlup v Delo (1995) 513 U.S. 298, 301, 115 S. Ct 851, 130 L. Ed 808).

Question number five of five:

Whether the U.S. Court of Appeals Order to dismiss Petitioner's Appeal No. 19-55508 as duplicative of Petitioner's Appeal No. 16-56885 is a procedural default that overcomes federal review of the merits of Petitioner's claims that invoke the Miscarriage of Justice/Actual Innocence Exception - where Petitioner's Appeal No. 19-55508 attacks an alleged defect in the integrity of the federal proceeding that also improperly foreclosed the Miscarriage of Justice/Actual Innocence Exception. The U.S. Supreme Court's holding allows federal courts to review the merits of a procedurally barred claim when Petitioner supports his allegation of constitutional error with new reliable evidence showing in light of new reliable evidence, it is more likely than not, no reasonable juror would have found Petitioner guilty beyond a reasonable doubt. (Schlup v Delo, 513 U.S. 298, 324 (1995) - The Miscarriage of Justice/Actual Innocence Exception).

Petitioner's 2017 Appeal (No. 16-56885) of the Distict Court's Order denying Petitioner's 2014 petition for writ of habeas corpus contained only claims exhausted on state direct appeal; however, Petitioner's 2019 Appeal

(No. 19-55508) of the District Court's Order denying Petitioner's motion for stay and abeyance and motion for leave to amend his federal habeas corpus petition contained claims invoking the Miscarriage of Justice/Actual Innocence Exception supported by new evidence that not only showed trial counsel's ineffective assistance probably resulted in Petitioner's convictions but the new claims also showed, in light of the new evidence, it is more likely than not no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.

LIST OF PARTIES

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

JURISDICTION

The date on which the U.S. Court of Appeals decided my case was May 16, 2019. A timely petition for rehearing was denied by the U.S. Court of Appeals on July 5, 2019. (See Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PRAYER FOR RELIEF

Petitioner respectfully prays that a writ of certiorari is issued to review the U.S. Court of Appeal's Order dismissing Petitioner's Appeal No. 19-55508. Petitioner further prays this Court re-open Petitioner's petition for writ of habeas corpus proceedings pursuant to F.R.Civ.P., Rule 60(b), and grant Petitioner leave to amend his habeas corpus petition adding his newly exhausted "Proposed" claims pursuant to the F.R.Civ.P., Rule 15(a) and pursuant to the U.S. Supreme Court's holding in Schlup v Delo [513 U.S. 298 (1995)].

OPINIONS BELOW

Federal:

The opinion of the U.S. Court of Appeals, No 19-55508, is dated May 16, 2019, and appears at Appendix B, to the petition and is unpublished.

The opinion of the U.S. Court of Appeal, No 16-56885, dated August 2, 2017, at ~~Joint~~ Appendix B, and is reported at 2017 U.S. App. LEXIS 27164.

The Order of the U.S. District Court denying Petitioner's petition for writ of habeas corpus, dated November 14, 2016, appears at ~~Joint~~ Appendix C, and is reported at 2016 U.S. Dist. LEXIS 157338.

The Order of the U.S. District Court denying Petitioner's motion for stay and motion for leave to amend his petition for writ of habeas corpus, dated September 1, 2015, appears at Appendix C, and is unpublished.

State:

The opinion of the California Court of Appeals, the highest state court to review the merits of Petitioner's pro se habeas petition, dated March 6, 2018, appears at Appendix L, and is unpublished.

The opinion of the California Court of Appeals, the highest state court to review the merits of Petitioner's attorney-filed petition, dated February 15, 2017, appears at Appendix O, and is unpublished.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fundamental Miscarriage of Justice - occurs ... when a constitutional violation has probably caused the conviction of one innocent of the crime. (McCleskey v Zant, 499 U.S. 467, Murray v Carrier, 477 U.S. 478).

Miscarriage of Justice/ Actual Innocence Exception - allows federal habeas courts to review the merits of a claim despite a procedural default. (Schlup v Delo, 513 U.S. 298).

For all other provisions, see Appendix.

STATEMENT OF THE CASE

Criminal Threat:

On December 24, 2010, Petitioner hosted a Christmas dinner at his 3989 Brown Street home located in Oceanside, California. The dinner was attended by Petitioner's wife, Angelia Pulley, Petitioner's visiting 25 year old son Justin Pulley, and Petitioner's 20 year old visiting son Matthew Pulley. (5TRT873:5-20). After eating dinner, Matthew argued with Petitioner, pushed Petitioner in the backyard swimming pool (5TRT832:12-13, 5TRT875:3, 5TRT879:7-9), and fought with Petitioner when Petitioner tried to eject Matthew from Petitioner's house (5TRT881:23-24, 6TRT917:15-17). During Petitioner's attempt to eject Matthew from his home, Matthew threatened to assault Petitioner with a golf club taken from Petitioner's house (6TRT922:17-21).

Later that same night, after being ejected, the intoxicated Matthew Pulley (6TRT930:27) called 911 and belligerently demanded a welfare check for Petitioner's wife, Angelia Pulley, at Petitioner's house. (3TCT390:12 - 391:26, 393:6 - 394:27). During the welfare check of Petitioner's wife, Matthew told police that Petitioner assaulted him (3TCT403:27 - 405:5) and threatened to shoot, stab and kill him. (3TCT408:18-21, 8TRT1415:9-19). Petitioner was briefly detained at the scene.

STATEMENT OF THE CASE

Second Degree Murder:

After Petitioner was released from police custody (pertaining to Matthew Pulley's allegations of criminal threat), Petitioner walked across the cul-de-sac to his neighbor, Jimmy Misaalefua, to apologize because Petitioner believed the presence of the police at Petitioner's house resulted in Misaalefua's house party being shut down. (3TCT458:24-27, 3TCT505:23-25). An altercation between Petitioner and Misaalefua ensued. When Misaalefua's nephew, Dexter Ena, tried to intervene, Misaalefua threatened to hurt him the same way he planned to hurt Petitioner saying to Ena, "Do you want me to knock you out too [?]." (4TRT581:14-26, 4TRT603:7-15); when Misaalefua's brother-in-law, Matthew Young, tried to stop Misaalefua, Misaalefua threatened him with violence also. (6TRT972:16-25). During the confrontation in the cul-de-sac, Misaalefua and Petitioner shouted at one another where Misaalefua's words were not remembered (4TRT582:27 - 583:13), but Ena remembered hearing Petitioner yell, "I got something for you, motherfucker" (4TRT515:19-22) before fleeing to his house.

After the altercation ended, Misaalefua's relatives, Ena and Young, witnessed Misaalefua walk towards Petitioner's house, enter an open garage attached to Petitioner's house (4TRT516:10, 4TRT533:8-9, 4TRT554:25-28, 4TRT611:9-14, 4TRT612:4-13) without Petitioner being present (PH3RT305:13 - 306:17 ~~testimony omitted from trial~~), remove his shirts inside Petitioner's garage (4TRT555:5-16, 4TRT566:7-20, 4TRT569:6-9, 6TRT979:18-28) and then laid in wait for Petitioner to show near an interior garage doorway (4TRT516:

14-16, 4TRT570:26 - 571:1, 6TRT947:3-10, 6TRT981:1-12). Neither Ena nor Young saw when Petitioner entered the garage through the interior doorway (4TRT516:20-21, 4TRT555:25-28, 4TRT571:9-11, 4TRT572:3-6, 6TRT981:15-26, 6TRT982:16-21, but both testified declaring that Misaalefua challenged Petitioner before a shot and struggle ensued. (4TRT516:17 - 517:5, 4TRT535:12 - 536:19, 4TRT556:1-4, 4TRT571:12-18, 6TRT982:12-25, 6TRT984:13-18). Both, Ena and Young, testified admitting that they entered Petitioner's residence to assist Misaalefua in his struggle against Petitioner. (4TRT474:13 - 478:1, 4TRT584:1-5, 6TRT983:2 - 989:3).

On the night of the homicide, Petitioner was interviewed by police and arrested. During the interview, and later at trial, Petitioner consistently declared that he shot the intruder, Jimmy Misaalefua, in self-defense as he (Petitioner) was being attacked by surprise in his own house. (3TCT459:8-9, 3TCT465:12-17, 3TCT472:11-15, 3TCT503:1-20, 8TRT1475:7-20). When Petitioner was questioned about his knowledge of Misaalefua's location at the time Petitioner armed himself with his gun, Petitioner told police that he believed Misaalefua was located outside the front section of his (Petitioner's) house. (3TCT465:1-4). Petitioner told police detectives, and testified at trial that he armed himself and immediately locked his front door (8TRT1472:6-9, 8TRT1472:26-27) because he feared that Misaalefua could, and possibly would enter his unlocked house (8TRT1472:1-5, 8TRT1521:28 - 1522:2). Petitioner testified declaring that after he locked his front door, he entered the garage through the interior doorway to close the exterior garage door by a remote control switch and was attacked by surprise. (8TRT1475:7-20).

Petitioner testified declaring that he could not remember the details of the shooting (8TRT1477:11-13) and the arresting police detective testified that he observed and noted a large closed trauma injury on the back of Petitioner's head (7TRT1218:7 - 1218:17). The Criminalist for the San Diego Sheriff's Department testified declaring that Misaalefua was shot once in the chest from a distance of less than six inches (6TRT1024:9-20, 6TRT1042:7-17).

An information was issued charging Petitioner with violating California Penal Code § 187(a) - the murder of Jimmy Misaalefua, violating California Penal Code § 422 - Criminal threat against Matthew Pulley, and violating California Penal Code § 242 - Misdemeanor battery of Matthew Pulley.

Trial counsel's misrepresentation of information to Petitioner:

Petitioner retained defense counsel David R. Thompson of Carlsbad, California by recommendation. In March of 2011, prior to Petitioner's April - May preliminary hearing, David R. Thompson ("trial counsel" herein) provided Petitioner with a March 1, 2011, memorandum authored by Thompson falsely alleging that Justin Pulley, the sole percipient witness to the events of the alleged criminal threat, called his office and "recited his recollections of the evening events." (See exhibit A, Thompson's March 1, 2011, Memorandum address to Robert Pulley, petitioner).

The San Diego District Attorney Investigator testified at an August 2, 2016, State Evidentiary Hearing declaring that a search warrant issued to David R. Thompson's telephone service provider found no record of a telephone call connecting Justin Pulley's telephone with Thompson's telephones on or near March 1, 2011. (August 2, 2016, State evidentiary hearing page 149:1-19).

DEFENSE COUNSEL DENIED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO INVESTIGATE KNOWN INCONSISTENT INFORMATION IN HIS BUSINESS RECORDS AND LEGAL DOCUMENTS RESULTING IN THE OMISSION OF EXCULPATORY EVIDENCE

Preliminary Hearing:

On April 19, 2011, Thompson issued a subpoena for Justin Pulley containing an address different from the address contained in the March 1, 2011, memorandum presented to Petitioner. (See Exhibit L, April 19, Subpoena). On April 19, 2011, the same day the subpoena was issued, Thompson received a signed proof of service declaring that Justin Pulley was personally served the incorrectly addressed subpoena (See Exhibit E, April 19, 2011, Proof of Service); however the proof of service was attached to a handwritten note on the subpoena coversheet stating that Justin Pulley, the summoned person, did not live at the incorrect address. (See Exhibit F, April 19, 2011, Subpoena Coversheet with handwritten note).

Defense counsel testified at an August 2, 2016, State Evidentiary Hearing admitting that he was medically diagnosed with an Alzheimer's like illness. (August 2, 2016, State evidentiary hearing page 103:24 - 104:1).

On April 28, 2011, Petitioner's preliminary hearing began. In reference to the charge that Petitioner uttered a criminal threat and committed a misdemeanor battery against Matthew Pulley, Matthew Pulley testified admitting that his out-of-court statements to police detectives were untrue. (PH2RT189: 23 - 190:8, PH3RT219:4-24, PH3RT229:22-27). Matthew also admitted to being intoxicated on the night of the incident (PH3RT222:13-15), admitted to being the aggressor of violence (PH3RT224:9-13) and admitted to being the initiator

of the altercation between he and Petitioner (PH3RT231:24-27). Although Matthew testified admitting that Justin Pulley was an eyewitness to the events that occurred at Petitioner's house (PH2RT187:20 - 188:13, PH2RT194:6-21), Justin was not called to give his account of the events that he witnessed. (August 2, 2016, State evidentiary hearing page 22:25-27).

The absence of Justin Pulley, who could have, and would have, corroborated Petitioner's claims, left Petitioner without any defense against Matthew's prior allegations.

THE STATE PRELIMINARY HEARING COURT DENIED PETITIONER OF HIS FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL WHEN IT ISSUED A RULING CONTRARY TO THE PRECEDENT RULE OF LAW - [that an attached garage is part of the inhabited dwelling] (People v Cook, 135 Cal App 3d 785, 795, 185 Cal Rptr 576 (1982), People v Harris, 224 Cal App 4th 86, 89-90, 168 Cal Rptr 3d 305 (2014)).

In reference to the charge of murder, Matthew Young, the victim's brother-in-law, and Dexter Ena, the victim's nephew, provided eyewitness preliminary hearing testimony that justified Petitioner's right to use deadly force against Jimmy Misaalefua pursuant to California Penal Code Section 197(1) and pursuant to the California Supreme Court's decision People v Ceballos [12 Cal 3d 470, 479, 116 Cal Rptr 233 (1974) - justifying the use of deadly force in resistance of a 'forcible and atrocious burglary'].

During Petitioner's preliminary hearing, Matthew Young provided undisputed testimony declaring that he (Young) could see inside Petitioner's garage but did not see Petitioner inside the garage as he (Young) watched Misaalefua enter Petitioner's garage through an open garage door (PH3RT305:13-

306:17), Dexter Ena provided undisputed testimony declaring that Misaalefua entered Petitioner's garage with an apparent design to commit an act of violence against Petitioner (PH3RT262:10-23), and Matthew Young provided undisputed testimony declaring that Misaalefua took off his shirts inside Petitioner's garage, positioned himself at the interior doorway and laid in wait for Petitioner to enter (PH3RT306:14-20). The testimony describing Misaalefua's behavior is sufficient to establish an unlawful entry into an occupied dwelling with an apparent endeavor to commit an act of violence against one inside, i.e., Justifiable Homicide, Defense of Habitation, California Penal Code Section 197(1) and 197(2).

After the reception of testimony proving that Petitioner could not have exited his garage with his gun (PH3RT265:16 – 266:25, PH3RT306:25-28, PH3RT311:24-27), the preliminary hearing court held:

"It is clear to the court that the -- for the purpose of the preliminary hearing that the crimes alleged in the felony complaint did occur... We have recanting relatives, which is not a -- an unseen event. We have a clear, unequivocal 'I've got something for you' and he went in got the gun and came out and shot." (PH3RT321:4-15).

Defense counsel's failure to vindicate Petitioner's right to relevant and precedent state law identifying an attached garage as part of the inhabited dwelling denied Petitioner of his Fifth and Fourteenth Amendment right to a fair trial and denied Petitioner of his Sixth Amendment right to effective assistance of counsel; the court may not abdicate its duty to know the law.

DEFENSE COUNSEL DENIED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE AT TRIAL WHEN COUNSEL FAILED TO INTERVIEW OR CALL THE SOLE PERCIPIENT WITNESS WHO COULD HAVE, AND WOULD HAVE CORROBORATED PETITIONER'S TESTIMONY (defense counsel later testified that he suffered from an Alzheimer's-like illness)

In July of 2011, Petitioner's criminal trial began. To establish the criminal threat allegation, prosecutor used Matthew Pulley's prior out-of-court statements to police. (8TRT1415:9-19). After Matthew Pulley testified declaring that Petitioner's statement to shoot, stab or kill was not a statement of intent, but a soliloquy of the circumstances (5TRT876:24, 5TRT888:8-14), and after Petitioner testified declaring that he did not recall making any statements to shoot, stab or kill, at all (8TRT1492:14-25), defense counsel failed to call Justin Pulley, the sole percipient witness who later, at an August 2016 state evidentiary hearing, corroborated Petitioner's testimony that Petitioner made no statements to shoot, stab or kill. (August 2, 2016, State evidentiary hearing page 21:1-3, p. 34:22-25, p. 39:25-28, p. 64:13-17).

Defense counsel's failure to investigate and present Justin Pulley's testimony that could have, and would have, corroborated Petitioner's version of the facts, left Petitioner without any defense to the state's case; and, defense counsel's March 1, 2011, memorandum addressed to Petitioner mislead Petitioner to believe that he (counsel) interviewed Justin Pulley and informed him (Justin) of Matthew Pulley's allegations (See Exhibit A, Defense counsel March 1, 2011, memorandum); however, new reliable post-conviction testimony by the San Diego District Attorney Investigator affirmed Justin Pulley's testimony that no March 1, 2011, interview occurred. (Aug. 2, 2011, State evidentiary hearing page 149:1-19).

THE STATE OVERCAME PETITIONER'S RIGHT TO USE DEADLY FORCE IN
RESISTANCE OF A FORCIBLE AND ATROCIOUS BURGLARY WHEN THE COURT
INSTITUTED AN UNCONSTITUTIONAL DIRECT VERDICT FOR THE STATE

In reference to the charge of the murder of Jimmy Misaalefua, Matthew Young, the victim's brother-in-law, and Dexter Ena, the victim's nephew, were the prosecution chief witnesses. The prosecution was able to overcome Petitioner's consistent statements and testimony declaring that he (Petitioner) shot the intruder, Jimmy Misaalefua, in self defense - [when Misaalefua ambushed Petitioner by surprise inside the garage attached to Petitioner's own house] - by applying a misrepresentation of Dexter Ena's testimony. Although Ena's testimony firmly established the fact that Misaalefua followed Petitioner from a distance of at least 15 feet when Petitioner fled to his house (4TRT531:5-9, 4TRT582:6-23), the state applied Ena's testimony saying,

"Pulley went in the house through an interior garage door and my uncle stopped at the (interior) door" (4TRT516:13-14) and saying, "so my uncle was still in the garage and just sat there -- just stood there waiting." (4TRT516:15-16),

to unreasonably infer that Petitioner not only witnessed Misaalefua's entry into the garage attached to Petitioner's house, but more importantly, to unreasonably infer that Petitioner acquiesced to Misaalefua's entry into the garage attached to Petitioner's house. The record is devoid of any testimony that support the theory that Petitioner was aware or acquiesced to Misaalefua's entry into Petitioner's garage. The state's theory is also contrary to Petitioner's police interview statements:

On the night of the shooting, homicide detectives questioned Petitioner about Misaalefua's location when Petitioner armed himself with his gun. Petitioner responded saying that he believed Misaalefua was somewhere in the front of his (Petitioner's) house when he armed himself. (3TCT465:1-5).

The absence of testimony, specifically, the particular part of Matthew Young's preliminary hearing testimony declaring that he (Young) could see inside Petitioner's garage as he (Young) watched Misaalefua walk inside Petitioner's garage and up to the interior door (PH3RT305:13 - 306:17), to directly rebut the state's theory resulted in an unconstitutional direct verdict for the state and a wholly unsupported presumption of implied malice.

First, the unsupported inference - [that Petitioner acquiesced to Misaalefua's entry into Petitioner's garage] - was used to render a direct verdict against Petitioner. The judge in Petitioner's trial held the State's unsupported inference as fact to erroneously withdraw all instructions of law relevant to the jury's determination of whether Misaalefua unlawfully entered Petitioner's house (i.e., inhabited dwelling) undetected through an open garage doorway to commit an act of violence against Petitioner inside the residence, i.e. a forcible and atrocious crime. (People v Ceballos (1974) 12 Cal 3d 470, 479, 116 Cal Rptr 233; Cal Penal Code § 197(1), (2)). The only defense of habitation jury instruction provided in Petitioner's trial, in relevant part, were as follows:

"[s]uch a killing is justified and therefore not unlawful, if the defendant reasonably believe that he was defending a home against Jimmy Misaalefua, who violently or riotously or tumultuously tried to enter that home intending to commit an act of violence against someone inside..." (See Exhibit G, 3TCT0751 - 0752, 9TRT1582 - 1583:13, CALCRIM 506: Justifiable Homicide - Defending Against Harm To Person Within Home Or Property).

The court's omission of all jury instructions of law that includes an undetected intrusion into one's dwelling withdrew from the jury's consideration Petitioner's only defense - [that Misaalefua's conduct was sufficient to constitute a forcible and atrocious burglary as matter of law, Cal. P. C. § 197(1)-(2)].

Second, defense counsel's failure to elicit the particular part of Matthew Young's preliminary hearing testimony that corroborate Petitioner's testimony demonstrating that Petitioner could not have known that anyone had entered, and was inside of, the garage attached to Petitioner's house removed from the jury the consideration of evidence that proves Petitioner's decision to enter his own garage with his gun was not a conscious disregard for human life. The absence of Matthew Young's evidence resulted in the jury's determination that Petitioner knowingly created the dangerous circumstance by entering his own garage, combined with the court's withdrawal of the only legally recognized justification relevant to the facts, satisfied the State's burden of proving implied malice, i.e., malice aforethought. (See Exhibit C, 9TRT1573:8 - 1574:10, 3TCT0736 - 0737, CALCRIM 520: First or Second Degree Murder With Malice Aforethought).

Defense counsel's failure to elicit and develop at Petitioner's trial the particular part of Matthew Young's preliminary hearing testimony that proves Misaalefua's entry into Petitioner's garage was not witnessed by Petitioner and defense counsel's concession to the court's omission of jury instructions relevant and material to Petitioner's defense denied Petitioner of his Sixth Amendment to the U.S. Constitution right to effective assistance of counsel - right to counsel that bring to bear such skill and knowledge as to render Petitioner's trial a reliable adversarial process (Strickland v Washington (1986) 466 U.S. 668); defense counsel later testified admitting at a state evidentiary hearing that he was medically diagnosed with an Alzheimer's-like illness. (August 2, 2016, State evidentiary hearing page 103:24 - 104:1).

On July 22, 2011, a jury found Petitioner guilty of second degree murder (violating California Penal Code § 187(a)) of his neighbor Jimmy Misaalefua; with Section 12022.53(d) - finding true the allegation of personally and intentionally discharging of a firearm, proximately causing death to another person, other than accomplice during the perpetration of a felony enumerated in Section 12022.53(a); and with Section 12022.5(a) - finding true allegation of personal use of a firearm. Appellant was also found guilty of felony criminal threat (violating California Penal Code § 422) and misdemeanor battery (violating California Penal Code § 242) of Petitioner's son, Matthew Pulley. Appellant was sentenced to 40 years to life.

Direct Appeal:

On September 2, 2011, Petitioner filed a timely motion for appeal claiming:

"Petitioner contends that his Fourteenth Amendment due process rights were violated because there was insufficient evidence to overcome the presumption under Penal Code Section 198.5 - PRESUMPTION THAT RESIDENCE WAS REASONABLY AFRAID OF DEATH OR GREAT BODILY INJURY - that he was acting in self-defense inside his home when he killed Misaalefua in the garage attached to his home." (California Court of Appeals ("CCA" herein) Opinion, No. D060502, dated 3/22/2013, See Joint Appendix H).

The Cal. Court of Appeals affirmed Petitioner's conviction determining that,

"The jury could have reasonably inferred that Misaalefua was not attempting to enter Pulley's home... and without any further physical threat from Misaalefua, Pulley fired a shot at Misaalefua... The jury could have concluded that in retrieving a gun and shooting an unarmed man, Pulley used more force than reasonably necessary to protect himself or his house, and thus, that the presumption of justification embodied in Section 198.5 had been overcome by contrary evidence." (CCA Opinion, No. D060502, page 16, dated 3/22/2013, See Joint Appendix H).

After reviewing the State Court of Appeals Opinion, Petitioner immediately became aware that Petitioner's conviction was affirmed as a result of both error of fact and error of law. First, the State court of Appeals followed the trial court's unsupported presumption that Petitioner either witnessed, or was somehow aware, that someone, particularly Misaalefua, had entered, and was inside Petitioner's garage prior to Petitioner's entry into his garage with his gun. The Court of Appeals stated,

"Pulley entered the house through an interior garage door, while Misaalefua stood in the garage... waiting for Pulley to return. (CCA Opinion, No. D060502, page 15-16, date 3/22/2013).

Second, the State Court of Appeals followed the trial court's disregard for state law material for Petitioner's defense. Precedent law required the courts to find that an attached garage is part of the inhabited dwelling (People v Cook (1982) 135 Cal App 3d 785, 795); where Petitioner's trial record contained undisputed eyewitness testimony declaring that Misaalefua entered the garage attached to Petitioner's house with an apparent design to commit an act of violence against one inside, Petitioner was entitled by the Fifth and Fourteenth Amendment Due Process Clause to have the jury determine whether or not Misaalefua's conduct constituted a 'forcible and atrocious' burglary justifying the use of deadly force as matter of law (Cal Penal Code § 197(1), People v Ceballos, 12 Cal. 3d 470, 479 (1974), CALJAC 5.10 and 5.16).

A forcible and atrocious burglary justifies the use of deadly force where an intruder unlawfully enters an occupied dwelling and threatens, or reasonably believes to threaten, the occupant with serious bodily injury. (Cal. Penal Code § 197(1) and 197(2), People v Ceballos, 12 Cal 3d 470, 479 (1974)).

Trial counsel's failure to elicit and develop at trial the particular part of Matthew Young's preliminary hearing testimony - [that Petitioner was not seen inside the garage when Misaalefua entered (PH3RT305:13 - 306:17)] - to corroborate Petitioner's consistent claims and testimony - [that the shooting was committed in the act of self-defense when Petitioner was ambushed by surprise inside his own garage (3TCT459:8-9, 3TCT465:12-17, 3TCT472:11-15, 3TCT503:1-20, 8TRT1475:7-20)] - resulted in the uncorrected error of fact and the omission of law and resulted in a fundamental miscarriage of justice. Trial counsel later testified during an August 2, 2016, State evidentiary hearing admitting that he was medically diagnosed with an Alzheimer's-like illness. (August 2, 2016, State evidentiary hearing page 103:24 - 104:1).

Petition For Review of Direct Appeal Claim:

After the California Court of Appeals affirmed Petitioner's conviction, Petitioner filed a timely Petition For Review with the California Supreme Court. The petition presented the same claim presented on direct appeal and was summarily denied on June 12, 2013. (California Supreme Court Order No. S209608, dated June 12, 2013, See Joint Appendix I).

New Information:

In August of 2013, while Petitioner was in the process of constructing his first habeas corpus petition, Petitioner received an unconfirmed allegation from his mother alleging that trial counsel did not interview Justin Pulley, the sole percipient witness of the incident involving his criminal threat and battery convictions. At that moment, Petitioner retained his mother's

voluntary assistance for the purpose of conducting a post-conviction investigation to receive definitive evidence of the new allegation of trial counsel's error. (See Exhibit H, Affidavit of Flora Howard).

On-going Investigation Good Cause To Delay Presentation Of The New Unexhausted Claims:

In August of 2014, near the end of the AEDPA limitation period, Petitioner was burdened with the decision to forgo the incomplete investigation into the potentially meritorious claims of trial counsel's ineffective assistance, or later file a heavily restricted second federal habeas petition after exhausting the new claims, or file a federal habeas corpus petition within the limitation period protecting the claims exhausted on direct appeal, seeking to stay the federal proceeding until exhaustion of all new claims in state court as required by federal statute 28 U.S.C. § 2254(b); then add the new claims to the federal petition for one perfect petition. Petitioner chose the later.

First Federal Petition Protecting Exhausted Claims Only:

On August 29, 2014, Petitioner filed a timely federal petition for writ of habeas corpus in the U.S. District Court for the Southern District of California. Petitioner's protective petition presented only the 'sufficiency of evidence' claims exhausted on state direct appeal. (See Joint Appendix G).

New Evidence:

In October 2014, Petitioner received an affidavit from Justin Pulley, the sole percipient witness of the incident involving the alleged criminal threat and battery against Matthew Pulley. In the affidavit, Justin Pulley declared that he witnessed the entire incident between Petitioner and Matthew Pulley, and Petitioner never threatened Matthew Pulley. Justin also declared that he was not interviewed by Petitioner's trial attorney nor anyone from Petitioner's attorney's office. (See Exhibit I, Affidavit of Justin Pulley).

Petitioner's Motion For Stay And Motion For Leave To Amend:

On October 23, 2014, 15 days after receiving the Affidavit from Justin Pulley, Petitioner filed a pro se motion requesting the District Court stay the federal habeas corpus proceedings and hold the petition in abeyance until Petitioner provided the state an opportunity to review the merits of Petitioner's new claims as required by the exhaustion doctrine, federal statute 28 U.S.C. § 2254(b). At the same time, Petitioner also filed a pro se motion for leave to amend his timely federal petition after exhausting his new claims in state court. (See Appendix J/I, District Court Dkt No. 6 and 8).

Petitioner's First ("Proposed") Amended Petition For Writ Of Habeas Corpus Relief In Federal Court:

On January 14, 2015, Petitioner filed a "First Amended" federal pro se petition for writ of habeas corpus relief alleging thirteen new claims of federal constitutional trial errors; and number fourteen invoking the Miscarriage of Justice Actual Innocence Exception. (See Appendix H, Dkt No. 22). This ("Proposed") petition was submitted 98 days after Petitioner received the affidavit from Justin Pulley.

Petitioner Presents New Claims In State Superior Court:
Petitioner's first opportunity to present his new claims in state court.

On February 9, 2015, petitioner filed a pro se petition for writ of habeas corpus in the California Superior Court alleging the same fourteen claims alleged in his federal "Proposed" petition. On March 10, 2015, the California Superior Court issued an Order denying the petition. (See Appendix V,W,Q California Superior Order, No. SCD231564).

Petitioner Presents New Claims In State Court Of Appeals:

On April 17, 2015, petitioner filed a pro se petition for writ of habeas corpus in the California Court of Appeals alleging the same claims alleged in the California Superior Court and the same fourteen claims alleged in his federal "Proposed" petition. On July 17, 2015, the California Court of Appeals issued an Order To Show Cause and appointed counsel. (See Appendix U/P, CCA Order, No. D067878).

The Federal District Court Denies Petitioner's Motion For Stay:

On September 1, 2015, less than two months after the State Court of Appeals issued an Order To Show Cause pertaining to Petitioner new claims, the Federal District Court issued an Order denying Petitioner's motion for stay and motion for leave to amend his federal petition after exhaustion of state remedies. The district court's decision was based on the court's improper view of the Supreme Court's decision as it applies to the Miscarriage of Justice/Actual Innocence Exception. The District Court held,

"Petitioner's post-conviction desire to include additional information in his defense, which was available to him at the time of trial is not grounds for applying the miscarriage of justice exception. Rather McQuiggin and Schlup make clear that the gateway is only open when a habeas petitioner presents new evidence of actual innocence, which was not substantially available at trial..." (See Appendix C, District Court Order, Dkt #47, page 29:8-12).

The District Court's decision was contrary to the U.S. Court of Appeal decision in Griffin v Johnson (9th Cir 2003) 350 F.3d 956, 961-963, stating,

"The evidence supporting an actual innocence claim must be 'newly presented' evidence of actual innocence, meaning that 'it was not introduced at trial.' However, the evidence need not be 'newly discovered,' meaning that it could have been available to the defendant during his trial." Griffin v Johnson (9th Cir 2003) 350 F.3d 956, 961-963).

The District Court's decision was also contrary to the U.S. Supreme Court's decision in Schlup where the Court clearly held the standard to apply to evidence "not presented at trial" as opposed to evidence "not available at trial." The U.S. Supreme Court stated, in relevant part,

"To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence ... that was not presented at trial." (Schlup v Delo (1995) 513 U.S. 298, 324, 115. S. Ct 851, 130 L. Ed 808).

Simultaneous Federal And State Litigation For The Same Cause:

The federal district court's September 1, 2015, Order containing an error of law came less than two months after the State Court of Appeals' Order To Show Cause for the same claims and created simultaneous legal litigation deadline concerns contrary to Federal Statute 28 U.S.C § 2244(d)(2). Because Petitioner had turned over all legal documents, transcripts, exhibits, ect. to his state appointed post-conviction relief attorney, Petitioner's could not effectively appeal the District Court's Order.

The Federal District Court's Final Judgment:

On November 14, 2016, while the State was conducting post-conviction proceedings to review the merits of the claims in Petitioner's petition for writ of habeas corpus, the Federal District Court issued an Order denying Petitioner's petition for writ of habeas corpus prior to the State court's conclusion of facts stating,

"While a jury could have found in favor of Petitioner based on the arguments and evidence he presents in his objections [to the magistrate judge's recommendations], federal law similarly requires that a reviewing court faced with a record of historical facts that supports conflicting inferences must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of prosecution, and must refer to that resolution." (See Joint Appendix C, District Court Order, Dkt #54, page 15:9-13).

The District Court further concluded,

"[T]he state court reasonably based its conclusion on the facts that a reasonable jury could have found that, even if Misaalefua was in Petitioner's home and even if Petitioner reasonably feared for his safety, Petitioner nevertheless used more force than was reasonably necessary when he shot an unarmed man. Thus, the state court did not 'fail to consider the danger to Petitioner - it reasonably concluded that the jury's verdict against Petitioner could be upheld despite the danger.' (Same, Dkt #54, page 18:28 - 19:6).

State Post-conviction Order To Show Cause Proceedings:

On February 15, 2017, the California Court of Appeals issued an Order pertaining to the August 2, 2016, State post-conviction evidentiary hearing held to receive evidence relating to Petitioner new habeas corpus claims. The State Court of Appeals Order denied Petitioner's request for habeas relief. In part relevant to Petitioner's claim that counsel provided a memorandum falsely alleging that he conducted a March 1, 2011, telephone interview with Justin Pulley, the state use that very memorandum to discredit Justin Pulley (contrary to reliable competent evidence) stating,

"We agree with the special master's finding... the special master reasonably found that Justin's 2014 affidavit and testimony at the evidentiary hearing were not credible exculpatory evidence based on evidence that Justin had no exculpatory testimony to offer in 2011. The evidence cited by the special master sufficiently supports her findings that... Thompson conducted an adequate investigation as to whether Justin would provide material exculpatory testimony in support of defense by speaking to Justin on March 1, 2011." (See Appendix O, CCA Opinion, No. D067878, page 33, dated 2/17/2017).

In its Opinion, and in its analysis of the evidence presented at the state post-conviction evidentiary hearing, the State Court of Appeals completely disregarded and excluded the reliable and competent post-conviction testimony by the San Diego District Attorney Investigator that satisfied Petitioner's burden of proving no March 1, 2011, telephone interview of Justin Pulley was conducted by trial counsel, David R. Thompson; Thompson admitted at the hearing that he suffered from a medical condition that causes memory loss.

In the part of the State Court of Appeals Opinion relevant to Petitioner's claim that trial counsel provided ineffective assistance - [Petitioner's claim that trial counsel failed to raise Matthew Young's preliminary testimony and trial counsel's failure to request jury instructions explaining the justifiable use of deadly force in resistance of a forcible and atrocious burglary], the court stated,

"[T]he jury was thoroughly instructed... on the laws regarding a person's right to use deadly force to defend his home from an intruder... It is not reasonably probable that any additional instructions, such as instructions addressing the theory that Misaalefua was committing the offense of burglary when Pulley shot him, would have resulted in a favorable outcome." (Same, CCA Opinion, page 36-37).

The California Court of Appeals' Opinion was based on the omission of Matthew Young's evidence. Although Petitioner's state appointed post-conviction relief attorney, James R. Bostwick, Jr. raised the trial court's failure to instruct

the jury of the material question of fact - Whether or not Misaalefua's entry into the garage attached to Petitioner's house for the purpose of committing an act of violence against one inside the dwelling violated California Penal Code Section 460(a) First Degree Residential Burglary, Petitioner's state appointed post-conviction relief attorney failed to raise Petitioner's claim of trial counsel's omission of Matthew Young's testimony that required [by the Due Process Clause] the jury to consider whether evidence of Misaalefua's undetected entry into the garage attached to Petitioner's house and Misaalefua's apparent design to commit an act of violence against one inside, manifested, was sufficient to constitute a forcible and atrocious burglary justifying Petitioner's use of deadly force pursuant to California Penal Code Section 197(1) and 197(2) - [California Jury Instruction CALJAC 5.10 and 5.16] - and pursuant to the California Supreme Court decision in People v Ceballos, 12 Cal 3d 470, 479, 116 Cal Rptr 233 (1974). Matthew Young's preliminary hearing testimony, in relevant part, supports Petitioner's claim - [that Petitioner was attacked by surprise when Petitioner entered inside the garage attached to his own house] - by declaring that Petitioner was not seen inside the garage when Misaalefua entered the garage and laid in wait near the interior door. (PH3RT305:13 - 306:17).

State Petition For Review:

On March 17, 2017, Petitioner's state appointed counsel filed a timely Petition For Review in the California Supreme Court. On May 10, 2017, the Petition was denied. (See Appendix T/M, Cal. S. Ct. No. S240713).

Denial Of Petitioner's First Federal Appeal (No. 16-56885):

On January, 23, 2017, while Petitioner was still in the process of exhausting all state remedies pertaining to his new ineffective assistance of counsel claims, Petitioner filed a motion for certificate of appealability in the Federal Court of Appeals For The Ninth Circuit. Petitioner's motion for the certificate of appealability only pertained to Petitioner's 'sufficiency of evidence' claims already exhausted in state court. (See Joint Appendix F, Dkt #). On August 2, 2017, The Federal Court Of Appeals denied Petitioner's motion. The denial of Petitioner's motions came one year before Petitioner's new ineffective assistance of counsel claims were fully exhausted in state court. (See Joint Appendix B, Dkt No. 61).

Petitioner's Motion For Rehearing Of Appeal No. 16-56885:

On October 4, 2017, Petitioner filed a motion for rehearing of his request for a certificate of appealability. The request was denied the same day it was filed and contained the same docket number. (See Joint Appendix E/A, Dkt #62).

Petitioner's Second State Petition For Writ Of Habeas Corpus:

On February 26, 2018, eleven months after the California Supreme Court denied Petitioner's state appointed attorney-filed Petition For Review, Petitioner filed a (pro se) second petition for writ of habeas corpus in the California Court of Appeal claiming ineffective assistance of the state appointed post-conviction counsel. The second petition alleged the state appointed post-conviction attorney failed to raise the strongest claims at

the hearing for the State Court of Appeals Order To Show Cause - [raising less viable and futile claims than stronger known claims], contrary to the U.S. Supreme Court's decision in Smith v Robbins [528 U.S. 259, 288 - establishing ineffective assistance of counsel for the failure to raise the stronger claims] and contrary to the U.S. Supreme Court's decision in Martinez v Ryan [132 S. Ct. 1309, 1318 - finding ineffective assistance of post-conviction counsel sufficient "cause" for procedural default]. (See Appendix S, CCA No. D073562). The California Court of Appeals denied Petitioner's Second petition on March 6, 2018. (See Appendix L).

Petitioner's Second State Petition For Writ Of Habeas Corpus In The California Supreme Court:

Petitioner's first presentation of his claim in state court alleging that his trial attorney, his state appointed appellate attorney on direct appeal and his state appointed post-conviction evidentiary hearing attorney, all, failed to raise the particular part of Matthew Young's preliminary hearing testimony that corroborates Petitioner's account of events and exonerate Petitioner of murder.

On May 16, 2018, Petitioner filed a second petition for a writ of habeas corpus claiming ineffective assistance of the state appointed post-conviction attorney on the Court of Appeal Order To Show Cause. The petition presented to the State's highest Court Matthew Young's testimony that was not raised by Petitioner's trial and post-conviction attorneys, and the petition presented to the State's highest Court the newly discovered testimony by the San Diego District Attorney Investigator. (See Appendix R, Cal. Supreme Court No. S248827). On September 12, 2018, the Cal. Supreme Court summarily denied Petitioner's second petition exhausting all available state remedies. (See Appendix K).

Petitioner's Second Appeal (No. 19-55508) Filed In Federal Court:

In April of 2019, seven months after Petitioner fully exhausted all state remedies pertaining to his new ineffective assistance of counsel claims, Petitioner filed an appeal of the District Court's 2015, Order denying Petitioner's motion for stay and motion for leave to add his new ineffective assistance of counsel claims to his original 'sufficiency of evidence' claims. Petitioner filed his new Appeal (No. 19-55508) in the Federal Court of Appeals seeking to overturn the District Court's Order and receive federal review of the merits of Petitioner's claims - [claims supported by new evidence showing that trial counsel's ineffective assistance resulted in the conviction of one who is actually innocent]. Petitioner's Appeal (No. 19-55508) was based on the Federal District Court's application of an improper statement of law to deny Petitioner's motions. The District Court's abuse of discretion had the effect of denying Petitioner any opportunity to receive federal review of state court errors that violated Petitioner's federally protected constitutional rights; and denied Petitioner any opportunity to present to the courts newly presented evidence by the percipient witness Matthew Young and newly discovered evidence by the percipient witness Justin Pulley and newly discovered evidence by the San Diego District Attorney Investigator, all, showing that in light of the new evidence, no reasonable, properly instructed juror would have found Petitioner guilty beyond a reasonable doubt. (See Appendix F, Dkt #63). On May 16, 2019, the federal Court of Appeals issued an Order denying Petitioner's Appeal No. 19-55508 as duplicative of Petitioner's Appeal No. 16-56885. (See Appendix B, Dkt #64).

Petitioner's Motion For Reconsideration:

On May 30, 2019, Petitioner submitted a motion for reconsideration of his Appeal No. 19-55508. The motion was based on the grounds that Petitioner's claims qualify for the Miscarriage of Justice/ Actual Innocence Exception - [the Schlup Gateway] - where a habeas petitioner may obtain a hearing on the merits of a claim despite an unexcused procedural default by showing that a fundamental constitutional trial error resulted in the conviction of one who newly presented evidence shows is actually innocent. (Schlup v Delo, 513 U.S. 298, 327, 130 L. Ed 2d 808, 115 S. Ct. 851 (1995)). (See Appendix E, Dkt #). On July 5, 2019, the Federal Court of Appeals issued an Order denying Petitioner's motion for reconsideration. (See Appendix A, Dkt #).

REASONS FOR GRANTING THIS PETITION

The Ninth Circuit Court of Appeals' dismissal of Petitioner's Appeal, No. 19-55508, is a quintessential example of the type of error the U.S. Supreme Court - [in Schlup v Delo, 513 U.S. 298] - sought to deter - where a procedural default precludes the review of a claim that new evidence shows a fundamental constitutional violation probably resulted in the conviction of one who is actually innocent. Petitioner's Appeal No. 19-55508 alleged that the U.S. District Court for the Southern District of California required Petitioner to satisfy an improper standard of law where Petitioner's motion for stay and motion for leave to amend his first federal petition invoking the Schlup Actual Innocence Gateway - [enunciated in Schlup v Delo (1995)

513 U.S. 298] - is clearly stated; moreover, Petitioner's claim - invoking the Miscarriage of Justice/Actual Innocence Gateway alleging that his convictions are the result of a procedural error is clearly distinct from a claim alleging a substantive actual innocence defense - [as enunciated in Sawyer v Whitley 505 U.S. 333 (1992) and Herrera v Collins, 506 U.S. 390 (1993)]. In Schlup v Delo, the United States Supreme Court decided,

"Habeas corpus petitioner who has been sentenced to death but claims to be actually innocent of the crime may avoid procedural bar to consideration of his constitutional claims in federal court by showing that constitutional violation 'probably resulted' in conviction of one who is actually innocent and need not show by clear and convincing evidence that but for constitutional error no reasonable juror would have convicted him." (Schlup v Delo, 513 U.S. 298 (1995)).

In Schlup's case, the District Court [erroneously] declined to reach the merits of Schlup's petition holding that Schlup could not satisfy the threshold showing of actual innocence required by Sawyer v Whitley, 505 U.S. 333 (1992), under which a petitioner must demonstrate by "clear and convincing" evidence that but for a constitutional error no reasonable juror would have found him guilty. (Schlup at 298). On Writ of Certiorari the United States Supreme Court held,

"The standard of Murray v Carrier, 477 U.S. 478 (1986) - which requires a habeas petitioner to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent' (Carrier at 496) - rather than the more stringent Sawyer standard, governs the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claim." (Schlup at 299).

The United States Supreme Court later applied the Schlup's actual innocence gateway (i.e., the Miscarriage of Justice Exception) in non-capital petitions. (Bousley v United States, 523 U.S. 614, 623 (1996)).

"To satisfy the [Murray v] Carrier's 'actual innocence' standard [rather than the Sawyer standard], a petitioner must show that in light of the new evidence, it is more likely than not that no reasonable juror would have [as opposed to 'could have'] found him guilty beyond a reasonable doubt." (Schlup at 300) (emphasis added).

In Carriger v Stewart, the Ninth Circuit Court of Appeals summarized the confusion between the actual innocence gateway and the actual innocence defense saying,

"The terminology in this area is sometimes confusing because the 'Miscarriage of Justice' Exception (i.e., Schlup's gateway) is lower than the 'extraordinarily high' threshold for the freestanding (Sawyer/Herrera) claims of innocence for two reasons. First, the Miscarriage of Justice' Exception (Schlup's Gateway) does not itself provide an independent basis for relief. The basis for relief is the claimed underlying constitutional violation. More importantly because a petitioner claiming he falls within the 'Miscarriage of Justice' exception asserts constitutional error at trial, his conviction is not entitled to the same degree of respect as one concededly free of constitutional taint...Accordingly, a petitioner asserting both innocence and constitutional error 'need carry less of a burden' with respect to innocence than a petitioner like Herrera who claimed only innocence. While a petitioner making a Herrera claim (i.e., a free-standing actual innocence defense) must present evidence so strong that his execution would be 'constitutionally intolerable' even if his conviction was the product of a fair trial, 'a petitioner making a Miscarriage of Justice (Schlup Gateway) claim need only present evidence of innocence strong enough' that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error..." Carriger v Stewart, 132 F.3d 463 (9th Cir 1997) (emph added).

"[A]s the United States Supreme court wrote in Schlup v Delo, Schlup's constitutional claims are based not on his innocence, but rather on his contention that ... the withholding of evidence, denied him of the full panoply of protections afforded to criminal defendants by the Constitution." (Carriger v Stewart, 132 F.3d 463 (9th Cir 1997) quoting Schlup at 314).

In the instant case, Petitioner sought to stay his first timely federal petition for writ of habeas corpus for the purpose of adding, after exhaustion, new claims alleging federal constitution trial errors. Petitioner sought

to introduce new claims supported by new evidence showing trial counsel denied the jury of readily available critical evidence known by both the prosecution and defense resulting in Petitioner's conviction of criminal threat and resulting in an unconstitutional direct verdict of second degree murder against Petitioner. However, after receiving Petitioner's timely motion for stay and motion for leave to amend his petition, the federal district court applied an improper statement of law to disqualify Petitioner's new evidence as "not new," and then applied an improper "sufficiency of evidence" (i.e., the "could have") legal standard to overcome the prejudice resulting from the omission of evidence, and then denied Petitioner's motions without providing Petitioner any opportunity to present state post-conviction evidentiary hearing testimony that shows the omission of evidence did occur and without providing Petitioner any opportunity to demonstrate that it is more likely than not that no reasonable juror would have (as opposed to "could have") found him guilty beyond a reasonable doubt in light of the new evidence and laws erroneously withheld from the jury.

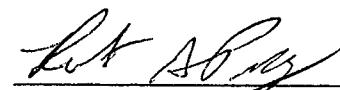
Petitioner therefore contends that the exculpatory preliminary hearing testimony by prosecution witness Matthew Young combined with the post-conviction certified government document evidence - [proving Petitioner's garage was an attached and integral part of Petitioner's house], the exculpatory post-conviction testimony by the sole percipient witness Justin Pulley considered with the state post-conviction testimony by the San Diego District Attorney Investigator - [proving that no March 1, 2011, witness interview occurred], are evidence known by both the prosecution and the defense attorneys, but unconstitutionally withheld from consideration, and is sufficient to satisfy the requirement as new evidence to invoke the Miscarriage of Justice/Actual Innocence Exception.

CONCLUSION

This Court is Petitioner's final remedy of law to vindicate his right to a fair trial and to demonstrate that the State court's decision was contrary to Petitioner's Sixth Amendment right to effective assistance of counsel (28 U.S.C. § 2254(d)(1) - Strickland v Washington (466 U.S. 668)) after trial counsel failed to raise at trial corroborating evidence of the victim's undetected entry into Petitioner's home and after the trial court withdrew from the jury's consideration the only jury instruction relevant to that particular justification for the homicide - resulting in an unconstitutional verdict for the State; and this Court is Petitioner's final remedy of law to vindicate his right to a fair trial after trial counsel failed to interview the sole eyewitness who could have, and would have, corroborated Petitioner's testimony that Petitioner did not threaten Matthew Pulley - also a Sixth Amendment violation.

A denial of this petition would not only result in the complete preclusion of any federal review of the State's violation of Petitioner's federally protected fundamental constitutional rights, but in this case, where newly presented evidence, either not raised or erroneously disregarded, demonstrate that the unconstitutional omission of defense evidence and laws at trial resulted in the conviction of one who is actually innocent, the failure to review, or allow for the review, of the claimed errors would further constitute, or justify, a fundamental miscarriage of justice. (McCleskey v Zant, 499 U.S. 467, 494, 111 S. Ct. 1454, 1470 (1991)).

Respectfully submitted,
September 26, 2019


ROBERT PULLEY AI-3233