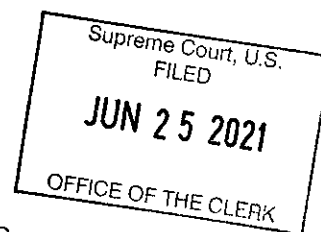


Original

No. 21-5950



IN THE

SUPREME COURT OF THE UNITED STATES

JAMES HENRY ABEL — PETITIONER
(Your Name)

vs.

DATRICK COVELLO, 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

JAMES HENRY ABEL P-34981
(Your Name)
MULE CREEK STATE PRISON
P.O. Box 409090
(Address)

IONE, CA. 95640
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I. WHETHER THE DISTRICT COURT JUDGE VIOLATED THE RULE ANNOUNCED IN GONZALES V. CROSBY, 545 US 524, 532, 534 (2005), BY CONSTRUING AND DENYING PETITIONER'S BODA FIDE RULE 60(b) MOTION TO REOPEN AS A REQUEST TO FILE A SECOND OR SUCCESSIVE HABEAS PETITION WHEN PETITIONER ONLY CHALLENGED THE DEFECTS OF THE DISTRICT COURT JUDGE IN DISMISSING PETITIONER'S FIRST HABEAS PETITION AS UNTIMELY, AND PETITIONER DID NOT ALLEGE A SINGLE HABEAS CORPUS CLAIM IN HIS BODA FIDE RULE 60(b) MOTION TO REOPEN?

PETITIONER PRESENTS THE FOLLOWING SUBSIDIARY QUESTIONS AS PREDICATES TO AN INTELLIGENT RESOLUTION OF THE FOREGOING QUESTION AND AS BEING "FAIRLY INCLUDED" WITHIN THE FOREGOING QUESTION. (SUPREME COURT RULE 14.1(a); OHIO V. ROBINETTE, 519 US 33, 38 (1996).)

A. WHETHER THE DISTRICT COURT JUDGE VIOLATED THE RULE ANNOUNCED IN WILLIAMS V. PENNSYLVANIA, 136 S. CT. 1899, 1905-06 (2016), BY JUDGING HIS OWN PRIOR DEFECTS DISMISSING

QUESTION(S) PRESENTED (Cont.)

1
2
3 Petitioner" FIRST FEDERAL HABEAS PETITION AS
4 UNTIMELY? (SEE 28 U.S.C. § 455; IN RE
5 MURCHISON, 349 U.S. 133, 136 (1955) (NO MAN
6 IS PERMITTED TO TRY CASES WHERE HE HAS
7 AN INTEREST IN THE OUTCOME); MARSHALL V.
8 JERRICO, INC., 446 U.S. 238, 243 (1980)
9 (THE DUE PROCESS CLAUSE ENTITLES A PERSON
10 TO AN IMPARTIAL AND DISINTERESTED TRIBUNAL);
11 OFFUTT V. UNITED STATES, 348 U.S. 11, 14 (1954)
12 ("JUSTICE MUST SATISFY THE APPEARANCE
13 OF JUSTICE"); LILBERG V. HEALTH SERVICES
14 ACQUISITION CORP., 486 U.S. 847, 863-864 (1988)
15 ("EXTRAORDINARY CIRCUMSTANCES" MAY INCLUDE
16 IN AN APPROPRIATE CASE, "THE RISK OF INJUSTICE
17 TO THE PARTIES" AND "THE RISK OF UNDERMINING
18 THE PUBLIC" CONFIDENCE IN THE JUDICIAL
19 PROCESS."))

20
21 B. WHETHER THE DISTRICT COURT JUDGE
22 VIOLATED THE RULE ANNOUNCED IN DAY V.
23 McDONOUGH, 547 U.S. 198 (2006), AS WELL AS
24 HABEAS RULE 4, BY SUA SPONTE CONSTRUING
25 AND DENYING PETITIONER" BONA FIDE RULE 60(b)
26 MOTION TO REOPEN AS A REQUEST TO FILE A
27 SECOND OR SUCCESSIVE HABEAS PETITION
28 WITHOUT PROVIDING PETITIONER FAIR NOTICE

QUESTION(S) PRESENTED (CONT.)

AND AN OPPORTUNITY TO SHOW HIS RULE 60(b) MOTION TO REOPEN WAS A BONA FIDE RULE 60(b) MOTION TO REOPEN BY ONLY CHALLENGING THE DISTRICT COURT JUDGE'S DEFECTS DISMISSING HIS FIRST HABEAS PETITION AS UNTIMELY AND NOT ALLEGING A SINGLE HABEAS CORPUS CLAIM.?

C. WHETHER THE DISTRICT COURT JUDGE VIOLATED THE RULE ANNOUNCED IN MCGUINN V. PERKINS, 569 US 383 (2013), BY NOT CONSIDERING IT CONSTITUTED AN INTERVENING CHANGE OF THE LAW THAT EXCUSED PETITIONER'S PROCEDURAL DEFAULT OF UNTIMELINESS BASED UPON NEWLY DISCOVERED EVIDENCE DEMONSTRATING PETITIONER'S ACTUAL INNOCENCE?

D. WHETHER THE DISTRICT COURT JUDGE VIOLATED THE RULE ANNOUNCED IN MAGWOOD V. PATTERSON, 561 US 320 (2010), BY REJECTING AND REFUSING TO CONSIDER PETITIONER'S CHALLENGE TO A NEW, INTERVENING JUDGMENT OF THE STATE COURT OF APPEAL FAILING AND REFUSING TO PROVIDE CORRECTIVE MEASURES OF THE SEVERAL "STRUCTURAL DEFECTS" THAT RESULTED IN THE CONVICTIONS OF AN INNOCENT PERSON BASED

1 UPON THE "NEWLY DISCOVERED EVIDENCE" PRESENTED
2 TO THE STATE COURTS DEMONSTRATING PETITIONER'S
3 CONVICTIONS AND SENTENCE ENHANCEMENTS
4 WERE BASED UPON "FALSE EVIDENCE" OF THE
5 PROSECUTION'S EXPERT WITNESSES? (SEE
6 JONES V. TAYLOR, 763 F.3d 1242, 1243,
7 FN. 1 (9TH CIR 2014) (PETITIONER'S ACTUAL
8 INNOCENCE CLAIM IN THE CALIFORNIA
9 COURTS WAS "ADJUDICATED ON THE MERITS
10 IN STATE COURT PROCEEDINGS" WITHIN THE
11 MEANING OF 28 USC § 2254(b), (d)); ACCORD
12 GREENE V. FISHER, 565 US 34, 38 (2011) (THE
13 PROVISION'S "BACKWARD-LOOKING LANGUAGE
14 REQUIRES AN EXAMINATION OF THE STATE-
15 COURT DECISION AT THE TIME IT WAS
16 MADE).)

LIST OF PARTIES

- ☒ 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:

RELATED CASES

King v. EVANS, 621 F. Supp. 2d 850
(N.D. Cal., April 14, 2009, case no. 00-0988 SI)
(see Appx. P.)

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

PETITIONER RESPECTFULLY REQUESTS TO BE EXCUSE
FROM LISTING THE FOLLOWING CITED AUTHORITIES
BECAUSE PETITIONER DOES NOT HAVE ACCESS
TO A COMPUTER TO LIST THE FOLLOWING CITED
AUTHORITIES IN ALPHABETIC ORDER.

STATUTES AND RULES

OTHER

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

A. INTRODUCTION 4

B. BACKGROUND OF
CRIMINAL TRIAL. 10

C. STATE PROMATE PROCEEDINGS
AND KAREN FELLOWS (JANE
DOE ONE) CIVIL JUDGMENT
AGAINST RETENTION FOR
\$1,25 million DOLLARS. 14

D. FIRST ROUND OF STATE
POST-CONVICTION PROCEEDINGS
FROM SEPT. 23, 2009 TO
NOV. 10, 2010. 15

E. FIRST ROUND OF FEDERAL
HABEAS CORPUS PROCEEDINGS
FROM NOVEMBER 19, 2010
TO OCTOBER 6, 2014. 15

TABLE OF CONTENTS (CONTINUED)

F. SECOND ROUND OF STATE
POST-CONVICTION PROCEEDINGS
FROM JANUARY 30, 2019 TO
JUNE 12, 2019. 17

G. SECOND ROUND OF FEDERAL
POST-CONVICTION PROCEEDINGS
FROM SEPTEMBER 13, 2019
TO MARCH 26, 2021. 20

REASONS FOR GRANTING THE WRIT 28

FIRST REASON 28

SECOND REASON 28

THIRD REASON 30

FOURTH REASON 31

FIFTH AND FINAL REASON 33

CONCLUSION 35

VERIFICATION BY PETITIONER 36

VERIFICATION BY JAILHOUSE LAWYER 36

CONCLUSION 37

PROOF OF SERVICE BY MAIL 38

INDEX TO APPENDICES

APPENDIX A : ORDER BY THE UNITED STATES
COURT OF APPEALS FOR THE
NINTH CIRCUIT DENYING REQUEST
FOR CERTIFICATE OF APPEALABILITY
9TH CIR. NO. 19-17328
FILED: FEBRUARY 10, 2021
(2021 U.S. APP. LEXIS 2837)

APPENDIX B: ORDER DENYING MOTION TO
REOPEN BY THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
CASE NO: 10-CV-05276-RS (PR)
FILED: NOVEMBER 4, 2019

APPENDIX C: ORDER BY THE UNITED STATES
COURT OF APPEALS FOR THE
NINTH CIRCUIT GRANTING
MOTION FOR AN EXTENSION OF
TIME TO FILE MOTION FOR
RECONSIDERATION AND DENYING
MOTION FOR RECONSIDERATION
AND MOTION FOR RECONSIDERATION
EN BANC.

9TH CIR NO. 19-17328
FILED: MARCH 2021

INDEX TO APPENDICES (Cont.)

APPENDIX D: CIVIL DOCKET FOR CASE
NO. 3:10-CV-05276 RS

APPENDIX E: ORDER BY THE UNITED
STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT
OF CALIFORNIA GRANTING
MOTION TO DISMISS
FEDERAL HARBERS PETITION
AS UNTIMELY.
CASE NO. CLO-05276 RS
FILED: MARCH 27, 2013
(2013 U.S. DIST. LEXIS 43819)
(2011 U.S. DIST. LEXIS 132967)

APPENDIX F: ORDER BY THE UNITED
STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
DENYING REQUEST FOR
A CERTIFICATE OF
APPEALABILITY
9TH CIR NO. 13-16087
FILED: APRIL 4, 2014

INDEX TO APPENDICES (Cont.)

APPENDIX G: ORDER BY THE UNITED STATES
SUPREME COURT DENYING
PETITION FOR WRIT OF
CERTIORARI.

U.S. NO. 14-5470
FILED: OCTOBER 6, 2014
(ARIEL V. BEARN,
574 U.S. 901 (2014))

APPENDIX H: MOTION TO REOPEN PETITION
FOR WRIT OF HABEAS
CORPUS. (FED. R. CIV. P. 60(h))
CASE NO. C-10-05276 RS
FILED: SEPTEMBER 23, 2019
DOCKET NO. 46

APPENDIX I: PETITION FOR WRIT OF
HABEAS CORPUS.
CASE NO. 3:10-CV-05276 RS
RECEIVED SEPTEMBER 23, 2019
DOCKET NO. 47

APPENDIX J: NOTICE OF LODGING
DOCUMENTS WITH THE
DISTRICT COURT.
(Docket No. 49) CASE NO. 3:10-CV-05276 RS
FILED: SEPTEMBER 23, 2019

1 INDEX TO APPENDICES (Cont)

2
3 APPENDIX K:

NOTICE OF APPEAL
CASE NO. 10-CV-05276 RS
MAILED: NOVEMBER 12, 2019
9TH CIR. NO. 19-17328
FILED: NOVEMBER 15, 2019

9 APPENDIX L:

GENERAL DOCKET
UNITED STATES COURT
OF APPEALS FOR THE
NINTH CIRCUIT
DOCKET # 19-17328

15 APPENDIX M:

APPLICATION FOR CERTIFICATE
OF APPEALABILITY.
CASE NO. 19-17328
FILED: DECEMBER 4, 2019
9TH CIR. NO. 3

21 APPENDIX N:

petition to RECALL THE
MANDATE; AND/OR petition
FOR REHEARING AND/OR
REHEARING EN BANCO.
CASE NO. 19-17328

INDEX TO APPENDICES

(Cont.)

Appendix O

CALIFORNIA COURT OF
APPEAL, SIXTH
APPELLATE DISTRICT,
DECISION.

CASE NO. H019469

FILED: SEPTEMBER 19, 2000

(2000 CAL. LEXIS 9375)

(2019 CAL. LEXIS 4258)

Appendix P

KING V. EVANS, 621

F. Supp. 2d 850

(N.D. CAL., April 14, 2009,

CASE NO. C 06-01988 SE)

Appendix Q.

APPLICATION FOR LEAVE TO

FILE SECOND OR SUCCESSION

RELATION UNDER 28 USC §

2254 OR MOTION UNDER

28 USC § 2255.

(NINTH CIRCUIT FORM)

XIV

Page Number

SOME OF CALIFORNIA'S PROCEDURAL BARS
TO FEDERAL REVIEW RECOGNIZED BY
THE UNITED STATES SUPREME COURT.

1. Ylst v. Nunnemaker, 501 US 797 (1991)

2. Evans v. Chavis, 546 US 189 (2006)

3. Harrington v. Richter, 562 US 86 (2011)

4. Walker v. Martin, 562 US 307 (2011)

5. Johnson v. Williams, 568 US 289 (2013)

6. Kernan v. Hingosa, 136 S Ct 1603 (2016)

7. Johnson v. Loe, 136 S Ct 1802 (2016)

8. ADDITIONAL CASES.

EXHAUSTION OF STATE COURT REMEDIES
AND DEFECTIVE STATE CORRECTIVE PROCESS.

1. O'Sullivan v. Boerckel,
526 US 839 (1999)

2. Baldwin v. Reese,
541 US 39 (2004)

3. Howell v. Mississippi,
543 US 445 (2005)

4. ADDITIONAL CASES.

5. See DUCKWORTH v. SERRANO,
454 US 1, 3 (1981) (A PETITIONER
MAY SEEK REDRESS IN FEDERAL
COURT "IF THE [STATE] CORRECTIVE
PROCESS IS SO CLEARLY DEFICIENT
AS TO RENDER FUTILE ANY EFFORT
TO OBTAIN RELIEF"); ACCORD 28
USC § 2254(b)(1)(A)(B)(i); SEE
ALSO SWARTHOUT v. COOKE, 562 US 216,
221 (2011) (FEDERAL DUE PROCESS
CHALLENGES TO STATE ADJUDICATIONS
OF STATE SUBSTANTIVE RIGHTS ARE
GENERALLY COGNIZABLE.)

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was FEBRUARY 10th, 2021

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: MARCH 26, 2021, and a copy of the order denying rehearing appears at Appendix C.

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

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

☐ For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AS CITED HEREIN.

STATEMENT OF THE CASE

A. Introduction.

1. Petitioner, SAMUEL HEARY ABEL, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, and/or the United States District Court for the Northern District of California, on the ground that a fundamental miscarriage of justice occurred within the meaning of *Schlup v. Delo*, 513 U.S. 298 (1995), in this case. Petitioner hereby alleges, contends, and argues by this verified petition as follows:

2. OVER 45 YEARS AGO, IF NOT LONGER, THIS HONORABLE COURT HAS RECOGNIZED A MISCARriage OF JUSTICE EXCEPTION TO SOCIETAL INTERESTS IN FINALLY, COMITY, AND CONSERVATION OF SCARCE JUDICIAL RESOURCES, AS AN ADDITIONAL SAFEGUARD AGAINST COMPELLING AN INNOCENT MAN TO SUFFER AN UNCONSTITUTIONAL LOSS OF LIBERTY. (SEE *Stone v. Powell*, 428 U.S. 465, 492-493 (1976); *Engle v. Isaac*, 456 U.S. 107, 135 (1982); *Kuhlmann v. Wilson*, 477 U.S. 426, 454 (1986); *Murray v. Carrier*, 477 U.S. 478, 495-496 (1986); *McCleskey v. Zant*, 499 U.S. 467, 494 (1991); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Sawyer v. Whitley*, 505 U.S. 273, 411 (1992); *Schlup v. Delo*, *Supra*, 513 U.S. at 326-327; *Bousley v. United States*, 523 U.S. 614, 622 (1998); *House v. Bell*, 547 U.S. 518, 536-537 (2006); *McQuinn v. Perkins*, 569 U.S. 783, 133 S.Ct. 1924, 1931, 1928, 1935 (2013); SEE ALSO DIST. ATTORNEY'S OFFICE FOR THIRD JUDICIAL DIST. V. OSBORNE, 557 U.S. 52, 68 (2009) (CITING

1 STATE STATUTES IN CONCLUDING THAT ALASKAN PRISONERS HAD STATE-
2 CREATED LIBERTY INTEREST IN USING "NEWLY DISCOVERED
3 EVIDENCE" TO DEMONSTRATE INNOCENCE BY "CLEAR AND
4 CONVINCING EVIDENCE".)

5 3. IN ADDITION, PETITIONER ALLEGES, CONTENTS, AND ARGUES
6 PURSUANT TO HERRERA V. COLLINS, 506 US 309, 404-405
7 (1993), THAT HE DEMONSTRATED A "FREE-STANDING" CLAIM
8 OF ACTUAL INNOCENCE BASED ON THE ALLEGED VICTIM
9 JANE DOE ONE (KAREN FELLOWS) TESTIFYING IN 2009,
10 11-YEARS AFTER PETITIONER'S CONVICTIONS, THAT PETITIONER
11 "DID NOT" PERFORM AN ACT OF SEXUAL INTERCOURSE WITH
12 HER, AND HE "DID NOT" TIE/BIND HER UP. AND BASED ON
13 THE PROSECUTION'S EXPERT WITNESS, DR. VALERIE BARNES, IN
14 2004 AND 2009, REPUDIATING HER TRIAL TESTIMONY IN 1998
15 THAT CLINICIANS WHO GATHER EVIDENCE IN MEDICAL-
16 LEGAL EXAMS (SEX-ABUSE CASES) NOW (2009) NO LONGER
17 PAY ATTENTION TO CLEFTS OR NOTCHES ON THE VICTIM'S
18 HYMEN BECAUSE THE PREVAILING VIEW IS THAT THESE
19 FEATURES ARE NOT EVIDENCE OF ABUSE. (SEE KING V. EVANS,
20 621 F. Supp. 2d 850, 854, FN. 5 (N.D. CAL., 4/14/09,
21 CASE NO. C 00-01988 SE); SEE ALSO PEOPLE V. HARLESS
22 (2004) 125 CAL. APP. 4TH 70, 80 (DR. VALERIE BARNES TESTIFIED
23 THAT THE MAJORITY OF SEXUALLY ABUSED CHILDREN DO NOT
24 SHOW ANY SIGNS OF INJURY; AND MORE DEFINITE PROOF
25 IS NEEDED SUCH AS THE PRESENCE OF SPERM OR A
26 SEXUALLY TRANSMITTED DISEASE).)

27 4. THE LOWER FEDERAL COURTS CLEARLY ERRED IN
28 NOT ORDERING ISSUANCE OF A CERTIFICATE OF

5

Page Number

1 APPEALABILITY ("COA") FROM THE DISTRICT COURT SUA SPONTE
2 CONSTRUING AND DENYING PETITIONER'S Rule 60(b) MOTION
3 TO REOPEN PETITION FOR WRIT OF HABEAS CORPUS AS A
4 REQUEST TO FILE A SECOND OR SUCCESSIVE HABEAS PETITION,
5 DESPITE THE RECORD SHOWING CLEARLY AND CONVINCINGLY
6 OTHERWISE. BECAUSE PETITIONER'S MOTION TO REOPEN WAS A
7 PROBA FIDE Rule 60(b) MOTION BECAUSE IT ONLY ATTACKED
8 THE DEFECTS OF THE DISTRICT COURT IN DISMISSING PETITIONER'S
9 FIRST FEDERAL HABEAS AS UNTIMELY, AND IT DID NOT ALLEG
10 "ANY" HABEAS CLAIMS. WHICH IS CONTRARY TO THIS COURT'S
11 PRECEDENTS. IN DOING SO, THE LOWER COURTS CLEARLY
12 VIOLATED THIS COURT'S AEDPA JURISPRUDENCE. THE LOWER
13 COURTS RESOLVED THIS CASE IN A MANNER FUNDAMENTALLY
14 INCONSISTENT WITH AEDPA. MOST STRIKING, THE TWO-
15 JUDGE PANEL OF THE NINTH CIRCUIT, AS WELL AS THE
16 DISTRICT COURT JUDGE, VIOLATED THE RULE OF HARRISON V.
17 Bell, 536 U.S. 180 (2000); 28 U.S.C. § 2107(a), AND
18 2253(a), BY CONSTRUING AND DENYING PETITIONER'S COA
19 AS AN APPEAL FROM "THE DENIAL OF A CONSTITUTIONAL
20 RIGHT" UNDER 28 USC § 2253(c)(2), WHEN PETITIONER'S
21 COA ONLY CHALLENGED THE DISTRICT COURT JUDGE
22 ABUSING HIS DISCRETION CONSTRUING AND DENYING SUA
23 SPONTE PETITIONER'S PROBA FIDE Rule 60(b) MOTION TO
24 REOPEN AS A REQUEST TO FILE A SECOND OR SUCCESSIVE
25 HABEAS PETITION. THE CALIFORNIA SUPREME COURT
26 ADJUDICATED THE MERITS OF PETITIONER'S "SCHLUP"
27 CLAIM OF "NEWLY DISCOVERED" EXCULPATORY "EVIDENCE"
28 OF INNOCENCE DEMONSTRATING PETITIONER'S

1 CONVICTIONS AND SENTENCE ENHANCEMENTS WERE BASED UPON
2 THE "FALSE EVIDENCE" OF THE PROSECUTION "EXPERT
3 WITNESS, DR. VIERIE BARNES, AND ADJUDICATED THE
4 MERITS OF PETITIONER'S CLAIMS OF "STRUCTURAL DEFECTS",
5 BECAUSE THE CALIFORNIA SUPREME COURT DID NOT CITE A
6 SINGLE PROCEDURAL BAR TO FEDERAL REVIEW FROM ANY
7 OF ITS NUMEROUS PROCEDURAL BARS. THE LOWER COURTS
8 EXCEEDED THEIR AUTHORITY IN REJECTING THAT DETERMINATION.
9 (SEE HARRINGTON V. RICHTER, 562 US 86 (2011); JOHNSON
10 V. WILLIAMS, 133 S. CT 1088, 1094-91 (2013).) WHICH WAS
11 SO OBVIOUSLY WRONG AS TO BE BEYOND ANY POSSIBILITY
12 FOR FAIRMINDED DISAGREEMENT. (SEE PURT V. TITUM, 134
13 S. CT. 10, 16 (2013) (THE RULING MUST BE "SO LACKING IN
14 JUSTIFICATION THAT THERE WAS AN ERROR ... BEYOND
15 ANY POSSIBILITY FOR FAIRMINDED DISAGREEMENT."))

16 S. IN MCGUIRE V. PERKINS, SUPRA, 134 S. CT. 1924, THIS
17 HONORABLE COURT HELD THAT A "CONVINCING SHOWING" OF ACTUAL
18 INNOCENCE UNDER SCHUP V. DEL, SUPRA, 513 US. 298 CAN
19 OVERCOME THE AEDPA STATUTE OF LIMITATIONS. (ID. AT 1928)
20 THIS HONORABLE COURT HELD IN SCHUP V. DEL, THAT, FOR THE
21 "FUNDAMENTAL MISARRIAGE OF JUSTICE" EXCEPTION TO APPLY, THE
22 PETITIONER MUST SHOW THAT A CONSTITUTIONAL VIOLATION PROBABLY
23 HAS CAUSED THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT
24 OF THE CRIME. (SEE SCHUP V. DEL, SUPRA, 513 US AT 324.)
25 UNDER SCHUP, 513 US 298, THE PETITIONER MUST ESTABLISH
26 HIS FACTUM INNOCENCE OF THE CRIME, AND NOT MERELY LEGAL
27 INSUFFICIENCY. (BOUSLEY V. UNITED STATES, SUPRA, 523 US AT 623.)
28 THIS HONORABLE COURT HELD IN SCHUP V. DEL, SUPRA, THAT "TO

1 BE CREDIBLE SUCH A CLAIM [OF ACTUAL INNOCENCE] REQUIRES PETITIONER
2 TO SUPPORT HIS ALLEGATIONS OF CONSTITUTIONAL ERROR WITH NEW RELIABLE
3 EVIDENCE - WHETHER IT BE EXCULPATORY SCIENTIFIC EVIDENCE, TRUST-
4 WORTHY EYEWITNESS ACCOUNTS, OR CRITICAL PHYSICAL EVIDENCE -
5 THAT WAS NOT PRESENTED AT TRIAL." (ID. AT 324.) FURTHER,
6 "THE PETITIONER MUST SHOW THAT IT IS MORE LIKELY THAN NOT
7 THAT NO REASONABLE JUROR WOULD HAVE CONVICTED HIM IN LIGHT
8 OF THE NEW EVIDENCE." (ID. AT 327.) WHICH PETITIONER HAD DONE
9 SO TO THE LOWER COURTS.

10 6. THIS HONORABLE COURT HAS STRESSED THAT THE EXCEPTION
11 IS LIMITED TO "CERTAIN EXCEPTIONAL CASES INVOLVING A COMPELLING
12 CLAIM OF ACTUAL INNOCENCE." (HOUSE V. PELL, SUPRA, 547 U.S. AT 524.)
13 "IN ASSESSING THE ADEQUACY OF PETITIONER'S SHOWING... THE
14 DISTRICT COURT IS NOT BOUND BY THE RULES OF ADMISSIBILITY THAT
15 WOULD GOVERN AT TRIAL," AND MUST "CONSIDER" ALL THE
16 EVIDENCE, INCLUDING THAT ALLEGED TO HAVE BEEN ILLEGALLY
17 ADMITTED (BUT WITH DUE REGARD TO ANY UNRELIABILITY OF IT) AND
18 EVIDENCE TENTATIVELY CLAIMED TO HAVE BEEN WRONGFULLY EXCLUDED
19 OR TO HAVE BECOME AVAILABLE ONLY AFTER TRIAL." (SCHUPP V.
20 DELO, SUPRA, 514 U.S. AT 327-428; SEE ALSO HOUSE V. PELL, SUPRA,
21 547 U.S. AT 537-538 ("THE HABEAS COURT MUST CONSIDER ALL THE
22 EVIDENCE, OLD AND NEW, INCRIMINATING AND EXCULPATORY,
23 WITHOUT REGARD TO WHETHER IT WOULD NECESSARILY BE
24 ADMITTED UNDER RULES OF ADMISSIBILITY THAT WOULD GOVERN
25 AT TRIAL.")) THE DISTRICT COURT FAILED TO DO SO.

26 7. THE QUESTION TO THE LOWER COURTS WAS WHETHER
27 PETITIONER'S "NEWLY DISCOVERED" EXCULPATORY "EVIDENCE"
28 OF INNOCENCE "IS SO STRONG THAT A COURT CANNOT HAVE

1 CONFIDENCE IN THE OUTCOME OF THE TRIAL UNLESS THE COURT IS ALSO
2 SATISFIED THAT THE TRIAL WAS FREE OF NONHARMLESS CONSTITUTIONAL
3 ERROR, THE PETITIONER SHOULD BE ALLOWED TO PASS THROUGH
4 THE GATEWAY AND ARGUE THE MERITS OF HIS UNDERLYING
5 CLAIMS." (Schlup v. Delo, SUPRA, 513 US AT 316, 329; ACCORD
6 McQuiggin v. PERKINS, SUPRA, 569 US 383, 386; SEE ID.
7 AT 312 ("THIS RULE, OR FUNDAMENTAL MISCARRIAGE OF
8 JUSTICE EXCEPTION, IS GROUNDED IN THE EQUITABLE DISCRETION
9 OF HABEAS COURTS TO SEE THAT FEDERAL CONSTITUTIONAL ERRORS
10 DO NOT RESULT IN THE INCARCERATION OF INNOCENT
11 PERSONS.")); SEE ALSO IN RE WINSHIP, 397 US. 358, 372
12 (1970) (MARLAN, J., CONCURRING) (EXPLAINING THE "CONCERN
13 ABOUT THE INJUSTICE THAT RESULTS FROM THE CONVICTION
14 OF AN INNOCENT PERSON HAS LONG BEEN AT THE CORE OF
15 OUR CRIMINAL JUSTICE SYSTEM, THAT CONCERN IS REFLECTED,
16 FOR EXAMPLE, IN THE FUNDAMENTAL VALUE DETERMINATION OF OUR
17 SOCIETY THAT IT IS FAR WORSE TO CONVICT AN INNOCENT
18 MAN THAN TO LET A GUILTY MAN GO FREE.").

19 8. BECAUSE THE FUNDAMENTAL ISSUE IN THIS CASE IS
20 WHETHER A FUNDAMENTAL MISCARRIAGE OF JUSTICE OCCURRED
21 BY THE LOWER COURTS REJECTING PETITIONER'S CLAIMS THAT
22 HE IS ACTUALLY INNOCENT OF THE CRIMINAL CHARGES
23 AND SENTENCE ENHANCEMENTS, BECAUSE, AS PRESENTED
24 TO THE LOWER COURTS, IN LIGHT OF THE "NEWLY DISCOVERED"
25 EXCULPATORY "EVIDENCE" OF INNOCENCE DEMONSTRATING
26 CLEARLY AND CONVINCINGLY THAT PETITIONER'S CONVICTIONS
27 AND SENTENCE ENHANCEMENTS WERE BASED UPON THE
28 "FALSE EVIDENCE" OF THE PROSECUTION'S EXPERT

1 witness, DR. VALERIE BARNES, AND ABSENT ANY OR ALL
2 THE "STRUCTURAL DEFECTS", "IT IS MORE LIKELY THAN
3 NOT THAT NO REASONABLE JUROR WOULD HAVE FOUND
4 PETITIONER GUILTY BEYOND A REASONABLE DOUBT." (SCHUPP
5 V. DELO, SUPRA, 513 U.S. AT 324, 327-328; SEE HOUSE V.
6 BELL, SUPRA, 547 U.S. AT 548; SEE ALSO KING V. EVANS, SUPRA,
7 621 F. Supp. 2d AT 855-857, 862 (THE DISTRICT COURT JUDGE
8 FOUND, AFTER HEARING TESTIMONY FROM THE PROSECUTION'S
9 EXPERT WITNESS, DR. VALERIE BARNES, WHO TESTIFIED
10 AT KING'S JURY TRIAL IN 1997 [AND AT PETITIONER'S
11 JUDGE TRIAL IN 1998], AND HEARING THE TESTIMONY
12 OF KING'S EXPERT WITNESS, DR. LEE COLEMAN [PETITIONER'S
13 EXPERT WITNESS NOW AS OF 2018], THAT THE TESTIMONY
14 OF A DEFENSE MEDICAL EXPERT, SUCH AS DR. LEE COLEMAN,
15 COULD HAVE CAUSED THE JURY TO REJECT THE PROSECUTION'S
16 EXPERT WITNESS, DR. VALERIE BARNES, TESTIMONY AND
17 THUS CHANGED THE OUTCOME AT KING'S TRIAL.) THEN,
18 EXCEPT AS PETITIONER HAS EXPLAINED TO THE LOWER
19 COURTS, (AS WELL AS THE STATE COURTS), PETITIONER
20 ADOPTS THE STATEMENT OF THE CASE AND FACTS IN THE
21 DECISION OF THE CALIFORNIA COURT OF APPEAL, SIXTH
22 APPELLATE DISTRICT, CASE NO. H019469 (SEE APPX. C
23 AT PP. 1, 2-3), THAT THE DISTRICT COURT RELIED ON IN
24 2013 WHEN DISMISSING PETITIONER'S FIRST FEDERAL HABEAS
25 PETITION AS UNTIMELY. (APPX. E (DKT. # 34) AT 2-3.)

26 27 B. BACKGROUND OF CRIMINAL TRIAL.

28 9. IN 1998, AFTER PETITIONER WAIVED HIS

FUNDAMENTAL RIGHT TO A JURY TRIAL,¹ THE TRIAL COURT² FOUND PETITIONER GUILTY OF NUMEROUS COUNTS OF SEXUAL ASSAULT UPON TWO CHILDREN AND FOUND TRUE THE SENTENCE ENHANCEMENTS, AND SENTENCED PETITIONER TO STATE PRISON FOR 40-YEARS TO LIFE. (APPX. E (DKT. # 34) AT PP. 2-3; APPX. O AT PP. 1, 2-11.)

10. PETITIONER'S CONVICTIONS AND SENTENCE ENHANCEMENTS WERE BASED UPON EVIDENCE SEIZED FROM PETITIONER'S RESIDENCE³ AND TRUCK, THAT INCLUDED PHOTOGRAPHS OF

FOOTNOTE 1: PETITIONER CLAIMED HE DID NOT KNOWINGLY, INTELLIGENTLY, OR VOLUNTARILY WAIVE HIS FUNDAMENTAL RIGHT TO TRIAL BY JURY. (APPX. I (DKT. # 47) AT 16-19; SEE APPX. J (DKT. # 49), EXHIBIT D AT #78-#96 PAGES, PARAS. 214-219.)

FOOTNOTE 2: PETITIONER CLAIMED THE TRIAL JUDGE WAS BIASED. (APPX. I (DKT. # 47) AT 13-15; SEE APPX. J (DKT. # 49), EXHIBIT D AT #65-#77 PAGES)

FOOTNOTE 3: DEPUTY OLIVEIRA TESTIFIED DEPUTIES WALKED WITH PETITIONER INTO HIS RESIDENCE, WITHOUT OBTAINING HIS CONSENT TO ENTER AND WALKED INTO PETITIONER'S BEDROOM, AND AFTER DISCOVERING THE PIPE-BOMB, ARRESTED PETITIONER FOR POSSESSION^{OF} DESTRUCTIVE DEVICE, AND RELATED CHARGES. (SEE APPX. O AT P. 2; SEE ALSO APPX. J (DKT. # 49), EXHIBIT D AT #7, PAGE, PARA. 7, AND #106-#107 PAGES, PARA. 273 (DEPUTY OLIVEIRA TESTIFIED "... THERE WAS NO DISCUSSION REGARDING WHETHER [DEPUTIES] COULD OR COULD NOT GO INTO [PETITIONER'S] RESIDENCE AT THAT TIME."); SEE ID. AT #100-#120 PAGES); SEE ALSO GEORGIA V. RANDOLPH, 547 US 103, 109 (2006); ACCORD LANGE V. CALIFORNIA, 579 US 486 (2021).)

1 NAKED CHILDREN, AND PHYSICAL EVIDENCE. (SEE APPX. E (DKT.# 34)
2 AT PP. 2, 13-14; SEE ALSO APPX. D AT P. 2.)

3 11. IN ADDITION, BASED UPON EVIDENCE POLICE SEIZED FROM
4 DEFENDANT'S FATHER'S STORAGE SHED, WHICH CONSISTED OF OVER
5 600+ VIDEOTAPES THAT WERE REVIEWED BY THE PROSECUTION'S
6 WITNESS, DETECTIVE LARRY BRYANT. (ID. AT PP. 2-3; APPX.
7 E (DKT.# 34) AT PP. 2, 5-6, 13-14.)

8 12. IN ADDITION, BASED UPON THE TESTIMONY OF THE
9 PROSECUTION'S EXPERT WITNESS, DR. VALERIE BARNES, THAT BASED
10 UPON HER PHYSICIAN EXAMINATIONS OF JANE DOE ONE AND
11 JANE DOE TWO (BOTH DID NOT TESTIFY), AND BASED UPON
12 HER REVIEWING THE TWO SUMMARY VIDEOTAPES,^{4/} THAT THERE
13 WAS PENETRATION OF BOTH JANE DOE ONE AND JANE DOE
14 TWO.^{5/} (SEE APPX. E (DKT.# 34) AT PP. 2, 5-6, 13-14; SEE ALSO
15

16
17 FOOTNOTE 4: DETECTIVE LARRY BRYANT EDITED THE 600+ VIDEOTAPES TO
18 CUT/SLICE/PASTE IMAGES INTO TWO SUMMARY VIDEOTAPES THAT THE
19 TRIAL JUDGE REVIEWED IN HER CHAMBERS. (SEE APPX. J (DKT.# 49),
20 EXHIBIT D AT #101-#102 PAGES, PARAS. 263 & FN. 32, #129-#131
21 & FN. 45, AND SEE #31-#32 PAGES, PARAS. 120-121 & FN. 6.)
22

23 FOOTNOTE 5: THE COLPOSCOPE PHOTOGRAPHS OF JANE DOE ONE
24 WERE COMPLETELY BLANK AND JANE DOE TWO WERE OF VERY
25 POOR QUALITY. (SEE APPX. J (DKT.# 49), EXHIBIT D AT #123
26 PAGE, PARA. 292, AND #34-#40 PAGES, PARAS. 128-
27 143, & FN. 8.)
28

1 Appx. O at pp. 2-3.) AND THE PROSECUTION'S EXPERT WITNESS, DR. VAKIRE
2 BARNES, TESTIFIED THAT PHYSICAL EXAMINATION OF JANE DOE ONE WAS
3 CONSISTENT WITH AN ACT OF PENETRATION. (APPX. E (DKT. # 34) AT P. N.)

4 13. PETITIONER TESTIFIED THAT HE NEVER TIED OR BOUND JANE DOE
5 ONE, AND THAT HE NEVER PENETRATED EITHER JANE DOE ONE OR JANE
6 DOE TWO WITH HIS PENIS OR HAND. (SEE APPX. E (DKT. # 34) AT P. 2; SEE
7 ALSO APPX. O AT PP. 2-3.) BUT, PETITIONER DID ADMIT TO TOUCHING JANE
8 DOE ONE'S GENITALIA WITH HIS HAND. (SEE APPX. E (DKT. # 34) AT P. 2.)

9 14. THE TRIAL COURT FOUND PETITIONER GUILTY OF 15 OR 16 COUNTS
10 OF SEXUAL ASSAULT UPON TWO CHILDREN, AND FOUND THE SENTENCE
11 ENHANCEMENTS TRUE. AND SENTENCE PETITIONER TO STATE PRISON
12 FOR 40 YEARS TO LIFE. (SEE APPX. E (DKT. # 34) AT PP. 2-3; SEE
13 ALSO APPX. O AT P. 3.)

14 15. ON SEPTEMBER 19, 2000 THE SIXTH APPELLATE DISTRICT OF
15 CALIFORNIA, IN CASE NO. H019469, REJECTED PETITIONER'S SENTENCING
16 ERRORS AND AFFIRMED THE JUDGMENT. (ID. AT PP. 1-12.) THE
17 CALIFORNIA SUPREME COURT DENIED PETITIONER'S PETITION FOR REVIEW
18 ON NOVEMBER 29, 2000. (SEE PEOPLE V. AMEL, 2000 CAL. LEXIS
19 9315, 5092491.) THUS, THE JUDGMENT BECAME FINAL ON
20 FEBRUARY 28, 2001. (PEOPLE V. NASATQA (1996) 12 CAL. 4TH 784,
21 789, FN. 5 (A JUDGMENT IS NOT FINAL UNTIL THE TIME FOR
22 PETITIONING FOR A WRIT OF CERTIORARI IN THE UNITED STATES SUPREME
23 COURT HAS PASSED); SEE LINKLETTER V. WALKER, 381 US 618, 622,
24 N.5 (1965) ("WHERE THE JUDGMENT OF CONVICTION WAS RENDERED,
25 THE AVAILABILITY OF APPEAL EXHAUSTED, AND THE TIME FOR
26 PETITION FOR CERTIORARI ... ELAPSED."))

1 C. STATE PROBATE PROCEEDING AND KAREN FELLOWS (JANE DOE ONE)
2 CIVIL JUDGMENT AGAINST PETITIONER FOR \$1.25 million Dollars
3

4 16. ON, OR ABOUT, FEBRUARY 15, 2008, FROM THE PROBATE
5 PROCEEDINGS PETITIONER INHERITED \$ 2.5 million Dollars THAT WAS
6 PLACED INTO A TRUST. (SEE APPX. J (DKT. #49), EXHIBIT D AT #13-#14.)
7

8 17. ON MARCH 7, 2008 KAREN FELLOWS (JANE DOE ONE) FILED A
9 CIVIL SUIT AGAINST PETITIONER BASED UPON THE ALLEGED SEXUAL
10 MISCONDUCT PETITIONER WAS CONVICTED OF IN CRIMINAL CASE
11 NO. 559800046. (Id. AT #14.)^{6/}

12 18. ON FEBRUARY 19, 2009 KAREN FELLOWS TESTIFIED DURING
13 HER DEPOSITION. (Id. AT #15, PARA. 52.)

14 19. ON JULY 21, 2009 KAREN FELLOWS TESTIFIED DURING HER
15 CIVIL TRIAL. (SEE APPX. J (DKT. #49) AT #16 PAGE, PARA. 53.)

16 20. ON JULY 24, 2009 THE JURY REACHED A VERDICT AND
17 AWARDED KAREN FELLOWS (JANE DOE ONE) \$ 1,250,000 million
18 DOLLARS AND \$ 250,000 FOR PUNITIVE DAMAGES. (Id. AT #15, PAGE,
19 PARA. 54.)

20 21. ON AUGUST 5, 2009 KAREN FELLOWS (JANE DOE ONE) AGREED
21 TO SETTLE FOR \$ 1,400,000. (Id. AT #15, PAGE, PARA. 55.)
22
23
24
25

26 FOOTNOTE 6: KAREN FELLOWS WAS REPRESENTED BY THE SAME LAW FIRM
27 THAT REPRESENTED PETITIONER'S SISTER DURING THE PROBATE
28 PROCEEDINGS. (SEE APPX. J (DKT. #49), EXHIBIT D AT #14, PARA.
45.)

1 D. FIRST ROUND OF STATE POST-CONVICTION PROCEEDINGS,
2 FROM SEPTEMBER 23, 2009 TO NOVEMBER 10, 2010.
3

4 22. ON SEPTEMBER 23, 2009, THE SAME ATTORNEYS WHO
5 REPRESENTED PETITIONER DURING THE PROBATE PROCEEDINGS,
6 AND KAREN FELLOWS CIVIL SUIT, FILED A PETITION FOR WRIT
7 OF HABEAS CORPUS WITH THE CALIFORNIA SUPERIOR COURT IN AND FOR
8 THE COUNTY OF MONTEREY AND ASSIGNED PETITION NO. HC6759.
9 (SEE APPX. J (DKT. #49) AT #16-#18, PAGES, PARAS. 51-62.)

10 23. ON DECEMBER 11, 2009 THE HABEAS CORPUS COURT
11 DENIED PETITIONER'S THREE CLAIMS ON THE MERITS AND
12 AS UNTIMELY. (ID. AT #19-#21, PAGES, PARAS. 68-74.)

13 24. ON FEBRUARY 2, 2010 THE SIXTH APPELLATE DISTRICT OF
14 CALIFORNIA DENIED PETITIONER'S PETITION FOR WRIT OF HABEAS
15 CORPUS. (APPX. J (DKT. #49) AT #21 PAGE, PARA. 75.)

16 25. ON NOVEMBER 10, 2010 THE CALIFORNIA SUPREME COURT
17 DENIED PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS. (ID.
18 AT #21 PAGE, PARA. 76.)
19

20 E. FIRST ROUND OF FEDERAL HABEAS CORPUS PROCEEDINGS
21 FROM NOVEMBER 19, 2010 TO OCTOBER 6, 2014.
22

23 26. ON NOVEMBER 19, 2010 PETITIONER'S FEDERAL PETITION
24 FOR WRIT OF HABEAS CORPUS WAS FILED AND ASSIGNED CASE
25 NO. C 10-05216 RS. (SEE APPX. D.)

26 27. ON MARCH 27, 2013 THE DISTRICT COURT REJECTED
27 PETITIONER'S CLAIM UNDER 28 U.S.C. § 2244 (d)(1)(D)
28 THAT THE FACTUAL PREDICATE OF HIS CLAIM WAS NOT

1 DISCOVERED UNTIL FEBRUARY 19, 2009, THE DATE OF KAREN
2 FELLOWS DEPOSITION AND GRANTED RESPONDENT'S MOTION
3 TO DISMISS. (APPX. E AT PP. 4, 5-6, 13-14.)

4 28. THE REASON THE DISTRICT COURT REJECTED PETITIONER'S
5 ACTUAL INNOCENT CLAIM IS BECAUSE THE DISTRICT COURT
6 FOUND THAT PETITIONER KNEW OF THE FACTUAL PREDICATE OF
7 HIS CLAIMS THAT HE WAS NOT GUILTY OF TYING AND BINDING
8 JANE DOE ONE (KAREN FELLOWS) AND DID NOT PENETRATE
9 JANE DOE ONE, PRIOR TO KAREN FELLOWS DEPOSITION OF
10 FEBRUARY 19, 2000, FROM VIDEOS PLAYED DURING TRIAL IN 1998,
11 TESTIMONY FROM THE PROSECUTION'S WITNESSES, AND FROM
12 PETITIONER'S OWN TESTIMONY. (ID. AT 5-6, 13-14.)

13 29. IN ADDITION, THE DISTRICT COURT FOUND THAT THE
14 PROSECUTION'S EXPERT WITNESS, DR. VALERIE PHARNES, WHO
15 EXAMINED KAREN FELLOWS, AND DETECTIVE LARRY BRYANT,
16 WHO REVIEWED THE VIDEO TAPES, DETERMINED THAT THERE
17 WAS PENETRATION OF BOTH JANE DOE ONE (KAREN FELLOWS),
18 AND JANE DOE TWO. (ID. AT 13-14; SEE DKT. # 34.)

19 30. IN ADDITION, THE DISTRICT COURT FOUND THAT THE
20 PROSECUTION'S EXPERT WITNESS, DR. VALERIE PHARNES, TESTIFIED
21 THAT THE PHYSICAL EXAMINATION OF KAREN FELLOWS (JANE
22 DOE ONE) WAS CONSISTENT WITH AN ACT OF PENETRATION.
23 (ID. AT P. 14.)

24 31. IN ADDITION, THE DISTRICT COURT FOUND THAT THE
25 PROSECUTION'S WITNESS, DETECTIVE LARRY BRYANT, TESTIFIED
26 THAT THE VIDEOTAPES SHOWED THAT THERE WAS WHAT APPEARED
27 TO BE A WHITE ROPE TIED AROUND JANE DOE ONE'S (KAREN
28 FELLOWS), HANDS DURING A PORTION OF THE FILMING. (ID.)

32. IN ADDITION, THE DISTRICT COURT FOUND THAT KAREN FELLOWS (JANE DOE ONE) HAD NO RECOLLECTION DURING HER DEPOSITION OF FEBRUARY 19, 2000 OF BEING PENETRATED BY PETITIONER, BUT SHE DID NOT REFUTE THAT IT HAD HAPPEN. (APPX. E (DKT.# 34) AT 14.)

33. FURTHERMORE, THE DISTRICT COURT FOUND THAT THE TRIAL JUDGE "SPECIFICALLY FOUND THAT PENETRATION OCCURRED AND THAT JANE DOE ONE HAD A ROPE TIED AND KNOTTED AROUND HER WAIST, MEETING THE REQUIREMENTS OF THE SENTENCING ENHANCEMENT IN THAT SHE LACKED FREE MOVEMENT OF HER HANDS HAD SHE TRIED TO ESCAPE." (Id.)

34. THEREFORE, THE DISTRICT COURT FOUND THAT PETITIONER DID NOT PRESENT EVIDENCE OF ACTUAL INNOCENCE SUCH THAT THE MERITS OF HIS TIME-BARRIED CLAIMS CAN BE REVIVED. (Id.)

35. ON APRIL 4, 2014 THE NINTH CIRCUIT DENIED PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY. (COA). (APPX. F.)

36. ON OCTOBER 6, 2014 THE UNITED STATES SUPREME COURT DENIED PETITIONER'S PETITION FOR WRIT OF CERTIORARI. (APPX. G; SEE AMEL V. BEARD, 514 U.S. 901 (2014).)

F. SECOND ROUND OF STATE POST-CONVICTION PROCEEDINGS FROM JANUARY 30, 2019 TO JUNE 12, 2019.

37. ON JANUARY 30, 2019 PETITIONER MAILED HIS 162-PAGE MOTION TO VACATE THE JUDGMENT, AND/OR PETITION FOR WRIT OF ERROR CORAM NOBIS PURSUANT TO PEOPLE V. KIM (2009) 45 CAL. 4TH 1078, WITH 1620-PAGES OF SUPPORTING DOCUMENTS, TO THE TRIAL COURT. (SEE

1 Appx. J (DKT.#49), exhibits A, B, C, AND D.)

2 38. ON FEBRUARY 15, 2019 THE TRIAL COURT REJECTED THE
3 Petition/MOTION FOR Filing IN THE APPELLATE COURT. (Id., EXHIBIT E.)

4 39. ON MARCH 6, 2019 PETITIONER'S 162-PAGE MOTION TO
5 VACATE THE JUDGMENT, AND/OR PETITION FOR WRIT OF ERROR CORAM
6 NOBIS, WITH 1620-PAGES OF SUPPORTING DOCUMENTS, WAS FILED
7 WITH THE SIXTH APPELLATE DISTRICT OF CALIFORNIA AND ASSIGNED
8 PETITION NO. H046689. (Appx. J (DKT.#49), exhibits D & F.)

9 40. ON MARCH 27, 2019 THE STATE COURT OF APPEALS IN
10 CASE NO. H046689 GRANTED PETITIONER'S APPLICATION FOR Filing
11 AN OVERSIZED BRIEF AND DENIED PETITIONER'S MOTION TO VACATE
12 THE JUDGMENT, AND/OR PETITION FOR WRIT OF ERROR CORAM
13 NOBIS, ON THE MERITS BECAUSE THAT STATE APPELLATE COURT DID
14 NOT CITE A SINGLE PROCEDURAL BAR TO FEDERAL REVIEW. (Appx.
15 J (DKT.#49), AT EXHIBITS B, C, D, F, AND G.)

16 41. ON APRIL 22, 2019 PETITIONER APPEALED TO THE CALIFORNIA
17 SUPREME COURT TO REVIEW THE JUDGMENT OF THE SIXTH APPELLATE
18 DISTRICT OF MARCH 27, 2019, IN CASE NO. H046689, TO
19 DETERMINE WHETHER THE JUSTICES OF THE SIXTH APPELLATE DISTRICT
20 VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW BY REFUSING
21 TO TAKE CORRECTIVE MEASURES OF THE SEVERAL STRUCTURAL
22 DEFECTS THAT RESULTED IN PETITIONER BEING CONVICTED OF A
23 MAJORITY OF THE MOST SERIOUS CHARGES AND SENTENCE
24 ENHANCEMENTS BASED ON THE FALSE EVIDENCE PRESENTED BY
25 THE PROSECUTION'S EXPERT WITNESS, DR. VALERIE BARNES. (Appx.
26 J. (DKT.#49) AT EXHIBIT M AT PP. 1-2, 6-7; SEE ALSO Id.
27 AT EXHIBITS K & L.)

28 42. IN ADDITION, PETITIONER PETITIONED THE CALIFORNIA

1 Supreme Court to recall the remittitur issued by the Sixth
2 Appellate District in case no. H019469 on the ground that
3 petitioner was denied effective assistance of counsel on appeal
4 in violation of *Evitts v. Lucay*, 469 U.S. 387, 396 (1985), by the
5 court appointed appellate counsel failing to investigate the
6 record to find the several structural defects found by
7 the sailhouse lawyer, and to raise and argue the structural
8 defects on appeal that would have more likely resulted
9 in a reversal of the judgment in Monterey County
10 Superior Court case no. SS980036. (Appx. J (Dkt. #49),
11 at exhibit M at pp. 1, 7.)

12 43. In addition, petitioner petitioned the California
13 Supreme Court pursuant to Penal Code § 1265 for a writ
14 of error *coram vobis* on the ground that had
15 petitioner been able to present the newly discovered
16 evidence of Dr. Lee Coleman's expert opinion demonstrating
17 the prosecution's expert witness, Dr. Valerie Barnes, testified
18 falsely that the victims were sexually penetrated, then
19 there is a reasonable probability that petitioner
20 would not have been convicted on the majority of the
21 most serious charges and sentence enhancements.
22 (Appx. J (Dkt. #49), at exhibit M at pp. 1, 2-4, 7-8.)

23 44. Furthermore, petitioner petitioned the California Supreme
24 Court to exhaust state court remedies pursuant to *Magwood*
25 *v. Patterson*, 561 U.S. 320 (2010), for the judgment in case
26 no. SS980036 to be vacated on the ground that the structural
27 defect(s) properly resulted in petitioner being convicted on
28 a majority of the most serious charges and sentence

1 ENHANCEMENTS BASED ON FALSE EVIDENCE, BIASED JUDGE, DENIAL
2 OF COUNSEL, AND WITHOUT A JURY'S DETERMINATION UNDER THE
3 DUE PROCESS CLAUSE. (APPX. J (DKT.# 49), AT EXHIBIT M AT PP.
4 1, 4-5, 8.)

5 45. ON JUNE 12, 2019 THE CALIFORNIA SUPREME COURT
6 DENIED PETITIONER'S PETITION FOR REVIEW IN CASE NO. S255320
7 ON THE MERITS BECAUSE IT DID NOT CITE A SINGLE PROCEDURAL
8 BAR TO FEDERAL REVIEW. (APPX. J (DKT.# 49), AT EXHIBIT N;
9 AND SEE EXHIBIT O; SEE ALSO 2019 CAL. LEXIS 4258,
10 S255320/M046689, JUNE 12, 2019.)

11
12 G. SECOND ROUND OF FEDERAL POST-CONVICTION PROCEEDINGS
13 FROM SEPTEMBER 23, 2019 TO MARCH 26, 2021.

14
15 46. ON SEPTEMBER 23, 2019 PETITIONER FILED HIS RULE
16 60(b) MOTION TO REOPEN HIS PREVIOUS FEDERAL PETITION FOR
17 WRIT OF HABEAS CORPUS. (APPX. H (DKT.# 46) AT PP. 1-41.)

18 47. IN ADDITION, PETITIONER FILED AND LODGED WITH THE
19 DISTRICT COURT 250 PAGES OF DOCUMENTS, EXHIBITS "A" TO
20 "O". (APPX. J (DKT.# 49).)

21 48. FURTHERMORE, PETITIONER'S FEDERAL HABEAS PETITION
22 WAS RECEIVED, NOT FILED, WITH THE DISTRICT COURT. (APPX. I
23 (DKT.# 47) AT PP. 1-31.)

24 49. ON NOVEMBER 4, 2019 THE DISTRICT COURT SUA SPONTE
25 CONSTRAINED AND DENIED PETITIONER'S RULE 60(b) MOTION TO REOPEN
26 AS A REQUEST TO FILE A SECOND OR SUCCESSIVE HABEAS
27 PETITION. (APPX. B (DKT.# 50).)

28 50. ON NOVEMBER 12, 2019 PETITIONER FILED A TIMELY

1 APPEAL FROM THE DISTRICT COURT ABUSING ITS DISCRETION DENYING
2 PETITIONER'S RULE 60(b) MOTION TO REOPEN. (APPX. K; APPX. L.)

3 51. IN ADDITION, PETITIONER APPLIED FOR AN APPLICATION FOR A
4 CERTIFICATE OF APPEALABILITY ("COA") TO APPEAL FROM THE JUDGMENT
5 ENTERED BY THE DISTRICT COURT ON NOVEMBER 4, 2019 DENYING
6 PETITIONER'S MOTION TO REOPEN HIS PREVIOUSLY DISMISSED PETITION
7 FOR WRIT OF HABEAS CORPUS. (APPX. L (9TH CIR. DKT. # 3); APPX.
8 M (CASE NO. 19-17328) AT PP. 1-52.)

9 52. PETITIONER SOUGHT A COA ON THE FOLLOWING ISSUES:

10 a.) WHETHER THE DISTRICT COURT JUDGE ABUSED HIS DISCRETION
11 UNDER 28 USC § 455(a), (b)(1), BY FAILING TO RECUSE HIMSELF
12 FROM REVIEWING AND DECIDING PETITIONER'S MOTION TO REOPEN HIS
13 PREVIOUS PETITION FOR WRIT OF HABEAS CORPUS. (APPX. M AT PP. 4,
14 20-22.)

15 b.) WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION
16 UNDER HABEAS RULE 4 BY SUA SPONTE DENYING PETITIONER'S
17 MOTION TO REOPEN AS AN UNAUTHORIZED REQUEST TO FILE A
18 SECOND OR SUCCESSIVE HABEAS PETITION WITHOUT PROVIDING
19 PETITIONER NOTICE AND AN OPPORTUNITY TO BE HEARD WHY HIS
20 MOTION TO REOPEN IS NOT A REQUEST TO FILE A SECOND OR
21 SUCCESSIVE HABEAS PETITION. (APPX. M AT PP. 4-5, 23-25.)

22 c.) WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION
23 UNDER MAGWOOD V. PATTERSON, SUPRA, 561 US 320, REJECTING
24 AND DENYING PETITIONER'S ARGUMENT THAT HIS MOTION TO REOPEN
25 WAS UNNECESSARY AS HIS PETITION FOR WRIT OF HABEAS CORPUS
26 CHALLENGED THE NEW INTERVENING JUDGMENT OF THE STATE
27 APPELLATE COURT. (APPX. M AT PP. 5, 26-42.)

28 d.) WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION

1 UNDER *Gonzales v. Crosby*, 545 U.S. 524, BY FAILING TO CONSIDER,
2 OR REJECTING, PETITIONER'S ARGUMENT THAT *McQuiggin v. Perkins*,
3 133 S.Ct. 1924 (MAY 28, 2013), CONSTITUTED AN INTERVENING
4 CHANGE IN THE LAW THAT PROVIDED PETITIONER AN EXCUSE FOR
5 HIS PREVIOUS PROCEDURAL DEFAULT OF UNTIMELINESS. (APPX. M
6 AT PP. 5, 43-45.)

7 R.) WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION
8 UNDER *Gonzales v. Crosby*, SUPRA, 545 U.S. 524, BY FAILING
9 TO CONSIDER, OR REJECTING, PETITIONER'S ARGUMENT THAT IT WAS
10 A FUNDAMENTAL MISCARriage OF JUSTICE DISMISSING PETITIONER'S
11 PREVIOUS FEDERAL HABEAS PETITION AS UNTIMELY, AND/OR IT
12 WOULD BE A FUNDAMENTAL MISCARriage OF JUSTICE NOT TO
13 ALLOW PETITIONER TO REOPEN CASE NO. C 10-05276 RS,
14 BECAUSE HE HAS ALWAYS BEEN ACTUALLY INNOCENT OF A
15 MAJORITY OF THE MOST SERIOUS CHARGES AND SENTENCE
16 ENHANCEMENTS. (APPX. M AT PP. 5-6, 46-52.)

17 53. FURTHERMORE, PETITIONER REQUESTED THE NINTH CIRCUIT
18 TO ISSUE A COA TO ALLOW PETITIONER TO APPEAL THE DISTRICT
19 COURT ABUSING ITS DISCRETION DENYING PETITIONER'S MOTION TO
20 REOPEN - BECAUSE THE NINTH CIRCUIT HAS THE DUTY TO "GUARD
21 AGAINST EXTREME MALFUNCTIONS IN THE STATE CRIMINAL JUSTICE
22 SYSTEM." (ID. AT P. 52 (QUOTING *HARRINGTON V. RICHTER*, 562
23 U.S. 86, 102-103 (QUOTING *JACKSON V. VIRGINIA*, 443 U.S. 307, 332
24 N. 5 (1979) (JENKS, J., CONCURRING IN JUDGMENT))).)

25 54. ON FEBRUARY 10, 2021 THE NINTH CIRCUIT DENIED
26 PETITIONER'S REQUEST FOR A COA. (APPX. A.) THE DECISION
27 WAS MADE BY TWO, NOT THREE, CIRCUIT JUDGES. (ID.)

28 55. ON MARCH 4, 2021 PETITIONER FILED WITH THE NINTH

1 CIRCUIT HIS 14-PAGE PETITION TO RECALL THE MANDATE; AND/OR
2 PETITION FOR REHEARING AND/OR PETITION FOR REHEARING EN BANC
3 (APPX. N AT PP. 1-14; SEE 9TH CIR. NO. 19-17320 DKT.# 12.)

4 56. PETITIONER'S PETITION TO RECALL THE MANDATE, ETC.,
5 WAS BASED UPON THE GROUND THAT THE TWO-JUDGE PANEL
6 "ERRED SO TRANSPARENTLY," DENYING PETITIONER'S REQUEST FOR
7 A COA TO APPEAL THE DISTRICT COURT ABUSING ITS DISCRETION
8 DENYING PETITIONER'S Rule 60(b) MOTION, THAT "NO" FAIRMINDED
9 JURIST FROM OTHER PANELS OF THE NINTH CIRCUIT, INCLUDING
10 THE FULL COURT, AND FROM EVERY OTHER FEDERAL CIRCUIT
11 COURT - NOT EVEN ONE - "COULD" AGREE WITH THE
12 PANEL'S DECISION. (APPX. N AT PP. 1-2, CITING HARRINGTON V.
13 RICHTER, SUPRA, 562 US AT 102; THOMAS V. DIXON, 132 S. CT.
14 26, 26 (2011).)

15 57. IN ADDITION, PETITIONER REQUESTED FOR THE NINTH
16 CIRCUIT TO GRANT HIS REQUEST FOR REHEARING AND REHEARING
17 EN BANC ON THE GROUND THE PANEL'S DECISION CONFLICTS
18 WITH EVERY CITED DECISION IN PETITIONER'S COA. (Id. AT P. 2;
19 SEE APPX. M AT PP. 6-7, 7-8, 20-22, 23-25, 26-42, 43-45,
20 46-52, 52.) ESPECIALLY PUCK V. DAVIS, 137 S. CT. 159 (2017),
21 AND GONZALES V. CROSBY, SUPRA, 545 US 524, BECAUSE
22 PETITIONER'S Rule 60(b) MOTION TO REOPEN ONLY CHALLENGED
23 THE DISTRICT COURT'S PREVIOUS RULING THAT PETITIONER WAS TIME-
24 BARRED. (APPX. N AT P. 2; SEE APPX. H (DKT.# 46) AT PP. 1-3,
25 10-45). AND WAS NOT A REQUEST TO FILE A SECOND OR
26 SUCCESSIVE PETITION. (APPX. N AT P. 2; SEE APPX. I
27 (STAMPED RECEIVED (NOT FILED), SEPTEMBER 23, 2019).)

28 58. FURTHERMORE, PETITIONER RELIED EXCLUSIVELY ON

1 (AND AGAIN RELIES ON), KING V. EVANS, 621 F. Supp. 2d 850 (N.D.
2 Cal. 2009) [Appx. P], TO DEMONSTRATE THAT THE DISTRICT
3 COURT'S DECISION DENYING PETITIONER'S Rule 60(b) MOTION
4 TO REOPEN (APPX. M (DKT.# 50)), AND THE PANEL'S DECISION
5 DENYING PETITIONER'S REQUEST FOR A COA, (APPX. A), RESULTED
6 IN A "FUNDAMENTAL MISCARriage OF JUSTICE" WITHIN THE
7 MEANING OF HERRERA V. COLLINS, SUPRA, 500 US 390, AND/OR
8 SCHUPP V. DELO, SUPRA, 513 US 296, AND ITS PROGENY.
9 (APPX. N AT PP. 2-3.) BECAUSE, AS REFLECTED IN THE
10 RECORD BEFORE THE DISTRICT COURT, THE "VERY SAME AND
11 IDENTICAL NEWLY DISCOVERED EVIDENCE," THAT RESULTED IN
12 KING'S HABEAS PETITION BEING GRANTED, EVIDENCE THAT WAS
13 NOT PRESENTED AT KING'S, OR PETITIONER'S, TRIAL, I.E.,
14 DR. LEE COLEMAN'S DECLARATION, THAT DEMONSTRATES
15 CLEARLY AND CONVINCINGLY THAT THE PROSECUTION'S
16 EXPERT WITNESS, DR. VALERIE BARNES, WHO TESTIFIED AT
17 KING'S TRIAL IN 1997 (KING V. EVANS, SUPRA, 621 F.
18 SUPP.2D AT 854; SEE PEOPLE V. KING, NO. HO18094, Slip.
19 OP. AT 1-6 (Cal. App., MAR. 25, 1990), FOOTNOTE OMITTED) (SEE
20 APPX. P), AND WHO TESTIFIED AT PETITIONER'S TRIAL IN
21 1998, (SEE APPX. N AT P. 3; SEE APPX. E (DKT.# 34), AT PP.
22 2, 13-14), TESTIFIED FALSELY TO, AND MISREPRESENTED
23 THE CAUSES OF THE VICTIM'S INJURIES THAT RESULTED
24 IN KING'S, AND PETITIONER'S, CONVICTIONS FOR CRIMES KING,
25 AND/OR PETITIONER, NEVER COMMITTED. (APPX. N AT PP.
26 3-4; SEE APPX. P, KING V. EVANS, SUPRA, 621 F. SUPP.2D AT
27 855-857, 862 (FINDING THAT THE TESTIMONY OF A DEFENSE
28 MEDICAL EXPERT, SUCH AS DR. LEE COLEMAN, COULD HAVE

24

Page Number

1 CAUSED THE JURY TO REJECT DR. BARNES' TESTIMONY AND THUS
2 CHANGED THE OUTCOME AT TRIAL); SEE ALSO APPX. J (DKT.#
3 49), AT EXHIBIT D, MEMO. AT P. 36, PARA. 132 (CITING
4 SIX CASES FROM THE CALIFORNIA SUPREME COURT FINDING DR
5 LEE COLEMAN QUALIFIED AS AN EXPERT WITNESS FOR THE
6 PROSECUTION AS A REBUTTAL WITNESS); SEE ALSO APPX. P,
7 KING V. EVANS, SUPRA, 621 F. SUPP. 2D AT 856, 862 (FINDING
8 DR. COLEMAN QUALIFIED AS TO OFFER EXPERT OPINIONS ON
9 THE PHYSICAL EVIDENCE IN KING' CASE AND SCIENTIFIC
10 RESEARCH ON EVIDENCE FROM SEX ABUSE CASES. AND
11 FINDING DR. COLEMAN'S TESTIMONY CREDIBLE AND CONVINCING);
12 AND SEE PEOPLE V. HARRIS (2004) 125 CAL. APP. 4TH 70, 80
13 (DR. VALERIE BARNES REPUDIATED HER OPINION HOW TO
14 DETERMINE WHETHER THERE WERE PENETRATING INJURIES
15 IN SEXUALLY ABUSED CHILDREN CASES). (SEE APPX. N
16 AT PP. 4-5.) [±]

17 59. IN SUPPORT OF DEMONSTRATING THE DISTRICT COURT'S
18 DECISION (APPX. B (DKT.# 50)), AND THE PANEL'S DECISION
19 (APPX. A), RESULTED IN A "FUNDAMENTAL MISCARriage OF
20 JUSTICE", PETITIONER PRESENTED TO THE NINTH CIRCUIT
21 THE "NEWLY DISCOVERED" EXCULPATORY "EVIDENCE", THAT
22
23

24 FOOTNOTE 7: DR. LEE COLEMAN'S DECLARATION FROM KING V. EVANS,
25 SUPRA, 621 F. SUPP. 2D AT 855-856, AND FROM AUGUST 2, 2018,
26 WERE BOTH PRESENTED TO THE CALIFORNIA SUPREME COURT. (SEE
27 APPX. J (DKT.# 49) AT EXHIBIT M AT PP. 2-4; ID. AT EXHIBIT C,
28 LOD. DOCS. T & V), AND TO THE DISTRICT COURT. (ID.; SEE
APPX N AT P. 4, N. 1).

25

Page Number

1 WAS NOT PRESENTED AT PETITIONER'S TRIAL, THE TESTIMONY
2 OF JANE DOE ONE (KAREN FELLOWS) (APPX N AT p. 5;
3 SEE SCHUP V. DELU, SUPRA, 5TH US AT 324; ACCORD LEE
4 V. LAMPERT, 65TH F3D 929, 936 (9TH CIR. 2011) (EN BANC)
5 (EVIDENCE NOT PRESENTED AT TRIAL).)

6 (1.) THAT PETITIONER DID NOT PERFORM AN
7 ACT OF SEXUAL INTERCOURSE WITH HER. (APPX. N AT
8 p. 5; SEE APPX. J (1)KT.# 49) AT EXHIBIT C, LOD. DOC. X,
9 RT 75.) [RT DENOTES COURT REPORTER'S TRANSCRIPT].

10 (2.) THAT PETITIONER TOUCHED HER VAGINA ONLY
11 ONCE WITH HIS HAND WHEN SHE WAS GOING TO SLEEP. (Id.,
12 RT 72-73, 74.)

13 (3.) THAT PETITIONER NEVER THREATENED HER;
14 THAT HER WRISTS WERE NOT TIED, BOUND, OR RESTRAINED
15 BY THE ROPE/CORD, IT WAS KIND OF LOOSELY DRAPED
16 AROUND HER WRISTS AND SHE COULD EASILY GET IT OFF
17 HER WRISTS. (Id., RT 75-77, 77, 78.)

18 (4.) AND THE CHAIN AROUND HER ANKLE WAS NOT TIED
19 TO ANYTHING AND DID NOT RESTRICT HER MOVEMENT. (Id., RT 78.)

20 (5.) IN ADDITION, KAREN FELLOWS REMEMBERED
21 TESTIFYING THAT PETITIONER "DID NOT" PERFORM AN ACT OF
22 SEXUAL INTERCOURSE WITH HER. (APPX. N AT pp. 5-6.)

23 60. FURTHERMORE, PETITIONER CONTENDED (AND CONTENTS
24 NOW) THAT, IN LIGHT OF THE NEWLY DISCOVERED EVIDENCE
25 OF DR. LEE COLEMAN'S DECLARATIONS, AND JANE DOE ONE
26 (KAREN FELLOWS), TESTIMONY OF FEBRUARY 19, 2009 AND
27 JULY 21, 2009, AND ABSENT THE CONSTITUTIONAL
28 ERROR(S), THAT "IT IS MORE LIKELY THAN NOT THAT

1 NO REASONABLE JUROR WOULD HAVE CONVICTED HIM IN
2 LIGHT OF THE NEW EVIDENCE." (APPX. N AT PP. 6-7, (QUOTING
3 M'QUINN V. TERKINS, SUPRA, 137 S. CT AT 1928, (AND
4 AUTHORITIES CITED THEREIN).)

5 61. THEREFORE, BASED UPON THE REASONS ALLEGED
6 IN PETITIONER'S PETITION TO RECALL THE MANDATE, ETC.
7 (APPX. N AT PP. 1-14), PETITIONER SHOULD HAVE BEEN
8 ENTITLED TO PRESENT HIS CONSTITUTIONAL CLAIMS (APPX. I
9 (DKT. # 47)), FOR RELIEF IN FEDERAL COURT. (APPX. N
10 AT PP. 7, 1-14.)

11 62. ON MARCH 26, 2021 THE NINTH CIRCUIT
12 DENIED PETITIONER'S PETITION FOR REHEARING AND REHEARING
13 EN BANC. (APPX. C.)

14 63. PETITIONER SUBMITTED HIS PETITION FOR WRIT OF
15 CERTIORARI WITHIN 90-DAYS OF THE NINTH CIRCUIT
16 DECISION OF MARCH 26, 2021 DENYING PETITIONER'S
17 PETITION FOR REHEARING AND REHEARING EN BANC
18 (APPX. C), BY PROVIDING IT TO PRISON OFFICIALS FOR
19 MAILING ON JUNE 24, 2021 TO THIS HONORABLE COURT.
20 (SEE PROOF OF SERVICE BY MAIL ATTACHED HERETO AT
21 PAGE 38B.)

22 64. IN ADDITION, PETITIONER IS SUBMITTING HIS PETITION
23 FOR WRIT OF CERTIORARI, AFTER MAKING THE NECESSARY
24 CORRECTIONS AS THE CLERK'S OFFICE INSTRUCTED, ON
25 OCTOBER 2021, BY PROVIDING IT TO PRISON OFFICIALS
26 FOR MAILING TO THIS HONORABLE COURT. (SEE PROOF OF
27 SERVICE BY MAIL AT PAGE 38.)
28

REASONS FOR GRANTING THE WRIT

65. PETITIONER INCORPORATES THE FACTS OF THE FOREGOING PARAGRAPHS 1 TO 64 BY REFERENCE AS DULY SET HEREIN.

66. PURSUANT TO DYE V. HOFBAUER, 546 US 1, 4 (2005), PETITIONER INCORPORATES THE DOCUMENTS ATTACHED HERETO AS APPENDIXES "A" TO "Q" BY REFERENCE AS DULY SET FORTH HEREIN.

FIRST REASON.

67. PETITIONER ALLEGES, CONTENTS, AND ARGUES THAT HE HAS ESTABLISHED HIS "ACTUAL INNOCENCE" WITHIN THE MEANING OF HERRERA V. COLLINS, SUPRA, 560 US 390.

68. BECAUSE KAREN FELLOWS (JANE DOE ONE), WHO DID NOT TESTIFY DURING PETITIONER'S TRIAL IN 1998, TESTIFIED ON FEBRUARY 19, 2009, AND JULY 21, 2009, THAT PETITIONER DID NOT PERFORM AN ACT OF SEXUAL INTERCOURSE WITH HER, NEVER THREATENED HER; THAT HER WRISTS WERE NOT TIED, BOUND, OR RESTRAINED BY THE ROPE/CORD, IT WAS KIND OF LOOSELY DRAPED AROUND HER WRISTS AND SHE COULD EASILY GET IT OFF HER WRISTS; AND THE CHAIN AROUND HER ANKLE WAS NOT TIED TO ANYTHING AND DID NOT RESTRICT HER MOVEMENT. (SEE APPX. J (DKT.# 49) AT EXHIBIT C, 100 DOCS. X & Z; SEE ALSO APPX. J (DKT.# 49) AT EXHIBIT D AT #14-#16 PAGES, PARAS. 44-56.)

SECOND REASON.

69. PETITIONER ALLEGES, CONTENTS, AND ARGUES THAT THE

1 "NEWLY DISCOVERED" EXCULPATORY "EVIDENCE" OF INNOCENCE
2 BY KAREN FELLOWS TESTIFYING, TWICE, THAT PETITIONER DID NOT
3 PERFORM AN ACT OF SEXUAL INTERCOURSE WITH HER, AND DR
4 LEE COLEMAN" DECLARATIONS (SEE KING V. EVANS, SUPRA, 621 F.
5 SUPP. 2D AT 845-856; APPX. P), DEMONSTRATE PETITIONER'S
6 CONVICTIONS AND SENTENCE ENHANCEMENTS WERE BASED
7 UPON THE "FALSE EVIDENCE" OF THE PROSECUTION" EXPERT
8 WITNESS, DR. VAMERIE BARNES, IN VIOLATION OF CLEARLY
9 ESTABLISHED FEDERAL LAW AS DETERMINED BY GIGLO V.
10 UNITED STATES, 405 US 150, 153 (1972); UNITED STATES V.
11 AGURS, 427 US 97, 103 (1976); MILLER V. DATE, 386 US 1,
12 6 (1967); NAJME V. ILLINOIS, 360 US 264, 271 (1959),
13 (SEE GREEN V. FISHER, 565 US 34, 38-40 (2011)) (CLEARLY
14 ESTABLISHED FEDERAL LAW INCLUDES ONLY THE HIGH COURT'S
15 DECISIONS AS OF THE TIME OF THE RELEVANT STATE COURT
16 ADJUDICATION ON THE MERITS); ACCORD HOWES V. FIELDS,
17 132 S.Ct. 1181, 1187 (2012).) THUS, IN LIGHT OF THIS
18 COURT'S CLEARLY ESTABLISHED PRECEDENTS PROHIBITING
19 STATES FROM RELYING ON "FALSE EVIDENCE" TO SECURE
20 A DEFENDANT'S CONVICTION, THERE WAS NO "REASONABLE
21 BASIS FOR THE "CALIFORNIA SUPREME" COURT TO DENY
22 RELIEF," ON PETITIONER'S CLAIMS. (SEE APPX. J (DKT#49),
23 EXHIBIT M AT PP. 1-8, EXHIBITS N & O; SEE ALSO
24 HARRINGTON V. RICHTER, SUPRA, 131 S.Ct. 770, 784; ID AT
25 787; ACCORD DAVIS V. AYALA, 135 S.Ct. 2187, 2199 (2015)
26 (THE STATE COURT'S CONCLUSIONS ARE SO UNREASONABLE
27 THAT THERE IS NO "POSSIBILITY OF FAIR-MINDED DIS-
28 AGREEMENT."))

THIRD REASON.

10. PETITIONER ALLEGES, CONTENTS, AND ARGUES THAT THE LOWER COURTS' DECISIONS RESULTED IN A "FUNDAMENTAL MISCARRIAGE OF JUSTICE" BECAUSE PETITIONER IS ACTUALLY INNOCENT OF THE CRIMINAL CHARGES AND SENTENCE ENHANCEMENTS, BECAUSE IN LIGHT OF THE "NEWLY DISCOVERED EVIDENCE" OF KAREN FELLOWS TESTIMONY AND DR. LOE COLEMAN'S DECLARATIONS, AND APPARENT ANY OR ALL THE CONSTITUTIONAL VIOLATIONS,⁸ (SEE APPX I (DKT.#41) AT PP. 5-12, 13-15, 16-19, 20-23, 24-25, 25-27), "IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE FOUND PETITIONER GUILTY BEYOND A REASONABLE DOUBT." (MCQUINN V. PERKINS, SUPRA, 123 S.Ct. AT 1933, 1935; SCHUPP V. DELO, SUPRA, 513 US AT 329, 327; SEE HOWE V. BELL, SUPRA, 547 US. AT 536; SEE ALSO THUMFIELD V. CAIN, 135 S.Ct. 2269, 2277 N. 3 (2015) ("REVIEW UNDER [28 U.S.C.] § 2254(d)(2)" IS "CONCERNED ... NOT WITH THE ADEQUACY OF THE PROCEDURES AND STANDARDS" IN STATE COURT, "BUT WITH THE UNDERLYING FACTUAL CONCLUSIONS THE COURT REACHED."); CULLEN V. PINKSTER, 509 US 170, 182 (2011) (ONLY THE STATE RECORD INFORMED "WHAT [THE] STATE COURT KNEW AND DID."); GREEN V. FISHER, SUPRA, 132 S.Ct AT 44.)

FOOTNOTE 8: PETITIONER EXHAUSTED STATE COURT REMEDIES ON HIS "ACTUAL INNOCENT" CLAIM. (APPX. I (DKT.# 41), AT EXHIBITS M, N, & O; SEE ALSO SOULIOTES V. EVANS, 622 F.3d 1173, 1176-77 & FN. 2 (9TH CIR 2010).)

FOURTH REASON.

71. PETITIONER ALLEGES, CONTENTS, AND ARGUES PURSUANT TO THE REASONING OF *MAGWOOD V. PATTERSON*, SUPRA, 561 U.S. 320; *SIMONEZ V. QUARTERMAN*, 555 U.S. 113, 118-120 (2009); *PANETTI V. QUARTERMAN*, 551 U.S. 930, 947 (2007); *STEWART V. MARTINEZ-VILLAREAL*, 523 U.S. 637, 643 (1998); AND *SLACK V. MCDANIEL*, 529 U.S. 473, 478 (2000), THAT THE STATE COURT'S DECISION (APPX. J (DKT.#49), EXHIBIT G), CONSTITUTES A NEW INTERVENING JUDGMENT. BECAUSE THE STATE COURT DECISION (IBID.) WAS BASED UPON AN INTERVENING "CHANGE IN THE LAW AFFECTING THE PETITIONER." (IN RE HARRIS (1993) 5 CAL. 4TH 813, 814), BY THE CALIFORNIA LEGISLATURE, IN 2014, AFTER PETITIONER'S CONVICTION BECAME FINAL IN 2001 (SEE *PEOPLE V. APPEL*, SUPRA, 2000 CAL. LEXIS 9375; SEE ALSO *BROWN V. ROE*, 188 F.3D 1157, 1159 (9TH CIR. 1999)), ENACTING SENATE BILL NO. 1058 (2013-2014 REG. SESS.), WHICH REVISED THE DEFINITION OF "FALSE EVIDENCE" TO INCLUDE OPINIONS OF EXPERTS THAT HAVE EITHER BEEN REPUDED BY THE EXPERT WHO ORIGINALLY PROVIDED THE OPINION AT A HEARING OR TRIAL OR THAT HAVE BEEN UNDERMINED BY LATER SCIENTIFIC RESEARCH OR TECHNOLOGICAL ADVANCES. (IN RE RICHARDS (2016) 63 CAL. 4TH 291, 309-311 (CITING PENAL CODE § 1473, SUBD. (E)(1)); ACCORD IN RE FIGUEROA (2018) 4 CAL. 5TH 576, 587-588 (PETITIONER DEMONSTRATED THAT EVIDENCE OF EXPERT OPINIONS OF INJURIES TO SUPPORT SEXUAL ASSAULT CONVICTIONS WAS "FALSE EVIDENCE" TO WARRANT HABEAS RELIEF).)

72. IN ADDITION, BECAUSE THE STATE COURT DECISION WAS BASED UPON AN INTERVENING "CHANGE IN THE LAW

1 AFFECTING THE PETITIONER" (IN RE MARRIS, SUPRA, 5 CAL. 4TH AT
2 814), BY THE CALIFORNIA LEGISLATURE, IN 2017, AFTER
3 PETITIONER'S CONVICTION BECAME FINAL IN 2001 (SEE PEOPLE V
4 APPEL, SUPRA, 2000 CAL. LEXIS 9375), ENACTING SENATE
5 BILL NO. 1134, THAT SIGNIFICANTLY LOWERED THE STANDARD
6 FOR GRANTING HABEAS CORPUS RELIEF BASED UPON "NEWLY
7 DISCOVERED EVIDENCE." (SEE IN RE MILES (2017) 7 CAL. APP. 5TH
8 821, 828, 879-840 (EFFECTIVE JANUARY 1, 2017, HABEAS
9 CORPUS RELIEF IS NOW GRANTED WHEN "NEW EVIDENCE EXISTS
10 THAT IS CREDIBLE, MATERIAL, PRESENTED WITHOUT SUBSTANTIAL
11 DELAY, AND OF SUCH DECISIVE FORCE AND VALUE THAT IT
12 WOULD HAVE MORE LIKELY THAN NOT CHANGED THE OUT-COME
13 AT TRIAL." (QUOTING PENN CODE § 1473, SUBD. (b)(3)(A));
14 SEE PENN CODE § 1473, SUBD. (b)(3)(B) ("... "NEW EVIDENCE"
15 MEANS EVIDENCE THAT HAS BEEN DISCOVERED AFTER TRIAL, THAT
16 COULD NOT HAVE BEEN DISCOVERED PRIOR TO TRIAL BY THE
17 EXERCISE OF DUE DILIGENCE AND IS ADMISSIBLE AND NOT
18 MERELY CUMULATIVE, CORROBORATIVE, COLLATERAL, OR
19 IMPACTING).)

20 13. FURTHERMORE, BOTH THE CALIFORNIA COURT OF APPEAL
21 AND SUPREME COURT DECLARED THAT THE DECISION (APPX. J
22 (DKT. #49), EXHIBIT G), CONSTITUTES A NEW, INTERVENING
23 JUDGMENT. BECAUSE BOTH COURTS HELD THAT THE CHANGE
24 IN THE APPLICABLE LAW CONCERNING THE NEW DEFINITION
25 OF "FALSE EVIDENCE," AND "NEWLY DISCOVERED EVIDENCE,"
26 PETITIONER'S PETITION (APPX. J (DKT. #49), EXHIBITS D, F,
27 G, M, N & O), IS NOT SUBJECT TO THE PROCEDURAL BAR
28 OF SUCCESSIVENESS. (IN RE RICHARDS, SUPRA, 63 CAL. 4TH AT 294;

1 IN RE CLARK (1993) 5 CR. 411 150, 757.) AND THAT STATE
2 COURT DECISION (APPX. J (DKT. # 49) EXHIBIT G) WAS AN
3 ADJUDICATION ON THE MERITS WITHIN THE MEANING OF
4 28 USC § 2254(d). (GREEN V. FISHER, SUPRA, 565
5 US AT 48-40; HOWES V. FIELDS, SUPRA, 132 S Ct AT
6 1182; MARRINGTON V. RICHTER, SUPRA, 562 US AT 101.)

7
8 FIFTH AND FINAL REASON.

9 74. THEREFORE, NOTWITHSTANDING THE FOREGOING
10 REASONS, PETITIONER ALLEGES, CONTENDS, AND ARGUES
11 PURSUANT TO GONZALEZ V. CROSBY, SUPRA, 545 US 574,
12 THAT BECAUSE PETITIONER MERELY ASSERTED IN HIS
13 RULE 60(b) MOTION TO REOPEN THAT THE "PREVIOUS RULING"
14 WHICH PRECLUDED A MERITS DETERMINATION WAS IN ERROR
15 FINDING PETITIONER'S FIRST HABEAS PETITION WAS UNTIMELY
16 (SEE APPX. H (DKT. # 46) AT PP. 2, 15, 21, 30-34, 34-38; SEE
17 ALSO APPX. E (DKT. # 31)), AND DID NOT RAISE A SINGLE
18 HABEAS CORPUS CLAIM IN HIS RULE 60(b) MOTION TO
19 REOPEN (APPX. H (DKT. # 46) AT PP. 1-45),⁹¹ THEN THE DISTRICT
20 COURT ABUSED ITS DISCRETION CONSTRUING AND DENYING,
21 SUA SPONTE, PETITIONER'S RULE 60(b) MOTION AS A REQUEST
22 TO FILE A SECOND OR SUCCESSIVE HABEAS PETITION UNDER
23

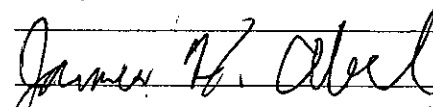
24
25 FOOTNOTE 9: IN PETITIONER'S RULE 60(b) MOTION, HE DID NOT PRESENT
26 "NEWLY DISCOVERED EVIDENCE" IN SUPPORT OF A CLAIM PREVIOUSLY
27 DENIED (APPX. H (DKT. # 46) AT 1-45), BUT DID ASSERT AN INTER-
28 VENING CHANGE IN THE LAW AND THE FUNDAMENTAL MISCARRIAGE
OF JUSTICE EXCEPTION. (Id.)

28 U.S.C. § 2244(b). (TRUCK V. DAVIS, 137 S. CT. 759, 771-780 (2017); SEE GONZALEZ V. CROSBY, SUPRA, 545 US AT 532 N.Y.; SEE ALSO HILL V. MITCHELL, 2019 U.S. DIST. LEXIS 69688 (SO. DIST. OH., 4/24/2019, CASE NO. 1:98-CV-452), 2019 WL 1785485 (Rule 60(h) motion was not a successive petition because the petitioner presented newly discovered evidence and argued the actum-innocence exception under McQuiggin v. Perkins, supra, 569 US 383 to the statute of limitations applies to overcome AEDPA's one-year limitations period); AKENS V. WYNTER, 2014 U.S. DIST. LEXIS 38121, 2014 WL 1202746 AT *2 (E.D. PA. MAR. 24, 2014, NO. 06-5239) (petitioner's motion as a bona fide Rule 60(h) motion to the extent petitioner challenged district court's application of the AEDPA statute of limitations); PRIDGEN V. SHANNON, 2015 U.S. DIST. LEXIS 44422, 2015 WL 1525135, (NO. CO-4561, APR. 2, 2015) (same); OSBORNE V. UNITED STATES, 514 F.2D 867 (11th Cir. 2014) (same).)

1 Conclusion

2
3 15. THEREFORE, BASED UPON THE FOREGOING REASONS,
4 PETITIONER RESPECTFULLY REQUESTS FOR THIS HONORABLE COURT
5 TO GRANT PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS,
6 GRANT THE PETITION FOR CERTIORARI, VACATE THE JUDGMENT
7 OF THE NINTH CIRCUIT COURT OF APPEALS, AND REMAND THE
8 CASE FOR FURTHER CONSIDERATION OF THE QUESTION WHETHER
9 PETITIONER IS ENTITLED TO A COA. (THARPE V. SELLERS, 138
10 S. CT. 545, 546-547 (2018) (PER CURIAM); SEE BUCK V. DAVIS,
11 SUPRA, 137 S. CT. AT 177-180 (THE DISTRICT COURT'S
12 DENIAL OF BUCK'S Rule 60(h) MOTION WAS AN ABUSE OF
13 DISCRETION); ID. AT 173-175 (THE FIFTH CIRCUIT EXCEEDED
14 THE LIMITED SCOPE OF THE COA ANALYSIS).)

15
16
17 Respectfully Submitted

18
19 
20 JAMES HENRY ABEL, PETITIONER
21

22 DATE: OCTOBER 4TH, 2021
23
24
25
26
27
28

1 VERIFICATION By PETITIONER
2

3 I, JAMES HENRY ABEL, DECLARE UNDER
4 THE PENALTY OF PERJURY, 28 USC § 1746,
5 THAT THE FOREGOING IS TRUE AND
6 CORRECT BASED UPON MY OWN
7 PERSONAL KNOWLEDGE.
8

9 EXECUTED ON THE 24TH DAY OF JUNE
10 2021 AT MULE CREEK STATE PRISON,
11 JONES, CA. 95640
12

13 James H. Abel

14 JAMES HENRY ABEL, DECLARANT/PETITIONER
15
16

17 VERIFICATION By Jailhouse Lawyer
18

19 I, STEPHEN F. SNOW, DECLARE UNDER THE
20 PENALTY OF PERJURY, 28 USC § 1746, THAT
21 THE FOREGOING IS TRUE AND CORRECT BASED
22 UPON MY OWN PERSONAL KNOWLEDGE FROM
23 READING JAMES HENRY ABEL'S LEGAL PAPERS
24 AND THE FOREGOING CITED AUTHORITIES.
25

26 EXECUTED ON THE 24TH DAY OF JUNE 2021
27 AT MULE CREEK STATE PRISON, JONES, CA. 95640
28

Stephen F. Snow

STEPHEN F. SNOW, DECLARANT/JAILHOUSE LAWYER
PURSUANT TO JOHNSON v. MARY, 393 US 483 (1969).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

x James H. Aluf

Date: June 24th, 2021