No. 21-6649

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL JAMES HULTMAN — PETITIONER
(Your Name)

vs.

STATE OF CALIFORNIA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

NINTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

PAUL JAMES HULTMAN
(Your Name)

California Institution For Men B4-MH-229
(Address)
P.O. Box 3100
Chino, CA. 91708
(City, State, Zip Code)

NONE
(Phone Number)

ORIGINAL

## QUESTIONS PRESENTED

I

Were the Sixth and Fourteenth Amendments violated when a juror admitted viewing unadmitted evidence during deliberations and stated that her verdict was prejudiced thereby?

II

Did the District Court err by denying petitioner's juror misconduct claim on the merits even though the state never refuted the presumption of prejudice and without an evidentiary hearing as requested by petitioner in both state and federal courts?

III

Were petitioner's Sixth and Fourteenth Amendment rights to effective assistance of trial counsel and due process violated where trial counsel failed to investigate and raise an alibi defense despite readily available strong evidence in the record?

IV

Were petitioner's rights to the effective assistance of appellate counsel and to due process under the Sixth and Fourteenth Amendments violated when appellate counsel refused to file a habeus corpus petition with the direct appeal and when appellate counsel stated that to do so would jeopardize the appeal as the petition was unsupported, where the District Court ultimately concluded the evidence did support petitioner's claims contained in his petition for writ of habeas corpus?

V

Did the District Court deny petitioner's Fourteenth Amendment right to due process when it imbued the petitioner, a layman with no prior legal training, background or exposure to the legal system, with legal insight of such sufficiency as to realize that his appellate counsel's instructions were erroneous and to disobey appellate counsel's orders not to file a habeas petition during the appeal but to wait until post-appeal, with the result petitioner's grounds 2 through 6 were procedurally barred under 28 U.S.C. 2244(d)(1)(D) for lack of diligence because petitioner did not file a habeas petition in pro se during the appeal so as to create an exception to the procedural bar rule of Coleman v Thompson, 501 US 722 (1991)?

VI

Were the petitioner's Sixth and Fourteenth Amendment rights to a fair trial and due process violated where the prosecution suppressed and withheld evidence of an irrefutable alibi defense which placed petitioner out of the area, state and country at the times the alleged crimes allegedly occurred, and secondly suppressed and withheld strong impeachment evidence of the star witnesses' plot to frame the petitioner?

VII

Was the petitioner's right to due process under the Fourteenth Amendment abrogated where both the Ninth Circuit and District Courts denied a Certificate of Appealability using the wrong legal standard or misapplying the correct one via narrow interpretation?

VIII

Where a state habeas petition is denied as untimely by the Federal District Court under 28 U.S.C. 2244(d)(2) although filed within the one-year AEDPA deadline, does the Fourteenth Amendment Due Process Clause mandate that a habeas petitioner be accorded the right to challenge such a denial under the rule that the presumption of correctness may be rebutted by clear and convincing evidence?

/
/
/
/
/
/
/
/
/
/
/
/
/

## LIST OF PARTIES

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

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

## TABLE OF CONTENTS



## INDEX TO APPENDICES

# TABLE OF AUTHORITIES CITED

**CASES CITED:** **PAGE(s)**



**********

CALIFORNIA CASES:



////

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 _____ 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 _____ 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 A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the California Court of Appeals, Div. 2 court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

## JURISDICTION

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

The date on which the United States Court of Appeals decided my case was _____.

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

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

[x] 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.

[ ] A timely petition for rehearing was thereafter denied on the following date: None, 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 None (date) on None (date) in Application No. ___A_____.

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### SIXTH AMENDMENT

Section 1: In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed,which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### FOURTEENTH AMENDMENT

**Section 1:** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state in which they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

******************

### STATUTORY PROVISIONS

### 28 U.S.C., 2244(d)(1)

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation hsall run from the latest of -

(A) the date on which the judgment became final by the concluison of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by state action in violation of the constotution or laws of the United States is removed if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initilaly recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable in cases on collateral review, or,

(D) the date on whihh the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

## STATUTORY PROVIISONS, CONT'D:

### 28 U.S.C. §§ 2254(d)-

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shlal not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court proceeding.

### 28 U.S.C. §§ 2254(e)(1):

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determinantion of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

/

/

/

/

/

/

/

/

/

/

## STATEMENT OF THE CASE

### Procedural History

On 4/17/14 petitioner was convicted of one count of continuous sexual abuse, two counts of committing lewd acts upon a child under 14 years old and one count of comitting a lewd act with a child under 14 or 15 years old when the defendant was at least 10 years older than the victim. The jury also found that the petitioner committed his offenses against more than one victim. The petitioner was sentenced on 11/21/14. On 3/15/16 the California Court of Appeals affirmed his convictions. On 5/18/16 the California Supreme Court denied review.

### State Habeas Review

The petitioner's first state habeas petition was filed 8/5/17 after a three-month delay in appellate counsel's return of case records and transcripts. The petiiton raised (1) juror misconduct; (2) prosecution misconduct (lying to jury, Brady issues); (3)ineffective trial ocunsel (failure to investigate alibi defense); (4) factual innocence-newly discovered evidence); (5) Evidentiary hearing request for Grounds 1,3,4. The petition was denied on the merits and for procedural pleading errors that were corrected on appeal on 1/2/18.

On 2/26/18 petitioner corrected the pleading errors and filed his first petition with the state appellate court. The petitioner raised the following issues: (1) juror misconduct; (2) ineffective trial counsel (failure to investigate alibi defense); (3) prosecution misconduct (Lying to jury, Brady issues); (4) Denial of fair trial); (5) Due process denial of evidentiary hearing in face of prima facie claims); (6) ineffective appellate counsel. On 3/16/18 the petition was denied on the merits and as untimely using death penalty time constraints.

On 5/8/18, petitioner filed his first habeas petition with the California Supreme Court. The petition raised the same issues as in the court of appeals with specific citation to the U.S. Constitution as to each ground raised (and as presented in the First Amended Federal habeas petition (hereinafter "FAP"). The petition was denied without opinion on 8/29/18.

**Federal Habeas Review**

The petitioner's original federal habeas petition was filed as a "protective" petition raising both exhausted and unexhaused claims. A stay in abeyance was granted. On 8/29/18 all grounds were exhausted and on 10/09/18 the petitioner filed the First Amended federal habeas petition.

The state filed a motion to dismiss the FAP as untimely filed and barred by 28 U.S.C. 2244(d)(1) based on the state's application of the death penalty time constraints rejected by this court as inapplicable to non-capital cases. The petitioner posited that the wrong standard of review was applied in opposition, as all filings in the state court were within one-year deadline of 28 U.S.C. 2254(d)(1) and even the more stringent death penalty deadlines, in opposition filed 4/20/19.

On 2/26/19, the first Magistrate Judge filed his report and recommendations ("hereinafter "R&R"). In it, the Magistrate Judge recommended that Grounds 2,3,4 and 6 be dismissed as untimely filed under 28 U.S.C. 2244(d)(1)(D), that Ground 5 dismissed as not cognizable on habeas corpus and that these grounds be dismissed with prejudice. The court did order the state to answer Ground 1, (juror misconduct) on the merits and to raise any procedural defenses.

////

On 6/6/19, the state answered Ground One (jury misconduct) and raised on two defenses, the "Dixon" rule (**In re Dixon, (1953) 41 Cal 2d 756**)(barred if not raised on direct appeal) and AEDPA 28 U.S.C. 2254(d)(1) arguing that the state court decision was not objectively unreasonable application of controlling federal precedent nor contrary to it.

On 7/6/19, petitioner traversed this answer referencing both the sworn affidavit of juror Townsend describing the misconduct and that her verdict was prejudiced (Exhibit 3 to FAP) and arguing that as the state did not refute the presumption of prejudice, no case or controversy existed on which to apply the AEDPA procedural bar in the absence of any evidentiary hearing, requiring habeas relief.

On 2/6/20 a new Magistrate Judge issued new factual findings and recommendations report. Here, the Magistrate Judge did not address the procedural defenses raised by the state. Instead, the Magistrate Judge argued the merits for the state that were not raised before and denied Ground One on the merits as non-prejudicial without an evidentiary hearing. On 3/30/20, the district court affirmed the Magistrate's ruling and dismissed the petition with prejudice and denied the Certificate of Appealability.

Appellant filed a timely notice of appeal 4/22/20, and an amended Certificate of Appealability with the Ninth Circuit on 9/21/20. It was denied on 7/22/21. A petition for re-hearing on 8/4/21 and denied as untimely on 9/15/21, although timely filed by the "mailbox" rule established by this court. This petition follows.

////

////

## Facts Underlying Questions Presented

### Questions I, II-Juror Misconduct

During an on-line Seniors' Chatroom conversation , petitioner's sister discovered the person she was talking to was a juror on the petitioner's jury and remembered the case. Juror Paula Townsend agreed to talk with the petitioner's investigator.

In the 4/13/17 interview, juror Townsend described how the petitioner's cell phone was brought into the jury room at the start of deliberations, how it was activated, opened up, and the entire contents of its text library and photo gallery were viewed and read. Appendix C, pp. 5-6.

Juror Townsend also noted that there was "nothing bad" in any of the photo's or text messages. Id. pg. 6. This exposed the lie by the prosecuting attorney D. Foy during closing arguments that the phone contained "sexting" messages. Id. pg. 7, lines 19-23; 5 RT: 844.[1/]

Juror Townsend also stated unequivocally that none of the contents of petitioner's cell phone were admitted as evidence and that the only view of them was the screen-saver photo of one of the alleged victims, and that was in the courtroom. Id. Townsend also admitted her viewing the contents "might have" affected her verdict. Id.

In a subsequent interview on 6/29/17, Juror Townsend described in detail the circumstances surrounding the introduction of the cell phone into the jury room and the viewing of its contents and why. Appendix D, pp. 1-2. The jury wanted to see the screen-saver photo because when it was shown in the courtroom on the monitor they did not get a good look (after the judge told them the rest of the contents were not to be shown to the juyr). It ws then the jury opened up the cell phone and juror Townsend stated unequivocally that her verdict was "swayed". Id. pg. 6.

1/ "RT" equals Reporter's Transcript

Underlying Facts, Cont'd:

Questions I, II, Cont'd:

As shown by **Appendix E**, a defense objection pursuant to California Evidence Code § 402 (relevancy) was raised regarding the cell phoner contents. Id. pp. 1-2. As shown, the defense was ambushed by the prosecution. Later into the trial when a foundation was being raised again for for the cell phone's contents, a second 402 objection was raised. Id, pp 5-6. It was determined that only the screen-saver photo and Tebbit's notes on the text message he saw would be admitted to evidence. Id. pp. 10-11. Thus, when the cell phone was admitted as evidence, its contents were not and the prosecution knew it when the phone was sent into the jury room. **

In his first state habeas, petitioner requested an evidentiary hearing on the juror misconduct because of the vagueness of the 4/13/17 report.and the explicit statement that juror Townsend made stating that her verdict had been swayed by viewing the phone contents. It was denied. Petitioner raised the same request in both the state appellate court and the California Supreme Court; the former did not address the issue and the state Supreme Court denied the entire petiitoner without opinion or citation. There was no refutation of the presumed prejudice, meaning that no AEDPA review was possible. Appendix A; Appendix B

The federal district court initially ruled that the Juror Misconduct claim (Ground One in the FAP) was timely and ordered the state to answer and address the merits and raise any procedural arguments available. Appendix F, pp. 12, 26.

**/ On 6/29/17, the alleged victim Kylie Stoykovich stated in a post-conviction interview that it was she who put the pictures of Children on petitioner's phone. Until then, this fact was unknown.

Underlying Facts, Cont'd:

Questions I, II, Cont'd:

After the petitioner traversed respodent's answer, which did not address the merits but only raised a totally inapplicable ground and an AEDPA procedural bar 28 U.S.C. 2254(d)(1) but with no citation to any Supreme Court case that excused juror misconduct where not only was prejudice presumed but expressed as precedent, the district judge changed Magistrates. The new Magistrate Judge issued a new Report and Recommendation Report, **Appendix F**, pp. 27-37, in which the court first, re-summarized the petitioner's crimes in detail, disregarding the entire body of evidence showing the witnesses recanting their entire testimony, impeaching the star witnesses and alleged third victim, Id. pp. 27-33, then proceeded to argue for the state that the AEDPA did apply but then argued that because the cell phone itself was admitted into evidence, the contents were likewise admitted, ergo no jury misconduct. No mention of the state trial court's elaborate ministrations for the jury to view the screen-saver photo and Tebbit's notes was made. Id. pp. 36-37. Appendix E belies this finding; the courtroom monitor mentioned in the juror's statements and in the 402 objections.

The District Court accepted the findings then dismissed the petition with prejudice and denied the Certificate of appealability. The petitioner filed a new Certificate of appealability with the Ninth Circuit. It was denied, Appendix G, A petition for a re-hearing was denied as untimely filed although timely if the prison "mailbox rule" is applied.

////

Underlying Facts, Cont'd:

Question III-Ineffective Trial Counsel

This claim was dismissed pursuant to 28 U.S.C. 2244(d)(1)(D) as untimely filed even though it was not reasonably discoverable until after petitioner received his trial records from his appellate attorney three months after his appeal because final. Appendix F, pp. 10-11. See Question V, infra.

Notwithstanding the demonstrated error by the Distritc Court as to timeliness, the petitioner showed that (1) the prosecution had the petitioner's FAA flight record ipad required for commercial pilots to maintain; (2) it was in the items seized by the police on 6/23/14 after petitioner's arrest. This ipad would have shown that as a commercial pilot, during the times of the crimes, he was either out of the immediate area where the crimes allegedly occurred, ferrying planes around the country and out of state, and occasionally out of the country. (3) Petitioner's employment records would have corroborated his whereabouts and when.

Added to this, when the alleged crimes occurred, Shyann Galindo, the only non-recanting victim, moved five miles away from petitioner, any visits with petiitoner were two hours long only, in public places, and with Kylie and Chelsea Stoykovich, the two recanting witnesses, and only when he was available, not sick or injured, and could travel. EXHIBIT 5 to the FAP. (Petitioner's Declaration and attachments.)

Petitioner did not know the police had his ipad so he could not tell his attorney about it, nor did his counsel ever ask him where he was when the crimes were committed before trial or afterwards. And, only at trial was it learned that the alleged crimes occurred after July, 2011

Underlying Facts, Cont'd:

Question 3, Cont'd:

through approximately December 2012. The record shows, per Shyann Galindo's trial testimony, that the Galindo's residence changed in April, 2011 to a location five miles away four months before the alleged crimes occurred. Yet, none of these facts were brought out until after the trial because petitioner's counsel did not confer with his client or investigate anything. See: FAP Exhibits 5, (petitioner's declaration, Exhibit 25, (Investigator's statement of 12/12/17).

Thus, between petitioner's job and flights and the five miles that the alleged victim lived away from petitioner, her father's trial testimony limiting the visits to two hours, FAP Exhibit 24, (Eric Galindo testimony), petitioner's illnesses in over half of 2012, Exh. 5 to FAP, his whereabouts and alleged contacts with the alleged victims raise grave doubts as to the verdict had the trial court jury heard this evidence.

Although within the duty of trial counsel to investigate, had he done so, he would not have discovered the victims' parents, and specifically, Merlina Stoykovich. Although a citizen of this country, both her parents and her husband's were children of Russian emigrees of the Soviet Union, who in turn imparted upon their progeny an in-born fear of the police, the state, and persons who appeared to act as agents of the state system, in this case Michelle Galindo nee Eddy. See: FAP Exhibits 30, 31, 33 and 26. Michelle Eddy intimidated them into silence by threates of actions taking her children away, violence, and an appearance of being an agent working with the police, telling them to hide from defense investigators and not speak to anyone. Out of fear they did not.

Underlying Facts, Cont'd:

Question III, Cont'd:

None of this came out until after the trial was over, first in a motion for a new trial, Exhibits 26-29, then in further investigative interviews. Exhibits 30, 31, 33 to FAP. Merlina Stoykovich believed that Michelle Eddy was a police agent. Id.

In sum, this claim was dismissed as untimely filed by the state and district court pursuant to the AEDPA because of facts hidden by the state and frightened, intimidated witnesses. The uniqueness of these facts compels this petition be granted and the matter remanded to the lower courts in the interests of justice.

QUESTIONS IV, V -Ineffective Appellate Counsel/Due Process

As shown by Appendix B, pp. 2-3, this claim was deemed untimely filed by the state appellate court using an incorrect calculus and the death penalty filing limits to a non-capital case, already condemned by this court. Further the state petition was denied on its merits with no evidentiary hearing by the California Supreme Court.

This incorrect state calculus led to the district court finding that the AEDPA "goal posts" for the one-year filing date were moved some five months backward, making every claim filed after January2, 2018 fell afoul of the AEDPA untimely thus improperly filed procedural bar, holding that this decision was unassailable under 28 USC 2244(d)(2). Appendix F pp. pp. 10-12; 18-21.

The District Court further mis-states the record stating that the petitioner's family exhorted appellate counsel to file a state habeas after the appeal was over. A fair viewing of the record and the dates of the emails between counsel and petitioner's family clearly shows

Underlying Facts, Cont'd:

Questions IV, V, Cont'd:

the requests for counsel to file a state habeas petition with the direct appeal based on FAP Exhibits 26-30 and Exh. 5, and not afterwards as posited by the District Court. Appx F, pp. 18-21.

Here, both the Magistrate Judge who, with 20/20 judicial adroitness and myopic precision, opined appellate counsel's excuses for not filing a petition with the direct appeal (it would jeopardize the direct appeal) and ordered petitioner not to file any petition until after the direct appeal was over as non-prejudicial so as to warrant equitable tolling, and after twisting the record, the district court confirmed the ruling.

Hence, the questions: as the court decisions below imbue the layman petitioner with no legal exposure to the legal system or education, the knowledge and legal acumen to know that counsel's advice and orders were wrong, something he clearly does not have, or the skill to file in pro se during the direct appeal process, it would seem that the duty to file a habeas petition was incumbent upon appellate counsel rather than dodge it when the evidence discovered would have pilloried trial counsel and the prosecution, as shown by Exhibits 30-33. And particularly when the petitioner is time-barred for a belated investigative efford to adduce the same evidence; counsel's efforts would also have uncovered during the direct appeal.

Quite simply again, petitioner was procedurally barred for failure to be able to do what appellate counsel was duty-bound to do - and didn't. Therefore this petiiton should be granted to give the petitioner the hearing Due Process says he is entitled to.

**Underlying Facts, Cont'd:**

**Question VI:** Brady Violation/Due Process

The real issue is whether a Prosecutorial Misconduct/Brady violation can be procedurally barred as untimely and therefore improperly filed so as to bar federal habeas relief under the AEDPA when the delay is the result of the intentional suppression by the prosecution.

When the petitioner was arrested in June, 2014, a search of his house produced an ipad which the prosecution ultimately received. It was, as described earlier, an FAA log which petitioner, a commercial pilot was required to keep and maintain. It contained the date/time, duration of each flight, including stops for refueling, layovers, destinations, type of aircraft flown, and hours flown. From this, petitioner's whereabouts at any time he was at work was documented, whether in the air, at home base or anywhere he went to and from his home base, during the time period between July 1, 2011 and December, 2012. Employment records would also have confirmed his whereabouts.

This ipad still remains in the hands of the state prosecutor. It was listed in a lengthy list of items seized given to the defense on the eve of trial. Petitioner did not know that the ipad had been seized. However, the prosecution saw its contents, knew that it would wholly undermine their case (especially knowing that at least two of the alleged victims were lying about being molested) and did not turn it over to the defense. This was discovered when the appeal was over and returned to petitioner three months after his appeal became final in September, 2016 when his appellate counsel gave him his legal papers and transcripts.

Also discovered in the post-appeal investigation was the cell phone of Kylie Stoykovich, also seized when petitioner was arrested but afterwards during a police interview. The prosecution ended up with it in 2013. The phone contains (??) numerous emails between Kylie and Shyann Galindo urging Kylie to falsely charge petitioner with molesting her so that Shyann would not be mistreated by her step-mother Michelle Galindo nee Eddy. They show these emails dating back before petitioner was arrested. The existence of these emails and Kylie's phone did not come to light until Kylie's post-appeal interview of 7/15/17, FAP Exhibit 32.

In the 7/15/17 interview, Kylie stated that the prosecutor said that if she did not change her testimony, he would give the phone back to her after the trial. He also told her not to mess with the emails.

The evidence just from this phone substantiates that the three alleged victims were being put up to testifying falsely by Michelle Eddy and that there was a plan to "frame" the petitioner by Eddy. At the very least it impeaches the testimony of star witness Shyann Galindo, and her mother Michelle Eddy.

When combined with the ipad, the cumulative effect of these items before a jury, already dis-satisfied with the evidence, Appendix C, would more than likely aquitted petitioner.

However, the district court found this claim untimely under the AEDPA and the state court finding that the claim was untimely filed less than six months after it was discovered. It could not be found out earlier because noone but Kylie and the prosecutor knew the cell phone existed.



(??) Texts

Underlying Facts, Cont'd:

Ground VI, Cont'd:

The real question is whether petitioner's procedural default of this claim under an erroneously applied state procedural rule may be excused when the procedural default is the result of state action and not petitioner's fault. Here it should be. An earlier discovery or investigation would not have been productive.

Ground VII - Due Process

The district court and Ninth Circuit denials of the Certificate of Appealability deny the petitioner Due Process where the denials quote 28 U.S.C. 2253(c)(2) but state that no substantial denial of a fundamental constitutional right was made. Appendix G.

Here, Ground One, juror misconduct, was ultimately denied on the merits with no evidentiary hearing or rebuttal of the presumption of prejudice by the state, even though the juror herself stated in her statement (sworn) that the unadmitted evidence did negatively "sway" her verdict to guilty. Appendix C. The question posed to the Ninth Circuit was whether Ground One was dismissed where the juror's affidavit shows misconduct and prejudice and was unrefuted by the state, where no evidentiary hearing was held. The balance of the claims revolved on the procedural bar imposed by the state except for Ground 6, ineffective appellate counsel.

There, Ground Six was procedurally barred by the state and District Court under 28 U.S.C. 2244(d)(1)(A) and 2244(d)(1)(D) and 2244(d)(2) for state court untimeliness and AEDPA untimely ifled rule. This Ground was undiscoverable until the state's highest court had ruled on both the direct appeal and FAP. Here, the reeord shows petitioner's appellate

Underlying Facts, Cont'd:

Ground VII, Cont'd:

counsel refused to file a petition for habeas corpus with the direct appeal on his professional opinion that the evidence in the 2014 and 2015 interviews of the Stoykovich family would not support a habeas petition, but the Magistrate Judge and District Court deemed these interviews more than adequate, Appendix F, pg 15, lines 3-5, then procedurally barred the petitioner for obeying appellate counsel's advice and orders not to file a petition during the direct appeal. Again, this schism between counsel and court illustrates the satiation of the "cause and Prejudice" test for petitioner's procedural default.

If petitioner could have relied upon the 2015-2015 interviews to file a pro se petition against counsel's orders, counsel's professional opinion to the contrary supports a claim of ineffectiveness. The rule of leniency set forth in Slack v McDaniel, (2000) 529 US 473 and Miller-El v Cockrell, (2005) 537 US 322, 328 was ignored.

Ground VIII - Due Process

The issue is whether a state court in habeas denies relief as an untimely filing and that decision deemed unassailable and the "end of the matter" Pace v DiGugliemo, (2005 544 US 408, 414,417 for purposes of dismissal under 28 U.S.C. 2244(d)(2), is a federal habeas petitioner allowed to challenge the state decision when it is clearly erroneous under 28 U.S.C. 2254(e)(1) and rebut the presumption of correctness as a matter of due process.

////

////

In Pace, the petitioner filed several habeas petitions out of time before his final petition was rejected by the state. The state court cited In re Reno, (2012) 55 Cal 4th 428 and Inre Sanders, (1999) 21 Cal 4ht 697. 703 for the proposition that petitioner's first and only state petition was untimely and an abuse of the writ process, relying on a casuistic mis-representation of the facts.

Both of these cases were death penalty cases employing the two-year time constraint for timely habeas filings, both cases citing In re Robbins, (1998) 18 Cal 4th 770. In Martin v Walker, (2011) 562 US 301 this court rejected California's use of death penalty cases in non-capital cases, citing Carey v Saffold, (2002) 536 US 214, 210-220 and relying on thefiling within "a reasonable time" standard. In Evans v Chavis, (2006) 546 US 189, this court determined that a 30-60 day delay between petition's in state court once the intial filing was timely was "reasonable." In Martin, supra, a petition was deemed filed within a "reasonable" time period if filed within the 12-month AEDPA limit in 28 U.S.C. 2244(d)(1) and within the 12-month period after denial of direct appellate review. The state appellate court's rendition of the delay, "The petition, filed more than three years after he was sentenced and nearly two years after the judgment was affirmed on appeal without an adequate explanation for the delay is barred as untimely. In re Sanders, (1999) 21 Cal 4th 697, 703."

The record belies this finding as petitioner's first state habeas was found timely filed by the District court. **Appx. F, pg. 10, Lines 3-5.** That is, it was filed within the 1-year time period of 28 U.S.C. 2254(d).

////

In fact, the District Court noted that the original state habeas was filed one week before the deadline. Id, and, only 14 months after the end of the direct appeal. (June 14, 2016 - August 10, 2017). The state court's calculus is clearly erroneous based on the record and federal court finding. Id.

This said, did the district court err in accepting the state court calculation, erroneous as it is, where petiitoner's opposition clearly demonstrated with the record just how erroneous the state court's finding was. The petitioner shows that his filings in both state and federal court were as diligent as possible and within the elastic "reasonable time" standard. Therefore, notwithstanding the District Court employing a due diligence bar under 28 U.S.C. 2244(d)(1)(D), described ante @ pg. 13-14, 28 U.S.C. 2254(e)(1) would appear to allow a state court untimeliness finding and bar to be challenged when it appears that the state court finding is arbitrary and unsupported by the record as a matter of due process, in rebuttal to 28 U.S.C. 2244(d)(2) dismissal.

////

////

////

////

////

////

////

////

## REASONS FOR GRANTING THE PETITION

This petition should be granted as it is necessary for this court to exercise its supervisory powers. This necessity arises when, as here, the inflammatory and revulsive nature of the charges and conviciton appear to evoke otherwise latent biases and prejudices in otherwise objective courts and jurists that produced, in this case, flawed decision making and opinions thta radically skew or depart from both circuit law and controlling precedents of this court to uphold an otherwise quite unsafe verdict when juxtaposed with the habeas corpus evidence record and trial record.

As posed in Questions I and II, the state and federal court opinions denying a juror misconduct claim on the merits where a juror plainly says that her verdict was "swayed" toward guilt based on extraneous material introduced into the jury room at the start of deliberations without an evidentiary hearing or evidence rebutting the prejudice presumption by the state or reference to the record showing the absence of prejudice literally abandons reliance on this court's holdings in Pena-Rodriguez v Colorado, (2017) ___US___; 137 S.Ct. ___ 197 L.Ed2d 107; Wellons v Hall, (2000) 558 US 220, 224, Remmer v United States, (1954) 341 US 229, and Remmer v United States, (1956) 350 US 327 (Remmer II). **Appx. B; Appx. F.**

The opinions at **Appx. B** and **Appx. F @ pp-35-37**, also diametrically conflict with circuit law holdings in Godoy v Spearman, 861 F.2d. 956, 961-969 (9th cir. 2017)(en banc)(collecting cases); Dyer v Calderon, 151 F.3d. 970, 974-975 (9th cir. 1995)(en banc), supporting and quoting both Remmer and Remmer II, supra, for the proposition that the state must produce evidence in the record that clearly refutes the presumption, or failing that, issue the writ in absence of any issue of fact to be decided. Godoy, supra, pg. 968 (citing Texas Dept. of Community Affairs

v Burbine, (1981) 450 US 248, 251; Caliendo v Warden, California Mens Colony, 365 F.3d. 691, 697.

And, where the state state denies relief on the merits by stating there is no prejudice and any error is harmless wihtout an evidentiary hearing, shifts the burden of proof to the petitioner to prove prejudice which, if upheld, creates a separate paradigm to guide decisions in cases like this one or other rather inflammatory matters. In short, this court need to re-establish and remind the lower courts that the question (of Due Process) "is not whether guilt may be spelt out of the record, but whether guilt has been found by a jury according to...standards appropriate for criminal trials." Bollenbach v United States, (1964) 326 US 607, 615-617. And, had the jury seen what is proffered by the petitioner in his habeas petition, the extraneous materials issue would have been moot and he would have been found not guilty of anything.

***

Questions III through VI arise where, as demonstrated in Appendice F, petitioner is procedurally defaulted from rulings on the merits on Grounds 2 (ineffective trial counsel), Ground 3 (prosecutorial misconduct (Brady issue), Ground 4 (Due Process-cumulative error/fair trial), Ground 6 (ineffective Appellate Counsel) because he himself did not file a pro se habeas petition in conjunction with his direct appeal after his appellate attorney warned him not to and ordered him to wait until after the direct appeal was over, then delayed returning his court documents and papers for three months after the appeal became final predicated on a state procedural bar erroneously imposed.

////

In a narrow exception to a state court procedural default of federal claims doctrine of Coleman v Thompson, (1991) 501 US 722, 731-732, this court opined in Martinez v Ryan, 132 S.Ct. 1309 (2012)that a petitioner could show the "cause" element of the "cause and actual prejudice" exception, Coleman, supra, 501 US 753, by showing that the cause for the default was attributable to something external to petitioner and not attributable to him.Id. Attorney ignorance or inadvertence was not "cause" for excusing a procedural default. Id.

In Martinez, this court ruled that in a collateral proceeding, where appellate counsel failed to raise an ineffective trial counsel claim, the petitioner must show that the underlying ineffective trial counsel claim "is a substantial one" meaning that it must show that it has merit. Id. 132 S.Ct. 1309, 1318, and that appellate counsel's failure to raise the ineffective trial counsel claim was an error "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment and cause the petitioner prejudice".Id. 1318-1319 citing Strickland v Washington, (1984) 466 US 668, 687.

Thus, this court held that a state procedural default in state court will not bar federal habeas relief or federal court from hearing a substantial claim of ineffective trial counsel if, in the initial collateral hearing..."counsel in that proceeding was ineffective."id. 132 S.Ct. 1320. The reviewing court must then determine whether appellate counsel in the first proceeding was ineffective under Strickland, uspra and whether the underlying trial counsel claim is both substantial and there was actual prejudice." Id. 1321.

////

The petitioner's state habeas petition that was procedurally barred contains every element required to state a claim under Martinez and meet the exception to the Coleman v Thompson, supra, doctrine, in Grounds Two (ineffective trial counsel failure to investigate/raise alibi defense where evidence readily available) and Ground Six (ineffective appellate counsel (failure to file habeas with direct appeal raising ineffective trial counsel), where California law condemns failure to investigate and presnet alibi defense as prejudicially ineffective trial counsel under Strickland v Washington, supra. People v Ledesma, (1987) 43 Cal 3d 170, 217, 222.

Hence, a hearing of this petiiton is necessary for two reasons: one as a matter of strong public policy habeas petitions should be decided on their merits in the first instance; two, as a matter of Due Process and to conserve judicial resources, the district court' failure to rule on the merits and instead procedurally bar Grounds Two, Three, Four and Six of the FAP when Martinez, supra, excuses the bar to reach the merits when all the element are met, makes a pro se petitioner re-file again in the lower courts under Martinez, when the issues could have been ruled on in the first instance. Therefore, this court should exercise its supervisory powers and institute a rule requiring district courts to decide ineffective trial counsel claims in accordance with Martinez v Ryan, supra, in pro se petitions especially, without an ipsimmis verbis invocation of Martinez, supra where the elements are present in the petition and supporting papers and record however inartfully worded.

/////

This petition should be granted and heard to rectify an absolute travesty and miscarriage of justice of the First order of Magnitude. Question VI raises the spectre of the State suppressing evidence to prevent an otherwise innocent person from proving that innocence, a practice condemned by this court in a veritable catalogue of opinions, including Kyles v Whitley, (1995) 514 US 419, 434-437, Youngblood v Virginia, (2006) 547 US 867, 869-870 and Chambers v Mississippi, (1973) 410 US 284, 302.

As posited ante, the state seized an FAA ipad containing flight records of petitioner, a commercial pilot ferrying various aircraft across the state, the contiguous 48 states, and occasionally Canada and Mexico during the period he was allegedly committing the crimes of which he was/is convicted. It undermined the prosecutions entire case and would have impeached the star witness, Shyann Galindo.

The police also seized the alleged victim Kylie Stoykovich's phone when she was interviewed and gave it to the prosecution. On the phone were a series of emails sent before petitioner was arrested from Shyann Galindo hectoring Kylie and her sister Chelsea, to lie and falsely accuse petitioner of molesting them so Shyann's father would not beat her. As Exhibit 32 to the FAP showed, the prosecutor coerced Kylie to lie on the stand if she wanted her cell phone back. This was discovered 7/15/17, three years after the trial, and time-barred as untimely.

As Appendix C and D, show, had the jury heard any of this information, the plot by Shyann's mother to frame petitioner would have been exposed, the testimony of the prosecution witnesses would have been impeached, leaving the verdict quite unsafe and any confidence in it undermined. Kyles v Whitley, supra, 514 US 419, 433-434; c.f. Strickler v Green, (1999) 527 US 263, 281-282. The prejudice suffered is nearly

palpable. Indeed, when taken in its totality, Kyles v Whitley, supra, the evidence and record shows a near-complete repudiation of Due Process by the state, particularly when the evidence given by Merlina Stoykovich in Exhibits 30 and 31 to the FAP shows the prosecutor using Michelle Galindo nee Eddy to coerce the then-barely teenage alleged victims into testiyfing falsely, even after the Stoykovich children told the prosecutor that they were lying to the police. That, and her statement that in a change meeting with Michelle Eddy and Eric Galindo in Walmart several months before the trial, Eddy and Galindo admitted that they ahd lied to the police about petitioner's molestations but had to stick with it "because what was done was done." (quoting Eric Galindo). Thus, this petition should be granted and this case remanded back for a re-trial.

*****

Question VII's answer again requires that this petition be granted and the case remanded back to the lower ocurts. The text of Appendix G when addressing the jury misconduct issue, revisits the same claim of error in Wellons v Hall, (2000) 558 US 220; 130 S.Ct. 727, 735-736. The Wellons court, addressing the issue of an AEDPA procedural bar of a jury misconduct matter where no evidentiary hearing was held in the courts below, opined that it was "error to dismiss a petition the dismissal was based aprtially, or possibly wholly on procedural bars, or on the merits without an evidentiary hearing, where the merits denial is based on speculation or ocnjecture because no evidentiary hearing was held despite the petitioner's repeated requests." Id. 130 S.Ct. 735-736.

Indeed, the Ninth Circuit's sagely held in Earp v Ornowski, 431 F.3d 1158, 1169-70 (2005), citing Wellons v Hall, supra, that in the absence

////

////

of an evidentiary hearing in a jury misconduct case where credibility is an issue, that:

> "It would be bizarre if a federal court had to defer to state court factual findings made without an evidentiary record in order to decide whether it coud create an evidentiary record to decide whether the (state)factual findings were erroneous ...the AEDPA does not require such a crabbed and illogical approach." 431 F.3d. 1170, citing Wellons v Hall, supra, 130 S.Ct.735-736.

The Wellons court remanded the case back to the Eleventh Circuit for a hearing to determine whether the petitioner was entitled to an evidentiary hearing on the issue of a juror's credibility.

This case requires a remand, in the very least for an evidentiary hearing on whether the juror was actually prejudiced, even though she says her veridct was "swayed" by the extraneous material introduced at the start of deliberations. If taken at face value, the juror's statement requires a new trial. In all events, the rejection of the COA on the basis of the AEDPA, 28 U.S.C. 2254(d)(1) simply fails to apply, either incorrectly or not at all, Mattox v United States, supra, 146 US 149-150, Remmer v United States, supra, 347 US 229-230, and Buck v Davis, (2017) 197 L.ed2d 1, 5-6 in an objectively reasonable manner.

The issue further requires the need for granting this petition where as here, a second Magistrate attempted to correct the error of the state's attorney ~~by~~ OF failing to object to the jury misconduct issue on the merits despite being ordered to do so, arguing the merits in the second Report and Recommendation. Compare: APPX. F, pp. 17,26, with pp. 36-37. In so doing, the court simply re-stated the same reasons for the denial as posed by the state court: "The entire phone was admitted as evidence without restriction." The record belies this finding. Therefore, this petition should be granted and a remand back ordered.

Question 8 necessitates granting this petition to resolve an apparent tenison between the decisions, Carey v Saffold, supra, 536 US 219-221, Pace v DiGugliemo, supra 544 US, 414,417, wherein once a state court declares a state habeas petition untimely, that is "the end of the matter." Pace, supra; Saffold, supra, and 28 U.S.C. 2254(e)(1), which allows a petitioner to rebut a state court finding by "clear and convincing evidence."

Both the Pace and Saffold courts dealt with late petitions over the AEDPA 1-year deadline by months and years and dismissed under 28 U.S.C. @@$$(d)(2), where the state courts also denied them as untimely. In this case, the first state petition was filed some seven days before the 1-year deadline and after being timely filed under Evans v Chavis, supra, in the appellate court (less than 60 days) the appellate ocurt declared the petition untimely using a clearly erroneous calculus and standard.

Under Pace and Saffold the petitioner has no recourse to correct the error even though his petition was timely under the correct calculus, thereby removing the state procedural bar which triggered the federal court's dismissing Grounds 2-6 under 28 U.S.C. 2244(d)(2).

The petitioner urges this court to grant this petition and clarify whether such state court errors can be reviewed by the federal courts when the initial state habeas filing date is timely under the AEDPA under 28 U.S.C. 2254(e)(1) or whether the Coleman doctrine precludes federal review because the "cause" is state court error.

////

////

////

////

## C O N C L U S I O N

**This petition should be granted in the interests of justice.**

DATED: November 8, 2021

Respectfully submitted,

Paul J. Hultman, AV3602