No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH MARTIN DANKS,

Petitioner,

vs.

RONALD BROOMFIELD,
Warden of California State Prison at San Quentin,

Respondent.

On Petition for Writ of Certiorari to
the Court of Appeal for the State of California

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

In re: Joseph Danks CDC# E-66310	)	HC # 16213A
	) ORDER DENYING PETITION) FOR WRIT OF HABEAS CORPUS	

A Petition for Writ of Habeas Corpus was originally filed by Joseph Danks ("Petitioner") with the California Supreme Court on September 11, 2011 ("Current Writ"). After the California Supreme Court requested such, an Informal Response ("IR") was filed by the Department of Corrections and Rehabilitation ("CDCR") on December 9, 2011. Petitioner filed a Reply to the IR on June 22, 2012, along with additional exhibits.

The Current Writ was transferred to this Court on May 29, 2019.

On November 4, 2020, Petitioner filed more additional exhibits with this Court in support of the Current Writ regarding an involuntary medication proceeding in February 2020 involving Petitioner.

This Court entered several orders extending the time for this Court to issue a ruling with the last order designating September 28, 2021 as the deadline for the Court to rule upon the Current Writ.

In this Current Writ, Petitioner raises seven claims. His requests for relief seek to have his 1993 conviction and death sentence, based upon Petitioner's action in killing his cellmate in September 1990, entered in Kern County case number 44842 ("KC Case") vacated.

Claim 7 and the Associated Request for Relief is Not Ripe.

In the alternative, relating to Claim 7, Petitioner seeks the issuance of an order prohibiting Petitioner's execution on the basis of the nature, severity and effect of his chronic and incurable mental disorder. Petitioner seeks an order determining that Petitioner is incompetent to be executed under *Ford v. Wainwright*, (1986) 477 U.S. 399. However, Claim 7, and this alternative request for relief, is not ripe for consideration by the courts.

A current death warrant is necessary before the claim that an execution would violate a Petitioner's Eighth Amendment rights because he is not competent to be executed is not ripe. This position was recently reiterated in the United States Ninth Circuit Court of

Appeals May 21, 2021 opinion in the case of *Pizzuto v. Tewalt*, (9th Cir. 2021) 997 F.3d 898, 900 – 901, wherein the Court stated:

> "We agree that the issuance or lack of a death warrant is important (perhaps crucial) to determining ripeness in the context of other challenges to executions. When a prisoner claims that his execution will violate the Eighth Amendment because he is not competent to be executed, that claim becomes "'unquestionably ripe' only after it [is] clear that he 'would have no federal habeas relief for his conviction or his death sentence, and the Arizona Supreme Court issue[s] a warrant for his execution.'" *Beardslee v. Woodford*, 395 F.3d 1064, 1069 n.6 (9th Cir. 2005) (per curiam) (quoting *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998)). But that is because a *Ford* claim depends on the mental competence of the prisoner at the time of his execution. *See Ford v. Wainwright*, 477 U.S. 399, 406–07, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); *In re Campbell*, 874 F.3d 454, 460 (6th Cir. 2017) (per curiam) ("Under [*Ford*], the road from sanity to insanity ordinarily being a one-way street, a sentence of death—although legally pronounced—cannot legally be carried out."). Without a death warrant or some other indicator of the execution date, the court does not know what the petitioner's mental competence will be at the time of execution, and any judgment it makes would be entirely hypothetical. *See Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009) (per curiam) ("[T]he facts to be measured or proven [in a *Ford* claim] — the mental state of the petitioner at the time of execution—do not and cannot exist when the execution is years away."). Thus, the issuance of a death warrant is essential to the ripeness of a *Ford* claim because only at that point does a *Ford* claim become concrete. *Cf. Jones v. Kelley*, 854 F.3d 1009, 1013 (8th Cir. 2017) (per curiam) (noting that the ripeness rule for *Ford* claims "does not necessarily extend to all claims that an inmate is unfit to be executed")."

A court-ordered moratorium on executions has been in place in California since February 2006, when a federal judge declared that California's lethal injection protocol was unconstitutional. The last execution in California was over 15 years ago and in January of 2006. New execution protocols had been under review but have since been withdrawn.

On March 13, 2019, California Governor Newsom signed an Executive Order putting a moratorium on executions as long as he is in office. Even if Governor Newsom were to be removed from office in the upcoming elections, the new execution protocols would still need to be reviewed and enacted before any death warrants would be issued. Such events are unlikely to occur within a short period of time. It could be years before the issue of whether Petitioner's mental competence is such that his execution would violate his Eighth Amendment right to be free of cruel and unusual punishment.

Petitioner commenced an action in the United States District Court for the Eastern District of California ("Federal Action") (Case #1:11-cv-00223). This same issue, labeled as Claim 36 in the Federal Action, seeking an adjudication as to whether Petitioner was mentally competent to be executed, was addressed by the District Court in ruling upon a

motion filed by Petitioner on September 20, 2011. In the order entered on October 14, 2011, the District Court held that under both federal and state law, the issue of whether a defendant is mentally competent to be executed cannot be determined until the defendant's execution date has been set, citing to the cases of *Panetti v. Quarterman*, (2007) 551 U.S. 930, 943, and *People v. Leonard*, (2007) 40 Cal.4th 1370, 1430–31 in support. Claim 36 was dismissed from the action as premature. (*Danks v. Martel*, (2011) 2011 WL 4905712).

Claim 7 and the request for the issuance of an order prohibiting Petitioner's execution on the basis of the nature, severity and effect of his chronic and incurable mental disorder is denied as not being ripe for adjudication.

Prior Actions Initiated by Petitioner and Relevant Court Rulings and Events.

After Petitioner was sentenced to death in the KC Case, an automatic appeal was presented to the California Supreme Court on April 2, 1993 (case #S032146) ("KC Case Appeal"). Petitioner's death sentence was affirmed by the California Supreme Court on February 2, 2004 and an amended opinion was entered April 14, 2004. (*People v. Danks*, (2004) 32 Cal.4th 269). The United States Supreme Court denied a petition for certiorari on November 1, 2004. (*Danks v. California*, (2004) 543 U.S. 961).

On December 8, 2003, Petitioner filed his first Petition for Writ of Habeas Corpus with the California Supreme Court raising 32 claims for relief ("2003 Writ").

On September 15, 2010, the California Supreme Court denied the 2003 Writ denying all 32 claims for relief on the merits and also denying Claims 2, 5, 8, 10, 17, 20, 23, and 28 on the grounds that they could have been, but were not, raised on appeal citing *In re Dixon*, (1953) 41 Cal.2d 756, 759. Except to the extent it alleged ineffective assistance of counsel, Claim 15 was also ruled to have been forfeited because Petitioner failed to raise it in the trial court citing *In re Seaton*, (2004) 34 Cal.4th 193, 200.

Shortly thereafter, and on February 9, 2011, Petitioner initiated the Federal Action (United States District Court for the Eastern District of California Case #1:11-cv-00223).

The Federal Action raised 37 claims for relief, which included the 32 claims set forth in the 2003 Writ plus claims of constitutional violations for jury instructional errors and deprivation of Petitioner's right of self-representation (Claims 31 through 35) and Claim 36, regarding Petitioner's incompetence to be executed under *Ford*, mirroring Claim 7 in the Current Writ, which is addressed above.

After the denial of the 2003 Writ, and while the Federal Action was pending, the United States Supreme Court rendered the decision in *Brown v. Plata*, (2011) 563 U.S. 493, which concluded that the medical and health care provided to California inmates fell below standards of decency that inhere in the Eighth Amendment. The *Plata* decision affirmed that the reduction of prisoners was an appropriate remedy to reduce overcrowding and to improve the delivery of medical and mental health care to California

inmates. The period covered by the decision included the period of time when Petitioner killed his cellmate - September 1990.

Another relevant event occurred on September 1, 2011. An order was entered by the California Office of Administrative Hearings granting the petition of the California Department of Corrections and Rehabilitation ("CDCR") for the administration of involuntary anti-psychotic medication to Petitioner pursuant to the case of *Keyhea v. Rushen*, (1986) 178 Cal.App.3d 526.

The Current Writ was filed with the California Supreme Court just a few weeks later and on September 13, 2011.

On September 14, 2011, just a day after the Current Writ was filed, Petitioner filed a motion in the Federal Action seeking to hold federal proceedings in abeyance during the pendency of Petitioner's State Court exhaustion petition, which was then pending before the California Supreme Court but is now before this Court as the Current Writ. The District Court was made aware of the Current Writ and the claims made therein.

In ruling on this abeyance motion, in an order entered on October 14, 2011, the District Court held that Claims 31 through 35 in the Federal Action had not been exhausted through presentation in the State Court and were untimely brought in the Federal Action. However, the District Court requested additional briefing on the issue of whether the claims could relate back. As indicated above, Claim 36, addressing the issue of whether Petitioner was competent to be executed, was dismissed as premature.

After receiving the further briefing, in an order entered on November 9, 2011, the District Court held that the Federal Action would be held in abeyance for Claims 1 through 37, Claim 36 was dismissed as premature, and that the allegations that Petitioner's equal protection rights under the Fourteenth Amendment were violated, as alleged in Claims 31 and 33, were held to be not yet exhausted.

Effectively, the District Court's determination was that all but Claims 31 and 33 brought by Petitioner in the Federal Action were previously resolved in the 2003 Writ or were dismissed as premature. In Claim 31 Petitioner asserted the trial court erroneously submitted to the jury six counts of prior-murder special circumstances and, in Claim 33, Petitioner argued the trial court violated his Eighth Amendment rights when it failed to instruct the jurors that they did not have to unanimously agree on mitigating circumstances in order to consider them. There are no claims included in the Current Writ regarding the allegations raised in Claim 31 or Claim 33. Therefore, the resolution of the Current Writ will not result in the exhaustion of these claims.

Claim for Relief in the Current Writ.

The Current Writ presents seven claims for relief as follows:

> Claim One: The alleged capital crime was the direct and avoidable result of the State's wanton violation of the Eighth and Fourteenth Amendments.

Claim Two: The trial court unreasonably denied Petitioner the assistance of a qualified expert to evaluate his need for medication.
Claim Three: The trial court repeatedly and unconstitutionally failed to conduct adequate inquiry, suspend criminal proceeding, and determine Petitioner's incompetency to stand trial.
Claim Four: Petitioner was in fact mentally incompetent to stand trial.
Claim Five: Trial Counsel's prejudicially deficient performance at all stages of the proceeding deprived Petitioner of his right to the effective assistance of counsel and to the fair and reliable determination of competency to stand trial, guilt and penalty.
Claim Six: Petitioner did not knowingly, intelligently, and voluntarily make an implicit or explicit waiver of his constitutional rights at any stage of the capital case investigation of criminal proceedings.
Claim Seven: Petitioner's execution is barred by *Ford v. Wainwright.*

All of the claims in some way relate to the mental state of Petitioner, either just prior to the killing of Petitioner's cellmate, Walter Holt, during the trial in the KC Case, or currently.

Claim 7 has been determined by this Court to be premature and is therefore denied as explained above. The other six claims were already brought forth in the 2003 Writ and denied on the merits with some claims also denied on multiple grounds. The District Court in the Federal Action has also confirmed that these claims were already adjudicated in the denial of the 2003 Writ.

Therefore, as explained in further detail below, unless Petitioner can demonstrate a basis for bringing these claims yet again, the Current Writ could be denied as successive or an abuse of the writ for which there is a procedural nondiscretionary bar. (*See*, *In re Gay,* (2020) 8 Cal.5th 1059 citing *In re Clark,* (1993) 5 Cal.4th 750, 769–774).

For Many Years There has Been a Procedural Bar for Successive Claims in Writs – The *Waltreus* Rule.

It has long been the rule that a claim raised in a petition for writ of habeas corpus is procedurally barred when the claim was raised and rejected on direct appeal (*In re Waltreus,* (1965) 62 Cal.2d 218) or the claim was raised in a prior Petition for Writ of Habeas Corpus and denied (*In re Miller*, (1941) 17 Cal.2d 734).

The procedural rules applicable to habeas corpus petitions are "a means of protecting the integrity of our own appeal and habeas corpus process" (*In re Robbins,* (1998) 18 Cal.4th 770, 778, fn. 1) and vindicate "the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments" (*Id.* at p. 778).

The general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that

remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction. (*Ex Parte Dixon*, (1953) 41 Cal. 2d 756, 759).

"Successive petitions ... waste scarce judicial resources as the court must repeatedly review the record of the trial in order to assess the merits of the petitioner's claims and assess the prejudicial impact of the constitutional deprivation of which he complains." (*In re Clark,* (1993) 5 Cal.4th 750, 770).

This rule that successive Petitions for Writ of Habeas Corpus are procedurally barred was the law at the time of the filing of the Current Writ in September 2011. Shortly thereafter, the California Supreme Court again discussed the existence of these procedural bars regarding a Petition for Writ of Habeas Corpus in connection with a capital case in the case of *In re Reno*, (2012) 55 Cal.4th 428 as follows:

> "Given the ample opportunities available to a criminal defendant to vindicate statutory rights and constitutional guarantees, and consistent with the importance of the finality of criminal judgments, this court has over time recognized certain rules limiting the availability of habeas corpus relief. Sometimes called "procedural bars" (see, e.g., *In re Martinez* (2009) 46 Cal.4th 945, 950, fn. 1, 95 Cal.Rptr.3d 570, 209 P.3d 908; *In re Lawley, supra,* 42 Cal.4th at p. 1239, 74 Cal.Rptr.3d 92, 179 P.3d 891; *People v. Kelly* (2006) 40 Cal.4th 106, 121, 51 Cal.Rptr.3d 98, 146 P.3d 547; *Jackson v. Roe* (9th Cir. 2005) 425 F.3d 654, 656, fn. 2), these rules require a petitioner mounting a collateral attack on a final criminal judgment by way of habeas corpus to prosecute his or her case without unreasonable delay, and to have first presented his or her claims at trial and on appeal, if reasonably possible. Strict limits exist for claims not raised in a litigant's first habeas corpus petition. These rules establish what the high court, addressing a similar issue, described as "a background norm of procedural regularity binding on the petitioner" (*McCleskey v. Zant, supra,* 499 U.S. at p. 490, 111 S.Ct. 1454), and permit the resolution of legitimate claims in the fairest and most efficacious manner possible. Untimely claims, or claims already presented to this court and resolved on the merits, are as a general matter barred from consideration."

In re Reno, (2012) 55 Cal.4th 428, 452.

The California Supreme Court in *In re Reno* confirmed that such procedural bars continue to exist, even in capital cases, noting that the California Supreme Court has never condoned abusive writ practice or repetitious collateral attacks on a final judgment. Entertaining the merits of successive petitions is inconsistent with the recognition that delayed and repetitious presentation of claims is an abuse of the writ. It is the policy to deny an application for habeas corpus which is based upon grounds urged in a prior petition which has been denied, where there is shown no change in the facts or the law substantially affecting the rights of the petitioner. (*See, In re Reno*, (2012) 55 Cal.4th 428, 455).

In the case of *In re Reno*, (2012) 55 Cal.4th 428, the California Supreme Court established some ground rules for exhaustion petitions in capital cases seeking to speed the consideration of them without unfairly limiting petitioners from raising justifiably new claims. The *Reno* Court first noted that legal claims that have previously been raised and rejected on direct appeal ordinarily cannot be re-raised in a collateral attack by filing a petition for a writ of habeas corpus. This has come to be known as the *Waltreus* rule since it arose in the case of *In re Waltreus,* (1965) 62 Cal.2d 218.

It is the rule that a Petition for Habeas Corpus based on the same grounds as those of a previously denied petition will itself be denied when there has been no change in the facts or law substantially affecting the rights of the petitioner. (*In re Miller*, (1941) 17 Cal.2d 734, 735).

The basis for applying the *Waltreus* rule in capital cases was further discussed by the California Supreme Court in the *In re Reno* opinion as follows:

> "In a capital case, a detailed and comprehensive *first* state habeas corpus petition serves an important purpose, for courts can rest assured that, between the trial, the appeal, and the habeas corpus petition, the defense has had ample opportunity to raise all meritorious claims, the adversarial process has operated correctly, and both this court and society can be confident that, before a person is put to death, the judgment that he or she is guilty of the crimes and deserves the ultimate punishment is valid and supportable. Indeed, a system of justice that does not allow for the fair and timely presentation of claims of innocence or the absence of fair procedure would lack credibility. . . . Any such justification for tolerating a detailed and comprehensive first petition all but disappears for second and subsequent petitions in this court. Absent the unusual circumstance of some critical evidence that is truly "newly discovered" under our law, or a change in the law, such successive petitions rarely raise an issue even remotely plausible, let alone state a prima facie case for actual relief. In the 18 years since *In re Clark, supra,* 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729, experience has taught that in capital cases, petitioners frequently file second, third, and even fourth habeas corpus petitions raising nothing but procedurally barred claims."

In re Reno, (2012) 55 Cal.4th 428, 457-458.

There are Exceptions to the *Waltreus* Rule.

The traditional rules governing the handling of successive petitions have distinguished between the presentation of newly available claims and the presentation of claims that could have been raised earlier. The law limited only the latter, forbidding consideration of repetitive or pretermitted claims except in a few, narrowly defined circumstances. (*In re Friend*, (2021) 11 Cal.5th 720.

The California Supreme Court also acknowledged, in the case of *In re Reno*, (2012) 55 Cal.4th 428, four exceptions to the *Waltreus* rule which had developed in the courts:

(1) Where the issue constitutes a fundamental constitutional error; that is, where the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process;
(2) Where the judgment of conviction was rendered by a court lacking fundamental jurisdiction, described as an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties;
(3) Where the court acted in excess of its jurisdiction, such as when it imposes an illegal sentence; and,
(4) When there has been a change in the law affecting the petitioner.

Although not labeled as such, it is this fourth exception (claiming there has been a change in the law affecting Petitioner) that Petitioner is attempting to invoke in this matter.

Petitioner is also contending that the unusual circumstance of some critical evidence that is truly "newly discovered" prevents this Current Writ from being a successive petition.

Petitioner contends that two changes, which occurred in the year 2011 and after the adjudication of the 2003 Writ, justify the filing of the Current Writ and prevents it from being deemed untimely, successive, and repetitive: (1) the change in the law pursuant to the decision in *Brown v. Plata,* (2011) 563 U.S. 493 and (2) the change in the facts based upon the adjudication in 2011 of Petitioner as mentally incompetent and requiring involuntary medication.

Proposition 66's Additional Successiveness Petition Restrictions.

The *Waltreus* Rule was the law of the land when, on November 8, 2016, the voters passed Proposition 66, the "Death Penalty Reform and Savings Act of 2016". Proposition 66 introduced new restrictions on the presentation of habeas corpus claims in what the measure refers to as "successive" petitions. Individuals who file successive petitions must show they are actually innocent or ineligible for the death penalty before courts may consider the merits of their claims. Proposition 66 added *Penal Code §1509(d)* which modified these traditional rules by further narrowing the circumstances under which courts may consider repetitive or pretermitted claims in capital cases.

Penal Code §1509(d) provides:

"[A] successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is . . . . ineligible for the sentence. . . .
"Ineligible for the sentence of death" means that circumstances exist placing that sentence outside the range of the sentencer's discretion. Claims of ineligibility include a claim that none of the special circumstances in subdivision (a) of *Section 190.2* is true, a claim that the defendant was under the age of 18 at the time of the crime, or a claim that the defendant has an intellectual disability, as defined in *Section 1376*. A claim relating to the sentencing decision under *Section*

190.3 is not a claim of actual innocence or ineligibility for the purpose of this section."

Penal Code § 190.2(a) provides:

> The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under *Section 190.4* to be true: . . .
> (2) The defendant was convicted previously of murder in the first or second degree.

In this case, Petitioner received the death sentence due to the special circumstance that he had previously been convicted of six murders in the LA Case. In the Current Writ, Petitioner is not claiming that this special circumstance of his prior murder convictions is untrue and, therefore, this basis for "ineligibility for the sentence of death", as defined in *Penal Code §1509(d),* is not applicable.

In 1990, when the killing of Petitioner's cellmate took place, Petitioner was not under the age of 18 and, therefore, that basis for "ineligibility for the sentence of death", as defined in *Penal Code §1509(d),* is also not applicable.

Finally, the claim that the Petitioner has an intellectual disability as the basis for his "ineligibility for the sentence of death", as defined in *Penal Code §1509(d),* has also not been raised by Petitioner.

Penal Code § 1376(a)(1) provides:

> "As used in this section, the following definitions shall apply:
> "Intellectual disability" means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the end of the developmental period, as defined by clinical standards."

None of the seven claims in the Current Writ contend that Petitioner suffers from an "intellectual disability". Petitioner had been tested in 1989 or 1990 and scored as being of average intelligence. His claims only raise the contention that Petitioner is "mentally incompetent". Mental incompetency is discussed in *Penal Code § 1367* and not in *Penal Code § 1376*.

Therefore, none of the three stated basis for excusing a petition from being labeled as successive in *Penal Code §1509(d)* exists for the Current Writ. If those basis were the only options, the Current Writ would be labeled as a successive petition and then must be denied under *Penal Code §1509(d)*.

Penal Code §1509(d) also includes the description of a claim which specifically does not qualify as a claim for "ineligibility for a sentence of death". A claim relating to the sentencing decision under *Section 190.3* is not a claim of "ineligibility".

Penal Code § 190.3 provides:

> "If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, . . . the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole."

Petitioner's claim in the Current Writ that he should have received a term of life without the possibility of parole instead of a death sentence, thereby questioning the sentencing decision of the jury under *Penal Code § 190.3*, was addressed in the 2003 Writ and, therefore, under *Penal Code §1509(d)* this claim is specifically labeled as a successive claim.

If Proposition 66 was to be read so as to replace and supersede the *Waltreus* Rule and the "newly discovered" claim exception to the *Waltreus* Rule, the Current Writ would have to be dismissed as successive under *Penal Code §1509(d).*

The Case of *In re Friend* Maintains the *Waltreus* Rule And the "New Claim" Exception.

The California Supreme Court considered the additional restrictions on successive petitions in capital cases enacted under Proposition 66 in the case of *In re Friend*, (2021) 11 Cal.5th 720, (modified September 1, 2021). In the *Friend* decision, rendered on June 28, 2021, the California Supreme Court held that Proposition 66's successiveness restrictions did not limit the consideration of claims that could not reasonably have been raised earlier, such as those based on newly available evidence or on recent changes in the law. It was held that such "newly discovered" claims had not previously been thought subject to successiveness limitations, under the exception to the *Waltreus* Rule, and the Court held that Proposition 66 did not change the analysis. Thus, under the law as amended by Proposition 66, habeas corpus petitioners must make a showing of actual innocence or death ineligibility if they seek a second chance to make an argument they could have made earlier. However, no such requirement applies to the habeas petitioner who raises a newly available claim at the first opportunity.

The *Friend* Court noted:

> "When we have barred a claim as 'successive,' it is because we have concluded that the claim was omitted from an earlier petition without justification, and its presentation therefore constitutes abuse of the writ process. We have not, by contrast, considered the filing of a claim that could not have reasonably been raised in an earlier petition to be an abuse of the writ subject to the bar on successive petitions."

In re Friend, (2021) 11 Cal.5th 720, 732 (modified September 1, 2021).

In the Current Writ, Petitioner is unable to sustain an argument that he is death ineligible under *Penal Code §1509(d).* However, even after the enactment of Proposition 66, pursuant to the *Friend* decision, he still has available to him the newly discovered evidence and changes in the law exceptions to the *Waltreus* Rule so as to avoid the determination that his claims are successive.

The Standard for Determining Whether There is Newly Discovered Evidence.

Effective January 1, 2017, the California legislature amended *Penal Code §1473* to permit claims of innocence based upon either false evidence presented at trial, or claims of newly discovered evidence pointing toward innocence. In particular, *Penal Code §1473(b)(3)(A)-(B)* permits habeas corpus petitions based upon newly discovered evidence which was presented without delay, and which is of such decisive force to create a probability of a change in the outcome.

Previously claims based upon newly discovered evidence had to so fundamentally undermine the prosecution's case and not merely cast doubt upon it. (*In re Lindley*, (1947) 29 Cal.2nd 709, 723). The evidence had to result in reduced culpability. (*In re Gonzalez*, (1990) 51 Cal.3d 1179, 1246).

With the amendment of *Penal Code §1473*, there is a relaxed standard for presentation of newly discovered evidence. *Penal Code Section 1473(b)(3)(A)* now provides that a Writ of Habeas Corpus should issue when "[n]ew evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial."

New evidence is defined as "evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching." (*Penal Code § 1473(b)(3)(B).*)

The California Supreme Court revisited the analysis of *Penal Code Section 1473(b)(3)(A)* after the 2016 amendment in the case of *In re Masters*, (2019) 7 Cal.5th 2054, 1081. The Supreme Court found no reason to expound on the standard which is clearly stated in the Code itself that habeas corpus relief based on newly discovered evidence may be granted when "[n]ew evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial." (*Penal Code § 1473(b)(3)(A).*)

The standard as stated in the amended *Penal Code Section 1473(b)(3)(A)* is that the new evidence must be "of such decisive force and value that it would have more likely than not changed the outcome at trial." This statement of the standard needs no further clarification.

The Writ will be granted upon the claim of new evidence only if the evidence is (1) new, (2) credible, (3) material, (4) presented without substantial delay, and (5) of such decisive force and value that it would have more likely than not changed the outcome at trial.

"New evidence" means only evidence (1) which could not have been discovered prior to trial by the exercise of due diligence, and that is (2) admissible and (3) not merely cumulative, corroborative, collateral, or impeaching.

The Alleged "New Claims" Presented in the Current Writ.

Petitioner contends that two changes which occurred in the year 2011 after the adjudication of the 2003 Writ which justifies the filing of the Current Writ and prevents it from being deemed untimely, successive, and repetitive: (1) the change in the law pursuant to the *Plata* decision and (2) the change in the facts based upon the adjudication of Petitioner as mentally incompetent and requiring involuntary medication.

The issue of Petitioner's mental health was admittedly addressed in Petitioner's appeals of his conviction and sentence in the KC Case and also in the 2003 Writ. However, Petitioner asserts the Current Writ is not a successive or abusive petition for writ of habeas corpus because the Current Writ is based upon "new" law and "new" facts on this issue.

The "new" law which Petitioner asserts provides grounds for relief in the Current Writ is the ruling on May 23, 2011 by the United States Supreme Court in the case of *Brown v. Plata,* (2011) 563 U.S. 493, which concluded that the medical and mental health care provided to California inmates fell below standards of decency that inheres in the Eighth Amendment. *Plata* affirmed District Court decisions that the reduction of prisoners is an appropriate remedy to reduce prison overcrowding and improve the delivery of medical and mental health care to California inmates. The period covered by the *Plata* opinion covers the time period of Petitioner's confinement when he killed his cellmate, Walter Holt.

The "new" facts asserted by Petitioner arose out of the investigations and hearings conducted in the year 2011 by the California Office of Administrative Hearings regarding a petition of the CDCR for the administration of involuntary anti-psychotic medication to Petitioner. The petition was filed by the CDCR on July 7, 2011, pursuant the *Keyhea v. Rushen,* (1986) 178 Cal.App.3d 526, following an incident in which Petitioner threatened a female correctional officer who attempted to deliver his food. Petitioner claims the testimony provided in connection with this matter provided "new" evidence that there is a direct connection between Petitioner's mental illness and his threatening and aggressive statements and behaviors.

Petitioner contends that the "new" case law combined with "new" facts results in the conclusion that the homicide on which the KC Case conviction was based was the direct foreseeable and avoidable consequence of the indifference to Petitioner's need of minimal medical, psychiatric and other clinical assessment and treatment, thus,

Petitioner's conviction and sentence to death was rendered in violation of his right to be protected from cruel and unusual punishment and government misconduct in not providing Petitioner with the treatment he needed.

Petitioner's Violent Criminal History.

As noted by the United States District Court for the Eastern District of California in the Federal Action:

> "Danks had an extensive history of violence since his January 20, 1987 arrest for those offenses, which history was introduced during the penalty phase trial of the Holt murder trial, including violence against other patients at Atascadero State Hospital when he was being evaluated for competence to stand trial for the six Los Angeles murders, stabbing another inmate at CCI while he was awaiting trial for the Holt murder, harboring numerous "homemade" shanks and weapons in his cell at CCI, setting fire to his CCI cell, and assaulting a CCI correctional officer. Also, at his trial, he inflicted multiple stab wounds on one of his defense attorneys and testified at penalty proceedings he would stab the other defense attorney if given the opportunity. These attacks on his attorneys were not introduced as aggravating evidence, but the jurors did observe some of his violence towards his attorneys."

Danks v. Martel, (2011) 2011 WL 4905712.

Petitioner had suffered two felony drug convictions in 1984 and 1985 but appeared to have no prior criminal charges before then. In 1986, Petitioner had pled guilty to possession of a short-barrel rifle and was placed on probation but absconded within two weeks.

It was believed that Petitioner was a serial killer and that he stabbed numerous elderly transients, particularly in the area of Los Angeles known as "Koreatown" in December of 1986 and January of 1987 and he was arrested on January 20, 1987.

In an interview with LA detectives after his January 20, 1987 arrest, Petitioner described stabbing victims while they slept, dug through garbage, fought with others, or simply walked along. He did not know any of the people he stabbed. Petitioner indicated the incidents were not serious because the victims were "bums" or "transients." "It ain't nothing, man, three or four bums. I don't see what the big f---ing deal is, what the big f---ing deal is, man." Petitioner did not believe anyone had died from his actions.

Petitioner was charged with six counts of murder in the first degree in the LA Case.

During the LA Case proceedings Petitioner was declared incompetent to stand trial and was transported to Atascadero State Hospital. While there another patient was found to have had sustained numerous puncture wounds, and was "covered in blood from his eyebrow down to his belt." Petitioner stated he first tried to suffocate the patient but he was able to break free and, therefore, Petitioner stabbed him with a pencil. Petitioner said

he was trying to stab him in the heart, but the pencil broke, and at that point he began to stab him in the face area. Petitioner also said he was trying to kill the patient, but when the pencil broke, he attempted to poke out his eyes. The staff indicted that after the incident Petitioner seemed irritated because he did not kill the other patient. Petitioner was charged with violence against other patients.

Eventually, Petitioner plead guilty in the LA Case to six first degree murder counts and was sentenced to six life terms or more specifically to 156 years to life. Petitioner was approximately 28 years of age at the time.

It was the conviction in the LA Case, which created the special circumstances leading to a death penalty charge in the KC Case.

After his conviction in the LA Case, Petitioner began serving his life sentences at California Correctional Institution ("CCI") in Kern County. On September 21, 1990, at approximately 1 a.m., Petitioner gained the attention of the staff and advised them "I murdered my cellie."

As recounted by the California Supreme Court in the KC Case Appeal affirming the sentence, Petitioner made two additional statements early that same morning describing the killing. In his first statement, which one of the interrogating officers wrote down as Petitioner spoke, Petitioner said, "They put me in with this guy and I was just sitting there. [H]e went up to bed. I waited 3 [hours]. I ripped off the thick part of the sheet [and] put it around his head and neck. [T]hen I pulled on the sheet with both hands. Then he went out for a second. [T]hen he said what the f---. [H]is hands flew up in my face and neck. Then I kept squeezing. I felt his heart pulsating. I kept squeezing till it stopped then put a knot in the sheet. [T]hen I got down and got another piece of sheet. [W]ent back up to his bed put [it] around his neck and put it around my foot for a pulley and pulled it real tight and held for awhile. [T]hen I waited from 10:00 until the officer came by at I think at 12:30. [T]hen I told the officer I think I killed my cellie." After this statement was written down, Petitioner continued to talk with the officers for eight to ten minutes. He told them that "he was on a mission from God to take and to kill these transients." He also made "a statement to the effect that he was supposed to kill old people." Petitioner felt he was God's own voice on earth. Petitioner was excited, very eager to talk, and perspiring profusely.

In his second statement, which was tape-recorded, Petitioner stated that he had decided to kill his cellmate (he did not know Mr. Holt's name) as soon as he was put in Mr. Holt's cell between 5:00 and 6:00 p.m. that evening. "The reason I did it, is because they charged me with six murders in the L.A. County Jail. They were all ... trumped up charges, they were fake charges. I didn't kill anybody. I confessed to what I did. They insisted that they charge me with murder, so I sit in the cell. So finally, they screwed me around and gave me a stupid deal, instead of ... giving me the death penalty. They gave me a dumb deal for six life sentences, consecutive. And I figured well, if I ever get a chance to kill somebody, I'll just kill them.... Just so they know that I really finally did kill somebody. Even if it was just an old man." Petitioner felt "nothing" after the murder.

When the topic of sharing a cell in the future came up, Petitioner said, "I'd like to be in a cell with somebody, it would give me somebody to talk to."

Further investigation indicated that Petitioner's cellmate, Mr. Holt, had been strangled to death with a bed sheet strip. Mr. Holt, age 67, had only been placed in Petitioner's cell merely several hours previously. Petitioner's assault and killing of Mr. Holt lead to the initiation of the KC Case.

As recounted above, even before charges were filed in the KC Case, Petitioner admitted to committing the offense of killing his cellmate and allegedly stated words to the effect that since he was serving six life terms for murders he did not commit, he might as well actually commit a murder. Petitioner also claimed he was on a mission from God to kill transients and old people.

Petitioner also later committed other crimes, some violent, while he was incarcerated.

On November 12, 1991 a stabbing weapon was found hidden in Petitioner's mattress at CCI. On January 23, 1992 Petitioner stabbed another inmate with a piece of metal so that it protruded from his head above his eye. January 26, 1992, Petitioner set fire to personal papers and newspapers in his cell. April 17, 1992 three inmate-manufactured stabbing weapons were found in Petitioner's cell. On May 12, 1992 a single-edge razor blade, an approximately three-inch-long copper wire, and an approximately six-inch-long sharp metal weapon were found in Petitioner's cell. After an incident which occurred on July 12, 1992, Petitioner was found guilty of assaulting a CCI correctional officer.

Also, during his trial in the KC Case, Petitioner inflicted multiple stab wounds on one of his defense attorneys and testified at penalty proceedings he would stab the other defense attorney if given the opportunity.

Petitioner's Mental Health History Presented in the Trials.

The subject of Petitioner's mental state *was investigated and litigated in both the LA Case and the KC Case.*

In these cases it was determined that Petitioner had a long history of mental illness dating to his childhood years. Throughout his life he has exhibited evidence of ongoing mental health problems. Petitioner had contact with mental health practitioners since his adolescent years.

In the LA Case it was alleged in substance that Petitioner was a serial killer and that he stabbed numerous elderly transients, particularly in the area of Los Angeles known as "Koreatown". Within nine days of Petitioner's arrest for the Los Angeles homicides, he was referred for psychiatric evaluation in the County Jail Out-Patient Unit for mentally-ill prisoners, and subsequently diagnosed with a psychotic disorder, admitted to the In-Patient Unit, placed in four-point physical restraints, and administered psychotropic medication. Petitioner's adjudicatory competency became the primary focus of pretrial

proceedings. Petitioner experienced extreme agitation as the result of delusional beliefs that his attorney was working against him and conspiring with the police. His inability to cooperate rationally with his attorney quickly triggered multiple inquiries into his adjudicatory competency. Petitioner's psychosis-related behaviors were so disruptive that the trial judge attempted to control them by having Petitioner muzzled in the courtroom.

During the LA Case proceedings, numerous mental health experts treated and evaluated Petitioner. In the LA Case proceedings, Petitioner showed evidence of serious mental illness and he was found to be mentally incompetent pursuant to *Penal Code Section 1368*. Petitioner was transferred for a time to Atascadero State Hospital for treatment. He was thereafter found to be competent and transferred back to Los Angeles County for further proceedings in the LA Case. After being re-transferred back to Los Angeles County Jail, Petitioner suffered a serious reaction to medication and nearly died.

After his conviction in the LA case, due to his worsening mental health, Petitioner was transferred back to Atascadero State Hospital, where he remained from June 1989 to March 1990. While housed there, he was diagnosed with paranoid schizophrenia and antisocial personality disorder following a psychiatric evaluation. Petitioner also underwent a neurological examination for a suspected cyst in his brain, however, no such thing was found.

After undergoing treatment, his mental state improved and Petitioner was transferred out of the hospital on August 23, 1990 to serve his life sentence at CCI. Less than a month later Petitioner murdered Walter Holt.

One of Petitioner's initial trial counsel in the KC Case knew from the very beginning of the KC Case that Petitioner's mental health was going to be an issue in the case. He review six boxes of materials related to the LA Case, which included records regarding Petitioner's mental health and investigated the possibility of entering a plea of not guilty by reason of insanity. In a motion to continue the preliminary hearing date of January 30, 1991, Petitioner's counsel in the KC Case expressed his opinion that an evaluation of Petitioner's mental competence needed to be completed.

A trial strategy in the KC Case was an attempt to strike the special circumstances arising from a guilty plea to six murders in the LA Case. KC Counsel investigated and sought discovery regarding the LA Case because he believed early on that those six prior convictions of murder could be challenged. KC Counsel stated his opinion was that the guilty pleas were entered by Petitioner while he was not mentally competent and while he was represented by a conflicted counsel, among other grounds. KC Counsel also knew that Petitioner had assaulted his LA Counsel more than once, that the Petitioner had been heavily medicated when the LA Case plea agreement was entered, and that Petitioner had been found mentally incompetent at one point during the LA Case.

The primary issue which was litigated at the guilt phase of the KC Case was whether Petitioner was sane at the time of the offense.

In the KC Case, two psychiatrists were retained to evaluate and test Petitioner's relative to sanity, competency. The first psychiatrist evaluated Petitioner in October 1991. That evaluation was not fruitful or satisfactory. Petitioner personally objected to this person. Petitioner had consistently indicated an unwillingness to cooperate in undergoing and submitting to mental evaluations. Therefore, a second psychiatrist was retained and the newly appointed psychiatrists reviewed records and met with Petitioner in January of 1992.

At trial in the KC Case lay and expert witnesses testified about Petitioner's bizarre behavior, obsession with cleanliness (hence, his loathing of "bums" in Los Angeles), paranoia about having his prison food adulterated, and sadistic ideations. Expert mental health witnesses testified to numerous and varied descriptions: average range of intelligence (I.Q. of 106), severe thought disorder, paranoid schizophrenia, antisocial personality disorder (ASPD), sociopathic tendencies to lie and manipulate, history of polysubstance abuse, afflicted with delusions, easily controlled by schizophrenic delusions because ASPD left him with a dearth of internal controls, "a happy camper" when he was in his sickness because he was full of exotic violent themes and wishes to kill, the belief that he was righteously performing murders, the desire to follow and harm disadvantaged people, organic brain damage, no organic problems, that his competence to be tried could be maintained as long as he was medicated with Haldol (antipsychotic medication), that he was a continuing homicidal threat, even on Haldol. (*Danks v. Martel,* (2011) 2011 WL 4905712).

In other words, there were multiple and contradictory opinions by experts as to the mental state of Petitioner presented in the KC Case and whether medication effect his state of mind and return his potential towards violent behaviors. The issue of Petitioner's mental state at the time of the crime and during the KC Case proceedings was clearly addressed at the time of these proceedings.

At the trial in the KC Case, several of Petitioner's family members testified as to behavior during his early years, including Petitioner's mother Karen. She provided the following information:

> "In 1977, Karen was advised by a Dr. Franks that defendant was suffering from "some sort of psychiatric disturbance." Beginning in 1979, when defendant was 16 years old, until 1982, defendant hitchhiked for extended periods of time. When he was 16, he was arrested in Mexico, and his release was negotiated by Edward Whyte. During the years 1979–1982, defendant also began to wash dishes he took out of the cupboard before he would use them, and once moved all of Karen's wall hangings from eye level to the ceiling. In May 1982, defendant made unusual statements, such as "Ronald Reagan smokes 10,000 weeds a day," and accused his mother and aunt of printing counterfeit money. He also said that his grandparents, all of whom were deceased, had spoken to him. In October 1982, defendant walked into a New Jersey elementary school in shredded clothes. Upon his return to Michigan, defendant would go out in the backyard and start screaming at someone not visible to Karen to "shut up." At some point, defendant

> asked Karen to take him to the road so he could leave. She did so, and then persuaded him to get back into the car. Defendant said, "It won't stop. I've got to set myself on fire. I got to kill somebody so I can go to prison for the rest of my life." In October 1982 Karen had defendant involuntarily committed to a psychiatric hospital. After approximately two weeks he was given grounds access and left the facility. He was found in Florida and placed in a psychiatric institution there. As in Michigan, however, defendant walked away from the facility. In late 1983, defendant lived with Karen for a couple of months. According to Karen, he "was still bizarre" and carried a knife for protection."

People v. Danks, 32 Cal.4th 269.

Several people in the KC Case also spoke of Petitioner's concern with his cleanliness and the fact he liked clean people and clean things dating back to the early 1980s. Petitioner was also concerned about other people being out to get him or poison him and was reluctant to eat prepared food.

Petitioner even introduced testimony at the KC Case trial apparently intended to demonstrate that prison officials should have been on notice regarding his violent character prior to the killing of Walter Holt. Such testimony included a prison guard who said while in LA central jail in 1987 Petitioner could be described as follows:

> "He was always extremely paranoid. He would say the system is railroading him. He would say his attorneys are against him.... [T]he whole system was out to get him.... Then an hour later, he would admit to" stabbing people, but say "I didn't kill those guys." Defendant said his food was poisoned, "that somebody is in the kitchen excreting in his food. He would state Burt Reynolds, Johnny Carson is down there, I know they're excreting in my food, and I want to pick my own tray." "It was practically a daily thing." Defendant would clean his cell on his hands and knees with a toothbrush an average of six to 10 times a day. "It was the cleanest cell I've ever seen." He believed he was being brainwashed by the music broadcast in the jail."

In connection with the Petitioner's Petition for Writ of Habeas Corpus filed on September 14, 2011 with the United States District Court for the Eastern District of California (Case #1:11-cv-00223) it was noted by his counsel that Petitioner's "diagnosis is schizophrenia, paranoid type. He also suffers from antisocial personality disorder, Hepatitis C viral infection, and Crohn's disease. He has a documented history of mental illness symptoms dating back to before he arrived on Condemned Row. He has required psychiatric hospitalizations in state psychiatric facilities. For several years, he has presented as disorganized, paranoid, agitated, threatening, and hostile. He frequently yells racial slurs and profanities from his cell for hours on end. He consistently refuses to speak with mental health clinicians, attend mental health appointments, or discuss medication treatment options. He also suffers from consistent delusions. Examples of his delusional topics include government, media, and prison conspiracies". (*Danks v. Martel*, (2011) 2011 WL 4905712).

There has Not Been a Change in the Law Affecting the Petitioner.

Not all changes in the law afford a petitioner the ability to file another Petition for Writ of Habeas Corpus and avoid a finding that it is successive and a dismissal. The exception to the *Waltreus* Rule regarding a change in the law only excuses those changes which affect the petitioner. (*In re Reno*, (2012) 55 Cal.4th 428).

The "new" law which Petitioner asserts provides his grounds for relief in the Current Writ is the ruling on May 23, 2011 by the United States Supreme Court in the case of *Brown v. Plata,* (2011) 563 U.S. 493. Petitioner contends this opinion concluded that the medical and mental health care provided to California inmates fell below standards of decency that inheres in the Eighth Amendment. In fact, *Brown v. Plata* merely affirmed District Court decisions that found that the reduction of prisoners is an appropriate remedy to reduce prison overcrowding and improve the delivery of medical and mental health care to California inmates. The period covered by the *Brown v. Plata* opinion covers the time period of Petitioner's confinement when he killed his cellmate, Walter Holt.

The *Brown v. Plata* opinion however, also addressed the findings in the case of *Coleman v. Wilson,* (1995) 912 F. Supp. 1282, a 1995 United States District Court Eastern District of California decision that found that California mentally ill inmates risked harm as a result of the gross systemic deficiencies of the CDCR.

The *Coleman v. Wilson* holding was summarized as follows:

> "Coleman involves the class of seriously mentally ill persons in California prisons. Over 15 years ago, in 1995, after a 39–day trial, the Coleman District Court found "overwhelming evidence of the systemic failure to deliver necessary care to mentally ill inmates" in California prisons. *Coleman v. Wilson*, 912 F.Supp. 1282, 1316 (E.D.Cal.). The prisons were "seriously and chronically understaffed," *Id.*, at 1306, and had "no effective method for ensuring ... the competence of their staff," *Id.*, at 1308. The prisons had failed to implement necessary suicide-prevention procedures, "due in large measure to the severe understaffing." Id., at 1315. Mentally ill inmates "languished for months, or even years, without access to necessary care." *Id.*, at 1316. "They suffer from severe hallucinations, [and] they decompensate into catatonic states." *Ibid.* The court appointed a Special Master to oversee development and implementation of a remedial plan of action."

Brown v. Plata, (2011) 563 U.S. 493, 506.

The remedies ordered in the *Coleman v. Wilson* decision for such gross systemic deficiencies included the development and implementation of protocols and the appointment of a special master. The *Brown v. Plata* decision rendered in the year 2011 noted that these prior remedies had not proven effective and determined that overcrowding was the primary cause of the violation of the prisoners' constitutional rights. The Supreme Court concluded that a court-mandated population limit was

necessary to remedy the violation of prisoners' constitutional rights. The *Brown v. Plata* decision merely provided that the deficiencies highlighted in the *Coleman v. Wilson* decision could be remedied by a reduction in the prison inmate population.

The *Coleman v. Wilson* decision was rendered eight years prior to the filing of Petitioner's 2003 Writ and, therefore, any law set forth in that opinion is not "new" so as to provide an exception to the *Waltreus* Rule. The District Court's conclusion that there was "overwhelming evidence of the systemic failure to deliver necessary care to mentally ill inmates" in California prisons was in existence at the time of the filing of the 2003 Writ and, therefore, does not qualify as "new law".

Petitioner has also failed to explain how the *Brown v. Plata* personally affected him. *Brown v. Plata* affirmed that reducing prison overcrowding was an appropriate remedy for below standards of decency of the medical and mental health care provided to California inmates. However, as pointed out in the dissent to that opinion written by Justice Scalia, the litigations did not involve individual claims as a result of the bad medical system in California prisons but merely a claim that the prison medical system was so defective that some number of prisoners will inevitably be injured by incompetent medical care. *Brown v. Plata,* (2011) 563 U.S. 493, 552. Therefore, the *Brown v. Plata* opinion itself does not provide a personal connection by Petitioner to the decision so as to allow the application of the exception to the *Waltreus* Rule.

The Current Writ does not contain an allegation that there was a lack of medication and treatment for Petitioner that was caused by overcrowding of the prison facility. There is an allegation that the recommendation of the judge in LA Case that Petitioner be placed in the CDCR's psychiatric facility in Vacaville was "disregarded". However, Petitioner does not contend that the decision to send Petitioner instead to a regular prison was due to any overcrowding at Vacaville.

In this case, Petitioner claims that his need for mediation to quell his aggressive behavior should have been noticed prior to Petitioner killing Walter Holt. He appears to be making an argument for a quasi-malpractice claim for failing to properly diagnose and treat Petitioner rather than a limitation of resources.

Petitioner's own expert noted that Petitioner's medical chart reasonably informed "any competent clinician" of the necessity to administer neuroleptic medication to prevent Petitioner from being a danger to himself or others. Obviously the medical chart evidenced that Petitioner was receiving care, even in the overcrowded prison. Petitioner simply asserts that the doctors treating Petitioner did not prescribe the proper treatment in the form of neuroleptic medication.

Any changes in the law effectuated by the case of *Brown v. Plata,* (2011) 563 U.S. 493, did not so affect Petitioner so as to be considered "new" law allowing for the application of an exception to the *Waltreus* Rule. Petitioner had no personal connection to the ruling.

The "New Evidence" Does Not Undermine the Conviction of Petitioner.

"New evidence" means only evidence (1) which could not have been discovered prior to trial by the exercise of due diligence, and that is (2) admissible and (3) not merely cumulative, corroborative, collateral, or impeaching.

The Writ will be granted upon the claim of new evidence only if the evidence is (1) new, (2) credible, (3) material, (4) presented without substantial delay, and (5) of such decisive force and value that it would have more likely than not changed the outcome at trial.

The "new" facts asserted by Petitioner arose out of the investigations and hearings conducted in the year 2011 by the California Office of Administrative Hearings regarding a petition of the CDCR for the administration of involuntary anti-psychotic medication to Petitioner. The petition was filed by the CDCR on July 7, 2011. Petitioner claims the testimony provided in connection with this matter provided "new" evidence that there is a direct connection between Petitioner's mental illness and his threatening and aggressive statements and behaviors. Petitioner goes so far to say that this evidence substantiates the claim that had Petitioner been properly medicated in 1990 Walter Holt would not have been killed.

The evidence is "new" in that it could not have been discovered prior to the trial by the exercise of due diligence. The testimony in the year 2011 opining the there is a connection between Petitioner's mental illness and his threatening and aggressive statements and behaviors is based upon information accumulated in the twenty years since Petitioner killed Walter Holt while Petitioner has been incarcerated and under observation. In the late 1980s and early 1990s this long history of observation Petitioner was not available. Petitioner had been arrested in January 1987 and Walter Holt was killed in September 1990.

However, the evidence is not "new" in that the testimony opining about Petitioner's mental illness and possible connection to his threatening and aggressive statements and behaviors would have been cumulative. There was plenty of evidence presented in the KC Case trial regarding Petitioner's mental state, including expert testimony.

As recounted in the opinion *People v. Danks*, (2004) 32 Cal.4th 269,

> "Five defense experts (three psychiatrists and two psychologists) described defendant, as severely ill mentally, suffering from paranoid schizophrenia. He complained that certain well-known entertainers were "in the kitchen excreting in his food." He was convinced that the Mayor of Los Angeles, the Governor of California, and the President of the United States all conspired against him. He thought people watched him through the television set. He talked of conversations with his dead grandparents, and said his mother printed counterfeit money in her basement. He insisted that the homeless men he had killed were not really dead, and he felt compelled to clean his jail cell with a toothbrush six to 10 times a day. In short, the defense presented compelling evidence that defendant, although not

> legally insane at the time of the offenses . . . , suffered from a mental illness that destroyed his capacity for rational thought."

One more expert's opinion suggesting that if Petitioner had been given medication Petitioner's thought processes might have been better and he would not have acted so aggressively towards Walter Holt would have merely added a nuance to the other experts' positions that Petitioner was not completely mentally stable.

Finally, this "new" evidence is not of such decisive force and value that it would have more likely than not changed the outcome at trial. The penalty phase of the case would not have been different even if it was known that if medicated Petitioner might have acted differently the day he killed Walter Holt. There was overwhelming evidence that Petitioner was a violent person who was intent on continuing his acts of violence.

As recounted in the opinion *People v. Danks*, (2004) 32 Cal.4th 269, Petitioner testified on his own behalf in the KC Case and admitted to his propensity towards violence and his intent to continue his violent acts as follows:

> "I would have pled guilty to this crime the very first day. I would have pled guilty. . . . There would have been no need for you and there would be no need for the money that was spent on this, because, obviously, it was an open and shut case. It is like I was caught red-handed.
> . . . what I'm trying to say is, is that if you leave matches for a little kid to play with, he is going to play with them and burn himself, and I keep finding myself in these types of situations all of the time, and in jail. . . . I'm trying to make it clear that if everything was just so hunky-dory and peachy-keen in prison, why am I being charged with Walter Holt and why did Mr. Dellostritto (defendant's counsel) get stabbed in his face. . . . But what I'm saying is, this court seems to have picked up where God has abandoned us and saying, 'hey, man, we cannot allow someone to run wild out here,' and I did stab them bums in their back, in the back of their neck, in their side while they were laying down, while they were asleep, and I would do it to you too—. . . . Let me rephrase it. Just as I done it to Mr. Dellostritto, I would do it to Mr. Eyherabide (defendant's other counsel) if I had a chance. . . .they sent me to the mental hospital after I practically slit Rodney's throat in the jail. . . . if you are man enough to get into it, be man enough to get out of it, and I guarantee if I spend every last day of my life in prison, it is of no consequence to me, man, either way, and that should be made clear. Because just like in L.A., it was of no consequence. I knew from the day that I got arrested, and it ain't stopped me yet, and I ain't never going to stop, so even if I was to be let out here right now, I ain't going to stop."

Petitioner also testified that he was mentally competent and he believed he should be held accountable for his actions:

> "They are trying to tell you that I'm absolutely crazy and I can't think and all of this.... I'm trying to tell you that I have no problem thinking, functioning ... I have

> no trouble with my faculties. I can read. I can write. I can add, subtract, multiply. I can read my [prison rule handbook]. I can eat my food. I don't shit and piss in my pants, and I don't drool on myself, and it seems to me that they were trying to bring in the psychiatrist and tell you that I'm just a f---ing moron that can't do anything, and that is absolutely incorrect."

Even the Justice who wrote the concurring and dissenting opinion affirming Petitioner's conviction but objecting to the penalty of death noted that the aggravating evidence at the penalty phase was strong. (*People v. Danks*, (2004) 32 Cal.4th 269, 321). The aggravating evidence at the penalty phase included (1) Petitioner's six prior convictions for murdering homeless men, (2) his own testimony that "I would not change a thing I did in my life," and (3) the concession by psychiatrists who testified for the defense that Petitioner was an "extremely dangerous" sadist who derived sexual excitement from killing. *Id.*

The evidence which Petitioner claims as "new evidence" is not as unequivocal and persuasive as Petitioner avers. Petitioner claims that the "new evidence", which was introduced in the 2011 *Kayhea* proceeding addressing the issue of whether the involuntary administration of anti-psychotic medication was appropriate, demonstrates that the medical records back in 1990 indicated Petitioner's need for anti-psychotic medication before Walter Holt's death, that Petitioner's homicidal behavior was a direct result of his un-medicated condition, and that providing Petitioner with medication would have avoided the death of Walter Holt. Petitioner claims that the testimony of the State's psychiatrist in this 2011 proceeding was essentially an admission that if Petitioner had been medicated back in 1990 Walter Holt would not have been killed by Petitioner.

This Court agrees with the finding of the District Court in the Federal Action that Petitioner has exaggerated the concessions that were made in the 2011 *Kayhea* proceeding. The admission that Petitioner suffered from a serious psychotic illness since adolescence and that, in the year 2011, his mental illness was directly connected to his aggressive behaviors, in the year 2011, does not constitute an admission that if Petitioner had been given anti-psychotic medication in 1990 the killing of Walter Holt would have been avoided. This is not a concession that a lack of adequate anti-psychotic medication was the foreseeable cause of Petitioner's killing of Walter Holt. (*Danks v. Martel*, (2011) 2011 WL 4905712).

The 2011 analysis of Petitioner's mental state was that Petitioner had a diagnosis of schizophrenia, paranoid type and also suffered from antisocial personality disorder, Hepatitis C viral infection, and Crohn's disease. For several years prior to July 2011, Petitioner had presented as disorganized, paranoid, agitated, threatening, and hostile. He frequently yelled racial slurs and profanities from his cell for hours on end. He consistently refused to speak with mental health clinicians, attend mental health appointments, or discuss medication treatment options. He also suffered from consistent delusions. In 2011 a direct connection was made between his mental illness and his threatening and aggressive statements and behaviors that occurred in 2011.

The psychiatrist who testified in 2011 had only been treating Petitioner since 2009. Although the psychiatrist reviewed Petitioner's prior medical records he only testified of a severe and persistent psychotic mental illness, schizophrenia, of Petitioner dating back to the duration of his incarceration at San Quentin, which was after the killing of Walter Holt. He did not opine as to Petitioner's mental state at the time of the killing of Walter Holt. The testimony regarding the connection between Petitioner's mental illness and his actions was not regarding a connection with his prior crimes but only the most recent incidents of threatening to hit the correctional officer in the head and spit in her face.

The introduction of evidence that in 2011 Petitioner's aggressive behavior could be controlled by medication would not more likely than not changed the outcome of the imposition of the penalty of death for a crime which occurred in September 1990.

In the case of *In re Reno*, (2012) 55 Cal.4th 428, addressing a nearly identical claim of "new" evidence, the Court found that a more recent psychiatrist's opinion in that case was cumulative to the evidence presented at trial, and reflexed "nothing more than the ability of present counsel with the benefit of hindsight, additional time and investigative services, and newly retained experts, to demonstrate that a different or better defense could have been mounted had trial counsel or prior habeas corpus counsel had similar advantages." *Id. at* 470.

The facts which arose out of the investigations and hearings conducted in the year 2011 by the California Office of Administrative Hearings regarding a petition of the CDCR for the administration of involuntary anti-psychotic medication to Petitioner are not "new" facts nor are they of such decisive force and value that it would have more likely than not changed the outcome at trial.

Conclusion.

Claim 7 in the Current Writ is denied as not being ripe for adjudication.

Claims 1 through 6 in the Current Writ are procedurally barred as successive claims except to the extent an exception to the *Waltreus* Rule applies.

The changes in the law effectuated by the case of *Brown v. Plata,* (2011) 563 U.S. 493, did not affect Petitioner so as to be considered "new" law allowing for the application of an exception to the *Waltreus* Rule.

The facts which arose out of the investigations and hearings conducted in the year 2011 by the California Office of Administrative Hearings regarding a petition of the CDCR for the administration of involuntary anti-psychotic medication to Petitioner do not qualify as "new" evidence because the information is cumulative. This information also fails to provide a basis for the issuance of a Writ of Habeas Corpus under *Penal Code Section 1473(b)(3)(A)* because this information is not of such decisive force and value that it would have more likely than not changed the outcome at trial.

Claims 1 through 6 in the Current Writ are procedurally barred as successive claims.

ORDER

On the basis of the foregoing, the Current Writ is accordingly denied.

Dated: 9/10/21

Brian McNamara
Judge of the Superior Court

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

In re	F083411
JOSEPH MARTIN DANKS,	(Kern Super. Ct. No. HC016213A)
On Habeas Corpus.	**ORDER**

BY THE COURT:[*]

Appellant Joseph Martin Danks's "Request for a Certificate of Appealability" (Pen. Code,[1] § 1509.1, subd. (c)), filed on October 13, 2021, is DENIED.

Appellant's recent habeas corpus petition considered by the Kern County Superior Court sought to vacate his 1993 conviction and death sentence, entered in that court in case No. 44842, based on appellant's killing of his prison cellmate in September 1990. The petition raised seven issues all relating to appellant's mental state either just prior to the murder, during trial, or currently: On September 10, 2021, the trial court found all seven claims successive to and/or unripe for review in denying the habeas petition in a thorough and well-developed trial court decision, and that court did not issue a Certificate of Appealability.

The California Supreme Court previously affirmed appellant's direct appeal in *People v. Danks* (2004) 32 Cal.4th 269, with certiorari denied by the U.S. Supreme Court in *Danks v. California* (2004) 543 U.S. 961. In September 2010, the California Supreme Court denied appellant's first petition for writ of habeas corpus originally filed in December 2003. (Case No. S121004.) Appellant filed the current, second habeas petition in September 2011 with the California Supreme Court, which it later transferred to the Kern County Superior Court for adjudication in May 2019.

The Appellant's Request for Certificate of Appealability to this court raises the same seven claims presented to the trial court:

1. The alleged capital homicide was the direct and unavoidable result of the state's violation of the Eighth and Fourteenth Amendments in wantonly denying appellant adequate medical and psychiatric diagnosis and treatment.

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[*] Before Poochigian, A.P.J., Peña, J. and Snauffer, J.

[1] Further statutory references are to the Penal Code.

2. The trial court unreasonably denied appellant's assistance of a qualified expert to evaluate his need for medication.
3. The trial court repeatedly and unconstitutionally failed to conduct adequate inquiry, suspend criminal proceedings, and determine appellant's incompetency to stand trial.
4. Appellant was in fact mentally incompetent to stand trial.
5. Trial counsel's prejudicially deficient performance at all stages of the proceedings deprived appellant of his right to effective assistance of counsel and to a fair and reliable determination of competency to stand trial, guilt, and penalty.
6. Appellant did not knowingly, intelligently, and voluntarily make an implicit or explicit waiver of his constitutional rights at any stage of the capital case investigation or criminal proceedings.
7. Appellant's execution is barred by *Ford v. Wainwright* (1986) 477 U.S. 399, which prohibits the state from inflicting the penalty of death on a mentally insane prisoner.

On September 10, 2021, the Kern County Superior Court denied appellant's petition for writ of habeas corpus on the grounds claims 1 through 6 were successive habeas claims and that claim 7 was not ripe; the trial court therefore failed to find by a preponderance of the evidence that appellant was actually innocent of the crime of which he was convicted or that he was ineligible for the death penalty, as required to grant relief under section 1509, subdivision (d).

As the Supreme Court recently summarized in *In re Friend* (2021) 11 Cal.5th 720 (*Friend*), "Proposition 66 enacted a number of statutory reforms in an effort to make the system of capital punishment 'more efficient, less expensive, and more responsive to the rights of victims.' " (*Friend,* at pp. 725–726.) Among the changes, newly enacted section 1509 imposes a new one-year deadline for filing an initial habeas petition, which should now be filed or transferred to the sentencing trial court for adjudication. "And whereas the law generally requires unsuccessful habeas corpus petitioners to seek review by filing a new habeas corpus petition in a higher court [citation], newly added Penal Code section 1509.1 requires capital petitioners to seek review by way of appeal instead. (Pen. Code, § 1509.1, subd. (a).)" (*Friend,* at p. 726.)

Section 1509, subdivision (d), provides, in relevant part:

> "An initial petition which is untimely under subdivision (c) or a successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence."

The term "successive petition" refers to what Supreme Court case law "would typically call a ' "new … petition" seeking review of a lower court's ruling.' " (*Friend, supra*, 11 Cal.5th at p. 733.) An appellant seeking review of the denial of a successive habeas corpus petition " 'may appeal the decision of the superior court denying relief on a successive petition only if the superior court or the court of appeal grants a certificate of appealability.' " (*Friend,* at p. 727, quoting § 1509.1, subd. (c).) A court may issue such a certificate "only if the petitioner has shown both a substantial claim for relief, which shall be indicated in the certificate, and a substantial claim that the requirements of subdivision (d) of Section 1509 have been met." (§ 1509.1, subd. (c).) "The overall effect of these restrictions is to forbid courts from considering successive petitions, or appeals from the denial of such petitions, that are unaccompanied by a showing of innocence or ineligibility for the death penalty." (*Friend,* at p. 727.)

Appellant here admits in his certificate request that "Claims One through Six were initially presented to the California Supreme Court as part of the 440-page petition for writ of habeas corpus, supported by 18 volumes of exhibits, which were filed in case No. S121004 in December 2003," and which the Supreme Court later denied on September 15, 2010. Appellant contends that although successive, he is nevertheless entitled to relief and appellate review because new factual and legal predicates support his initial six claims and his seventh claim was not previously available prior to the Supreme Court's 2010 denial of his first habeas corpus petition.

While we agree, as noted in *Friend*, that newly available facts and changes in the law may potentially provide grounds to construe previously considered habeas claims reviewable in a successive habeas petition, appellant fails to make such a showing here. Indeed, appellant admits in the certificate request that "a subsequent petition that presents the court with previously raised claims" should be addressed "if there has been a 'change in the facts or law *substantially affecting the rights of the petitioner*.' " (Quoting *In re Martin* (1987) 44 Cal.3d 1, 27, fn. 3; italics added.) Appellant fails to set forth in the certificate request newly available facts or a change in the law that substantially affect his rights regarding his 1993 conviction.

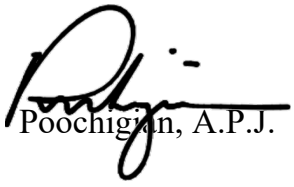
In supporting appellant's attempt to revive his first six habeas claims, appellant contends his capital offense was caused by the state's unconstitutional failure to provide him medically necessary psychotropic medication to control his violently psychotic behavior, which is now further supported by the newly available fact that in 2011, the state initiated proceedings to involuntary medicate petitioner, and new law in the form of the United States Supreme Court's decision in *Brown v. Plata* (2011) 563 U.S. 493, 532 (*Plata*) finding that the failure of California's entire prison system to afford adequate medical and mental health care violated the Eighth Amendment.

Appellant's involuntary psychotropic medications and the Supreme Court's *Plata* decision both occurred in 2011, and thus were unavailable prior to the Supreme Court's review of appellant's original habeas petition decided in 2010, but appellant fails to establish how those considerations affect appellant's substantial rights in terms of

establishing he is either actually innocent of the crime of which he was convicted or that he is ineligible for the death sentence. (§ 1509, subd. (d).) As the trial court noted in its habeas decision finding the issues successive, the subject of appellant's mental health was investigated and litigated in both of appellant's underlying trials, and it was well-known during prior litigation that appellant had a long history of mental illness dating to his childhood years. Further, the primary issue litigated at the guilt phase of the trial leading to appellant's capital sentence was whether appellant was sane at the time of the offense. The new evidence and legal finding proffered by appellant of his forced medications and systemwide prison mental health treatment some 21 years after the commitment offense does not tend to establish appellant was actually innocent or ineligible for the death sentence. (See, e.g., § 1473, subd. (b)(3)(A) [new evidence must be "of such decisive force and value that it would have more likely than not changed the outcome at trial"].) We therefore conclude the factual and legal changes in circumstances offered by appellant do not render claims 1 through 6 non-successive for purposes of appealability under Proposition 66.

As to appellant's remaining seventh claim asserting execution would be barred by *Ford v. Wainwright*, *supra*, 477 U.S. 399, the trial court found that issue premature and unripe absent a death warrant issued by the Governor for the reasons noted by the Nineth Circuit in *Pizzuto v. Tewalt* (2021) 997 F.3d 893, 900–901. The trial court therefore has not addressed the merits of the claim and effectively dismissed that issue without prejudice to later presenting it to that court when or if it becomes ripe in the future. There is therefore no final appealable order on that claim for which this court could issue a Certificate of Appealability.

For the foregoing reasons, appellant's Request for Certificate of Appealability is denied.



Poochigian, A.P.J.

Court of Appeal, Fifth Appellate District - No. F083411

S271569

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JOSEPH MARTIN DANKS on Habeas Corpus.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice