22-6792

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GARY D. SWIERSKI — PETITIONER
(Your Name)

v.

LUIS MARTINEZ, Acting Warden,
CRAIG KOENIG,
J. LIZARRAGA — 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

GARY D. SWIERSKI
(Your Name)

CORRECTIONAL TRAINING FACILITY
P.O. Box 705
(Address)

SOLEDAD, CA 93960-0705
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED FOR COURT REVEIW:

(1) When the Northern District Court issued an "ORDER TO SHOW CAUSE" in this Petitioner's (S.A.P.) Second Amendment Petition, is that indicative that jurist of reason would find the claim[s] reasonably debatable and C.O.A. should issue? (Buck v. Davis (2017) 137 S.Ct. 759) See **"ORDER TO SHOW CAUSE"** (on Page 3 of 4, Line 7) states: Liberally construed, the claims appear arguably cognizable under §2254 and merit an answer from Respondent; see **Appendix C** for copy of Order to Show Cause. Petitioner requests this Court take judicial notice of all records.

When the Northern District Court denied C.O.A. on all of Petitioner's claims, Petitioner filed "Request for the Issuance of a Certificate of Appealability" in the Ninth Circuit Court of Appeals, and the 9th Circuit also denied C.O.A. on all claims. Petitioner then requested in 9th Circuit, "Request for Rehearing En Banc" and "Evidentiary Hearing" to flush out the truth in the claims, Petitioner never had evidentiary hearing. Both were denied. "The standard for granting COA is low," Frost v. Gilbert (9th Cir.2016) 835 F.3d 883,888. Appendix D

Petitioner believes that he and state appellate counsel, both "made a substantial showing of the denial of a constitution right[s]," pursuant to Slack v. McDaniel (2000) 529 U.S. 473,484, whereby C.O.A. may issue from Order to Show Cause.

Pursuant to SCOTUS precedent in (Buck v. Davis (2017)), supra, the initial determination for whether a C.O.A. should be granted is simply "whether a claim is reasonably debatable, and if so, an appeal is the normal course," "The COA inquiry...is not coextensive with a merits analysis."

Pursuant to SCOTUS precedent in Miller-El v. Cockrell (2003) 537 U.S. 322, 338, "[A] claim can be debatable even though every jurist of reason might agree, 'after' the C.O.A. has been granted and the case has received full consideration, that petitioenr will not prevail."

Is this Petitioner incorrect to think that the issuing of an Order To Show Cause in this case means the Court found merit in the claims and therefore the claims are debatable and C.O.A. should have issued?

(2) Should Petitioner's claim of "Actual Innocence" and "Factual Innocence" of first-degree murder be adjudicated on the merits since there is NO scientific cause of death determination? see APPENDIX G 1RT,121; 2RT,141-144; cause of death was based on alleged hearsay by prosecution main witness Eva Swierski, who is schizophrenic and has experienced auditory hallucinations, (see attached Appendix No. G regarding Eva) there is No confession, No eyewitness, No crime scene, No weapon evidence, No blood or DNA type evidence, No underlying felony, No evidence of the actual "alleged act?" This case does Not have substantial evidence which is reasonable, credible, and of solid value to support this first degree murder conviction. See Second Amended Petition (S.A.P.). This claim is state procedurally time barred. This question presents constitutional importance to all. Petitioner was arrested six years after the incident.

Should Petitioner's "Insufficient Evidence" / Insufficient Corroboration claim (S.A.P) under Jackson v. Virginia (1979) 443 U.S. 307 be adjudicated on the merits? This claim is state procedurally time barred.

Is it possible that "failure to consider the claim[s] will result in a fundamental miscarriage of justice?" Coleman v. Thompson (1991) 501 U.S. 722, 750; See Petition for Writ of Error Coram Vobis at Appendix No. G .

Is it possible that the alleged error[s] "probably resulted in the conviction of one who is actually innocent?" Murray v. Carrier (1986) 477 U.S. 478,496. **Within all the questions presented for SCOTUS review lie all the reasons to grant certiorari.**

The trial court made a prejudicial "conditional" ruling that denied Petitioner an Intimate Partner Battering (I.P.B.) defense (People v. Humphrey (1996) 13 Cal.4th 1073) with I.P.B. Expert Witness testimony, see Exhibits EE,FF,GG, at Appendix No. I even though Petitioner had been stabbed by the deceased victim and the victim had previously been arrested for (D.V.) domestic violence and did jail time with court mandated D.V. classes and anger management. Petitioner was intoxicated by alcohol and prescribed opiate pain pills for back injury during tragedy. Petitioner's restraining order, move out order, 6 pages attached. see Appendix I

Is it possible "that it is more likely than not that no reasonable juror would have convicted him in the light of the new I.P.B. evidence?" Schlup v. Delo (1995) 513 U.S. 298,327.

* Is California's first degree murder statute unconstitutionally vague as applied to this petitioner and likely vague to others similarly situated?

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(2) **Is Petitioner denied "EQUAL JUSTICE UNDER LAW"** if the 9th Circuit reverses a case somewhat identical to Petitioner's (Parle v. Runnels (9th Cir.2007) 505 F.3d 922) but denies Petitioner any type of relief?

May this Petitioner pass the **'Gateway'** after asserting and demonstrating actual and factual innocence and insufficient evidence, McQuiggin v. Perkins (2013) 133 S.Ct. 1924? The Federal Courts have also expressed a willingness to excuse a petitioner's default, even absent a showing of cause, "where a constitutional violation has probably resulted [133 S.Ct. 1924,1938] in the conviction of one who is actually innocent.

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(3) Does a court violate a criminal defendant's Sixth and Fourteenth Amendment rights to present a complete defense (Crane v. Kentucky (1986) 476 U.S. 683,690) by "conditioning" the presentation of the defense on the admission of very inflammatory false evidence, (regarding Hilda Muhammad) which the court itself has previously ruled inadmissible on the basis that its probative value is outweighed by its potential to create undue prejudice to the defendant?

Does a defendant have a due process right to present all evidence of "significant probative value" to their defense? (Washington v. Texas (1967) 388 U.S. 14,19 .

Does the Constitution prohibit the exclusion of defense evidence under rules that...are disproportionate to the ends that they are asserted to promote? (Holmes v. South Carolina (2006) 547 U.S. 319,326)

Are trial court evidentiary rulings reviewed for "abuse of discretion?" Highmark Inc. v. Allcare Health Mgmt. Sys. (2014) 134 S.Ct. 1744.

(4) Should a conviction premised on and obtained with False Evidence, False Testimony, Fraud, and Perjury via Prosecution Misconduct, continue to be affirmed in violation of SCOTUS precedent?

(4) Is It prosecution misconduct to "vouch" for his main linch pin witness and also "shift the burden of proof to the defense?"

Can the prosecutor "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained?" Chapman v. California (1967) 386 U.S. 18,24?

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(5) Does a court commit **CLEAR ERROR** (U.S. v. Olano (1993) 507 U.S. 725,732) and **ABUSE ITS DISCRETION** (Highmark Inc. v. Allcare Health Mgmt. Sys. (2014) 134 S.Ct. 1744) by denying a **Trombetta/Youngblood motion** on the basis that the disputed evidence never existed, where its evidence was clearly established by a police officer's statements to a suspect, followed by the police officer's testimony in court that the evidence did exist, he took the evidence with a search warrant and booked it into evidence because the officer felt the evidence had evidentiary value, that evidence AND "extra copies" of the (audio tapes) evidence made by police - "ALL disappeared," and the police never turned it over to defense after numerous requests by defense counsel? See Petitioner's TRAVERSE starting at page 3 through 30 with complete precise details, Case No. 16-cv-03199-HSG (PR) California Northern District Court. See Trial Counsel's Discovery Request (C.T.) court transcript, page 159. **Was this structural discovery error too?** Decisions on questions of fact are reviewable for clear error, and decisions on matters of discretion are reviewable for abuse of discretion. Accord U.S. v. Olano and Highmark Inc. v. Allcare, supra. **Is it a "BRADY" violation"** Brady v. Maryland (1963) 373 U.S. 83,87 as Petitioner claims? Accord U.S. v. Agurs (1976) 427 U.S. 97,112; U.S. v. Bagley (1985) 473 U.S. 667,676; Kyles v. Whitley (1995) 514 U.S. 419. **IMPORTANTLY**, in this case, the spoliator destroyed the "original" audio taped exculpatory type evidence AND "they destroyed at least 3 copies" ("the Duplicates") that they made. That is tantamount to purposeful - deliberate - bad faith. **Trial counsel asked for dismissal as sanction.** See **Appendix F** for Exhibit A1 containing trial counsel's Trombetta/Youngblood motion, with copies of numerous emails requesting evidence along with other information. **IMPORTANTLY**, In Trombetta/Youngblood motion page 13, No. 15, "the last copies" means the last received, nothing else is forthcoming.

Appendix F

Appendix L

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(6) Is a criminal defendant denied his **Sixth Amendment right** to competent counsel (Strickland v. Washington (1984) 466 U.S. 668,698) by counsel's repeated failure to object to irrelevent and very prejudicial testimony, by counsel's failure to contemporaneously object to **prosecutor's fraudulent misrepresentation** with false evidence, false testimony, fraud, perjury in his closing argument, (U.S. v. Chronic (1984) 466 U.S. 648,659 n.25), by counsel's failure to object to prosecutorial misconduct amounting to a shift in the burden of proof, and to the prosecutor **vouching** for the veracity of linch pin prosecution witness Eva Swierski by reference to facts outside the record, and **vouching** by repeatedly telling the jury "she told you, the truth," "she's telling the truth about it all," "she told the truth," with NO objection by trial counsel?

* Is Petitioner entitled to effective assistance of counsel intoto?
* Is this cumulative I.A.C. error?

If defense counsel is mentally absent during a critical stage of prosecutor's closing argument where a flagrant, calculated, very prejudicial, outrageous statement is made without foundation and without evidence, is that Constitutional Error without any showing of prejudice, pursuant to Chronic?

Is the prosecutor's closing argument considered a critical stage of the proceeding where Petitioner absolutely needs effective assistance of counsel? Mempa v. Ray (1967) 398 U.S. 128,134; U.S. v. Ash (1973) 413 U.S. 300,309,313.

Is it I.A.C. when defense counsel fails to notice or object to the trial court instructing the jury with the "natural and probable consequence" of the act ——— theory when counsel is cognizant that there is no scientific determination for cause of death and **the cause of death is based on "alleged" hearsay** by prosecution witness Eva, who **is schizophrenic and has auditory hallucinations**, and there is no evidence of the "alleged" act?

(7) Is a criminal defendant denied his Fifth, Sixth, and Fourteenth Amendment rights to Due Process / Fair Trial and Effective Assistance of Counsel when copious amounts of errors are made pretrial and especially during trial by the court, the prosecutor and trial counsel, to amount to **CUMULATIVE ERROR?** Parle v. Runnels (9th Cir.2007) 505 F.3d 922,927; Chambers v. Mississippi (1973) 410 U.S. 284,290.

Did the errors complained of violate Due Process to create negative synergistic effect amounting to cumulative error?

(8) Should this first degree murder conviction stand when the trial court instructs the jury with the **"natural and probable consequence"** of the act theory (CALCRIM 520, Court Transcript pp.426-427), even though there is NO scientific determination for cause of death (1RT,121; 2RT,141-144) to support "intent" and/or to support "the act" referred to in the "natural and probable consequences" of [the act]; and SCOTUS called this kind of error **"alternate-theory error,"** Hedgpeth v. Pulido (2008) 555 U.S. 57,61; which is typically assessed under Chapman v. California (1967) 386 U.S. 18, for legal error subject to the rule generally requiring reversal? **Reversed** - People v. Sandoval 2021 Cal.App.Unpub. Lexis 8116. Was malice imputed improperly to this petitioner?

Is this error a due process violation for **shifting burden of proof on issue of malice** because it lessened the prosecution burden to prove every element and fact of first degree murder beyond a reasonable doubt? In re Winship (1970) 397 U.S. 358,364? California Senate Bill 1437; People v. Gentile (2020) 10 Cal.5th 830 (HN16)**"Thousands," in California prisons are convicted of 1st or 2nd degree murder via N.P.C. invalid alternative legal theory Error and unable to get relief.**

Is this error also **structural error**; error violating due process, 5th, 6th, and 14th Amendments, requiring reversal, precluding harmless error analysis?

Is it correct that "General instructions" on the presumption of innocence and the state's burden of proving every element of the charged offense beyond a reasonable doubt are usually insufficient to cure an error? Francis v. Franklin (1985) 471 U.S. 307,319-20,322-24.

Is it correct that **a presumptive instruction** that could be interpreted as removing the prosecution's burden of proving intent (malice) beyond a reasonable doubt (CALCRIM 520/2012 version) deprives the defendant of due process? Sandstrom v. Montana (1979) 442 U.S. 510,515; Sullivan v. Louisiana (1993) 508 U.S. 275.

Is it correct that a conviction on an **"unauthorized legal theory"** violates a defendant's right to due process under the 14th Amendment? Suniga v. Bunnell (9th Cir.1993) 998 F.2d 664,669, citing Yates v. United States (1957) 354 U.S. 298.

(8) Is it correct that a conviction on a **"invalid legal theory"**," violates due process even when the decision of the state court recognizing the invalidity of the theory (Cal. Senate Bill 1437) occurs **"after"** the conviction has become final? Fiore v. White (2001) 531 U.S. 225,225-229.

Is "alternate theory instructional error," "unauthorized legal theory," and "invalid legal theory," the type of error that "had a substantial and injurious effect or influence in determining the jury's verdict," in this Petitioner's trial for first degree murder?

Is this alternate theory error also **cumulative error** and **structural**? With the enactment of California Senate Bill 1437 (2017-2018 Regs. Sess.), which amended Penal Code section 188 and 189 so as to eliminate natural and probable consequence liability for murder, and outside the context of felony murder, "in order to be convicted of murder, a principle in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (stats. 2018, ch. 1015 §2.) California Supreme Court has concluded that S.B. 1437 eliminates natural and probable consequences liability for murder **regardless of degree.** People v. Gentile (2020) 10 Cal. 5th 830,847-848. Petitioner's jury was instructed with natural and probable consequences alternative theory error. See too SB 775, chapter 551.

Is it possible that this natural and probable consequence / alternate theory error "probably resulted in the conviction of one who is **actually innocent**" of first degree murder? Murray v. Carrier (1986) 477 U.S. 478,496.

(9) Should Petitioner's state procedural default time barred claims be adjudicated on the merits de novo? e.g. "BRADY" violation, Actual Innocence of 1st degree murder, Factual Innocence, Insufficient Evidence of first degree murder, California's first degree murder statute is unconstitutionally vague, prosecution misconduct, and others. These claims were denied by California Supreme Court as procedurally time barred citing In re Robbins (1998) 18 Cal. 4th 770,780, and In re Clark (1993) 5 Cal. 4th 750,767-69. The Attorney General (AG) motioned to dismiss these claims, as procedural bar constitutes an independent and adequate state law ground barring federal review and N. District Fed. Court granted A.G. motion to dismiss. These claims were "**not adjudicated on the merits.**" Thus, AEDPA standards do not apply if the State court judgement rested exclusively on procedural grounds because such a judgement does not adjudicate the merits, see Cone v. Bell (2009) 556 U.S. 449,472, Accord, Johnson v. Williams (2013) 568 U.S. 289,292. Are the claims ripe for federal de novo review?

(10) WOULD FAILURE TO CONSIDER THE CLAIMS RESULT IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE? 501 U.S. 722 at 750, as explained below. This "indigent" Petitioner was represented first by state Public Defender, then state Alternate Defender, then state assigned or appointed appellate counsel.

Due process and equal protection both require the state to provide appellate counsel to indigent defendants when the state provides a first appeal as of right. Douglas v. California (1963) 372 U.S. 353, 357-358, holds states must appoint counsel on an indigent prisoner's first appeal. Evitts v. Lucey (1985) 469 U.S. 387,396, held that this right encompasses the right to effective assistance of counsel for all criminal defendants in [501 U.S. 756] their first appeal as of right. [501 U.S. 754] Carrier explains, "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires, that responsibility for the default be imputed to the state." Murray v. Carrier, 477 U.S. 478 at 488, 106 S.Ct. at 2646. It is not the gravity of the attorney's error that matters, but that it constitutes a violation of Petitioner's right to counsel, so the error must be seen as an external factor, "imputed to the state."

Petitioner avers his state assigned appellate counsel was ineffective because appellate counsel did NOT raise numerous substantial material meritorious violations of U.S. Constitutional magnitude that prejudiced Petitioner at trial and on appeal, thereby forcing Petitioner to file pro se habeas corpus petition to get relief and /or exhaust the claims so the claims would not be abandoned. Thereby the California Supreme Court then alleged a state procedural timebar under Clark and Robbins to procedurally bar Petitioner's pro se claims. Therefore, this "indigent" Petitioner avers the procedural default is the result of I.A.C. Appellate Counsel provided by the state, and as Carrier explains, responsibility for the default be imputed to the State. I.A.C. Appellate Counsel claims by their nature can only be brought on habeas collateral review, since they do not manifest themselves until the state appellate process in complete. An attorney's errors during an appeal on direct review, where the substantial material prejudicial claim[s] should have been raised, (false evidence, false testimony, perjury, fraud) may establish and provide "cause" to excuse a procedural default, if the attorney appointed by the state to pursue direct appeal is ineffective, the "indigent" state prisoner has been denied fair process and the opportunity to comply with State's procedures and obtain an adjudication on the merits. U.S. Sixth Amendment. Citing Martinez v. Ryan (2012) 566 U.S. 1,[11][12] In short, while §2254(i) precludes Petitioner from relying on the ineffectiveness of his post-conviction attorney as a "ground for relief," it does not stop Petitioner from using it to establish "cause". Holland v. Florida (2010) 130 S.Ct.2549,2563. Petitioner is prejudiced with I.A.A.C., U.S. Constitutional rights violations, State procedural default time bar, and unable to adjudicate the claims on the merits. Trevino v. Thaler (2013) 569 U.S. 413, Cone v.bell (2009) 556 U.S. 449, 472, Johnson v. Williams (2013) 568 U.S. 289,292.

LIST OF PARTIES

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

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

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Appendix A: Last reasoned State Court decision allegedly procedurally time barred; reviewed through California Supreme Court. 52 pages.

Appendix B: Last reasoned state Court decision "NOT" time barred. All claims are Exhausted through California Supreme Court. 42 pages.

Appendix C: ORDER TO SHOW CAUSE by Northern District Federal Court. 4 pages

Appendix D: District Court - Habeas denial & C.O.A. denial
9th Circuit - C.O.A. denial
9th Circuit - Rehearing EN BANC denied.
59 pages.

Appendix E: Interlocutory Appeal of Interlocutory Order of Northern District Federal Court to 9th Circuit; 9th Circuit denied because they claimed to Lack jurisdiction.

Appendix F: Exhibit **A1** BRADY VIOLATION TROMBETTA/YOUNGBLOOD MOTION by Counsel

continued on next page.

Appendix F: Exhibit **A1** cover pages describes everything contained in the exhibit to demonstrate Petitioner claim for dismissal. 59 pages.
Includes all emails by trial counsel to prosecutor and police to turn over the exculpatory type evidence to no avail.

Appendix G: Petition for Writ of ERROR CORAM VOBIS Demonstrating False Evidence, False Testimony, Fraud, Perjury, Fraud on the Court, Vouching, Fundamental Miscarriage of Justice. 117 pages. Exhausted to California Supreme Court.
Petitioner avers it will be a miscarriage of justice if the claims are not considered.

Appendix H: Petition For Review to California Supreme Court by Appellate Counsel. All claims are timely exhausted and accepted as such by Attorney General and Federal Court. Two denials attached.

Appendix I: Curriculum Vitae of Intimate Partner Battering (I.P.B.) Expert with evaluation of Petitioner. 30 pages.
(G) Reina Swierski and Gary Swierski verbal exchange. 4 pages.
(H) Reina Swierski ARREST REPORT
(SS) Declaration of Crystal Swierski regarding Reina Violence. 8 pages.
(RR) Declaration of Laura Swierski re: Reina Violence. 3 pages.
(P) Declaration of Ted Mattman re: Reina Violence. 3 pages.
(PP) Declaration of Gary Swierski re: Reina Violence. 8 pages.

continued on next page.

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(O) Declaration of Marilyn Gardner re: Reina violence. 3 pages.
(DD) Declaration of Ruth Ann Mastria re: Reina violence. 2 pages.

Appendix J: Appellants Reply Brief by Appellate Counsel.
53 pages.

Appendix K: Statement of Facts from Petitioner's Trial Testimony explaining the events and accidental demise from self defense, Petitioner's CPR attempt, and panic from previous police threats to arrest Petitioner for calling 911 so many times when Reina was violently out of control.

Appendix L: Petitioner's TRAVERSE. 80 pages.
Pages 3-30 covers BRADY-TROMBETTA-YOUNGBLOOD

Appendix M: REQUEST FOR THE ISSUANCE OF A C.O.A. 40 pages.

Appendix N: Petition for Rehearing "EN BANC" 25 pages.
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Appendix O: Trial Counsel I.A.C. Declaration with misc. others.
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Appendix P: California Supreme Court decisions: Jan. 24, 2018; Feb. 11, 2020; Sept 01, 2021; Aug. 10, 2022; CALCRIM 520 jury instruction, 2012 version - 2 pages C.T. pp. 426, 427. 14RT, 1312, 1323. Appellate SWIERSKI Attorney letter 12/30/2012 re: No cause of death. Senate Bills No. 1437 & 775, Penal Code § 1170.95 - 2 pages. People v. Sandoval case reversal

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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 D 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 D to the petition and is

[✓] reported at 2020 U.S. Dist. Lexis 209554; 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 B to the petition and is EXHAUSTED TO CAL. Supreme Court TIMELY.

[X] reported at 2014 Cal. App. Unpub. Lexis 8418; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Last reasoned state superior court appears at Appendix A to the petition and is allegedly time barred.

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. Filed Jan. 24, 2018

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was March 02, 2022.

[ ] 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: Filed March 30, 2022, and a copy of the order denying rehearing appears at Appendix D.

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

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

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

The date on which the highest state court decided my case was after stay and Abeyance Filed Jan. 24, 2018
A copy of that decision appears at Appendix A — Procedural Time Barred.
Filed Feb. 25, 2015 - H - Timely Exhausted.

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

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

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

STATEMENT OF THE CASE.

A Quiznos sandwich shop was very close to the new house that Petitioner/Gary Swierski and his wife Reina Swierski just purchased. Reina invited Gary to walk with her to Quiznos for lunch. Gary declined stating that he wanted to continue unpacking. Shortly thereafter Gary changed his mind and went to Quiznos, where he found Reina finishing a sandwich at a very small two seat table in a very crowded restaurant at lunch time. Gary asked Reina who she was eating with. Reina said she did not know the guy but asked to share the table with him because there was no place else to sit down. The guy said nothing. Gary noticed the guy had a big lanyard name badge around his neck with Ted Mattman on it. Gary accepted Reina's explanation and not wanting to wait on a long line to place an order, left Quiznos and walked home with Reina. This occurrence was approx. one month before the tragic incident that resulted in Reinas demise. Please see Appendix K for a concise detailed statement of facts from Petitioners trial testimony including trial transcript page numbers.

The PROSECUTION THEORY based on the above occurrence, is that Reina was caught cheating and Petitioner therefore decided to kill Reina with premeditation, deliberation, and malice aforethought, without regard to the fact that Petitioner and their children were living in an Intimate Partner Battering (IPB) marriage where Petitioner had called 911 numerous times, only to be threatened by police with his own arrest if he called 911 again. Reina was a restaurant manager and told Petitioner that she gives free meals to police officers so the police know her and do not want to arrest her. Eventually Reina was arrested for Domestic Violence (D.V.) and corporal injury to a child and did some jail time. Reina also did Court mandated D.V. classes, anger management classes, and parenting classes. The jury was prevented from learning about Reina's IPB and D.V. history with arrest and jail because of Trial Court quid pro quo explained in Petition for Certiorari. The jury was also prevented from learning that Reina physically battered her paramour Ted Mattman unbeknown to Petitioner until defense counsel showed him a police report. A copy of this report is at Petitioner's Appendix I(i), Exhibit P, at page 15 aka 000125, Mattman states: " And she (Reina) fuckin' cracks me in the face." Also at Appendix I , Exhibit H is a copy of Reina's arrest report. At page 2 or 000108 line 16-17 it states:" The RP said that he is constantly being struck and battered by his wife. That was 2/11/2002. The RP - reporting party is Gary Swierski. On 3/8-9/2005 late at night Reina Stabbed Petitioner, she tried to stab him two more times, Petitioner punched her in the head knocking her over & into the bathtub unconscious where she died. Petitioner tried CPR to no avail. Mattman testified RT p.376, that he would meet Reina at various locations in order to conceal his relationship with Reina from her husband.

PAGES 4-7

REASONS FOR GRANTING THE PETITION

Petitioner is in custody [state prisoner] pursuant to the judgement of a state court in violation of the U.S. Constitution or Law or Treaties of the United States under 28 U.S.C. §2254(a); §2254(d)(1) and (d)(2). **within all the questions presented for SCOTUS review lie all the reasons to grant certiorari.**

What does the U.S. Constitution and its Amendments, due process, EQUAL JUSTICE UNDER LAW, SCOTUS precedent-stare decisis, fundamental miscarriage of justice, actually mean, represent or stand for, if they are evasive and unattainable where justice should prevail?

Petitioner has (respectfully) a flagrant **BRADY-Trombetta/Youngblood** violation and renews his request for dismissal as sanction, to protect Petitioner from double jeopardy. Petitioner did NOT receive due process/fair trial. Appendix F

Petitioner asserts his Actual Innocence, Factual Innocence, Insufficient Evidence of first degree murder, and that his state court trial was a "fundamental and complete miscarriage of justice." See McQuiggin v. Perkins (2013) 133 S.Ct. 1924,1934; Coleman v. Thompson (1991) 501 U.S. 722,750. See Petitioner's **Interlocutory Appeal from Interlocutory Order** at Appendix E. In a Jackson v. Virginia (1979) 443 U.S. 307,321,324 claim, which states: "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,"Id. at 319. Only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt, has there been a due process violation, Id. at 324.

Petitioner averred there is an overwhelming amount of False Evidence, False Testimony presented to the jury to obtain his conviction. This Court needs to be aware of this. In Petitioner's Interlocutory Appeal, it is demonstrated that the prosecutor attempts to create a **mistrial** and/or severely prejudice Petitioner by testifying falsely with an outrageous calculated fraudulent misrepresentation to the jury in his closing argument where no foundation layed and no evidence existed. **What if the jury relied on that to convict**, with an Insufficient Evidence claim?

"Thousands," in California prisons are convicted of 1st or 2nd degree murder via N.P.C. invalid alternative legal theory Error and unable to get relief, like this Petitioner.

California's first degree murder statute is unconstitutionally vague as applied to this Petitioner and likely vague to thousands of others similarly situated.

PETITIONER WAS DEPRIVED OF A FAIR TRIAL/DUE PROCESS UNDER 5th, 6th, and 14th AMENDMENTS, via CUMULATIVE ERRORS

Petitioner's first degree murder conviction has NO scientific cause of death determination 1RT,121 and 2RT,141-144 to indicate intent to kill. You can't say whether the deceased victim was shot, stabbed, poisoned, or run over by a car etcetera. The cause of death alleged by prosecutor to jury is strangulation from "alleged" hearsay by prosecution linch pin witness Eva Swierski, who is developmentally disabled, schizophrenic, has auditory hallucinations, is an alcoholic, illicit drug addict, has a conservator, and lost physical and legal custody of her daughter because the voices in her head were telling her to kill her daughter. Moreover, there is NO confession, NO eyewitness, NO crime scene, NO weapon, NO blood or DNA evidence, NO underlying felony, NO actual evidence demonstrating that Petitioner strangled the deceased as alleged to jury. See X state appellate decision page 28 at Appendix B, that concurs with the defense, indicating Petitioner did Not strangle the deceased, as alleged to jury to show intent. Thus, a miscarriage of justice. Petitioner arrested 6 years after tragedy.

If a person was shot in the heart and in the head and died, you could assert the shots were in the kill zone, indicating an intent to kill. Not the case here.

Petitioner's conviction is premised on and obtained with an overwhelming amount of **False Evidence**, **False Testimony**, **Fraud**, **Perjury**, and **Fraud on the Court** via prosecution misconduct demonstrated in Petitioner's S.A.P.-second amended petition under prosecution misconduct. Petitioner avers that this case is the "grandiose" of all prosecution misconduct cases in jurisprudence. Someone just needs to read it and acknowledge it. E.g., Petition for Writ of Error Coram Vobis at Appendix G. The appellate courts and Attorney General reiterate whatever the prosecutor got into the record, regardless of falsehood. They assume prosecutor/officer of the court is always honest.

This court may liberally construe Petitioner's claims as a challenge to the fact finding process itself. E.g., See Appendix G. Petitioner's **Petition for Writ of Error Coram Vobis**. The Ninth Circuit has held in "some limited circumstances..., that the state court's failure to hold an evidentiary hearing may render its fact finding process unreasonable under §2254(d)(2);" Hibbler v. Benedetti, 693 F.3d 1140,1147 (9th Cir.2012); Taylor v. Maddox 366 F.3d 922 at 1001,1008. This Petitioner never had an evidentiary hearing.

Petitioner avers in S.A.P. that he has copious U.S. Constitutional violations that violated due process. In Murray v. Carrier (1986) 477 U.S. 478 the Court stated that procedural default would be excused, even in the absence of cause, when "a constitutional violation has probably resulted in the conviction

of one who is actually innocent." 477 U.S. at 496; see also House v. Bell (2006) 126 S.Ct. 2064,2076-77 ("Prisoners asserting innocence as a **gateway** to defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt,'" quoting Schlup v. Delo (1995) 513 U.S. 298,327, e.g., See **Appendix I** for Exhbits EE,FF,GG; **I.P.B. Expert Curriculum Vitae and evaluation** of Petitioner on **Intimate Partner Battering** which was not disclosed to trial jury because of **"conditional ruling"** by court. See question **2** this petition.

Failure to consider the claims will result in a fundamental miscarriage of justice. Coleman v. Thompson (1991) 501 U.S. 722,750; Murray v. Carrier (1986) 477 U.S. 478, at 495,496. The constitutional error[s] complained of probably resulted in the conviction of an actually innocent person.

Petitioner acted in self-defense, thus, Petitioner shows conviction for non-criminal conduct. Petitioner reflexively punched after being stabbed, thereby, the victim fell over into the bathtub and subsequently died. The law does not make criminal, a punch in self-defense, and there is no doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief. People v. Cravens (2012) 53 Cal.4th 500,507-508. "[a] single fist blow to the head does not involve a high probability of death, and not conscious disregard for life."

Since Petitioner was unable to present an (I.P.B.) Intimate Partner Battering defense with I.P.B. Expert Witness testimony because of the trial court's "conditional ruling," Petitioner was prevented from mentioning the I.P.B. history in the relationship, and the fact that Petitioner had called 911 (the police) at least a dozen times when Reina (the deceased) was violently out of control, only to have the police arrive and do nothing except to threaten to arrest Petitioner for calling the police. The police would leave and Rei na would tell Petitioner that she will never be arrested because the police come into the restaurant that Reina manages and she gives them free food, and all the cops are in love with her beauty.

Therefore, on the night of the tragedy, after Reina stabbed Petitioner and Petitioner punched Riena, knocking her over into the bathtub, Petitioner went into a huge panic when he stopped CPR and realized Reina was deceased. Petitioner and Reina were intoxicated. Petitioner remembered the police threats and still in a panic, made an impulse decision to remove and hide the corpse. Petitioner was

never charged with moving or concealing a corpse because the prosecutor wanted to assert first degree murder. The court's "**conditional ruling**" also prevented Petitioner from being asked and explaining to the jury, why he paniced and then made the impulse decision to remove and hide the body. Even though Petitioner averred self defense, he would have plead guilty to involuntary manslaughter and moving a corpse. Petitioner was unwilling participant forced to defend himself.

IMPORTANTLY, see People v. Anderson (1968) 447 P.2d 942; 'Evasive conduct of a defendant shows fear; (moving a corpse) it cannot support the double inference that defendant planned to hide his crime at the time he commited it and that, therefore, defendant commited the crime with premeditation and deliberation. **Accord** Davis v. Woodford (9th Cir.2002) 333 F.3d 982, the "3 prong test." Petitioner averred this in his Traverse on page 40.

The (A.G.) Attorney General often stated that the evidence against Petitioner is overwhelming to use the People v. Watson (1956) 46 Cal.2d 818,836 standard applicable to errors under state law; instead of Chapman v. California (1967) 386 U.S. 18 standard, to aver all errors were harmless, thus, Petitioner can't have cumulative error.

Suffice to say, we do not have a system of justice where we supplant what actually occurred for what the government pleads and what an unanimous jury finds beyond a reasonable doubt. Yet, that is exactly what happened to Petitioner. The deceased victim died somehow from a punch and fall into the bathtub (self-defense) after stabbing Petitioner; and Not from strangulation as alleged to jury with no actual evidence, however, prosecutor's coroner/expert witness testified extensively about strangulation only.

The trial court prevented Petitioner from receiving due process/fair trial and the court prevented Petitioner from receiving effective assistance of counsel. Thus, fundamental miscarriage of justice ensued.

Irrespective of trial court error, trial counsel when not obstructed, still did Not provide effective assistance of counsel.

As demonstrated, the prosecutor/officer of the court committed significant, calculated, flagrant prejudicial prosecution misconduct at every opportunity to win at all costs, regardless of U.S. Constitutional rights.

Respectfully, Petitioner's conviction should be dismissed with prejudice to bar retrial as the sanction from Brady-Trombetta/Youngblood violation, from actual/factual Innocence of first degree murder conviction with Insufficient evidence, from flagrant prosecution misconduct, et al to prevent double jeopardy. These claims are of U.S. Constitutional importance to all.

Petitioner is in custody (state prisoner) pursuant to the judgement of a state court in violation of the U.S. Constitution or law or treaties of the United States.

Petitioner avers Actual Innocence and Factual Innocence of first degree murder, Murray v. Carrier / Schlup v. Delo; and Insufficient Evidence of first degree murder. Jackson v. Virginia. See question 2. Petitioner avers in the same context that California's first degree murder statue is unconstitutionally vague as applied to this Petitioner and likely vague to others similarly situated. FAILURE TO CONSIDER THE CLAIMS WILL RESULT IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE. Coleman v. Thompson.

Petitioner was charged in the "abstract," generically. Malice was "Imputed" to Petitioner with "natural and probable consequences" of the act ——— theory in CALCRIM 520, 2012 version, attached. Petitioner was arrested six years after the incident. There is NO actual evidence to allege strangulation as the "ACT" with natural and probable consequences of the "ACT." There is NO scientific cause of death determination. 1RT,121; 2RT,141-144. Cause of death is based on alleged hearsay by prosecution main witness Eva Swierski, who is schizophrenic and has experienced auditory hallucinations. There is NO confession, NO eyewitness, NO crime scene, NO weapon evidence, NO blood or DNA type evidence, NO underlying felony, NO evidence of the actual "alleged act," jury was instructed with Petitioner's Voluntary Intoxication. This case does NOT have substantial evidence which is reasonable, credible, and of solid value to support this first degree murder conviction.

Please see additional facts at REASONS FOR GRANTING THE PETITION.

See Please Appendix G containing Petition For Writ of Error Coram Vobis demonstrating this conviction is premised on and obtained with False Evidence, False Testimony, Fraud, perjury, Fraud on the court by prosecutor/officer of the court and police officer Anderson (video to jury) to create premeditation, deliberation, malice aforethought and intent, where there was none. What if a rational trier of fact relied on that to convict? Then with an Insufficient Evidence and Innocence claim, the appellate court affirms, stating: a rational trier of fact could have found the essential elements of the crime from the evidentiary record, viewed in the light most favorable to the prosecution, to support a finding of guilt beyond a reasonable doubt. That's because the prosecutor has the record packed with overwhelming FALSEHOODS. I have INJUSTICE and CONUNDRUM here. Petitioner's 5th, 6th, and 14th Amendment rights to due process, fair trial, effective assistance of counsel violated. Can SCOTUS correct this injustice?

ACTUAL FACTORS INDICATIVE OF QUESTIONABLE-UNRELIABLE TESTIMONY BY PROSECUTION MAIN WITNESS EVA SWIERSKI

In Dutton v. Evans, 400 U.S. 74 (1970) the Supreme Court listed four factors which may indicate that a statement is unreliable if: (1) the statement contains as assertion of past fact; (2) the declarant did not have personal knowledge of the fact asserted; (3) there is a possibility of faulty recollection, and (4) the circumstances suggest that the declarant misrepresented the defendants role. See U.S. v. Winn, 767 F.2d 527, 529 (9th Cir.1985).

Eva's testimony was Inconsistent, Contradictory, and Convoluted throughout the preliminary hearing (PX) and trial. i.e., Exhibit K1, attached and Exhibit 3.
Additionally, see declaration/Exhibit L by Crystal Swierski.
Additionally, see two declaration[s]/Exhibit O by Marilyn Gardner.
Additionally, see declaration/Exhibit N by Gary Swierski.
Additionally, see declaration/Exhibit M by Laura Swierski.

See too - this Petition p. 33

* Early on in grade school, it was determined that (prosecution main witness) Eva had a "Developmental Disability," and was in special education with an (IEP) Individualized Education Plan under federal government standards; Individuals with Disabilities Education Act (IDEA). Eva still sucks her thumb since 1985.

Penal Code § 1370.1(H) defines "Developmental Disability." Eva has a slow learning disability. Eva has memory problems.

On the day of the incident, Eva testified that she was drinking alcohol and doing drugs all day, like crystal methamphetamine, (PX p. 58-59) smoking marijuana, and doing ecstasy. Eva has hallucinations and imagines things that are not true. Eva told the police that she can't remember very well 6RT 469 because she's used lots of drugs, PX p. 62. Eva was previously diagnosed Paranoid Schizophrenic. Eva was 5150 on a few occasions and taken on involuntary holds. Eva has serious mental issues and is on permanent social security; unable to hold a job. Eva was hearing voices that were telling her people were out to get her. The voices were also telling Eva to kill her daughter. So the court took physical and legal custody of Eva's daughter away from Eva. After Petitioner's trial, the Court gave Eva a conservator. Eva often has trouble DISTINGUISHING BETWEEN REALITY AND FICTION. In PX p. 108, Eva testified that she is on Geodon, an ANTIPHYCHOTIC MEDICATION. Eva's ability to remember and recollect accurately is questionable.

* There is a HUGE - SIGNIFICANT - MATERIAL DIFFERENCE between "Faulty Memory - Not Remembering" and "actually remembering THINGS THAT NEVER HAPPENED."

Second-degree felony murder is unconstitutionally vague under Johnson v. United States (2015) 135 S.Ct. 2551, 2015 U.S. Lexis 4251, 192 L.Ed.2d 569.

It is implied malice murder "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Petitioner testified, that he was attacked and stabbed by the deceased, who tried to stab him again. The "domestic violence history" of the deceased and prior threats by the deceased, to "kill the Petitioner one of these days," was kept from the jury by the Trial Court through "conditional" ruling. Petitioner testified, that he reflexively punched the deceased to disarm. RT pp. 958-966. In original Exhibit H (take note; the police report for the D.V. arrest of the deceased states: husband (Petitioner) is constantly being hit.) Petitioner testified that he actually believed that the deceased was going to kill him. (Original Exhibit C, RT p. 1009.). Petitioner testified, that he did not mean for it to happen. RT p. 999, 1007. Petitioners restraining/move out orders for deceased withheld.

The California Supreme Court has found that "implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another." People v. Knoller (2007) 41 Cal.4th 139, 143, 59 Cal.Rptr.3d 157, 158 P.3d 731. The jury instruction on implied malice requires (2016 U.S. Dist.Lexis 23) four findings by the jury: 1) that the defendant intentionally committed an act; 2) the natural consequences of the act were dangerous to human life; 3) at the time he acted, he knew his act was dangerous to human life; and 4) he deliberately acted with conscious disregard for human life, CALCRIM 520. 2016 U.S. Dist.Lexis 49884 Contreras v. Chavez.

The prosecutor very clearly informed the jury that he has an 'intent express malice' case (11RT, 1196), not an 'implied malice case.' The prosecutor stated: 11RT, 1196:20 Exhibit 1, "Malice is implied when the killing resulted from an 'intentional act,' the natural consequences of which are dangerous to human life. If --if the-- we don't have it here."

The prosecutor said; "we don't have it here." In other words, if you do not have an "intentional act," you 'DO NOT' have a first-degree murder case, nor do you have a second-degree murder case, according to the prosecutor's statements.

PETITIONER AVERS THAT CALIFORNIA'S FIRST-DEGREE MURDER AND SECOND-DEGREE MURDER ARE UNCONSTITUTIONALLY VAGUE under Johnson v. U.S. (2015) 135 S.Ct. 2551, 192 L.Ed.2d 569, 2015 U.S.Lexis 4251, as applied in Petitioner's case and currently.

Trial Court "conditional" ruling

The Trial Court ruled that under Evidence Code section 352 analysis, evidence of Hilda Muhammad's accidental drowning was more prejudicial than probative because her death had been determined by a forensic pathologist to be an accidental drowning, and therefore did NOT prove that Petitioner had done anything violent.

The Trial Court granted the defense motion in limine to exclude all of the evidence surrounding Hilda Muhammad's accidental drowning death on E.C. section 352 ground, because it had NO RELEVANCE to the pending case and any mention of Muhammad's death by the prosecutor, by insinuation or innuendo, that Petitioner was in some way connected to Hilda's demise would prejudice and inflame the jury to the point of wanting to punish Petitioner somehow. Petitioner is then put in a position to defend himself against a situation in which he was never charged with a crime.

Hilda Muhammad was Petitioners girlfriend in 1992.

The Court actually made the following findings of fact and law:

"With respect to Hilda Muhammad, this evidence is outside the window, although not by much, of E.C. § 1109. Certainly, it's no more inflammatory than the current charges. I do think it is somewhat remote. And I think that the probability of confusion is great. It will take 3 to 4 days to present. I also think that the degree of certainty of its commission ... is an issue in this case. The fact that the incident involving Ms. Muhammad did not result in a prosecution, let alone a conviction of the defendant, increases the danger that the jury may wish to punish the defendant for the uncharged [alleged] offenses and therefore increases the likelihood that the jury will confuse the issues because the jury has to determine whether the uncharged [alleged] offenses in fact occurred.

So I'm going to find that E.C. § 352 weighs in favor of exclusion, and I will be excluding that evidence." (2RT,134)

During trial, outside the presence of the jury, pursuant to E.C. §1103,(a) defense counsel proposed to introduce INTIMATE PARTNER BATTERING by Reina. (4RT, 196-197; 8RT,724-725).

The Court ruled that if the defense presented I.P.B Evidence, it would permit the prosecution to adduce evidence regarding Muhammad's death pursuant to E.C. § 1103, (b). This prosecutor was alleging, Petitioner murdered Hilda Muhammad.

In response defense counsel indicated that she would not introduce I.P.B. Evidence. (8RT,740,741-742). Trial Court abused it's discretion. D. Counsel was I.A.C. for failure to produce Hilda pathologist at Calif. Evidence Code 402 hearing.

THERE IS THE QUID PRO QUO "Conditional Ruling"

The California Penal Code (P.C.) begins by defining murder as an unlawful killing with malice aforethought, Cal. P.C. § 187. That malice may be "express" or "implied," as when the circumstances attending the killing show an abandoned and malignant heart, P.C. § 188. Cal P.C. § 189 then defines first-degree murder to include all express malice murders and certain implied malice murders - such as killing during the commission of arson, rape, or robbery. **That provision's residual clause** classifies all other types of implied malice murders as second-degree murder. First-degree felony murder is thus a killing during the commission of a felony enumerated in § 189. Second-degree felony murder, however, is less clearly defined.

According to the California Supreme Court, the state's **second-degree felony-murder rule covers** any unlawful killing during the perpetration of a felony that is not enumerated in Cal. Penal Code § 189 yet is "inherently dangerous" to human life. Unlike the felony-murder rules in all other states, California's rule takes an abstract approach to evaluating a crime's dangerousness. California courts determine whether a felony is inherently dangerous by looking to the elements of the felony in the abstract, not the particular facts of the defendant's conduct. At times, the California Supreme Court **has asked whether,** by its very nature, **the crime cannot be committed without creating an undue risk to human life, while at other times** it has considered the ordinary commission of a crime, even if, at the time of the offense, there was no innate risk at all. Henry v. Spearman, (9th Cir. 2018) 899 F.3d 703 [*708]

Based on the above, Petitioner is puzzled as to how the court allowed the prosecutor to charge Petitioner with first-degree murder by "alleged" strangulation when strangulation is not listed in P.C. § 189. Strangulation 'purports' to be a crime of second-degree murder which is less clearly defined.

Moreover, there is NO scientific cause of death determination in Petitioner's case. See 1RT, 121 and 2RT, 141-144 at Exhibit 2. Appendix G.

Without the prosecutor's false evidence-false testimony, fraud and perjury; See Appendix "G", the record evidence 'standing alone,' cannot support this first-degree conviction or the People v. Anderson, three prong test, (1968) 447 P.2d 942; Accord Davis v. Woodford (9th Cir. 2002) 333 F.3d 982. Appendix G, is Petitioners Petition for Writ of Error Coram Vobis which demonstates the Falsehoods used by prosecutor and presented to the jury to establish premeditation, deliberation, malice aforethought.

The Supreme Court of the United States (SCOTUS) held that a law is unconstitutionally vague if it "requires courts to assess the hypothetical risk posed by an abstract generic version of the offense." Welch v. United States (2016) ___ U.S. ___, 136 S.Ct. 1257, 1264, 194 L.Ed.2d 387. This was a "new rule" of constitutional law. Id. p.1264.

The Due Process Clause of the Fifth Amendment prohibits the government from taking away life, liberty, or property based on a criminal law that is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." (Johnson, supra, 135 S.Ct. at p.2556, citing Kolender v. Lawson (1983) 461 U.S. 352, 357-358). Because all statutory language leaves some need for interpretation, what is "fair notice" and "so standardless" is a matter of interpretation, and of degree, for which attorneys argue and SCOTUS stated: the Constitution cannot permit it.

People v. Howard (2005) 34 Cal.4th 1129, 23 Cal.Rptr.3d 306, 104 P.3d 107, 112 (holding that a felony that "can be committed without (899 F.3d 703 at [*708]) endangering human life" is not inherently dangerous.). Also, the risk threshold for an inherently dangerous crime is 'imprecise,' with the California Supreme Court alternatingly describing the standard as a "substantial risk" or "high probability" that someone will be killed. Henry v. Spearman (9th Cir.2018) 899 F.3d, 703, [*708].

See Professor Evan Tsen Lee's Law review article, Why California's Second-Degree Felony-Murder Rule is Now Void for Vaugeness (2015) 43 Hastings Const. L.Q. 1, UC Hastings Research Paper No. 158.

See Exhibit 1, "Report to the Judicial Council," dated Feb. 28, 2013, pages 1-5. It is as sufficiently clear as spring fed bottled water, that California's First-Degree and Second-Degree Murder definitions are imprecise, inexact, confusing, perplexed, ambiguous, vague, incomplete, and inaccurate. On page 3 of the report, it states: because jurors hear and interpret the instructions as a whole, and not in "isolation." That's not correct, and it's a ridiculous, asinine thought. You're dealing with lay people, uneducated in the law. There's a reason that there are different degrees of crimes - like murder. It requires the layman (you would hope and expect) to carefully read the different instructions in "isolation," to determine from the facts of the case, if you are guilty, and to what degree are you guilty.

When CALCRIM 520 states: Any murder that does not meet the requirements for first-degree murder is second degree murder, OR, any murder that does not

meet the requirements for first-degree murder is by default a second-degree murder, requires the jury to presume guilt of one or the other. That's a prejudicial injustice to Petitioner and others, and is indicative of a deficient statute.

Contrary to the "Report to the Judicial Council" 2/28/2013 by the Advisory Committee on Criminal Jury Instructions (Exhibit 1), "[Q]uestions from the jury can demonstrate that the trial court has failed adequately to instruct the jury, and can signify confusion." Pulido v. Chrones, 487 F.3d 669, 682 (9th Cir.2007) (collecting cases). It also indicates a statute is unconstitutionally vague. Johnson v. U.S., supra.

California's first-degree felony murder and second-degree felony murder law requires a "judge-imagined abstraction" not because evidence is lacking, but because courts are prohibited from considering the particular facts of the case before it and must evaluate ways that the offense can be committed. (See Howard, supra, 34 Cal.4th at p.1138.). Thus, if a death occurs during a felony that is claimed to be a basis for first-degree or second-degree felony murder, judges must ponder in the abstract whether there is some way (or ways) of committing that felony that is sufficiently safe to not carry a "high probability" of death. Howard, supra, Id. at p.1129, 1135. See too People v. Burroughs (1984) 35 Cal.3d 824, 830, 833.

In assessing whether a crime is inherently dangerous to human life, a California court "looks to the elements of the felony in the abstract, not at the particular facts of the case, and do not involve consideration of a defendant's 'alleged' actual conduct. A defendant's liability turns on a court's classifying, under an imprecise standard of risk, the entire crime that s[he] allegedly commited. There is "uncertainty about how much risk" is needed to qualify the degree of the 'alleged' crime under the "unspecific statutory standard[s]" of "substantial risk" or "high probability." This is more problematic when measuring the judge-imagined abstraction of an "ordinary case." Johnson, supra, Id. at p.2561.

This "high probability" test is no less ill-defined than the "serious potential risk" standard found in the residual clause in Johnson, supra. The problem with such a "fuzzy risk standard" (Sessions v. Dimaya (2018) ___ U.S. ___ 138 S.Ct. 1204, at p.1221, 200 L.Ed.2d 549) is that it allows for a wide range

of arguable results in evaluating the danger of any particular abstract of a felony, giving inadequate notice of which crimes are to be punished and creating unpredictable determinations by our courts.

The uncertainty about the "proper abstract version" of the felony (strangulation) along with the uncertainty of the inherent dangerous inquiry completes the constitutional vagueness problem with California's first-degree murder and second-degree murder. The Court must find that there is a "high probability" that death will result from the abstract version of the felony, yet it appears the courts have no guide as to what a high probability is. These uncertain threshhold[s] cause unpredictability.

* Petitioner again, unequivocally denies 'ever' choking or strangling the deceased.

Petitioner asserts ("assume arguendo") that the "alleged" choking-strangling was/is 'NOT' an "inherently dangerous act" with a "substantial risk" or a "high probability" of death, BECAUSE, according to the testimony of Prosecution Expert Witness (Dr. Michelle Jorden 8RT, 820-828), the defendant chokes/strangles the victim (to concisely dumb it down) they start to have trouble breathing, you release pressure from the neck, they start to breath again. Petitioner and/or anyone else, could do that precise act thousands of times according to the scientific precision-evidence based testimony of Prosecution Expert Witness, Dr. Michelle Jordan, a forensic pathologist associated with the prosecution, and no one will die.

The primary function of an "EXPERT WITNESS" is to assist the trier in resolving a factual dispute. Typically outside the common knowledge of the average person. Daubert v. Merrell Dow Pharmaceuticals Inc. (1993) 509 U.S. 579, 591-592. EXPERT testimony; accord, Kumho Tire Corp. v. Carmichael (1999) 119 S.Ct. 1167, a unanimous Court found "no relevant distinction between 'scientific' knowledge and 'technical,' or 'other specialized' knowledge and applied the "reliability standard to all ... skill or experience-based observation." Id., 119 S.Ct. at 1174, 1176.

* With no scientific determination on the actual cause of death of the deceased in the instant case, the prosecution and the Court, proceeded in the abstract with first-degree murder, and if it's not that, then it's (ambiguous CALCRIM 520) second-degree murder. The abstract was NOT made concrete clear by the Expert Witness Testimony, either. Petitioner's guilt depended upon an abstract legal issue, and an abstract inquiry, that has nothing to do with Petitioner's actual actions [the punch]. There is NO eyewitness to actual incident. The Sixth District Appellate Court, on page 28 of their decision, avers that prosecution Expert Witness Zephro's Testimony supports the defense, that Petitioner did NOT strangle the deceased. See Appendix G

In the instant case at least, strangulation is 'NOT' an inherently dangerous act with a "substantial risk" or "high probability" of death as defined in the Penal Code, if you can choke-strangle, then remove your hands, and the pressure, and the person survives. Common sense would dictate, that strangulation in the abstract generic version of the offense is a very imprecise hypothesis. Now think of the judge-imagined abstraction of an ordinary case of first-degree murder by actual strangulation, and this Petitioner received a prejudicial injustice.

There are some weird-crazy women that want to be choked-strangled during their sexual orgasm (erotica asphyxiation). So is that sexual fetish-preference listed as an inherently dangerous act in the Penal Code? That's only a crime by statute when someone dies.

U.F.C.,

In Wrestling and Mixed Martial Arts (MMA) they often use head-locks and other types of choke holds to make their opponent submit or tap out, when they feel they can't breathe. Some wrestlers are stubborn and absolutely refuse to submit, so they often lose consciousness for the moment, on the mat, from the strangulation. NO ONE DIES from these moves. Dying is 'NOT' the norm from choking-strangulating in competitions between opponents. Choking-strangling can be done safely, is done safely. To think in the abstract, that choking-strangulation always causes death - is wrong. That's a factoid.

Therefore, since choking-strangulating can be done safely, is often done safely, the "alleged" choking-strangulating of the deceased in the instant case, (with NO scientific determination on the ACTUAL cause of death) was/is 'NOT' an "inherently dangerous act" with a "substantial risk" or "high probability" of death. The prosecution Expert Witness (forensic pathologist, Dr. Michelle Jorden) also testified (unwittingly) that choking-strangulation can be done safely, just by releasing pressure. It was not inherently dangerous because "not all violations of [the felony] pose a danger to human life." (People v. Howard (2005) 34 Cal.4th 1129 at p.1139.).

There was insufficient evidence to charge Petitioner with first-degree murder, or second-degree murder (by strangulation), unless the Court assesses the hypothetical risk posed by an abstract generic FACTOID version of the offense, and postulates. Now add the false evidence-false testimony, fraud, fraud on the court, perjury by prosecutor and others to establish elements of the statute, and it is clear how a miscarriage of justice was perpetrated. As Petitioner quoted the prosecutor supra: "WE DON'T HAVE IT HERE" (11RT,1196:20) no "intentional act." Exhibit 1. The prosecutor's whole case in chief was a fallacy!

Petitioner avers that first-degree murder statute and second-degree murder

statute in California are unconstitutionally vague because the "uncertainty about how much risk" was needed to qualify an [act] as a violent felony crime (act of choking-strangulation) under the unspecific statutory standard of "serious potential risk." The standard is problematic when measuring the abstraction of an "ordinary case," like a judge-imagined abstraction of strangulation, with NO actual evidence of strangulation. The 1st and 2nd degree murder statute[s] are unconstitutionally vague, and produce more unpredictability and arbitrariness than the Due Process Clause of the Fifth Amendment tolerates and the same analysis applies under the Due Process Clause of the Fourteenth Amendment and Article I, Section 7 of the California Constitution. Petitioner prejudiced with vagueness & conviction, statute allowed prosecutor/state to overcharge & made it easier to convict. Statutes & Petitioner's State Court denial violated § 2254 (d) 1 and 2 & Brecht v. Abrahamson.

THE PROSECUTOR INTRODUCED AND ARGUED FROM
"ALLEGED FACTS NOT IN EVIDENCE!" "OBJECTIVELY UNTRUE LIES!"

The prosecutor in his closing argument told the jury:

"The method of killing." (11RT, 1207) Very telling evidence in this case, because the method of killing can suggest, can show, that there is reflection involved. There is consideration and appreciation of what one is doing. See Exhibit 2 for 1207-1208.

What did we hear the coroner tell us? (11RT, 1207) The coroner came in and told us the following (after the coroner was qualified as an expert witness):

the [defendant] has to have his hands on that throat with that constant pressure to cut off the blood supply...

Got to get those hands on there. Got to hold them on top [of her] till [she] cannot resist anymore.

And Dr. Jorden told you it's ten to twenty seconds. And [she] doesn't die at ten to twenty seconds, [she's] unconscious. [She] passes out. (11RT, 1207).

I mean, the person is unconscious after twenty seconds. He has to sit on top of [her] (11RT, 1208:13-21) or be on top with his hands with enough force to keep that blood supply completely shut off for at least another twenty seconds with absolutely no resistance whatsoever.

There can be no doubt knowing that, that during that time he has -- he is deciding and making the proactive decision: "I am going to kill this person right here, right now." (11RT, 1208:13-21). The method of murder in this case puts you into the first-degree murder area. (11RT, 1208:23-24).

The prosecutor is cognizant that there is NO scientific cause of death determination in Petitioner's case 1RT-121, Appendix G and 2RT-141 through 144 at Exhibit 2. The immediate cause of death is unknown. The "natural and probable

consequence theory ," was a prejudicial strategy used against Petitioner to prove "cause and effect." In other words, informing the jury that when you put your hands on someone's throat and squeeze, the victim will always die. Even when there is NO actual evidence to corroborate the "natural and probable consequnce of [the act]" theory . Petitioner testified, that he reflex punched the deceased in the head, after being stabbed by the deceased, to disarm.

CALCRIM 520 lowered the prosecution burden of proving beyond a reasonable doubt every element of the crime which this defendant was charged.

The State Court provided erroneous instruction[s], CALCRIM 520, to the jury. CALCRIM 520 required jury to presume Petitioner guilty and presume Petitioner did [the act] and convict.

Since the prosecutor's coroner never did an autopsy to scientifically establish the actual cause of death of the deceased, the coroner should 'not' have testified extensively about the mechanics of killing and dying by strangulation only; 8RT, 820-828.

The jury had to assume that this was a victim strangulation case, that's why they are hearing an expert testify extensively about the mechanics of killing and dying by strangulation. (8RT, 820-828)

The prosecutor explaining strangulation to jury was stating [she] and [her] in his closing argument to insinuate (NO DOUBT) he was talking about the deceased victim.

Petitioner's public defender - defense counsel (Mondonna Mostofi) did not request, and the court did not give, an admonition to the jury that they were not to consider Dr. Jorden's testimony as evidence that Reina was in fact, strangled. Nor did defense counsel object under P.C. §352, on the basis that it's limited probative value was vastly outweighed by a very real possibility of prejudicing the defendant, and misleading the jury. This omission constituted ineffective assistance of counsel. Dr. Jorden's testimony created a "substantial danger of confusing the issues." See Exhibit OO, which is defense counsel's I.A.C. declaration. Petitioner was prejudiced with I.A.C. and conviction. Appendix O.

There is no reason to suppose that the jury concluded on it's own, with no admonition from the court, that it should ignore everything Dr. Jorden said, and "assume" the deceased victim died from other causes. This "cause and effect" strategy demonstrates exactly how Petitioner was critically prejudiced with the "natural and probable consequence" of [the act] theory , CALCRIM 520, Appendix P.

The prosecutor and his coroner/expert witness, Dr. Michelle Jorden, associated with the prosecutor's office, did not talk about or suggest that the de-

ceased victim died by stabbing, gun shot, or poison. Petitioner surmised and his defense was that the deceased victim died from injuries sustained from the punch and fall into the bathtub (9RT, 966-970.).

This whole strangulation theory was born from the imagination of prosecution's main witness, Eva, who was NOT present when the tragedy occurred. In reading some police reports and interviews of Eva by the police, it appears that the police made numerous suggestions to Eva by way of coersion and confabulation to aggrandize their case against Petitioner. Eva admitted having memory problems, inter alia, and therefore her uncorroborated testimony lacked credibility. (6RT, 469-470.) There was NO indicia of trustworthiness or reliability in Eva's testimony. In fact,* even the prosecutor told the court that "she did not say the same thing" and "she was filled with 'don't remember.'" (7RT, p.614) Exhibit K1. Appendix G

There is a very real possibility "sufficient to undermine confidence in the outcome" that the jury's primary reason for rejecting Petitioner's account of Reina's death is that they believed that a qualified expert had corroborated Eva's account. Strickland v. Washington (1984) 466 U.S. 668, 698. Defense counsel did NOT make any proper objections. See Exhibit OO, which is defense counsel's I.A.C. statement. Petitioner was prejudiced, with conviction, and I.A.C. Appendix O

The only reasonable conclusion the jury could have drawn was that the testimony of prosecution expert witness Dr. Michelle Jorden (the coroner associated with prosecutor's office) was relevant because it described the manner of Reina's demise. There is NO solid credible corroborating evidence whatsoever that Petitioner strangled the deceased.

The importance of Eva's testimony to the prosecution's case was underscored during the defense closing argument: "In this case, you can only conclude that Gary Swierski committed First-Degree Murder if you believe* Eva Swierski beyond a reasonable doubt."

Petitioner will give more examples infra and demonstrate that Eva was NOT a credible witness. Falsus in uno, falsus in omnibus.

FALSE EVIDENCE - FALSE TESTIMONY - FRAUD - PERJURY

* BY PROSECUTOR / OFFICER OF THE COURT!

THE PROSECUTOR

INTRODUCED AND ARGUED FROM "MORE" "ALLEGED FACTS"

NOT IN EVIDENCE! "OBJECTIVELY UNTRUE LIES!"

The prosecutor stated to the jury, that the defendant slipped muscle relaxant drugs into the victim's drink, as part of his plan to help the defendant

strangle and murder the victim. There was NO actual evidence (whatsoever!) to back up any part of these statement[s], that the prosecutor used to critically prejudice Petitioner. (11RT,1192:6-9) Appendix G

There was no blood test to indicate that there was any type of drugs in the deceased victim's system or tissue. There is no documented history (doctor's reports/police reports) of the deceased victim using muscle relaxant drugs, and/or any other types of drugs for that matter.

The prosecutor's false testimony is repugnant covert perjury, Northern Mariana Islands v. Bowie (9th Cir.2001) 243 F.3d 1109, 1114.

The prosecutor's false testimony is **"outrageous goverment conduct"** that shock's the conscience. Rochin v. California (1952) 342 U.S. 165, 169; U.S. v. Gianni (11th Cir.1982) 678 F.2d 956, 960; United States v. Black (9th Cir.2014) 750 F.3d 1053; Morrow v. Superior Court 30 Cal.App.4th 1252, 1263, 1994 Cal.App. Lexis 1253, ***21.

The prosecutor (MATT BRAKER) introduced, argued from, and testified to false evidence - fraudulent statement[s] causing the jury to believe the falsehood[s] and convict Petitioner. A prosecutor's knowing use of false testimony to get a conviction violates due process. Napue v. Illinois (1959) 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217.

The jury probably thought that the prosecutor has integrity and would not state these things if they were not true. The jury thought that the prosecutor has inside knowledge. Otherwise, **why would he state this material "objectively untrue" information?** The jury "assumed" that prosecutor, is an honest, trustworthy, pillar in the community.

Except, MATT BRAKER committed flagrant, calculated, intentional, prejudicial, prosecution misconduct as an officer of the court, to win at all costs! Darden v. Wainwright (1986) 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144.

That was NOT the truth, the whole truth, and nothing but the truth!

Prosecutors may not make material misstatements of law or fact; U.S. v. Kojayan; 8 F.3d 1315, 1320-22 (9th Cir.1993.).

The question is not 'whether the defendant would more likely than not have received a different verdict' if the false testimony had not been presented, but whether the defendant 'received a fair trial' understood as a trial resulting in a verdict worthy of confidence. United States v. Bagley (1985) 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481. The improper comments by the prosecutor "SO INFECTED THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS" Darden v. Wainwright, supra; (quoting Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431.). The error had substantial injurious effect or influence in determining the jury's verdict. Brecht v. Abrahamson 507 U.S. 619, 638.

To prevail on a due process claim based on the presentation of false evidence, a petitioner must show that: Napue v. Illinois (1959) 360 U.S. 264, 269-271.

1. the testimony or evidence was actually false;
2. the prosecutor knew or should have known the testimony was actually false; and
3. the false testimony was material. U.S. v. Agurs (1976) 427 U.S. 97.

Hayes v. Brown (9th Cir.2005) 399 F.3d 972, 984, 2005 U.S. App.Lexis 3744. (quoting United States v. Zuno-Arce (9th Cir.2003) 339 F.3d 886, 889.

* False Testimony is [material] such that the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgement of the jury. United States v. Bagley, supra.

Petitioner testified that the deceased victim had actually stabbed Petitioner. Petitioner punched the deceased and knocked her over into the bathtub, as Petitioner attempted to disarm her and to protect himself. Petitioner was not * allowed to testify about the domestic violence history of the deceased (significant probative value), or the D.V. arrest of the deceased. Petitioner was not * allowed to present a defense of Intimate Partner Battering (I.P.B.), inter alia. This was an accident from self-defense. People v. Elize (1999) 71 Cal.App.4th 605, 611-616; People v. Humphrey (1996) 13 Cal.4th 1073; In re Walker (2007) 147 Cal.App.4th 533; In re Nourn (2006) 145 Cal.App.4th 820 (footnote 1). See too CALCRIM 850 and 851 jury instruction[s].

The state trial judge thoroughly compromised bench's neutrality by denying defendant I.P.B. defense with her quid pro quo, which also lessened the burden on the prosecution to prove every element of the crime beyond a reasonable doubt. In re Winship (1970) 397 U.S. 358, 364. See p. 11 of CERT.

Defense proffered I.P.B. evidence was/is critical to a fundamentally fair trial guaranteed by the Due Process Clauses of the 5th and 14th Amendments. This denial of a defense prejudiced Petitioner and also violated his 6th Amendment right to effective assistance of counsel. The exclusion of evidence by the Trial Court of wife's previous threats to kill Petitioner, and her demonstrated history and character for violence * went to the heart of the central issue of the case and accumulated to deprive petitioner of a constitutionally fair trial. Parle v. Runnels, 505 F.3d 922, 2007 U.S.App.Lexis 23734 (9th Cir.).

Once self-defense and provocation are put in issue at trial, it now becomes the burden of the government, incumbent on the prosecution, to prove beyond a reasonable doubt, that there was no provocation, and no self-defense to negate the elements of offense. People v. Thomas (2013) 218 Cal.App.4th 630.

* Tinsley v. Borg (9th Cir. 1990) 895 F.2d 520, 530, articulated five factors to be considered in evaluating whether the exclusion of evidence reaches Constitutional proportions.

Thomas explains, that "provocation and sudden quarrel are not elements of voluntary manslaughter." (Ibid., citing People v. Rios (2000) 23 Cal.4th 450, 462.) Rather, "sufficient provocation either negates the elements of malice required for murder or causes it to be disregarded as a matter of law." (Ibid., citing People v. Beltran (2013) 56 Cal.4th 935, 942 and People v. Bryant (2013) 56 Cal. 4th 959, 968.

THEREFORE

The prosecutor did not prove malice beyond a reasonable doubt, by proving sufficient provocation was lacking; Mullaney v. Wilbur (1975) 421 U.S. 684. There is "SUBSTANTIAL DOUBT OF GUILT" in Petitioner's case.

Under the Due Process clauses of the 5th and 14th Amendments, the prosecutor is required to prove beyond a reasonable doubt every element of the crime with which a defendant is charged. In re Winship, 397 U.S. 358-364 (1970).

"Any error" which lessens the prosecutions burden of proving each element of an offense beyond a reasonable doubt violates the defendant's right to Due Process and jury trial under the U.S. Constitution. In re Winship (1970) 397 U.S. 358, 364.

The introduction of improper extraneous information/false evidence-false testimony violated Petitioner's Sixth Amendment right to an impartial jury, as well as his right of confrontation and cross-examination. The prosecutor completed his case in chief and was into his closing argument when the prejudicial statement[s] were made i.e., (defendant slipped muscle relaxant drugs into the victim's drink, as part of his plan to help the defendant strangle and murder the victim.) Petitioner could not at that critical stage put the Prosecutor on the stand to cross-examine Matt Braker to demonstrate to the jury that he is a liar.* Defense Counsel was ineffective because NO contemporaneous objection was made, (U.S. v. Cronic (1984) 466 U.S. 648, 659 n.25) at that critical stage & others.

Petitioner's due process was violated because Petitioner could not retake the stand to deny or provide any type of explanation to the extraneous false evidence-false testimony by prosecutor.

A defendant's Sixth Amendment Rights are put in jeopardy when "alleged facts" appear before a jury that were not developed at trial. Such extraneous influence may threaten the guarantee of an impartial jury, see Herdon, 156 F.3d at 636; Goins, 605 F.2d at 953, and may trammel a defendant's right to confrontation and cross-examination. See Parker v. Gladden, 385 U.S. 363, 364-66, 17 L.Ed.2d 420, 87 S.Ct. 468 (1966) (per curiam) (holding that statements by a

court bailiff to jurors violated Sixth and Fourteenth Amendment rights.). See too Sheppard, 384 U.S. at 351 (counting among essential legal procedures "the requirement that the jury's verdict be based on evidence received in open court, not from outside sources"); Irvin 366 U.S. 717, 722 (stating that a juror's verdict "must be based upon the evidence developed at the trial").

Quoting from 2013 U.S. Dist. Lexis 111493 Farrow v. Lipetzky;

A critical stage is a "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." Hovey, 458 F.3d at 901 (quoting Mempa v. Rhay, 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967)). See too United States v. Ash, 413 U.S. 300, 309, 313, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973).

The Ninth Circuit has developed a three-factor test for determining whether a stage is critical. Menefield, 881 F.2d at 698-99; Benford, 574 F.3d at 1232; McNeal v. Adams, 623 F.3d at 1289.

Any of these three factors may be sufficient to make a stage critical:

1) failure to pursue strategies or remedies results in a loss of significant rights;
2) skilled counsel would be useful in helping the accused understand the legal confrontation;
3) the proceeding tests the merits of the accused's case.

Menefield, 881 F.2d at 696, 698-699 (9th Cir.1989); Hovey, 458 F.3d at 901-2.

The presence of any of these factors may be sufficient to render a stage in the proceedings "critical." Cf. Ash, 413 U.S. at 313, 93 S.Ct. 2568 (noting that the relevant inquiry is "whether the accused require[s] aid in coping with legal problems or assistance in meeting his adversary" (emphasis added)).

The question of whether a proceeding in Calfornia is a "critical stage" for the purposes of the Sixth Amendment is a question of federal law. Not state law. Federal principles govern the inquiry concerning whether a state procedure is a critical stage. See, e.g., Musladin, 555 F.3d at 839-43; Benford, 574 F.3d at 1232, n.2 (noting that Musladin applied a more general formulation of the three-part test applied in the Ninth Circuit, but stating that Musladin did not amount to a departure from that test). Of course, the analysis is specific to the state procedure.

The improper comments by the prosecutor "SO INFECTED THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS." Darden v. Wainwright, supra; quoting Donnelly v. DeChristoforo, supra. The prosecutor's closing argument with false evidence is a critical stage., the ERROR[S] "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson (1993) 507 U.S. 619 at 638.

IMPORTANTLY, Petitioner was charged with first degree murder in the abstract, generically, because there is No scientific determination for cause of death. "The cause of death is premised on alleged hearsay" This Petitioner was forced to participate and the death was an unintended tragic consequence of his reflex punch. Malice was Imputed to Petitioner based on his forced participation. People v. Cravens (2012) 53 Cal.4th 500,507-508. "[a] single fist blow to the head does not involve a high probability of death, and not conscious disregard for life."

"MALICE WAS IMPUTED to Petitioner" via CALCRIM 520, 2012 version, through the "natural and probable consequences" of the act. Since there is No scientific determination for cause of death, you cannot demonstrate intent from cause of death, and there is no actual evidence to demonstrate the "act" when the jury was instructed with the "natural and probable consequences" of the "act." The alleged act of strangulation is a "falsehood," from police confabulation with Eva, combined with Eva's poor memory from years of alcohol and drug abuse. 6RT469 The jury returned a generic guilty verdict. It is unknown if the jury relied on the "natural and probable consequences" to convict Petitioner, which means Petitioner's conviction must be reversed pursuant to law, Senate Bill 1437, and Senate Bill 775, collectively, "the Bills," and Hedgpeth v. PuLido.

SCOTUS called this kind of error "alternate-theory error," Hedgpeth v. Pulido (2008) 555 U.S. 57,61,129 S.Ct. 530,172 L.Ed.2d 388.

Thus, they assess alternative-theory error under Chapman v. California (1967) 386 U.S. 18 and reverse because we cannot conclude the error was harmless beyond a reasonable doubt. People v. Aledamat (2019) 8 Cal.5th 1, HN4, f.n. 3

The Sixth Appellate District Court of Appeal reversed People v. Sandoval, 2021 Cal.App.Unpub.Lexis 8116 for alternate-theory instructional error. Sandoval's jury was also instructed with CALCRIM 520 with the "natural and probable consequences" of the act theory. see at Appendix P.

Petitioner requests "EQUAL JUSTICE UNDER LAW" pursuant to SCOTUS, and pursuant to Sandoval ibid. This case should be reversed, just like Sandoval.

Importantly, here, a conviction on an "invalid legal theory" violates Due Process even when the decision of the state court recognizing the invalidity of the theory occurs "after" the conviction has become final. Fiore v. White (2001) 531 U.S. 225,225-229.

* Moreover, People v. Chiu 2014 Cal.Lexis 3760,59 Cal.4th 155 and People v. Gentile 10 Cal.5th 830 (2020) at p. 851-852 held, first degree murder and second degree murder convictions cannot stand when malice is imputed through natural and probable consequences theory as was done to this Petitioner with CALCRIM 520, 2012 edition.

Appendix P

The California Legislature makes laws, the Courts (Judiciary) enforce the law, the "natural and probable consequences" theory is NOT law, is not listed in California Penal Code. Petitioner invokes separation-of-powers or checks-and-balance constraints. N.P.C. enacted in contravention of legislative and Constitution. The Trial Court lacked subject matter jurisdiction to instruct the jury with N.P.C. as a legal ground to convict Petitioner. A court is not supposed to instruct the jury on theories that have no support in the evidence with CALCRIM 520.

Since there is NO scientific cause of death determination evidence in Petitioner's case (1RT-121, Appendix G and 2RT-141,142,143,144 at Exhibit 2), the immediate cause of death is unknown, AND, since there is NO actual evidence conclusively demonstrating - beyond a reasonable doubt - that Petitioner strangled the deceased [the act], it is obvious how **Petitioner was prejudiced with CALCRIM 520** referring to the **"natural and probable consequence of [the act]."** Petitioner was denied due process-fair trial, effective assistance of counsel at **"Critical Stage"** of trial.

Since the **"natural and probable consequence of [the act]" theory was 'not law,' Petitioner has standing to enforce his "personal right not to be convicted under a constitutionally invalid law."** Bond v. United States (2011) 564 U.S. 211, 226, 131 S.Ct. 2355, 180 L.Ed. 2d 269. See also id. at 217 (majority opinion)(holding that a criminal defendant's "challenge to her conviction and sentence 'satisfies the case-or-controversy requirement, because the incarceration constitutes a concrete [**14] injury, caused by the conviction and redressable by invalidation of the conviction." Henry v Spearman (9th Cir.2018) 899 F.3d 703,709;2018 U.S.App.Lexis2170[**14].

The prosecutor tried to "goad" defendant into moving for a mistrial more than once, especially when he told the jury, Appendix G; RT. p.1192:6-9) that defendant slipped muscle relaxant drugs into victim's drink, as part of his plan to help defendant strangle and murder the victim.

The prosecutor's intentions were very clear, very willful, and with purpose. The prosecutor wanted to cause a mistrial and/or severly harass and prejudice defendant's prospects for an aquittal. The prosecutor's statement to jury was not only overreaching, it was outrageous government official conduct. The prosecution critically prejudiced defendant and violated his 5th, 6th, and 14th Amendment Rights to Due Process, fair trial, and Effective Assistance of Counsel.

BRADY - TROMBETTA / YOUNGBLOOD MOTION

Petitioner assumes that Respondent/Attorney General's acceptance of Appellate Counsel's Petition for Review (for properly exhausted claims) also implicitly holds that Respondent accepts Appellate Counsel's Petition for Writ of Habeas Corpus to California Supreme Court. Therefore, this Northern District Federal Court should accept Appellate Counsel's habeas corpus claims as well. The primary reason the trial court denied the motion (3RT, 185); I don't think there's evidence that the tapes actually existed, their exculpatory value, police should have known of their exculpatory value.

Appellate Counsel's habeas also expounds on the claims in more elaborate detail. i.e., Intimate Partner Battering and Expert Witness Testimony regarding "NEW" Evidence. These were also filed within the one year statute of limitations period.

The state courts UNreasonably applied "Arizona v. Youngblood" (1988) 488 U.S. 51 and "California v. Trombetta" (1984) 467 U.S. 479 in denying Trial Counsel's Motion to Dismiss as a Sanction for destruction of evidence. The Trial Court also "abused its discretion" and committed "clear error" as demonstrated by appellate counsel. The State Court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. §2254(d)(1),(2).

Petitioner denies the alleged truth of Respondent's answer regarding the above with the withholding of BRADY exculpatory evidence by the prosecutor, then the destruction of BRADY exculpatory evidence by the police. Reviewing the e-mails (Exhibit A1) attached - between trial counsel and prosecutor, it is very clear that the prosecutor was controlling that evidence, before it was purposely altered and/or destroyed. Petitioner reasserts the facts and evidence demonstrated and set forth by appellate counsel and enhanced by Petitioner. C.T. p. 254 Exhibit A1 at Appendix F, C.T. p. 254

Petitioner through his defense counsel (see e-mails at Exhibit A1) are demanding the 'turn over' to defense of this favorable "BRADY" evidence to no avail. The prosecutor and police are absolutely put on notice that Petitioner is planning on using this favorable material evidence in his (self-defense) defense. The tapes certainly "might be expected to play a significant role in this suspect's defense." (Trombetta, 467 U.S. at p.488). As stated above, the police and prosecutor realized this favorable defense evidence "possess an exculpatory value that was 'APPARENT' before [it] was destroyed." (Id. at p.489). Otherwise, it would not grow legs and disappear. If it was favorable prosecution evidence, it would not have disappeared.

All of e-mails between prosecutor "MATT" BRAKER, defense counsel Mondonna Mostofi, and the police demonstrate a conscious effort to suppress favorable material exculpatory impeaching type evidence from the defense.

A federal court may grant habeas relief on a claim that was adjudicated on the merits by a state court when the state - court decision:

(1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or/and

(2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(1),(2). Harrington v. Richter (2011) 562 U.S. 86, 103; 131 S.Ct. 770, 786-87; 178 L.Ed. 2d 624. Miller-El v. Cockrell (2003) 537 U.S. 322 at 340; 123 S.Ct. 1029; 154 L.Ed 2d 931.

DEFERENCE does NOT mean abdication. "Deference does NOT by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable." Martinez v. Sullivan, 2019 U.S. Dist. Lexis 71146, Northern Dist. of Calif. (9th Cir.).

Petitioner avers that the state - court decision regarding trial counsel's Trombetta/Youngblood Motion to Dismiss (as sanction) fails both prongs of 28 U.S.C. § 2254(d) and Petitioner demonstrates in the following pages precisely why it fails. The Government failed its disclosure obligations. The fact that Petitioner was aware of the evidence, was instrumental in the recording of this evidence, has no relevance when determining whether or not a "BRADY" Violation occurred, as the Court's order dated 8/28/2019, pages 9-10 state the contrary. Quoting Respondent A.G. from his Memo. P&A, p.10, Line 17, The constitutional due process rights of a defendant may be implicated when he is "denied access to favorable evidence" in the prosecutions possession, Brady v. Maryland, where this evidence is material to guilt or punishment.

Petitioner avers "Relation Back" - Rule 15(c). Federal Rule of Civil Procedure 15(c), made applicable to habeas proceedings by § 2242, Federal Rule of Civil Procedure 81(a)(2), and 2255 Rule 12, provides that amendments made after the statute of limitations has run relate back to the date of the original pleading if the original and amended pleadings "arise out of the [same] conduct, transaction, or occurrance." Rule 15(c)(2). Relation back does not occur merely because the same conviction is being attacked. Rather, it "depends on the existance of a common 'core of operative facts' uniting the original and newly asserted claims." Mahon v. U.S., 2018 U.S. Dist. Lexis 189825 [*12], citing Mayle v. Felix (2005) 545 U.S. 644, 659, 125 S.Ct. 2562, 162 L.Ed. 2d 582 (applying Rule 15(c)(2) to state prisoner's habeas petition). Petitioner's "BRADY violation" - "RELATES BACK" and should be considered, as well as Petitioner's claim for "Structural Discovery Error," and "Abuse of Discretion" by trial court. All claims Relate Back and are out of the same conduct, transaction, or occurrance.

Trombetta hearing starts 3RT,152 on May 29,2012. Defense calls Detective Craig Anderson from Sunnyvale, CA. Police Department who was investigating Gary Swierski as a suspect and obtained a search warrant for the couple's home. Det. Anderson led the search of their home 3RT,154,155 and the search was done June 09,2005. Det. Anderson testified that he seized audio tapes that he felt had "evidentiary value" 3RT,156. Det. Anderson made copies of the tapes and booked the original tapes into evidence 3RT,170-171 and he did listen to the tapes collected 3RT,171. On June 15,2005 during one of many phone conversations between defendant and Det. Anderson, defendant asked ANDERSON about the audio tapes that he had seized with the search warrant and specifically about the audio tapes that contained Reina arguing and "GOING OFF" on the defendant (Gary) 3RT,159,164 & 7RT,597,598. See the transcripts of the conversations between Det. Anderson and Gary with pages marked 13,17,21 at APPENDIX F, also in the Augmented Clerk's Transcript, and is stated at 3RT,163-64. These are the TAPES (3) that also contained Reina's death threats to kill Gary. Det. Anderson testified 3RT,164 & 7RT,598 regarding one of the three tapes he heard: One I've heard in spanish, Reina's Going Off on something... But she's definitely Going Off on something. Refer back to page 21 at APPENDIX F. The Court tells defense counsel 3RT,162, Just keep going. I want to get done with this. Defense counsel offered to play the conversation between Anderson & Gary for the court, to impeach Det. Anderson 3RT,165. The Court said: I don't know why you need to impeach him when he says; if it's there, he said it. "I'm satisfied." So would you keep going 3RT,165. Det. Anderson testified, 3RT,165 & 7RT,595-596, " I LISTENED TO ALL THE T A P E S that I had." Det. Anderson testified, 3RT,165, "I know that I made duplicate's of them." That is very significant because none of the TAPES exist anymore. When the original 3 tapes AND the duplicate 3 tapes are manipulated and/or destroyed, that actually proves beyond any doubt, the purposeful bad faith, "INTENT" of police and prosecutor to deny to the defense, apparent, favorable, material, exculpatory, impeaching evidence. The prosecutor would portray Reina as a helpless shrinking violet, while the tapes would demonstrate to the jury that Reina was a threatening physically violent hellcat. Petitioner was prejudiced without the tapes. Det. Anderson testified that he knows the defense requested the tapes be turned over as Discovery, but he was never able to locate the tapes that he seized, booked into evidence, heard, copied, described as, " Reina arguing and Going Off" on defendant, and he did NOT turn this evidence over to the defense- 3RT,166,169 & 7RT,597-598. Anderson testified, that he recalls Mr. Swierski telling him, that he (Mr. Swierski) was taping conversations with Reina in case he needed to use them later in a court of law, to show her demeanor, 3RT,166. Reina had previously been arrested and went to jail for domestic violence, and corporal injury to their child after Petitioner called 911. See APPENDIX I(i) for copy of Reina arrest report where Gary said that he is constantly being struck and battered by his wife [Reina]. Defense counsel 3RT,185 explains why the court should grant the Trombetta Motion, then the Court states: I don't think

there's evidence that the tapes actually existed, or there's evidentiary value 3RT,185, or that the police should have known of their exculpatory value. So I'm going to deny the motion. Petitioner and appellate counsel averred that the court was/is incorrect.

THERE IS CLEAR AND CONVINCING EVIDENCE that the seized tapes did actually exist, that Det. Anderson did actually listen to the tapes, Det. Anderson did actually make duplicate copies of the tapes, the original 3 tapes and the duplicate 3 tapes no longer exist, therefore, the tapes were apparent, favorable, material, potentially exculpatory defense evidence that was in prosecution control, then withheld and destroyed by the prosecution, when it was material to guilt or punishment, and defendant prejudiced without tapes & conviction. Petitioner averred this in his Traverse, pages 3-30 at APPENDIX L.

See DECLARATION OF COUNSEL IN SUPPORT OF MOTION TO DISMISS (Trombetta/Youngblood Motion) pages 11-13, and e-mails concerning the evidence at APPENDIX F.

This particular evidence (death threats in the voice of the deceased, GOING OFF) is "UNEQUIVOCALLY" of such a nature that the defendant would be unable to obtain comparable evidence by any other reasonably available means." The same way a prosecutor or court views a confession that is recorded on tape, then is destroyed, then they lawyer up silent.

The tape recordings destroyed and the 3 "COPIES" made by the police were "RELEVANT" and probative to Petitioner's criminal defense and Petitioner was "PREJUDICED" because the jury was NOT able to hear the deceased in their own voice, threaten to kill defendant one of these days. Petitioner's defense was that Reina was violently GOING OFF on Gary with a knife and did stab Gary after she said she was going to kill him. Reina was a hellcat that acted precisely the way she previously did when recorded, except she had a knife.

Det. Anderson paraphrased and camouflaged what he heard as: "REINA'S GOING OFF ON SOMETHING," "SHE'S DEFINITELY GOING OFF ON SOMETHING." Meaning; Reina is "exploding" on her husband Gary Swierski. There is more than a reasonable probability that the outcome of the trial would have been significantly different if the jury were able to hear the tapes.

The Court must not be 'naive' and assume that the apparent favorable evidence (paraphrased, camouflaged, and described by Det. Anderson as containing arguments between Gary and Reina, and Reina was definitely going off on something) contained 'ONLY' that. If the tapes contained only that, why then did the prosecution team do what they did??? Common sense should dictate that the apparent favorable evidence contained way more than that.

* The tapes contained multiple death threats from Reina to Gary with stated examples as to how Reina can kill Gary, from hiring someone, to seducing a boyfriend, telling the boyfriend that Gary is abusing her and the boyfriend would kill me, etcetera.

The Government failed to meet it's disclosure obligation under the 5th & 14th Amendments of U.S. Constitution and Brady v Maryland, 373 U.S. 83 ,87,83 S.Ct. 1194 (1963) and Giglio v U.S. (1972) 405 U.S. 150,154, 92 S.Ct.763. In Brady v Maryland, the United States Supreme Court held that the prosecution has an affirmative duty under the federal constitution to disclose material, favorable evidence relevant to either guilt or punishment. Defendant is not required to show bad faith. 373 U.S. at 87. The duty to disclose is independant of any request by defendant. U.S.v Agurs(1976)427 U.S. 97,112,113,96 S.Ct. 2392. The Duty includes both exculpatory and impeachment evidence. U.S. v Bagley (1985) 473 U.S. 667,676,105 S.Ct.3375. Materiality is established by showing a " reasonable probability " that disclosure would have changed the outcome of the case. 473 U.S. at 682, U.S. v Bagley. Brady violation occurs when: (1) evidence is favorable to accused because it is exculpatory or impeaching; (2) evidence was suppressed by the state, either willfully or inadvertently; and (3) prejudice ensued. Strickler v Greene, (1999) 527 U.S. 263,119 S.Ct.1936. In Kyles v Whitley, 514 U.S. 419,436 (1995) materiality under Bagley is evaluated in a distinct, cumulative analysis in which " suppressed evidence is considered collectively, not item by item." In Kyles v Whitley, " the question is not whether the defendant would more likely than not have received a different verdict with the undisclosed evidence, but whether in it's absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Some circuits have stated, that government suppression in bad faith may suggest that the evidence is material. Favorable evidence is material. In California v Trombetta, 467 U.S. 479,488 (1984) the Supreme Court held that the Constitution requires the government to preserve evidence " that might be expected to play a significant role in the suspect's defense. A structural discovery error occurs when the government withholds material, favorable evidence and there is a reasonable probability that disclosure would have altered the result of the trial. Brady v Md.,supra;U.S. v Bagley; U.S. v Agurs,supra. Under the Brecht v Abrahamson(1993) 507 U.S. 619'standard' habeas relief is automatically granted for " structural defects." *the missing evidence is favorable to Petitioner and material to guilt or punishment, regardless of the State's good or bad faith.*

Final testimony of detective Anderson with defense counsel 7 RT, 598

Q. Were you able to find them?

A. No.

Q. So were you able to turn over the tapes to me of the argument -- or the yelling you heard Reina going off on?

A. No.

The destroyed Material, Favorable "BRADY" Evidence (the tapes) "LOWERED THE PROSECUTION BURDEN", of proving beyond a reasonable doubt every element of the crime which this defendant was charged.

"Any Error" which LESSENS THE PROSECUTION BURDEN of proving each element of an offense beyond a reasonable doubt violates the defendant's right to Due Process and Jury Trial under the U.S. Constitution. In re Winship (1970) 397 U.S. 358, 364.

Petitioner has presented clear and convincing evidence that is reasonable, credible, and of solid value to prove his claim[s], and to prove the State Trial Court "abused its discretion" in denying Petitioner's Trombetta/Youngblood Motion, and violated his U.S. Constitutional Right to Due Process / Fair Trial and to prove the State Appellate Court decision was wrong, and the decision was UNreasonable, 28 U.S.C. §2254(d)(1)(2) and contrary to clearly established U.S. Supreme Court precedent. This violated Petitioner's 5th, 6th, 14th Amendment Rights under the U.S. Constitution to Due Process / Fair Trial and Effective Assistance of Counsel. Petitioner was prejudiced all the way around and with conviction. All of the State Court findings are objectively unreasonable, and erroneous. 28 U.S.C. §2254 (e)(1)(2)(B)(f). Petitioner avers the state court's findings are egregiously wrong, misfeasance, injustice, miscarriage of justice. Petitioner avers respectfully that the Northern District Court decision was unreasonable.

The trial court commited CLEAR ERROR. U.S. v. OLANO (1993) 507 U.S. 725, 732
The trial court abused it's discretion, (2014) 134 S. Ct. 1744, Highmark INC. v. Allcare Health Mgmt. Sys..

The State trial court error denying the Trombetta/Youngblood Motion had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson (1993) 507 U.S., 619, 627, 113 S.Ct. 1710.

Unequivocally a fortiori clearly demonstrated, this Federal Court should as a SANCTION, DISMISS THIS CASE WITH PREJUDICE. Petitioner prejudiced; NO tapes with conviction.

APPELLANT'S TRIAL ATTORNEY'S DEFECTIVE PERFORMANCE DEPRIVED HIM OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND PREJUDICE ENSUED PETITIONER VIOLATING DUE PROCESS.

Trial counsel deprived appellant of effective assistance by failing to object to the admission of damaging evidence, and to two instances of misconduct by the prosecutor during his summation. Specifically, counsel failed to:

* Request a jury admonition limiting the jury's use of the testimony of prosecution expert witness Dr. Michelle Jorden;
* Object to the prosecutor's insinuation during his summation that the defense had the burden of adducing evidence of innocence, object to prosecutor testifying with no evidence, no foundation, that defendant drugged then strangled the victim.
* Object to the prosecutors vouching for Eva, and arguing alleged facts not in evidence by asserting that Eva's testimony at trial was consistent with her testimony at the preliminary examination (PX).

U.S. v. Cronic (1984) 466 U.S. 648,659,n.25. Strickland v. Washington (1984) 466 U.S. 668, 698.

During the hearing on the motions in limine, defense counsel objected to forensic pathologist Michelle Jorden testifying about " [s]trangulation in general" on the grounds that there was no evidence of the cause of Reina's death. (2RT 141-144.) The court overruled the objection on the basis that Eva was expected to testify that appellant had told her he strangled Reina, as she in fact did. (2RT 144; 6RT 469,489.) However, the court stated that its ruling was without prejudice, and urged defense counsel to object during Jorden's testimony if it proved to be inadmissible. (2RT 144.)

Counsel made no further objection to Jorden's testimony, either at the hearing on the motions in limine or during the testimony itself. In particular, counsel never objected to Jorden's testimony on the basis that its limited probative value was outweighed by a very real possibility of confusing or misleading the jury. (P.C.§352) This omission constituted ineffective assistance of counsel.

Jorden's direct testimony, after she was qualified as an expert witness, comprised slightly over eight transcript pages of detailed, graphic descriptions of the mechanics of killing and dying by strangulation only. (8RT 820-828.) Defense counsel did not request, and the court did not give, an admonition to the jury that they were NOT to consider Jorden's testimony as evidence that Reina was, in fact, strangled. Petitioner was significantly prejudiced at that critical stage with I.A.C.. U.S. v. Cronic, supra.

In the absence of such an admonition, it is impossible to imagine that the jury did not do precisely that. The jury must have wondered why they were hearing this detailed scientific testimony about strangulation only, and the only reasonable conclusion they could have drawn was that the testimony was relevant because it described the manner of Reina's death. In the language of P.C.§352, Jorden's testimony created a " substantial danger... of confusing the issues" of, on the one hand, the amount of time it takes for a strangulation victim to die , and on the other, whether Reina in fact died of strangulation?

Prosecution did not suggest that Reina was poisoned, shot, or stabbed, and also did not put on any experts to talk about death from poison, gunshot wounds, or stab wounds. The prosecution DID ASSERT that Reina was strangled (11RT 1192)(1192 at Appendix G) and they put on an expert to talk extensively about death by strangulation only. There is no reason to suppose that the jury concluded on its own, with no admonition from the court, that it should ignore everything Jorden said.

The ONLY ACTUAL, probative evidence before the jury that appellant strangled Reina was Eva's testimony. (6RT 489.) As noted above, Eva admitted having memory problems, and therefore her uncorroborated testimony lacked credibility. (6RT 469.) Even the prosecutor * complained about Eva (7RT 614:26-28 at Appendix G.) by averring to the court that Eva's testimony was "inconsistent" and " Eva was filled with don't remember." Falsus in uno - falsus in omnibus. As explained in detail above, Eva has significant drug, alcohol, and mental/memory issues, and Eva has a conservator. CERT p.9

Appellant's defense centered on the contention that Reina did NOT die of strangulation but rather of injuries sustained from a fall into the bathtub. (9RT 966-970.) Therefore, contrary to the Court of Appeal's holding, there is a possibility "sufficient to undermine confidence in the outcome" that the jury's primary reason for rejecting appellant's account of Reina's death is that they believed that a qualified expert had corroborated Eva's story. Strickland v. Washington (1984)466 U.S. 668,698; U.S. v. Cronic 466 U.S. 648,659,n.25.

COUNSEL'S FAILURE TO OBJECT TO TWO OTHER INSTANCES OF PROSECUTORIAL MISCONDUCT. THIS PREJUDICED PETITIONER. 1) The prosecutor's shifting the burden of proof.

"[I]t is improper for the prosecutor to misstate the law generally, and particularly to attempt to absolve the prosecution from it's prima facie obligation to overcome reasonable doubt on all elements." (People v. Hill(1998) 17 Cal.4th 800,829-830, internal quotations and citations omitted; see too People v. Boyette (2002) 29 Cal. 4th 381,435.)

At the end of the prosecutor's rebuttal argument, he misstated the law in a manner which impermissibly reduced or shifted the burden of proving elements of the charged offenses. Responding to defense counsel's description of the prosecution's burden of proof, he correctly stated that " The law is that I have to prove to you the truth of the charge beyond a reasonable doubt." (11 RT 1263.) THEN he contradicted that point as follows:

> What that means is, if you're back in the jury room and someone says "Well, it is possible, you know, that... maybe he caught her on the phone that day, and they had an argument, and then this happened. Maybe that's possible," other jurors should, please, say " Time Out," right there.
> [¶] First of all, there's no evidence of that....[¶] So the other jurors should say " Wait. There's no evidence. There's no testimony to point [to] that. We're going off the reservation when we talk about that testimony."

(11RT 1263-1264, emphasis supplied.) Appendix O.

This improperly conveyed to the jury that the defendant had the burden of producing evidence to prove his contention that he acted in self-defense, and that the prosecution should reject that contention if " there's no evidence of that." In fact, the prosecution has the burden of proving beyond a reasonable doubt that the defendant did NOT act in self-defense, and the defense does not have to adduce any evidence at all. (People v. Humphrey (1996) 13 Cal.4th 1073,1103; People v. Banks (1976) 67 Cal.App.3d 379,382-384 and fn.3 [only correct answer to question of whether defendant must prove self-defense is "no"].) Defense counsel's failure to object to this misstatement of law constituted ineffective assistance of counsel. Strickland v. Washington (1984) 466 U.S. 668,698; see U.S. v. Perlaza 439 F.3d 1149,1172-73 (9th Cir.2006) conviction reversed because of intentional and improper burden shifting comment.

The Court of appeal found that the error was not prejudicial, noting that the court correctly instructed the jury on the burden of proof. (opn.30-31.) This proves too much. Taken to it's logical conclusion, the Court of Appeal's analysis demonstrates that nothing a prosecutor can possibly say in closing argument can ever result in a shift in the burden of proof as long as the court's instructions were correct. But the court overlooked the point that "The argument of the district attorney, particularly his closing argument, comes from an official representative of the People. As such it does, and it should, carry great weight." (People v. Talle (1952) 111 Cal.App.2d 650,677; see also People v. Alverson(1964) 60 Cal.2d 803,805 [prosecutor's closing argument is a particularly CRITICAL stage of the trial].) U.S. v. Cronic 466 U.S. 648,659,n.25. In light of the fact that the prosecutor correctly stated the general rule about the prosecutions burden of proof immediately before turning the rule on it's head, it is highly likely that the jurors took the prosecutor's "there's no evidence of that" as a clarification of the rule rather than a contradiction. The need for the court to step in with a real-clarification was precisely why defense counsel needed to object to the prosecutor's misstatement of the law. The fact that she did not object prejudiced appellant and constituted reversible ineffective assistance of counsel. U.S. v. Cronic, supra, Strickland v. Washington, supra. I.A.C. denies due process. In failing to cure the misstatement of law, the Court (silence is condoning) placed its considerable weight behind the misstatement, gives the jury two conflicting legal interpre tations, we may not presume the jury followed Courts other instruction. Chapman v. Cal. (1967) 386 U.S. 18, the prosecutor cannot demonstrate the error was harmless beyond a rea sonable doubt. The prosecutor should "prosecute with earnestness and vigor," but may not use "improper methods calculated to produce a wrongful conviction." Berger v. U.S. (1935) 295 U.S. 78,88. This "NO EVIDENCE OF THAT" error "had substantial and injurious affect or influence in determining the jury's verdict." Brecht v. Abrahamson (1993) 507U.S.619,637. This error is plain, that affects substantial rights, and the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. United States v. Olano (1993) 507 U.S. 725,732.

The prosecutor's VOUCHING for Eva, and arguing facts not in evidence.

"Statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct." (People v. Bolton (1979) 23 Cal.3d 208,212, citing People v. Kirkes (1952) 39 Cal.2d 719,724.) Statement's of supposed facts not in evidence are a highly prejudicial form of misconduct, and a frequent basis for reversal. Hill,17Cal.4th828. 800

A special case of referring to supposed facts outside the record is what is commonly known as "vouching." " A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record." " Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." (United States v. Necoechea (9th Cir.1993) 986 F.2d 1273,1276.) The danger inherent in vouching is that "prosecutorial comments may be understood by jurors to permit them to avoid independently assessing witness credibility and to rely on the government's view of the evidence." (People v. Cook (2006) 39 Cal.4th 566,593, citing United States v. Young (1985) 470 U.S.1, 18-19.)

The prosecutor in his closing argument tells the jury; (regarding his main witness Eva) "She walked into that police department, and she tells them what she told you, the truth about what happened that March night in 2005," 11RT,1193:8-10. The prosecutor is obviously 'vouching' for his main witness who has no indicia of reliability in her testimony and no credibility. Please see Exhibit K1 for example. Eva's police report's were not put into evidence before the jury.

At 12RT,1281:5-7 The prosecutor(Matthew Braker) again 'vouches' for Eva with the jury by stating; " She's telling the truth about it all." "she relayed all of the information she had as best she could as accurate as she could." At 12RT,1281:23 "she told the truth, she told it all."

At 11RT,1195 The prosecutor tells the jury; " People murder their-- their pregnant-- their wives and things like that." Insinuating/suggesting to the jury that Reina was pregnant, with no evidence to back up that statement. That was a very prejudicial insinuation/suggestion to the jurors. Reina was not pregnant in fact.

United States v. Weatherspoon, 410 F. 3d 1142,1148 (9th Cir. 2005)
The Government improperly vouched for its witness.
U.S. v. Wallace 848 F. 2d 1464,1476 (9th Cir.1988)
U.S. v. Frederick 78 F. 3d 1370,1381 (9th Cir.1996)

Defense counsel devoted a great deal of her summation to explaining to the jury why Eva was not a credible witness. Among other things, she noted that Eva had refused, at the suggestion of the prosecution, to be interviewed by a defense investigator prior to trial. (11 RT 1240.) Defense counsel's point in bringing this up was that Eva had strong motivation to say whatever the prosecution wanted to hear, and that the prosecution urged her not to talk to the defense because they were worried that Eva might divulge " the real story of what happened [,n]ot the story that they put together with her after speaking to her over and over again." (11RT1240-1241.)

During his rebuttal argument, the prosecutor responded to this point as follows, in pertinent part:

She came to the preliminary hearing, folks. January, 2011,[6] she walked into court, Eva did. In front of a judge, got up on the witness stand, just like she did here, and answered every question the defense threw at her. And was there a single question, then or here, about this story [appellant] told? They didn't ask her one question about it. Don't you find that interesting? (1 CT 144.)

[6]The preliminary examination was in fact held on January 17,2012. (11 RT 1282.)

Since the transcript of the preliminary examination was not before the jury, this was a statement of facts not in evidence. (Bolton, supra, 23 Cal. 3d at p. 212.) Since the purpose of the prosecutor's statement was to assure the jury that he had personal knowledge of how she testified at the preliminary examination, which was not available to them and which supported Eva's veracity, it was also vouching. (Frye, supra, 18 Cal.4th 894,971.) It was misconduct for both reasons. Defense counsel's failure to object to it "fell below an objective standard of reasonableness" and thus constituted ineffective assistance. (Strickland, supra,466 U.S. at pp. 687-688.)

The prosecutor followed the above-quoted passage with a series of questions which, he asserted, the defense did not ask at the preliminary examination. His use of the phrase "then or here" makes it clear that he was discussing questions which the defense failed to ask at the preliminary examination. But since there was no evidence before the jury about what happened at the preliminary examination, they had no choice but to take his word for it. That is precisely the evil that the prohibition against arguing facts not in evidence is intended to avoid. (Bolton, supra, 23 Cal.3d at p. 212.)

The court suggests that "Eva testified that she had appeared at the preliminary hearing and had given the same account of appellant's actions on the night of Reina's death." (Opn.33.) This is incorrect. It is apparently a reference to Eva's testimony that at the preliminary hearing, defense counsel asked her "A lot of questions," and that she answered them all (6 RT 508.) But no where did she testify that she gave "the same account" at the preliminary hearing as she did at trial. For all her testimony indicated to the contrary, she could have testified entirely inconsistently at the two proceedings.

The Court of Appeal's rejection of appellant's argument on this point is based on the principle that "Trial counsel cannot be deemed to have provided ineffective assistance for failing to object to proper argument." (Opn.33.) But contrary to the Court of Appeal's interpretation, the prosecutor was referring to facts not in evidence in the above-quoted passage from his summation. Moreover, the prosecutor's statement assured the jury that he had personal knowledge of how Eva had testified at the preliminary examination, and that it supported her veracity. That was vouching. For both reasons, the prosecutor's comments were not proper argument. Defense counsel's failure to object to them "fell below an objective standard of reasonableness" and thus constituted ineffective assistance. (Strickland, supra, 466 U.S. at pp. 687-688.)

Petitioner was prejudiced with prosecutors vouching and shifting the burden of proof and "all" other improper argument. Petitioner was prejudiced with I.A.C.- Failure to object - to vouching and shifting the burden of proof, and conviction. See Exhibit 00 which is defense counsel's I.A.C. declaration at 'Appendix' 'O.' "These ERRORS and all others," had a substantial and injurious effect or influence in determining the jury's verdict, BRECHT v. Abrahamson (1993) 507 U.S. 619,638. Petitioner was prejudiced inter alia with conviction.

CONTINUATION OF CLAIMS; CUMULATIVE ERROR ...

CUMULATIVE EFFECT OF MULTIPLE ERRORS ...

Petitioner contends that the cumulative prejudice flowing from all the afore - mentioned errors deprived him of a fair trial. In fact, the trial was a miscarriage of justice that produced a verdict that's not at all trustworthy. Petitioner was continuously prejudiced throughout all the proceedings. Petitioner was deprived Due Process under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. When a number of trial errors occur, a reviewing court asks whether or not their cumulative effect was harmless beyond a reasonable doubt. People v Williams (1971) 22 Cal. App.3d 34,58-59; holding that there were errors and near improprieties in the case that taken together rose to the level of harmful prejudice. See In re Rodriguez (1981) 119 Cal. App.3d 457,469-470.

Reversal may be based on grounds of cumulative error, even where no single error standing alone would necessitate such a result;

People v Williams (1971) 22 Cal. App.3d 34,45;

People v Hill (1998) 17 Cal. 4th 800,845,847-848.

People v Cuccia (2002) 97 Cal. App. 4th 785,795.

"The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Chapman v California, 318 U.S. 18 (1967).

United States v Frederick 78 F.3d 1370, 1381 (9th Cir.1996); see also vouching error.

Parle v Runnels 505 F.3d 922,927 (9th Cir.2007) multiple errors in the admission and exclusion of evidence.

Chambers v Mississippi (1973) 410 U.S. 284,290 fn.3.

U.S. v Wallace 848 F.2d 1464,1476 (9th Cir.1988) vouching & cumulative error.

U.S. v Hands 184 F.3d 1322,1329,1334 (11th Cir.1999) (combined impact of prosecutors inappropriate statements and trial judge's evidentiary errors deprived defendant of fair trial and thus not harmless error.

Petitioner has claims that were state procedurally barred, then dismissed by Federal Court. Thus, AEDPA standards do not apply, claims should be adjudicated on the merits de novo. 556 U.S. 449, 472; 568 U.S. 289, 292.

Petitioner is in custody (state prisoner) pursuant to the judgement of a state court in violation of the U.S. Constitution or law or treaties of the United States.

PETITIONER'S PRAYER

Petitioner prays that this Court invoke the "Miscarriage of Justice Exception," in Coleman v. Thompson (1991) 501 U.S. 722 at 750; and the "Gateway" Exception in McQuiggin v. Perkins (2013) 569 U.S. 383, 391-392 to adjudicate Petitioner's claims on the merits, that were State procedurally barred and dismissed in part by Federal Court Order dated filed 8/28/19, case 4:16-cv-03199-

Issue a severe sanction for the ubiquitous prejudicial prosecution misconduct. Declare/Issue Nunc Pro Tunc Judgement of Acquittal based on Insufficiency of the Evidence-Insufficient Corroboration and Petitioner's case is reversed "with prejudice" to bar retrial under the Double Jeopardy Clause of the U.S. Constitution, 5th and 14th Amendments, and California Constitution, Art.I, §15, order — CDCR to release Petitioner immediately.

- People v. Rodriguez (2018) 4 Cal.5th 1123.
- Morrow v. Superior Court (1994) 30 Cal.App.4th 1252, *1263, [***21-22] [**218] Conclusion.
- People v. Lloyd (2000) 83 Cal.App.4th 1166, [*1197][***70].
- Gall v. Parker, 231 F.3d 265 at [**197](see v.) 2000 U.S. App.Lexis27039.
- Jackson v. Virginia (1979) 443 U.S. 307, 319.

The theory of double jeopardy being that a person need not run the gauntlet only once. N.C. v. Pearce (1969) 395 U.S. 711. Benton v. Maryland (1969) 395 U.S. 784

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

Gary Lawrence

Date: August 28, 2022