22-6886

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KAVIN MAURICE RHODES, — PETITIONER
(Your Name)

vs.

CHRISTIAN PFEIFFER, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mr. Kavin M. Rhodes, D-20245
(Your Name)

(Address)
Pelican Bay State Prison
P.O. Box 7500, B5-108

(City, State, Zip Code)
Crescent City, CA 95532
In Pro Se
(Phone Number)

QUESTION(S) PRESENTED

The Antiterrorism And Effective Death Penalty Act of 1996 (AEDPA) codified at 28 U.S.C. § 2244(d)(1)(A), contains a one-year statute of limitations for filing federal habeas corpus petitions.

1. Can a District Court applying United States v. Bagley, 473 U.S. 667, 682 (1985), on de novo review of Brady v. Maryland, 373 U.S. 83 (1963); and Napue v. Illinois, 360 U.S. 264 (1959) Claims, that the District Court after an Evidentiary Hearing, explicitly found had a "Material Impact" on Petitioner's trial, **erroneously** declare the timely and proven Material Brady/Napue Claims untimely, to subject the Claims to the heightened 'actual innocence' standard of Schlup v. Delo, 513 U.S. 298, 316 (1995), and refuse to adhere too the Court's conjunctive language in Schlup, "[**Unless** the court is [**also**] satisfied that the trial was free of [**nonharmless constitutional error.**]" Thereafter, perpetuated by the Ninth Circuit, contrary to Fed. R. Civ. Proc. 52(a), overturning the factual findings of the District Court, to **also eschew**, address[ing] this Court's Second Clause, i.e., the conjunctive language in Schlup?

2. Under California Law, Postconviction Discovery pursuant to California Penal Code § 1054.9, for Defendants Sentenced to Death, or Imprisonment for Life Without the Possibility of Parole, is a State Statutory Right, deemed part of he prosecution of a Petition for Writ of Habeas Corpus. Therefore, does Statutory Tolling under 28 U.S.C. § 2244(d)(2), apply during '**properly filed**' Appeals of Discovery Proceedings outside the direct review process, that sought, a **reexamination** of disclosed Brady Material the State Court also **joined** with '**properly filed**' habeas corpus petitions, a '**properly filed**' Appeal, that also raised the issue of Petitioner's illegal sentence?

3. Did the District Court err by failing to consider Brady Material collectively, for materiality purposes, under Kyles v. Whitley, 514 U.S. 419, 436 (1995); and if so, does that failure do violence to the 'actual innocence gateway' procedure of Schlup, because the Court's ratio decidendi of Schlup, is Brady itself, also dictating the collective consideration of Brady Material, disclosed by the State in Federal Habeas Corpus Proceedings; exacerbated by the Ninth Circuit's refusal to grant a Certificate of Appealability under 28 U.S.C. § 2253(c)(2), even on a Brady Claim the District Court found timely, which the District Judge previously **overruled** the Magistrate Judge on—ruling that that Brady Claim must be considered collectively under Kyles, demonstrating the Brady Claim to be reasonably debatable amongst jurist of reason?

LIST OF PARTIES

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

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

RELATED CASES

Rhodes v. Rowe, U.S. Supreme Court No. 03-5331

Rhodes v. Rowe, (9th Cir.), No. 01-55138

Rhodes v. Rowe, CV-97-7416-LGB-AJW (C.D. Cal.)

Rhodes v. Biter, (9th Cir.) No. 14-70204), January 10, 2014

Rhodes v. Pfeiffer, CV-14-7687-JGB(KK) (C.D. Cal.), sub nom., January 10, 2014

Writ of Habeas Corpus, Los Angeles Superior Court, No. A968415, February 15, 2012, denied August 14, 2012

Writ of Habeas Corpus, Cal. Court of Appeals No. B243869, September 4, 2012, denied October 16, 2012

California Supreme Court Habeas Corpus, No. S206706, November 16, 2012, denied February 13, 2013

California Supreme Court Habeas Corpus, No. S223839, March 4, 2014, denied April 1, 2015

California Court of Appeal, Appeal No. B242690, July 16, 2012, dismissed October 17, 2013

California Petition for Review of Appeal No. B242690, filed November 15, 2013, Case No. S214663, Review Denied January 29, 2014

People v. Rhodes, Los Angeles Sup. Ct. No. A968415; Direct Appeal Cal. Court of Appeal, No. B046477, December 1, 1991

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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

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

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

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

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

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

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

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

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

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

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was October 31, 2022.

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

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 16, 2022, and a copy of the order denying rehearing appears at Appendix C.

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

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

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

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Unites States Constitution Article I, § 9, cl. 2

United States Constitution, Article III

United States Constitution, 5th Amendment

United States Code, Title 28

§ 2244(b)(2)(B)(i)(ii)

§ 2244(b)(3)(C)

§ 2244(d)(2)

§ 2253(c)(2)

§ 2253(c)(3)

Federal Rules of Civil Procedure

Rule 52(a)

California Penal Code

§ 1054.9

§ 1237(b)

STATEMENT OF THE CASE

This case represents an Unconstitutional conundrum besetting Federal Habeas Corpus petitioners, whom discover Brady/Napue claims after the resolution of a first Federal habeas corpus petition, but goes on as in this case in Rhodes v. Biter, Case No. 14-70204 (9th Cir. 2014), to clear the gatekeeping mechanism implemented by Congress codified at 28 U.S.C. § 2244(b)(3)(C), requiring a showing of diligence and 'clear and convincing evidence of innocence,' and constitutional error, under 28 U.S.C. § 2244(b)(2)(B)(i)(ii).

And thereafter in the District Court, goes on to prove the Claims upon which a Petitioner is allowed to proceed, only to be dismissed under a falsely imposed bar of untimeliness, to subject the claims to a second stringent standard of innocence review under Schlup and denied relief, under the lower 'more likely than not' standard, interpreted by the Ninth Circuit to be above and beyond the standard of proof, for nonharmless constitutional error, Brady/Napue Claims.

That is, on August 10, 1988, long before before the start of Petitioner's criminal trial on October 11, 1989, Petitioner filed a continuing motion for Pre-Trial discovery, to include witnesses criminal histories, and all Brady material.

On October 31, 1989, Petitioner was convicted by a jury in the Los Angeles Superior Court, of Special Circumstance First Degree Murder and Attempted Robbery, pursuant to California Penal Code §§ 187(a), 190.2(A)()17), and 664/211. For which on November 14, 1989, Petitioner was sentenced to Life Imprisonment Without the Possibility of Parole. Petitioner's Direct Appeal was denied on December 24, 1991.

On October 21, 1997, Petitioner timely filed his first Federal Habeas

Corpus Petition, upon the discovery of the suppression of immunity given to prosecution witness Yvette Comeaux, in violation of Brady v. Maryland, 373 U.S. 83 (1983) Rhodes v. Rowe, Case No. CV-97-7416-LGB-AJW (C.D. Cal.), relief denied on November 8, 2000, and Certiorari denied by this Court, on October 6, 2003. Rhodes v. Rowe, Case No. 03-5331.

By Providence in February of 2009, Petitioner received information through the prison rumor mill, that his name and criminal case had been spotted by a fellow prisoner, in a document attached to the REPORT OF THE 1989-90 LOS ANGELES COUNTY GRAND JURY, INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY (1990). That exposed the methods secretly used by the Los Angeles County District Attorneys Office, to purchase testimony from prosecution witnesses, namely under the pretext of its Witness Protection Program; and the method of delay to deal with criminal charges pending against its witnesses, until after the District Attorneys Office, receives favorable testimony.

By this time, in 2004 California had enacted its Post-Conviction Discovery Statute, Cal. Penal Code § 1054.9, available only to defendants sentenced to Death, or Life Imprisonment Without the Possibility of Parole.

Therefore, permitting Petitioner to file postconviction discovery, to learn the truth of the rumors of concealed monetary payments to witnesses, that California hotly contest, until July 20, 2011, when Hon. Sam Ohta, Los Angeles Superior Court Judge, eventually appointed counsel for discovery, leading to the disclosure that the State in fact suppressed monetary payments to its Star Witness Hyron Tucker. The only witness whom falsely testified at Petitioner's trial, to seeing Petitioner with a gun in his hand after a shot

was fired; and for the discovery of allegations of misconduct of now deceased LAPD Officer Anthony Smith Jr., whom shot Petitioner in his abdomen upon his arrest, while bare chested and unarmed and said, "nigger you're going to die, what kind of flowers do you want on your grave?"

In any event, armed with the documentary evidence verifying the rumor that the State suppressed monetary payments to its Star witness, and knowingly used the perjured testimony of Tucker, and LAPD Det. Baird in that regard; and the suppression of new criminal charges picked up during the course of Petitioner's trial, by material prosecution witness Yvette Comeaux, at which time, "Comeaux threatened to hang herself with bed sheets, if booked into the Women's Jail." That Petitioner alleged in State Court, was used by the prosecutor, to force Comeaux to **recant** her testimony that she saw Vincent Denis shoot the decedent. Petitioner timely, and 'properly filed' state habeas corpus petitions with the newly discovered evidence, constituting the First Amended Petition ("FAP") Claims One through Five, in the District Court.

However, on June 19, 2012, on the record State Judge Ohta, tried to induce Petitioner to withdraw his 'properly filed' petition as "**unripe**," because the concomitantly filed Penal Code § 1054.9 Motion, that Ohta also on the record joined with the habeas corpus petitions, had not yet been litigated, an obvious pitfall under California law, to subsequently procedurally bar timely habeas corpus claims as untimely.

On June 22, 2019, outside of Petitioner's presence, Judge Ohta denied any further § 1054.9 discovery, and refused his promise to disclose access to Officer Smith's Personnel Records.

On July 16, 2012, Petitioner timely, 'properly filed' Notice of Appeal, of Judge Ohta's June 22, 2012 Order, pursuant to Cal. Penal Code § 1237(b),

that provides, An appeal may be taken by the defendant: ... (b) "From any order made after judgment affecting the substantial rights of the party."

On November 12, 2021, the State Court of Appeal, Appointed Counsel Carlo Andriani (Cal. State Bar No. 851000), to litigate the Discovery Appeal, under Case No. B242690, that sought **reexamination** of all the newly disclosed evidence and Claims asserted in the 'properly filed' State habeas corpus petitioner(s) that were still pending in the State Superior Court, Court of Appeal, and the California Supreme Court, also serving to exhaust FAP Claims One through Five; and a 'properly filed' Appeal, that also Requested reduction of Petitioner's illegal sentence, that under California law, can be brought at any time it is brought to the attention of the court, including the Court of Appeal. See Appendix D, attached hereto.

On January 13, 2012, while 'properly filed Appeal No. B242690, and concomitantly 'properly filed' habeas corpus petitions were still pending. Petitioner in pro per, exercising extraordinary dilligence, obtained the assistance of Pro Bono Private Investigator Michael Lamere, whom discovered that the State was also contemporaneously suppressing Criminal Charges lodged against Petitioner's arresting-and-shooting Officer, LAPD Officer Anthony Smith Jr., also during the course of Petitioner's trial, for Fraud and Perjury, filed against Smith by the Los Angeles County District Attorneys Office, resulting in Smith's conviction. And, that the Los Angeles County District Attorneys Office, was also suppressing monetary benefits, Rental Payments to Prosecution Witness Shashawn Green, at the Produce Hotel. Thus, revealing the State's true motivation for its denial of Penal Code § 1054.9 discovery of Officer Smith's Personnel Records on June 22, 2012.

On October 18, 2013, after Lamere's discovery of the suppressed criminal

charges pending against LAPD Officer Smith, and while Review of Appeal No. B242690, was still ongoing in the California Supreme Court, under Case No. S214663. Petitioner in pro per, through further exhibition of diligence, doubled back to the Los Angeles Superior Court, under Penal Code § 1054.9, with the documentary evidence discovered by Lamere, of the criminal charges lodged against Officer Smith, and the State Court would not process Petitioner's moving papers. Therefore, on February 10, 2014, Petitioner in pro per, filed Writ of Mandate in the Court of Appeal, under Case No. B254272, seeking access to the Superior Court.

On October 17, 2013, California Court of Appeal, dismissed Appeal No. B242690, on procedural grounds.

On November 18, 2013, Petitioner 'properly filed' Petition for Review of Appeal No. B242690, to the California Supreme Court, under Case No. S214663.

On January 29, 2014, the California Supreme Court, denied Review of Appeal No. B242690, under Case No. S214663, that again, sought **reexamination** of all the Brady evidence disclosed on July 20, 2011, pursuant to Cal. Penal Code § 1054.9. And the reduction of Petitioner's illegal sentence.

On February 10, 2014, Petitioner filed Writ of Mandate in the California Court of Appeal, under Case No. B254272, because State Court Judge Ohta, refused to acknowledge receipt of Petitioner's Penal Code § 1054.9 discovery motion, after Lamere's discovery of the suppressed criminal charges against LAPD Officer Smith, constituting FAP Claim Nine; and the Rental Payments to Shashawn Green, at the produce Hotel, constituting FAP Claim Eleven. The Court of Appeal denied the Petitioner on March 25, 2014.

On February 28, 2014, Petitioner filed a Supplemental to his Application

to file a Second or Successive Habeas Corpus Petition, corresponding to FAP Claim Eleven.

Also on February 28, 2014, the Ninth Circuit Ordered California Attorney General to file a Response to Petitioner's Application to file a Second or successive Petition for Writ of Habeas Corpus.

On April 10, 2014, Petitioner 'properly filed' Petition for Review of Writ of Mandate No. B254272, in the California Supreme Court, that Court denied Review on June 11, 2014, under Case No. S217442. See Appendix E.

On September 30, 2014, the Ninth Circuit GRANTED Petitioner's Application to file a Second or Successive Petition for Writ of Habeas Corpus, corresponding to FAP Claims One though Five, and Nine.

On June 26, 2015, the Ninth Circuit GRANTED Petitioner's Supplemental Application, to include the State's suppression of Rental Payments to Shashawn Green, at the Produce Hotel, discovered by Lamere, while 'properly filed' Appeal No. B242690, and its 'properly filed' Petitioner for Review, No. S214663, was pending in the California Supreme Court. Upon which the Ninth Circuit ruled: "Because Petitioner's Claim that the State withheld Brady material regarding criminal history for witness Shashawn Green was embedded within Petitioner's application and supplement thereto, we grant application to to file a second or successive habeas petition, nunc pro tunc January 22, 2014, with respects to this claim. This claim also includes petitioner's allegations that the state withheld Brady material for money paid to Green for rent/housing expenses." Id.

On July 8, 2021, the Magistrate Judge, deemed Petitioner's Federal Habeas Corpus filed in the District Court on January 10, 2014. Rhodes v. Pfeiffer, Case No. CV-14-7687-JGB(KK), sub. nom. Final R&R [Dkt. 310 at p. 57, Page #:ID13484].

STATEMENT OF THE FACTS

A.

At 1:22 a.m. on April 6, 1988, Paramedics responded to Vernon and Hooper Streets, in the City of Los Angeles. They found a Bell Cab impacted against a power pole. The driver, Johnny Johnson, had suffered a major head injury and was bleeding heavily. He was unconscious with zero blood pressure. He was transported to USC Medical Center at 1:32 a.m. where he expired, within an hour of arrival. After his death, police officers with the assistance of a nurse, found a bullet wound in the left armpit area. (RT 43-64; 67-68, 78.) The Paramedics did not see any money or cocaine on the person of the decedent or in the cab. (RT 77.)[1]

The autopsy, performed by Dr. Ava Hueser, on April 9, 1988, disclosed a gunshot entry wound on the back of the of the left shoulder. The bullet came to rest in the chest after passing through the left lung. It was the cause of death and was recovered as evidence. The scalp wound was not fatal. Bleeding from the chest injuries caused death. The bleeding would have been fatal even with medical help available at the scene. (RT 92-100.) No powder markings

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1. ("RT") Refers to Reporter's Transcripts, in People v. Kavin Maurice Rhodes, Los Angeles Superior Court Case No. A968415. Petitioner restates the facts to edify this Honorable Court, of the theory of the crime presented to the jury, by the trial prosecutor. The correctness of which Petitioner vehemently dispute as, evidenced by the multiplicity of the late revealed Brady/Napue violations in this case, which contaminated the truth finding mechanism of the trial process. Obliging Petitioner to continue on in the Herculean task of trying to prove his innocence, atop his establishment of nonharmless constitutional error; upon which rest, the foundation of the instant miscarriage of justice.

were found on the skin. That would not be surprising to the autopsy doctor if the body were clothed. Assuming the body to have been in an upright position, the entry angle being eighteen inches from the top of the head. The internal bullet path was approximately 18 inches long. It went from back to front as well as left to right, with a trajectory of a 6° downward angle. (RT 100-103, RT 104-105).

B.

POLICE INVESTIGATION

Officer Winter and his partner, Navarro, arrived at the accident scene at approximately 1:50 a.m. They found blood stains inside of the driver's door. The driver had already been removed. The windshield was cracked, possibly from the impact of the driver's head. No money or weapons, or cocaine was found in the cab or around it. Mr. Johnson expired at approximately 2:22 a.m., before the officer arrived at the hospital. (RT 79-80).

Detective William Baird searched the cab and found no money, weapons or cocaine. He interviewed various witnesses, leading to Petitioner's arrest on May 3, 1988. Baird claimed to have interviewed Yvette Comeaux first. And she supplied the names of other witnesses. (RT 249-255, 252.) When Detective Baird contacted Comeaux, she was smoking a cocaine pipe in the doorway of the Roxy Hotel. (RT 64-65.) Comeaux allegedly met Petitioner in 1987. She had seen him off and on around the neighborhood of 47th and Avalon. (RT 109-110.)

C.

WITNESSES DESCRIBE THE SHOOTING

Yvette Comeaux testified that in the early morning hours of April 6,

1988, she was standing on the sidewalk about two houses from Evelyn's house (1244 East 47th Street), selling rock cocaine. Vincent Denis, his sister Veronica Denis, Shashawn Green, and Hyron Tucker was present. At about 1:00 a.m. a cab arrived, bearing only the driver. He turned off his motor. That is usually required by the sellers so the drivers don't run off with dope without paying. Comeaux had been selling earlier in the evening, but still had some cocaine left. She could not recall if Petitioner had been selling earlier in the evening. Comeaux approached the driver's window. He asked for a "dove" meaning a $20 rock. Kevin and Vincent came to the driver's window, Vincent arrived first. Only Comeaux was displaying a rock to the driver. Comeaux did not see or hear Kevin or Vincent offer to sell the cab driver a rock or display a rock to him. The driver had a 20 in his hand and offered to by the rock from Comeaux. Vincent Denis was standing to Comeaux's left and Rhodes to her right. (RT 58, 109-116, 127).

Petitioner allegedly told the cab driver to give up his money, but Comeaux was not positive it was Petitioner who spoke, or whether the speaker said, "give up the money," or "give me the money." (RT 127), and allegedly stuck his hand under Comeaux's arm. This was the arm that was holding a rock in an open palm. Comeaux saw nothing in Petitioner's hand. She did not know which of Petitioner's hands he allegedly used. Comeaux heard a shot coming from her right, allegedly from where Petitioner was standing. Denis was standing to Comeaux's left. She did not see Denis or Petitioner with a gun earlier that day. After the gunshot, Comeaux snatched her hand out of the cab. The driver turned on his engine and took off, with Denis hanging on the car. The cab driver said nothing. Denis or Petitioner said nothing further. It happened fairly fast. Denis had his head and arms in the cab and fell off

about three houses down the street. There did not appear to be any struggle between Denis and the cab driver. Comeaux did not see what Petitioner did after the shot was fired. She walked away in shock without conversing with Denis or Petitioner. (RT 117-124.) The cab went north on Hooper. (RT 124.)

Comeaux, was admittedly high on crack cocaine when she gave her statement to Detective Baird on April 25, 1988. She was scared and she really didn't know what she was saying. The police told her that if she testified at Petitioner's trial her probation would not be taken away. Vincent Denis' family or people speaking on the behalf of Denis threatened to kill Comeaux or beat her up. They wanted her to say that Petitioner was the shooter. But that was not the truth. When asked if Denis was the one that shot the victim, Comeaux replied, **"I saw him."** (RT 128-130, 136.) Comeaux testified consistently from the Preliminary Hearing, that she did not see Petitioner with a gun or shoot the cab driver. (CT 57.)

Shashawn Green, who had known Petitioner for many years, testified that she was in a car with Veronica Denis. She saw Hyron Tucker-(her boyfriend) Petitioner, Vincent Denis and others, but she did not see Yvette Comeaux. She saw Vincent and Petitioner standing there, she heard a shot but did not see anyone with a gun. (RT 140, 141.) When Denis fell to the ground, she rushed over to help him. (RT 143.) Green further testified that her and Veronica Denis followed the cab, because Vincent told her that the cab driver ran off with his money, and they saw he hit a pole. (RT 146-147.) She did not see Petitioner shoot the man. (RT 148.) She did not see Petitioner with a gun in his hand. (RT 150.) Green admitted to having told Defense Investigator Marian E. Smith, that when she heard a shot, Petitioner was standing across the street and she did not see Petitioner with a gun anytime that day. (RT

149-150, RT 293-300.)

Hyron Tucker, who had allegedly known Petitioner for a short time, was selling drugs in the 1200 block of East 47th Street. He had been there off and on all day. He did not see Petitioner selling cocaine within the last several hours before the cab driver arrived, but believed that Petitioner may have been doing so earlier in the day. Comeaux was selling that night. Tucker was across the street from Evelyn's house. He saw Comeaux, and then Denis, and allegedly Petitioner went up to the cab. Comeaux said the driver wanted a 20. When Denis ran up, they told Comeaux, "Bitch step back," and they were like "tussling" for two or three minutes. Tucker was 40 feet away, to Petitioner's left. He heard of couple of shots. Comeaux was standing nearby at the time. Petitioner allegedly stepped back and his right had came down, allegedly with a gun in it. Tucker saw no one else with a gun. He did not see the gun when the men first went to the cab. The driver drove off after a few seconds. Denis was hanging on the cab's door, half way in and half way out of the cab, trying to distract the steering. The cab was swerving. Denis fell off down the street. Tucker then walked directly up to Petitioner and allegedly asked Petitioner if he shot the man, Petitioner allegedly shrugged his shoulders and said nothing. Tucker did not see a gun at that time. Tucker left the scene 15 minutes thereafter. (RT 152-165.) Tucker was under the influence of beer and cocaine when he made his observations. (RT 152-154, RT 173, RT 177-178.) Tucker was under the influence of beer and cocaine, and had not had any sleep an entire day before the incident. (CT 29-30, CT 40-41.) Tucker testified that he was standing with Veronica Denis and Shashawn Green when he saw the incident. They were not in a car. (RT 170-171.) Shashawn Green is Tucker's girlfriend. (RT

182.)

Before the shooting, Tucker spoke to Denis about $5 that Tucker owed Denis. Tucker did not have the $5. Denis told Tucker, "I'm going to jack everything that moves. (RT 169, 171, 176-177.) "Jack" means to rob. (RT 177.) Petitioner was not around when Denis made that statement to Tucker. (RT 191.)

The police came to interview Tucker about this matter while he was in jail for possession of cocaine. Those charges were still pending at the time of Tucker's testimony, with a Preliminary Hearing coming up at the end of the week. (RT 168, 183-185.) The Special Prosecutor in Petitioner's trial-Tom Holmes, interceded on Tucker's behalf when Tucker failed to make a court appearance to keep him out of jail. (RT 178-180.) In spite of being in violation of his probation, Tucker was not in jail. He claimed he could not explain why that was. (RT 186.) The prosecutor represented to the jury that Tucker had no Felony convictions. (RT 387-388.) Tucker denied anyone paid him money for his testimony, and that neither of the detectives or anybody from the district attorney's office promised him anything for his testimony in this case. (RT 387-388.) Tucker denied his attempts to extort money from Petitioner's family. Although, Tucker went to a car wash owned by Petitioner's family where he left a note about the upcoming trial. (RT 187-188.)

D.

THE APPREHENSION OF PETITIONER

On May 3, 1988, Officers Patricia Strong and her partner, Delatorre, responded to a 911 call. At morning roll call, they had been advised that Rhodes was a suspect in a murder case. Outside of the residence indicated on

the computer, a woman named Marry Reddic, came towards the street from the rear of the residence. The officers went to inquire but Reddic stated she did not call the police. The officers went to the address to check on a small child said to be inside by Reddic. They were admitted into the residence by the child. After entering the residence, they found Petitioner asleep laying face down on a bed in a bedroom. The officers claimed to only had ordered Petitioner to stand up, but he allegedly walked towards the officers instead, and looked surprised when he looked in Officer Storng's direction. He allegedly pushed Officer Strong and Ms. Reddic, who had reentered the house. The officers chased Petitioner and Strong called for assistance. Officer Strong saw something "shinny" in Petitioner's hand. (RT 194-211.) Petitioner allegedly failed to comply with Deletorre's demands to halt. Delletorre claimed to have saw a "dark object" in Petitioner's hand, and had taken off his jacket. It was claimed to only be known at this point that the suspect was Kavin Rhodes, allegedly determined by speaking to Ms. Reddic. The name she gave rang a bell and that information was broadcast. (RT 208-246, 270-279.)

E.

THE DEFENSE

Defense investigator Marian E. Smith interviewed Shashawn Green in a holding cell in Department 100 of the Los Angeles Superior Court, the day before the jury was impaneled. Green said that on the night of the killing she was seated in a car behind the cab with Veronica Denis. She heard a shot and looked up. She saw Petitioner on the left-hand side of the street, all the way to the curb. Veronica's car was on the same side of the street as the cab, and she was behind the cab. Green said that she did not see anyone with

a gun. Green was asked specifically, several times if she saw Rhodes with a gun then or at anytime that day, and Green replied in the negative. When she looked up. She saw Denis on the ground by the cab. (RT 292-303.)

Laroy Berry is Petitioner's cousin. A note containing Tucker's telephone number was left with Berry saying, "get in touch with me about going to court about Kavin." Berry did not see Tucker. The police came to the home of Berry's grandmother looking for Petitioner. However this was approximately two years before the trial. (RT 303-334.)

A witness miraculously unearthed by Defense Investigator Marian E. Smith, at Hyron Tucker's home, i.e., Gregory Maxwell, attempted to testify, that Tucker had bragged to Maxwell, that the police were paying him (Tucker) money and drugs to testify falsely against Petitioner, but was prevented from doing so by the court, as hearsay. And the court admonished the jury to disregard the questions and answers to and from Maxwell, because there was no evidence of it from Tucker, that he received money from police. (RT 335-345, 350-353).

Recalled by the defense, Hyron Tucker testified that at the time of the shooting, he saw Ms. Comeaux, standing behind Petitioner and Vincent Denis. Comeaux was trying to sell the cab driver fake drugs. Comeaux had wax in the shape and color of cocaine. Denis told Tucker that he was "going to jack every mother fucking thing that moves." No one else went to the cab that night. Tucker was on drug diversion. The detectives had come to the jail to speak to him, he had not discussed the facts with anyone except Debo, a fellow inmate in the jail, whom unbeknownst to Tucker, was also Petitioner's brother. Tucker claimed no promises were made to him for his testimony and that he was not paid for testifying. He had been taken off diversion and a Preliminary

Hearing was pending. Tucker claimed to had been beaten up by Petitioner's brother and another person on June 3, 1988. He claimed to had been given protection and relocated. Tucker claimed he had gone to Petitioner's family car wash at the request of "Brother-In-Law." He left the number there and left, just to protect himself. He never intended to take the money from Petitioner's family. Tucker claimed that he did not tell Debo that Vincent Denis shot the cab driver. (RT 359-398.)

F.

REBUTTAL

Detective Baird claimed to had talked to Hyron Tucker only after Petitioner's arrest. He obtained a written statement from Tucker. He claimed that he did not inform Tucker of the other witness' statements in advance. And that nothing had been promised or done for Tucker other than relocating him and keeping him out the the County Jail. No promises or leniency was given to Yvette Comeaux and Baird did not intercede in her probation. (RT 404-405.) Baird testified there was a routine investigation into Officer Smith's shooting arrest of Petitioner, Officer Smith was not disciplined. (RT 406-408.) Officer Smith testified that at the time he shot Petitioner in his abdomen, he thought he saw a shinny object in Petitioner's wasteband, so he fired one shot striking Petitioner in his abdomen. He later learned the shinny object, was a belt buckle. (RT 230-246.)

The prosecutor in his closing arguments to the jury, relied exclusively on a theory of special circumstance felony murder, during the commission of robbery. (RT 424-429.) And with respects to Comeaux's testimony, the prosecutor in closing, stated to the jury, "Now, in this trial she testified that she didn't actually see the gun but that when he ran his arm up under

hers and he was on her right; Vincent was on her left; and the shot came from the right. She felt and heard the shot and she jumped back, but she didn't see the gun. Remember Detective Baird testified to that, you can consider that statement of hers originally to the police as the truth of the matter asserted in that statement; that is, you can find as a matter of fact that when she told the police that she seen the gun, you can take that into consideration with all the circumstances going on out there, I think you can really see that she did see the gun. You can take that as true." (RT 431.)

The prosecutor in closing, also argued to the jury, "you have the testimony of the coroner that she identified that photo and said yes, that is the entry wound; that is the wound that killed Mr. Johnson. Mr. Johnson was a dead man from the time that shot was fired. She described the path of the bullet."

The prosecutor in closing further argued to the jury, "And Detective Baird has said that he didn't tell Mr. Tucker any of the things that the other witnesses said before they took the statements from him. And I would think that you can believe that's the officer's job. He has got no reason to pin this on Mr. Rhodes if Mr. Rhodes is an innocent man." (RT 479).

DISTRICT COURT PROCEEDINGS

On January 10, 2014, Petitioner after permission of the Ninth Circuit Court of Appeal, pursuant to 28 U.S.C. § 2244(b)(3)(C), filed a Second or Successive Petition for Writ of Habeas Corpus in the District Court, captioned Rhodes v. Biter, Case No. 14-70204 (9th Cir. 2014), sub. nom. Rhodes v. Pfeiffer, Case No. 7687-JGB(KK), corresponding to Claims One through Eight. [Dkts. 1, 2].

On October 30, 2014, Petitioner filed a Motion to Stay and Hold in

Abeyance his Petition for Writ of Habeas Corpus, to permit exhaustion of additional newly discovered Brady Claims. [Dkt. 10].

On December 8, 2014, Respondent filed a Combined Motion to Dismiss the Petition as untimely, and an Opposition to Petitioner's Request for a Stay. [Dkts. 18, 19].

On February 5, 2015, Petitioner in Pro Se, filed an Application for Leave to File an Opposition to Respondent's Combined Motion, and Supplemental Request for a Stay. [Dkts. 40, 42, 43, 44].

On May 7, 2015, the District Court Granted Petitioner's Request for a Stay, and DENIED without prejudice, Respondent's Combined Motion to Dismiss Petition for Writ of Habeas Corpus, as untimely. [Dkt. 45].

On June 5, 2015, Petitioner filed a First Amended Petition ("FAP"), corresponding to FAP Claims One through Five, Nine, and Eleven. [Dkt. 53].

On August 4, 2015, Respondent filed a second Motion to Dismiss FAP, on the false premise that all claims were time barred, and that Grounds Twelve, and Thirteen were outside of the Court's jurisdiction. [Dkts. 57-63].

On November 27, 2015, Petitioner in Pro Se, filed an Opposition to Respondent's second Combined Motion to Dismiss FAP, along with with Notice of Lodging Exhibits in Support of Opposition to Respondent's Motion to Dismiss FAP. [Dkts. 73, 74], (Lodged out of order by the District Courts Clerk).

On March 24, 2016, the Original Magistrate Judge David T. Bristow, issued a Report and Recommendation ("R&R") segmenting Petitioner's Claims into two Phases, that Grounds Six through Nine be dismissed with prejudice as time barred, and Ground Ten, Twelve, and Thirteen be dismissed because they were outside of the scope of the Ninth Circuit's permission to file a second or successive petition. Phase One Claims. And that, "although petitioner is

entitled to statutory tolling, it is insufficient to render Grounds Six through Nine timely." [Dkt. 76, at 22, Page ID #:3184].

On March 24, 2016, Magistrate Judge David T. Bristow, also issued an Order Appointing Counsel, to represent Petitioner in the Phase Two Claims. FAP Claims One through Five; including an Order permitting Discovery, to permit Petitioner to adjudicate the remaining Phase Two Claims. [Dkt. 75].

On April 15, 2016, Petitioner filed Objections to the R&R, with the specific Objection that FAP Brady Claim Nine is timely, and material, because the prosecutor in closing to the jury, elicited Officer Smith's testimony for a consciousness of guilt jury instruction, and material in regards to Baird's testimony, of Smith's routine shooting of Petitioner. [Dkts. 85, 88].

On June 21, 2016, the District Court, overruled the Magistrate Judge Bristow, opining that FAP Brady Claim Nine, "(materiality of Brady evidence is viewed 'collectively, not item by item'"); and the standard of review of all Brady Claims is de novo. [Dkt. 94].

On October 11, 2016, Respondent filed an Answer to FAP Brady Claims, One through Five, Nine, and Eleven, arguing in part the claims are untimely, [Dkt. 107 at p. 13, Page ID#: 3355, but does not discuss the issue in its memorandum in support of the Answer except by brief reference, without a timeline. [Dkt. 107 at. p. 5 fn. 6; Page ID#: 3362]; and because there is no need for an evidentiary hearing because further expansion of the record of barred by Pinholster and Grounds One through Five are procedurally barred. [Dkt. 107 at 13-14; Page ID#:3355-3356].

On March 15, 2018, Magistrate Judge Kato, issues an Order confirming the District Court's ruling that the standard of review is do novo, therefore, Pinholster, does not apply. [Dkt. 164].

Therefore the following Claims remained in the FAP:

1. Ground One: The prosecution suppressed evidence that it provided monetary benefits to prosecution witness Hyron Tucker in exchange for his perjured testimony.

2. Ground Two: The prosecution knowingly used the perjured testimony of witnesses Hyron Tucker and Detective Baird to secure Petitioner's conviction.

3. Ground Three: The prosecution suppressed new pending criminal charges against prosecution witness Yvette Comeaux, picked up during the course of Petitioner's trial.

4. Ground Four: The prosecutor, Thomas Holmes, committed misconduct by failing to disclose to the jury his status as counsel of record in Hyron Tucker's probation violation hearing, recommending Tucker's release on his own recognizance; and failing to disclose Tucker prior felony convictions (including those under aliases "Manual Evens" and "Rolando Sanchez"), and obtaining dismissal of all charges against Tucker after Petitioner's trial ended.

5. Ground Five: The prosecutor knowingly used the perjured testimony of prosecution witnesses of Hyron Tucker and Shashawn Green to Secure Petitioner's conviction.

6. Ground Nine: The prosecution suppressed impeachment evidence of criminal charges of Fraud and Perjury lodged against LAPD Officer Smith during Petitioner's trial, the police officer that shot Petitioner upon his arrest and testified at Petitioner's trial.

7. Ground Eleven: The prosecution suppressed evidence that it provided monetary Rental Payments for prosecution witness Shashawn Green at the Produce Hotel, in exchange for her perjured testimony.

On December 9, 2016, Petitioner through Appointed Counsel filed a Traverse to the Answer, in which Counsel simply referred to Petitioner's Pro Se Pleadings, with respects to the timeliness of all of Petitioner's Claims, at Dkt. 42, at pages 15-59; Dkt. 74, at pages 25-75, and Objections to R&R, Dkt. 85, ay pages 3-14. [Dkt. 115].

On June 20, 2018, Appointed Counsel filed an Ex Parte Motion to be Relieved as Counsel. [Dkts. 174, 175, 179].

On October 19, 2019, Magistrate Judge Kenly Kiya Kato, required

Petitioner to file his Witness and Exhibit List, in preparation for the Evidentiary Hearing. [Dkt. 254].

On October 24, 2019, Magistrate Judge Kato, also required Petitioner in Pro Se, to file his Pre-Hearing Brief, to establish that the Claims met the standard for second or successive habeas petitions, under 28 U.S.C. § 2244(b)(2)(B)(i)(ii). [Dkt. 257]. That discussed the factual development of Petitioner's Claims, and the new Brady material discovered in federal habeas corpus discovery proceedings, i.e., the following:[2]

> **(A)** The factual development of the suppression of exculpatory impeachment evidence; and the commission of perjury by prosecution witnesses Hyron Tucker and Det. Baird, that Baird in his February 9, 2018 Deposition Testimony, admit he knew was false, inclusive of Baird's authentication of the newly discovered documentary evidence, with respects to the funds he provided to Tucker, and Baird's communication with the Prosecutor's Investigator Cpt. Maus, in regards to Baird's funds to Tucker, and Baird's admission, that those documents were not in the version of the Murder Book he gave the trial prosecutor pre-trial. Cited to by Petitioner in his (AOB, at pp. 15-16); (1 SER-19, 32); (Lodg. 12); Final R&R [Dkt. 310 at p. 25, Page ID#:13502]; Prosecutor Thomas Holmes' November 16, 2020 Evidentiary Hearing Testimony. [Dkt. 298, at pp. 96, 116; Page ID#:12350, #:12550.
>
> **(B)** The February 2, 2018 Deposition Testimony of LAPD Det. J.D. Furr, Baird's Supervisor, whom testified that he did not direct Baird, and Det. Hector Becerra, to: (i) create two different Murder Books in this case, the method used by Baird and Becerra, to conceal the funds too Tucker; (ii) that the funds to Tucker from the District Attorneys Office, and LAPD funds to Tucker, are from two different sources, and (iii) District Attorney Tom Holmes' pretrial version of the Murder Book is not complete. (AOB, at p. 16); (1 SER-19, 31-32); (Lodg. 13); Final R&R [Dkt. 310 at pp. 24-25, Page #:ID13501-#:13502].
>
> **(C)** The July 20, 2011, disclosure of Hyron Tucker's Probation Reports, that revealed that Tucker claimed he was placed in Witness Protection, for a homicide he witnessed

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2. ("AOB") refers to Petitioner's Opening Brief; and ("SER") refers to Respondent's Excerpts of Records, in the Ninth Circuit, in Rhodes v. Pfieffer, Case No. 21-55870. And ("Lodg.") refers to Respondents Lodgment of Records considered by the District Court, in Rhodes v. Pfiefer, Case No. CV-14-7687-JGB(KK).

while at a **Barbershop**, which could not have been this case. See Petitioner's Witness and Exhibit List [Dkt. 254, Exh. 18]; and Prosecutor Thomas Holmes' November 16, 2020 Evidentiary Hearing Testimony, admitting he had never before heard Tucker was placed in Witness Protection for a homicide Tucker witnesses coming out a **Barbershop.** [Dkt. 298 at p. 90; Page ID#:12524]. Militating in favor of the conclusion, that Tucker's Witness Protection was in fact a scam, as determined by the 1989-90 Los Angeles County Grand Jury. An Investigation considered by the District Court. Final R&R [Dkt. 310 at p. 4, Page ID#:13481]; (Lodg. 42).

(D) Petitioner's November 16, 2020 live Evidentiary Hearing Testimony, that Petitioner's murder book was incomplete, with only a partial copy of the investigation chronology, it was missing the second page of notes authored on April 25, 1988. [Dkt. 298 at pp. 125-26, 130, 139; Page ID#:12559-#:12560; #:12564, #:12573]. And did not contain reports of certain witness interviews or a complete copy of the autopsy report [Dkt. 298 at p. 123; Page ID#:12557]. And that Petitioner's copy of the murder book contained no records of payments from LAPD to any witness including Hyron Tucker. [Dkt. 298 at pp. 140-42; Page ID#:12574-#:12576]. Petitioner also testified he did not learn of LAPD Payments to Tucker until July 20, 2011, when he received the Original LAPD Murder Book through post conviction discovery. Petitioner's Evidentiary Hearing Testimony was found credible, by the District Court. Final R&R [Dkt. 310 at p. 22; Page ID#:13499; Dkt. 310 at pp. 44-46; Page #:13521-#:13523], **finding Material Brady/Napue violations.**

(E) LAPD Det. Becerra's suppression of Form 3, of the Victim's Autopsy Report, that reflects Becerra knew from the very beginning of his investigation of this crime, that the crime did not involve a robbery attempt. Petitioner's Pre-Hearing Brief [Dkt. 257-1 at pp. 65-66; Page ID#:11246-#:11247, and Exh. 11, Page ID#:6096-#:6103; Dkt. 257-1 at pp. 67; Page ID#:11247-#:11248, and Exh. 15, at Dkt. 257-5 Page ID#: 6153]. Form 3, was secreted in an altered version of the Preliminary Hearing Transcript, provided by the Federal Public Defender on January 31, 2018, [Dkt. 257-4, Exh. 13; Page ID#:6121], reflecting that the page numbers had been changed, from page 117, too 118, to include Form 3, after the Original Transcript had been provided to Petitioner in Pro Per, in 1989. (AOB, at pp. 17-19). The Magistrate Judge, Final R&R [Dkt. 310 at p. 39, fn. 16; Page ID#: 13616), assume it is true, Petitioner did not have Form 3 pretrial.

(F) The November 16, 2020 Evidentiary Hearing Testimony, of Los Angeles County Public Defender David P. Carleton, confirming that the Preliminary Hearing Transcript, was 117 pages when he provided it to Petitioner on January 12, 1989. [Dkt. 298, at p. 15, 23, 24-25; Page ID#:12499, #:12457-#:12459]; (RT 66-68), (AOB, at 18); Objections to R&R, [Dkt. 309-1, Page ID #: 13312-#:13314]; Dr. Hueser's testimony in

the Denis trial, denied Petitioner pre-trial, also provided July 20, 2011 on postconviction discovery, where Hueser acknowledge the existence of Form 3, and Becerra's background knowledge. Petitioner's Witness and Exhibit List, [Dkt. 254, at Exh. 81; Petitioner's Pre-Hearing Brief, [Dkt. 257-1, at p. 67; Page ID#:11248; 257-4, Page ID:#6015]. Petitioner in 2019, obtained a Certified Copy of the Autopsy Report, from Los County Medical Examiners Coroner's Office, and learned it was 14 pages in length, not the 11 pages, as Stipulated to by the Prosecutor Holmes and Public Defender Carleton pretrial. See Petitioner's Pre-Hearing Brief, [Dkt. 257-5, at Page ID#:6125-#:6154]. See also Prosecutor Thomas Holmes November 16, 2020 Evidentary Hearing Testimony, [Dkt. 298, at pp. 92-95; Page ID#:12526-#:12529]. [Dkt. 309-2, Page ID#:13298], Petitioner's July 22, 1988 Preliminary Hearing Transcript, reflecting "AUTOPSY REPORT PAGES 107-116;" and Dkt. 309-1, Page #:13299-#:13310], showing that the Court Reporter's 117th Certification Page, has been renumber[ed] by hand to 118, to accommodate the post hoc insertion of For, 3. (AOB, at pp. 18-19).

(G) The suppression of an exculpatory statement by Leticia Ellis, (**although untrue**), "Vincent Denis told her that, 'the cab driver ran off with his drugs, and Kevin shot him.'" (AOB, at p. 20); (Final R&R, at pp. 39-40, fn. 16; Page ID#:13516-#:13517, and p. 43, fn. 20; Page ID#:13520-#:13521]; Holmes' Evidentiary Hearing Testimony, [Dkt. 298, pp. 66-70; Page ID#:12500-#:12504], exhibiting that the only evidence in the trial that there may have been another motive other than robbery, was Shashawn Green's Testimony, that Veronica Denis told her the cab driver ran off with his money, which Holmes Object to as hearsay, sustained by the Court. While the entire time, Holmes never revealed that he had the statement from Leticia Ellis, turned over by Holmes **himself,** on July 10, 2017, on discovery in federal court, found in Holmes' at home, version of the Murder Book; Final R&R [Dkt. 310 at p. 11; Page ID#: 13488]. Revealing Homles to have introduced False Evidence, to supply a mens rea, for the crime.

(H) Det. Baird's suppression of a statement from Diana Jordon, that she saw Vincent Denis sitting in the front passenger's seat of the cab with the victim, prior to the shooting. Petitioner's Witness and Exhibit List [Dkt. 254, at Exh. 73]. Contrary to the false narrative presented to the jury by the prosecutor, that the cab just happened upon the scene, and there was no evidence that anyone knew the the victim. Part and parcel of the false narrative the prosecutor used to establish a motive of robbery.

(I) The 2015 letter written by Vincent Denis, to Petitioner's Pro Bono Investigator Michael Lamere, in which Denis writes "he never saw Petitioner with a gun." That the District Court wholly overlooked. Objections to R&R [Dkt. 309

at pp. 7-8, Exh. 4, Page ID#:13064-#:13065; #:13152-#:13153]; Petitioner's Witness and Exhibit List [Dkt. 254, Exh. 46].

(J) Det. Baird's suppression of his handwritten note, found in the Original Murder Book disclosed in Cal. Penal Code § 1054.9 postconviction discovery on July 20, 2011, that the Magistrate Judge in Federal habeas corpus proceedings sua sponte made the Court's discovery request for, because Respondent's admitted that Holmes' 2017 private in home Third version of the Murder Book, could not be authenticated. And the versions of Baird's notes in the Original Murder Book, **DOES NOT** reflect that Comeaux said she saw Kevin shoot, nor with a gun, contrary to Baird's trial testimony. And that Baird continued to start and stop the tape recorder during his interview with Comeaux, for five-to-ten minutes. Objections to R&R [Dkt. 390 at pp. 9-10; Exh. 5, Page ID#:13066-#:13067, #:13155]; Final R&R [Dkt. 310 at pp. 19-22; Page ID#:13496-#:13496]; (AOB, at p. 24).

(K) The prosecutor's suppression of the new criminal charges picked up by Yvette Comeaux, during the course of Petitioner's trial, at which time Comeaux threatened to "hang herself with the bed sheets, if booked into the Women's Jail," use[d] by the prosecutor to force Comeaux to **recant** her testimony that "she saw Denis shoot the cab driver." Final R&R [Dkt. 310 at p. 49; Page ID#:13526]. The State during Federal and State habeas corpus proceedings refused to disclose the State's final resolution of the new criminal charges filed against Comeaux, and the District Court similarly refused to Order the disclosure of Comeaux's Probation Reports; and the Ninth Circuit refused to grant Petitioner's Request for a COA. (AOB, at p. 49).

(L) The Jury's Request for readbacks of Shashawn Green and Yvette Comeaux's testimonies, and request for Clarification of the Special Circumstance Allegations, with "**EMPHASIS ON PERSONAL USE OF A FIREARM.**" At which time, outside of Petitioner's presence, the trial judge informed the Jury Foreman, "If there was no robbery, or attempted robbery, then there is no Special Circumstance. There is nothing to rob." That Ninth Circuit case law, construe as as a jury's doubting the truth of allegations. (RT 514-521). Witness and Exhibit List [Dkt. 254, Exh. 79; Page ID#:5854]; (AOB, at pp. 21-23, and Appendices A-C).

(M) The prosecution's suppression of impeachment evidence, that prosecution witness Shashawn Green, also received monetary benefits, Rental Payments at the Produce Hotel, in exchange for her perjured testimony. Petitioner's Witness and Exhibit List [Dkt. 254, at Exh. 62; Page #:ID5851]; Final R&R [Dkt. 310 at p. 40; Page #:ID13517]; Objections to R&R [Dkt. 309 at p. 35, Page #"13092]; (AOB, at p. 49). The Ninth Circuit similarly denied Petitioner's Request for a COA.

(N) The discovery in Federal habeas corpus

proceedings, that the State also suppressed impeachment evidence, i.e., the criminal history of Petitioner's arresting LAPD Officer Particia Strong. Petitioner's Pre-Hearing Brief [Dkt. 257 at p. 35; Exh. 8]; Objections to R&R [Dkt. 309 at pp. 60-61, Exh. 24; Page #:ID13117-#:13118; Dkt. 309-2; Page #:14352].

(O) LAPD Officer Smith's Personnel Records disclosed in Federal Court on discovery, in regards to the suppressed impeachment evidence of Officer Smith for Fraud and Perjury, lodged against Smith during the course of Petitioner's trial. That revealed that the investigation against Smith, was simultaneously conducted by LAPD. Det. Becerra along with his investigation against Petitioner, and suppressed by Becerra, at which time Becerra claimed that he did not immediately submit his criminal investigation of Officer Smith to Internal Affairs, **because someone broke into his office within the Police Station, and stole his Investitation Files.** Petitioner's Witness and Exhibit List [Dkt. 254 at Exhs. 1-8; Page #: ID 5846]; Objections to R&R [Dkt. 309 at p. 40; Page ID#:13097; Dkt. 309-1, Exh. 13; Page #:ID13265-#:13284].

(P) The suppression of Scientific Evidence of Petitioner's Innocence, discovered in Federal habeas corpus discovery proceedings, yet another Brady/Napue violation, establishing the Prosecutor Thomas Holmes' known use of Perjured Testimony, by the decedent's Autopsy Doctor, Ava Heueser. Whom testified that the **trajectory of the bullet fired causing the victim's death**, was at a mere "**6° downward angle,**" that Homles extensively cross-examined Hueser on at trial, and argued to the jury in his closing arguments, in 1989. And on July 10, 2017, on discovery in Federal Court, Holmes **himself**, disclosed a Third version of the Murder Book, that contained a handwritten post autopsy note, that reflect that the **trajectory** of the fatal bullet wound to the decedent was at a "**40° downward angle.**" Scientific Proof, that Petitioner could not have fired a shot with that trajectory by placing his hand under Comeaux's arm, as testified too by Comeaux at trial. See Petitioner's Pre-Hearing Brief [Dkt. 257-1 at pp. 59-60; Page #:ID11240-#:11242]; Witness and Exhibit List [Dkt. 254 at Exhs. 10; and Hueser's trial testimony at Exh. 42, Dkt. 254; Page #:ID5847-#:5850]. Attached hereto, at Appendices F-H.

The Magistrate Judge opined: "The Court acknowledges Petitioner's assertions that the trajectory of the bullet proves he was not the shooter and that the pathologist altered her findings and testified falsely to conform the evidence to Comeaux's allegations that Petitioner stuck his hand inside the victim's car." But goes on to reject the new Brady/Napue violations discovered in Federal Court, on the premise that "Petitioner cannot prove who authored the note, that the trial prosecutor **himself**, unwittingly produce in Federal Court in 2017, that this Court ought find does

not absolve the prosecutor of his tripartite Constitutional obligations, to disclose that post autopsy note pretrial; and not to use perjured testimony, and argue facts to the jury in his closing arguments, he knew was false. See Final Report and Recommendation, attached hereto, as Appendix F.

Nevertheless, Petitioner in Pro Se, was able to demonstrate, that the handwriting on the post autopsy note, is **identical** to **Becerra's** handwriting in the Original Murder Book in this case, initially assigned to Detectives **Becerra**, and **Baird.** And, **Becerra's** handwriting on the Chronology, of **Becerra's** lone investigation of Officer Smith. See Petitioner's documentary evidence, attached to his Objections to R&R [Dkt. 309-1, at Exh. 13; Page #:ID13265-#:13287, Id. at Page ID#:13285-#:13257, and Exh. 22, Dkt. 309-2 at Page #:ID13371-#:13374], at the entry dates of: April 6, 1988, April 7, 1988, April 9, 1988, April April 11, 1988, and April 12, 1988. Handwriting that LAPD Detectives J.D. Furr, and Baird, each in their 2018 Deposition Testimony in the the District Court, identify as Det. Becerra's handwriting. As well as, Baird's admission that the Original version of the Murder Book, the only record containing funds to Hyron Tucker, was not provided to the defense pretrial. Collectively, Becerra actively with Baird's knowledge, and participation, suppressed: Funds too Tucker, LAPD Smith's Misconduct Investigation; Form 3 of the Autopsy Report showing the crime did not involve a robbery, that reflects that Becerra was present, and actively participating with the Coroner's Investigator, and the Post Autopsy Note is written in Becerra's own hand. Appx. F, G & H.

It is worth mentioning, that the dichotomy between a "**6° downward angle,**" and a "**40° degree angle,**" is not a trivial matter. The Magistrate Judge denied Petitioner's Request for the Appointment of Experts, to interpret this **Scientific Evidence.** Therefore, Petitioner left to his own devices, recruited the prison's Educational Math Professor, whom constructed Petitioner's Diagrams. See Objections to R&R [Dkt. 309 at p. 44; Exh. 20 & 21; Page #:13101, Id. at Dkt. 309-2; Page ID#:13363-#:13369]; (AOB, at p. 28, 49, and Appendices D-F), and denying Petitioner's request for a COA. Rhodes v. Pfieffer, Case No. 21-55870 (9th Cir. 2021), ID: 1232188, DktEntry: 12-2, at pp. 20-45 of 324. Final R&R [Dkt. 310 at pp. 26-27; Page #:ID13503-#:13504], here at Appx.G-H.

In any event, after an Evidentiary Hearing, conducted by the Magistrate Judge, consisting of the live testimony of Petitioner, the trial prosecutor, the public defender who represented Petitioner and received the pretrial discovery from the prosecutor, the testimonies of the LAPD homicide detectives, and the review of thousands of pages of documentary evidence

disclosed in State and Federal habeas corpus proceedings by Order of discovery, culminating in dispositive Findings of Fact and conclusions of law. The Magistrate Judge in a Final Report and Recommendation, Adopted in full by the District Court, in which the Magistrate Judge opined:

> Here, Petitioner could not have discovered the basis for Claims One through Five before July 20, 2011, because Petitioner was not provided with a copy of the murder book containing evidence of payments of evidence to Tucker at that time. Dkts. 265-13 at 178-79; 298 at 43, 140. Such evidence was only disclosed during post-conviction discovery discovery. Dkts. 279-5 at 78; 279-6 at 15-18, 21; 298 at 141-42. It is less clear whether other evidence, such as the evidence of criminal charges pending against Comeaux and Tucker at the time of Petitioner's trial, was also omitted from the version of the murder book disclosed to Petitioner at trial."

See Appx. B, attached hereto, marked SER-045; Final R&R [Dkt. 310 at p. 32; Page #:ID13509]. The Magistrate Judge, also made the unambiguous 'Findings of Fact,'

> "The Court first notes Petitioner's new evidence would have been critical to impeach Tucker, the prosecution's main witness at trial. Tucker offered testimony that after the gunshot, he saw Petitioner holding a gun has he moved his hand down towards his leg, 1 RT 157, 159, 172-73, 191, and that the sight "was something you don't forget," id. at 173-177-78. Tucker also testified that when he asked Petitioner if he shot the victim, Petitioner merely shrugged his shoulders. Id. at 162-63. Finally, Tucker testified that before trial, Petitioner called him and offered him money and cocaine to change his favorable testimony. Id. at 166-68. Petitioner's new evidence would have established the trial testimony of Tucker and Detective Baird denying such payments was false. Dkts. 256-13 at 143-56, 168-69; 279-4 at 52-70, 72; 279-7 at 60. Had Petitioner's Claims one and two been timely, it is likely Petitioner would be entitled to relief under Brady and Napue v. People v. State of Ill., 360 U.S.264 (1959)(finding prosecution may not present or fail to correct material testimony it knows or reasonably should know is false).
>
> The standard under Schlup is distinct and significantly higher than the standard for a habeas claims brought under Brady or Napue. Under Schlup, the question is whether, in

> light of the new evidence, no reasonable juror would have found Petitioner guilty beyond a reasonable doubt. Because errors were made with respects to Tucker that could have a material impact on Petitioner's trial, the Court will not consider Tucker's testimony as evidence of Petitioner's guilt for purposes of the Court's analysis."

The District Court, Adopted the Migistrate Judge's Final Report and Recommendation without modification. See Appendix B, attached hereto; i.e., the District Court's Order Accepting Findings and Recommendations of the United States Magistrate Judge, the District Court's Judgment Denying Habeas Corpus; and Granting a Certificate of Appealability, on FAP Claims One through Five. Attached hereto as Appendix B, marked SER-005-009. Where the District Court in pertinent part writes:

> "Here, in accordance with 28 U.S.C. § 2253(c)(3), the Court finds that Petitioner has made a substantial showing of a denial of a constitutional right with respects to a ground for relief set forth in the First Amended Petition so as to support the issuance of a certificate of appealability. Specifically, the Court finds Petitioner has made the requisite showing with respects to the following issue: Whether Petitioner may pass through the actual innocence gateway set forth in Schlup v. Delo, 513 U.S. 298, 327 (1995) on Claims One through Five solely by undermining or impeaching the credibility of witnesses. While the Ninth Circuit in Gandarela v. Johnson, 386 F.3d 1080, 1086 (9th Cir. 2002) suggested "undermin[ing] the credibility of the prosecution's case may alone suffice to get an otherwise barred petitioner through the Schlup gateway[,]" Id. at 1086 (emphasis in original), it is not clear when, if ever, undermining the credibility of the prosecution's case alone, as Petitioner has here, would make it "more likely than not that no reasonable jurors would have found petitioner guilty beyond a reasonable doubt," Schlup, 513 U.S. at 327."

See Id., Appx. B, at SER-006; [Dkt. 315 at p. 2; Page ID#:13540].

A subversion of the rule of law in this case unfaithful to this Court's decision in Schlup, supra, 513 U.S. at p. 330, opining: "The newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." Within the ambit of **S. Ct. Rule 10(c).**

REASONS FOR GRANTING THE PETITION

I.

The Ninth Circuit Decision Provides Petitioner with No Adequate Remedy At Law. After Having Proved Nonharmless Constitutional Violations.

First, the District Court under the **guise** of the Schlup procedural gateway, standard of review on timely and proven Brady/Napue Claims. Under time lines manufacture[d] by Respondent through fraud upon the Court, over Petitioner's vehement objections; endorsed **sub silentio** by the District Court, to **falsely** declare the Claims untimely and unfairly subject the newly discovered Brady/Napue violations, to the heightened Schlup gateway standard of review. Thereafter in substance, actually applying an impermissible "insufficiency of the evidence" standard of review, in deference to the verdict. And in toto, **ignored** this Court's 'conjunctive-language' in both Schulp v. Delo, supra, 513 U.S. at p. 316; and McQuiggin v. Perkins, 569 U.S. 383, 401 (2013), holding: "We stress once again that the Schlup standard is demanding. The gateway should open when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial "['**unless**']**[3]** **the court is ['also'] satisfied that the trial was free of ['nonharmless constitutional error']**." (Emphasis added). A procedural anomaly sanctioned by the Ninth Circuit. Within the ambit of **S. Ct. Rule 10(c).**

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3. See e.g., Merriam-Webster's Collegiate Dictionary, (11th Ed. 2011), at p. 1378), describing the word **"Unless"** as a conjunction, defined as: **1:** "Except on the condition that: under any other circumstances **that:** under another circumstance than 2: without the accompanying circumstance or condition that: but that: BUT. **2. unless:** except possibly : EXCEPT." See also Miklosy v. Regents of Univ. of Cal., 44 Cal.4th 876, 888 (2008), opining: "**The word 'unless' when used as a conjunction** means 'except on the condition that.' (Webster's 9th New Collegiate Dict. (1988) p. 1292.) Thus, as a **matter** of established usage, the "**unless**" clause states a condition that must be satisfied **in every case.**" And Merriam-Webster's Dict., (New Ed. (2017), at

(Continued...)

Petitioner respectfully submit, it is his contention and belief, that this Court's use of the **conjunctive word** "**Unless** in both Schlup, supra, 513 U.S. at p. 316, and McQuiggin, supra, 569 U.S. at p. 401, in the context of the actual innocence for otherwise procedurally barred habeas corpus claims, is the Court second clause in the Courts decisions, perhaps intended to be a **syntactical** exception to the first clause, for the preservation of constitutional rights, enunciating the legal principle, "The gateway should open only when a petition presents 'evidence of innocence strong that a court cannot have confidence in the outcome of the trial," | "unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through gateway and argue the merits of his underlying claims." Against the backdrop of Murray v. Carrier, 477 U.S. 478, 496 (1986) (procedural default context citing Brady) and Brady v. Maryland, supra, 373 U.S. 83, (the Court's protector of the truth finding mechanism of the trial process), to differentiate free standing actual innocence claims from those in which "a constitutional violation has probably resulted in the conviction of one who is actually innocent."

(...Continued)

p. 21), describing the word "**Also**," as an adverb, defined as "In addition: TOO." But see, Mellinkoff's Dictionary of American Legal Usage, (1992) at p. 667), "**Unless the context otherwise requires**: a legal writer's backdoor escape route to dodge responsibility for an adequate definition. <Unless the context otherwise requires, in this contract the singular included the plural, and the plural includes the singular.> What is included in context? Who determines when context requires something else? Must context scream for change or only hint? Improving the phrase grammatically to read unless the context requires otherwise is no solution; the uncertainties remain. In short, I mean what I say, **unless** I don't." It is academically doubtful that this Court, in its **Supreme Judicial Wisdom**, use of the words "**Unless**" and "Also," in both Schlup and **McQuiggin** above, was intended to be an exercise in surplusage, rather than as an escape route to avoid unconstitutional complications, under the Suspension Clause of U.S. Const. art. I, § 9, cl. 2.

Logical[ly] speaking, the Court's use of the word "**Unless**" in Schlup and McQuiggin above, has the same **import** as the Court's use of the same word "**Unless**," in for example: United States v. Bagley, 473 U.S. 667, 680 (1985); Landgraff v. USI Film Products, 511 U.S. 244, 249, 259, 263-64, 272 (1994); United States v. Olano, 579 U.S. 725, 732, 734-35 (1993), Harris v. Reed, 489 U.S. 255, 258 (1989), (Terry) Williams v. Taylor, 529 U.S. 362, 383 (2000), Inwood Labs. v. Ives Labs., 465 U.S. 844, 855 (1982), and Banister v. Davis, 140 S.Ct. 1968, 1712 (2020) (ALITO, J., Dissenting); accord Supreme Court Rule. 13.1,4. Exemplifying the Court's use of the word "**Unless**" as an exception to the Court's Rules of Procedure.

It is noteworthy, to pause here for a moment, and reiterate that said ante, at p. 23 subsection (A)-(C), through p. 30, subsections (D)-(P). The District Court after an Evidentiary Hearing, on November 16, 2020, at which the District Court found Petitioner's testimony credible; the Magistrate Judge thereafter applying United States v. Bagley, 473 U.S. 667, 682 (1982), **made explicit factual finding(s)** and issued a Final Report And Recommendation. [Dkt. 310, at pp. 45-46 ;. Page ID#:13522; 13523]. Attached hereto as Appendix B, also marked SER-058, SER-059. Adopted in full by the District Court, finding Petitioner carried his burden of proving material **Brady/Napue violations**, on FAP Claims One and Two, in regard to the prosecution's suppression of exculpatory evidence, and known use of perjured testimony of Prosecution witnesses Hyron Tucker the only witness (and proverbial crook recruited by Det. Baird from a jail) to testify falsely at trial to seeing a gun in Petitioner's hand) and therefore the Court, did not consider Tucker's testimony, for the purposes of the Court's Schlup analysis. Petitioner argued in the District Court, and in the Ninth Circuit, that because Tucker and Baird

conspired to commit perjury together, on the same suppression of evidence. A constitutional violations, to which the this Courts harmless error doctrine does not appply. See Kyles v. Whitley, 514 U.S. 419, 435 (1995), at that point the District Court's **pretextual** Schlup gateway exception on timely claims, should have come to an end. The District Court was likewise obliged to disregard Baird's perjured trial testimony, for the purposes of the Court's Schlup analysis, under the principles of **falsus in uno, falsus in omnibus.** See Final R&R [Dkt. 310 at p. 22; Page ID#:13499; Dkt 310 at p. 32; Page #:ID13509; Dkt. 310 at pp. 44-46; Page #:ID13521-#:13523; and Dkt. 310 at p. 50 fn. 27; Page #:13527]. Attached hereto as Appendix B, also marked SER-035; SER-045; SER-057-059, and SER-063. And especially because the new evidence showed that Baird suppressed his Original Murder Book interview notes, that does not reflect that Comeaux saw Petitioner with a gun, nor that she saw Petitioner shoot. And it was Baird's perjured testimony, that the prosecutor relied on in his closing arguments to the jury saying, "you can believe Baird when he testified that Comeaux told him she saw him, with a gun, as the truth of the matter asserted." (AOB, at pp. 34-35).

II.

At Each End Of The Constitutional Spectrum The Procedures Implemented By The Lower Courts in This Case Conflicts With Decisions Of This Court

First, the District Court's Judgment upon Adopting the Magistrate Judge's Report and Recommendation, finding Material Brady/Napue violations, Granting a COA, on FAP Claim One through Five, quoted above at p. 30, after concluding that Petitioner's new Brady material, undermined each witness in the prosecutor's entire case, to eschew its Article III obligations to say what the law is, the District Court opined: "it is not clear when, if ever,

undermining the credibility of the prosecution's case alone, as Petitioner has here, would make it "more likely than not that no reasonable jurors would have found petitioner guilty beyond a reasonable doubt," Schlup, 513 U.S. at 327." See Appx. B, at SER-006; [Dkt. 315 at p. 2; Page ID#:13540]. This is a case in which the prosecution admitted absolutely no physical evidence against Petitioner, to usher Petitioner before the Court of Appeals, as a sacrificial lamb, for doctrinal purposes. The District Courts abdication of its Art. III obligations to say what the law is, conflicts with this Courts decision in Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1803); Anthony v. Louisiana, ___ U.S. ___ (2022), 2022 BJDAR 11577, 11586 (SOTOMAYOR, JACKSON, JJ., Dissenting from the denial of certiorari).

Second, if there were any ambiguity in this Courts Brady Jurisprudence, the District Court ought have applied the ancient doctrine, the rule of lenity. Wodden v. United States, 595 U.S. ___, ___ (2022) (GORSUCH J., Concurring). The District Courts abdication here, further conflicts with Courts decision(s) in United States v. Bagley, 473 U.S. 667, 676 (1982), holding impeachment evidence as well as exculpatory evidence falls within the Brady rule. And, Napue v. Illinois, 360 U.S. 264, 269 (1959), opining: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." And the failure of the District Court, and the Ninth Circuit, to follow the above Constitutional principles enunciated by this Court, renders a dead letter, the Courts command in Murray v. Carrier, 477 U.S. 478, 498 (1986) that, "The character of respondent's claim should be central to an evaluation of his habeas corpus petition."

Accord, McQuiggin, supra, 569 U.S. at p. 400. Within the ambit of **S. Ct. Rule 10(c).** As the impeachment evidence in this case, is unlike that in the Courts decisions in Calderon v. Thompson, 532 U.S. 538 (1998); and Sawyer v. Whitley, 505 U.S. 333, 438 (1992), as a step removed from the crime itself. Because Tucker and Comeaux, were said to be percipient witnesses to the crime. The Ninth Circuit, and the District Court, should have gaged Baird's perjured testimony, and he whom assembled the entire case against Petitioner, in the prism of the Courts Decision in Kyles, supra, 514 U.S. at p. 446, citing Bowen v. Maynard, 799 F.2d 593, 613 (10 Cir. 1986). The Ninth Circuit decision here at Appendix A, at pp. 4-5 thereof, is in conflict with this Court decisions above. Also within the ambit of **S. Ct. Rule 10(a),** as it sanctions the District Court's false premise of untimeliness, as explained post, at pp. 39-40. To elevate the standard of proof for proven Brady/Napue claims, beyond that required, as consistently counseled against by this Court. See e.g., Chinn v. Shoop, ___ U.S. ___, ___ (2022); 2022 DJDAR 11570 (JACKSON, SOTOMAYOR, JJ., Dissenting from the denial of certiorari); and reward(s) prosecutors for long concealed Brady/Naue violations. Cf. Bernard v. United States, 141 S.Ct. 504, 505-07 n. 1 (2020).

Moreover, together with the new Brady material discovered in federal court on discovery, allowed to be presented to the District Court on de novo review, upon the District Court ruling that Cullen v. Pinholster, 563 U.S. 170, 186 (2010), did not apply. That is: (a), the suppression of documentary evidence that the police knew the crime did not involve a robbery, the false mens rea, used by the prosecutor, and for which Petitioner was convicted, elevating Petitioner's sentence exposure to Death, or Life Imprisonment Without the Possibility of Parole, that Petitioner received. And (b), the

suppression of **scientific evidence of the 40°** downward angle of he bullet's trajectory, that proves Petitioner is not the shooter-and to which the District Court denied Petitioner's Request for the Appointment of Experts, and the Ninth Circuit denied a COA; also on the prosecutor's known use of perjured testimony of Dr. Hueser, in this regard. See newly discovered evidence, ante at p. 24, subsections (E)-(F); p. 26, subsection (J), and p. 27, subsection (P), that also meets Schlup's **false[ly]** imposed criteria. 513 U.S. at p. 327 & n. 45. That also clears the heightened 'clear and convincing evidence' standard, under 28 U.S.C. § 2244(b)(2)(B)(i)(ii)-in this case, because the jury was concerned about; and requested clarification, of the **Robbery Murder Special Circumstances Allegations, ["With Emphasis On The Sentence That Reads Personal(ly) Use[d] A Firearm."]** See Appendices K-L , attached hereto. That is controlling under California law, permitting a finding of guilt, for **first degree murder robbery**, based on an intent to commit the underlying felony of robbery, however false. See People v. Ricks, 244 Cal.Rptr. 696, 700-705 (1988). The Ninth Circuits decision here at Appx. A, at p. 6, ¶ 3, also conflicts with Schlup itself, mandating the Court review all the newly presented evidence. That actually revealed new Brady/Napue violations, discovered in federal court, that also must be considered collectively under Kyles, supra, 514 U.S. at p. 436; Cullen, supra, 563 U.S. at p. 214, (BREYER, SOTOMAYOR, JJ. Dissenting). **A fortiori** as noted **ante,** at p. 4. Petitioner was only allowed to proceed in the District Court, after obtaining permission from the Ninth Circuit, to file a Second Petition, upon satisfying 28 U.S.C. § 2244(b)(2)(B), whence Congress borrows its 'clear and convincing evidence standard from Sawyer v. Whitley, supra, 505 U.S. at 348. Hence, to be dismissed under Schlup's lower and **falsely** imposed "more likely than not"

standard, after having prove[d] nonharmless constitutional error, is incongruous, and produces anomalous results, in violation of the 5th Amendments Due Process and Equal Protection Clauses. Demonstrating the Ninth Circuits decision here at Appx. A, p. 6, ¶ 3. To be quantitatively in conflict with the Sixth Circuit Court of Appeal decision on the same subject matter, in the Brady/Napue context. See In re Jackson, 12 F.4th 604, 610 (6th Cir. 2021), opining: "Jackson has shown 'but for' constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense, which would suffice to demonstrate prejudice under Brady. 28 U.S.C. § 2244(B)(2)(B)(i)(ii)." Within the ambit of **S. Ct. Rule 10(c).**

III.

THE NINTH CIRCUITS DECISION IS AN IMPERMISSIBLE REVOCATION OF THE DISTRICT COURTS FACTUAL FINDINGS WITHOUT EVEN A PASSING REFERENCE TO THE CLEARLY-ERRONEOUS STANDARD

In clear violation of Federal Rules of Civil Procedure 52(a), without any reference to the Clearly-Erroneous Standard, to eschew addressing Petitioner's issue on Appeal. (AOB, at pp. 33-40), that the District Court failed to follow this Courts second clause in Schlup, 513 U.S. at 316, for nonharmless constitutional error. The Ninth Circuit in its decision, here at Appx. A, at pp. 4-5, thereof, **set aside** the District Courts factual finding that Hyron Tucker and Det. Baird violated Brady/Napue, therefore, the Court would not consider **Tucker's Testimony** for its Schlup analysis. Factual findings made after an Evidentiary Hearing, crediting the live testimonies of Petitioner, Prosecutor Thomas Holmes, and Public Defender David P. Carleton, all whom testified to **never knowing** of payments to Tucker, as well as, hundreds of pages of documentary evidence, and the Deposition Testimony of Det. Baird, whom authenticated the documents and admitted to concealing **his monetary payments to Tucker**. See [Dkt. 310, at pp. 45-47; Page ID#: 13522-#:13533];

Appx. B, SER-058-059. [Dkt. 310 at pp. 19-25; Page #:13496-#:13502]; Appx. B, marked SER-032-038; Dkt. 310 at 32; Page #:ID13509]; Appx. B, at SER-045. Adopted in full by the District Court. [Dkt. 313 at p. 1; Page ID#:12337]; Appx. B, marked SER-009. Those are the factual findings of the Court. Anderson v. Bessemer City, 470 U.S. 564, 575 (1985), "review of factual findings under the clearly-erroneous standard -- with its deference to the trier of fact -- is the rule, not the exception." Id. "**Without even referring to the Magistrate Judge's finding,** the Court of Appeals 'disagree[d]." "But courts of appeals may not set aside a district courts findings **unless** those findings are clearly erroneous. Fed. Rule Civ. Proc. 52(a)." See Knowles v. Mirzayance, 566 U.S. 111, 126 (2009) (THOMAS, J.), opining: "Here, the Court of Appeals failed to even mention the clearly-erroneous standard let alone apply it, before effectively overturning the lower courts factual findings." Within the ambit of **S. Ct. Rule 10(a).**

IV.

THE DISTRICT COURTS JUDGMENT REST ON FRAUD UPON THE COURT

First, Respondent committed fraud on the court, turning Petitioner's **diligent** pursuit of his FAP claims on its head, to deprive Statutory Tolling under 28 U.S.C. § 2244(d)(2), to render the claims timely by 155 days in advance. That is, Respondent's Lodgment 23, 25-26, mixes Appeal No. **B242690,** 'properly filed' on July 16, 2012, and its Petition for Review No. **S214663,** seeking **reexamination** of FAP Claims One through Five, and Petitioner's sentence. With Writ of Mandate No. B254272, and its Petition for Review, No. S217442, filed **after** the discovery of the suppressed Officer Smith Brady material. To break the continuity of Appeal No. B242690, and **its** Review Petition No. **S214663,** as not being separate collateral proceeding, when they are. See Appendices D-E, attached hereto. The Magistrate Judge countenance

this fraud, Final R&R [Dkt. 310 at p. 34; Page ID#:13511], where the Magistrate Judge perverts Petitioner's **truth** that his Penal Code § 1054.9 discovery motion was joined with his habeas corpus petition, and separate proceedings, and **sandbags** Petitioner on his Exhibit 4, to [Dkt. 43-2, at Page ID#:796-#:881, Exhs. 4-6], here at Appx. M. Please take Judicial Notice, Fed. R. Evid. 201(d), also to [Dkt. 73-2, Exhs. 4, 5, 6; Page ID#:2838-#:2923]. Second, the Ninth Circuit in its decision at Appx. A, ¶ 1, at pp. 2-3, to justify the District Courts error, and the denial of tolling, **conflates** the words "discovery-motion" and "appeal" and sua sponte invokes a procedural defect, not relied on by Respondent below. In conflict with this Courts decisions in Wall v. Kholi, 562 U.S. 545, 557-560 (2011); Artuz v. Bennett, 531 U.S. 4, 8-11 (2000); Sebelius v. Cloer, 569 U.S. 369, 376 (2013), and the Fifth Circuit decision in Foreman v. Dretke, 383 F.3d 336, 340 (5th Cir. 2004). Within the ambit of **S. Ct. Rule 10(c).** The State permitted Appeal No. **B242690**, and appointed counsel, in a collateral proceeding. Cf. Jimenez v. Quarterman, 555 U.S. 113, 121 (2009), and under California law, Penal Code § 1054.9 discovery, is part of the prosecution of a habeas corpus petition. See Stevenson v. California, 2016 U.S. Dist. LEXIS 95377, at *1 (C.D. Cal. 2016). Rejecting No. **B242690**, was to conceal Claim Nine evidence, disclosed in federal court, that should be considered collectively under Kyles. Here at Appx. N; and a COA granted.

In summation, the Brady evidence at Claim Three, is not cummulative. Turner v. United States, 582 U.S. ___, ___, (slip. op. at 14) (2017); Wearry v. Cain, 136 S.Ct. 1002-1007 (2016)(per curiam).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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DATED: February 10, 2023