23-6107

No. _____

ORIGINAL

FILED
OCT 19 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH CUA — PETITIONER
(Your Name)

vs.

GENA JONES, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOSEPH CUA G44691
(Your Name)

P.O. BOX 213040 E2B108
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Stockton, CA 95213
(City, State, Zip Code)

NA
(Phone Number)

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QUESTIONS PRESENTED

Petitioner respectfully petitions this court to review the judgment of the United States Court of Appeals for the Ninth Circuit(filed 7/24/23) denying a Certificate of Appealability from the U.S. District Court's denial of appellant's Fed. R. Civ. P. 60(b) and 59(e) motions (dated 3/30/22), filed by appellant subsequent to procedural errors by the District Court in its denial of petitioner's Rule 60(d)(1) motion (dated 6/29/21), which requested relief from the District Court's dismissal of Cua's habeas petition on 9/16/15.

Pursuant to U.S. Supreme Court R. 10 the judgment is (1) in conflict with the decisions of another court of appeals; (2) a decision that's so far from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court; and/or decided an important federal question(s) in a way that conflicts with relevant decisions of this court. Therefore, petitioner presents the following issues that violated petitioner's due process rights:USCA 5,14

I WHETHER EXCEPTIONS TO THE AEDPA ONE YEAR TIME LIMITATIONS RENDERED THE DISTRICT COURT'S 2015 DISMISSAL FOR UNTIMELINESS OF CUA'S HABEAS PETITION AND DENIAL OF HIS DISCOVERY MOTION AS MOOT AN ABUSE OF DISCRETION?

II WHETHER PETITIONER'S R. 60(d)(1) MOTION WAS AN INDEPENDENT ACTION THAT WAS NON-SUCCESSIVE - THE DISTRICT COURT'S DENIAL OF THAT MOTION DENYING SUCH WAS AN ABUSE OF DISCRETION?

III WHETHER THE DISTRICT COURT'S FAILURE TO CONSIDER MATERIAL FACTS AND DISPOSITIVE LEGAL ARGUMENTS REGARDING INNOCENCE AND A P.C. 12002 WEAPONS ENHANCEMENT WAS AN ABUSE OF DISCRETION IN THE MATTER OF GUILT V. INNOCENCE; CONSIDERING THE PLETHORA OF DNA AND FORENSIC EVIDENCE POINTING TO A 3rd PARTY PERPETRATOR, FAILURE BY THE PROSECUTION TO PROVE MEANS AND OPPORTUNITY, THE JURY MISAPPLYING COURT'S INSTRUCTIONS REGARDING "BEYOND A REASONABLE DOUBT?

IV WHETHER THE COURT'S FAILURE TO CONSIDER MATERIAL FACTS AND DISPOSITIVE LEGAL ARGUMENTS REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL AND APPELLATE ATTORNEY WAS AN ABUSE OF DISCRETION

V WHETHER THE DISTRICT COURT'S VIOLATION OF PROCEDURAL RULES IN ITS DENIAL OF PETITIONER'S R. 60(d)(1) MOTION FOR RECONSIDERATION WAS AN ABUSE OF DISCRETION

LIST OF PARTIES

The names of all parties appear in the caption of the case on the cover page

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORI

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

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals has been designated for publication but is not yet reported.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 7/24/23

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution which is applicable to the states through the fourteenth Amendment, Bigelow v. Virginia, 421 U.S. 809, 811 (1975) states that congress should make no law..... abridging the freedom of speech..... or the right of the people..... to petition the government for a redress of grievances.

CONVICTION

On June 27, 2008 petitioner was convicted on two counts of murder under P.C. 187; special allegations for use of a knife (P.C. 12022), and for multiple murders under P.C. 190.2(a)(3) - two terms of life without the possiblitity of parole.

PROSECUTION CASE THEORY

Prosecutor theorized that Cua committed the murders soon after he talked on the Wagner house phone with Edith Edmonds, a mutual friend of his and the Wagners; set up the crime scene to look like a sex criem; then fled to Southern California (where his family home was) driving down Hi 101 in order to get rid of evidence along the way.

STATEMENT OF THE CASE

I THERE WERE VALID EXCEPTIONS TO THE ONE YEAR AEDPA TIME LIMITATIONS THAT BARRED PROCEDURAL DEFAULT OF CUA'S ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS RENDERING THE DISTRICT COURT'S GRANTING MOTION FOR DISMISSAL AND DENIAL OF HIS DISCOVERY MOTION AS MOOT, AN ABUSE OF DISCRETION AND A VIOLATION OF DUE PROCESS UNDER USCA 5 and 14.

a. The CA Supreme Court denied Cua's Petition for Review on 1/21/15 (APPENDIX E) stating: The petition for review is denied on the merits with regards to petitioner's claims of ineffective assistance of counsel." In Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) the court ruled: "State Supreme Court's rejection of IAC on the merits of petitioner's original petition made federal review available." SEE also Owen v. Secretary, 568 F.3d 894, 913 (11th Cir. 2009); Lewis v. Borg, 879 F.2d 697, 698 (9th Cir. 1989)

b. Deprivation of legal materials may warrant equitable tolling if inmate shows diligence and causal connection to late filing." Waldron Ramsey v. Pacholke, 556 F.3d 1013-1014 (9th Cir. 2009). "Petitioner was conducting an ongoing investigation and had been pursuing his rights diligently in at least one meritorious clain." Clark v. Cate, May 13, 2014 581 Fed. Appx. 654 It would be impossible for petitioner to assess the scope of his lawyer's ineffectiveness without access to the majority of his case discovery/police reports. He not only needed to examine documents; he needed to find out what was missing from the files. Denial of the opportunity for disoovery is an abuse of discretion when the discovery is necessary to develop the facts of the claim. Harris v. Nelson, 394 U.S. 286, 300, (1968), Teague v. Scott, 60 F. 3d 1163, 1172 (5th Cir. 1995) Following are the actions taken by petitioner to obtain post-conviction discovery, as stated on pp. 20-21 of the R. 60(d)(1) motion:

7/13/11 Cua filed discovery motion after requesting discovery from attorney on 5/20/11 prior to CA Supreme Ct denial became final.
7/19/11 CA Supreme Ct denial of Petition for Review became final.
12/21/11 Order to conduct testing of DNA on John Halley, attorney, issued.
12/23/11 Order compelling trial attorney, Ed Pomeroy and San Mateo county DA to provide post conviction discovery.
Cua wrote to John Halley re: testing on 3/8/12 and 4/6/12; and to Ed Pomeroy on 3/8/12, 4/27/12 and 5/31/12 (Exhibit 16a of R. 60(d)(1) with no response from either attorney.
5/31/12 Cua filed Motion to Compel Compliance of Discovery Order on Ed Pomeroy and San Mateo County District Attorney. He also filed the same twice in 2016.
6/27/12 Cua received police reports from Pomeroy (1800 pages) (EXHIBIT 17a - R.60(d)(1).
7/5/12 Seeing that there was a lot still missing, Cua wrote to Pomeroy asking for more discovery (EXHIBIT 16b) He also sent him letters on 8/5/14 and 4/28/15
5/31/12 Cua wrote to DA asking for discovery.(EXHIBIT 16b - legal mail log) He also wrote to the DA again on 8/1/14 and 11/18/14
10/18/12 Cua filed his habeas petition with the San Mateo County Superior Court - 3½ months after digesting 1800 pages of police reports and comparing them with 40 volumes of clerk's and reporter's transcripts (EXHIBIT 16b)

3/17/15 Received 1800 pages of discovery and 500 pages of defense generated documents. This was 3½ years after the discovery was ordered by the court.

It's clear that petitioner made more than the required "reasonable effort" to obtain discovery that would give him perspicacity of his case and determine the scope of the constitutional violations that occurred in his trial. It's also evident that "extraordinary circumstances stood in the way of his filing on time; and he exercised reasonable diligence in pursuing his rights." Holland v. Florida, 560 U.S. 631, 653-654 (2010) The superior court took 5½ months to address Cua's discovery motion; and there was a lack of cooperation from Ed Pomeroy and the San Mateo County District Attorney in providing the ordered discovery to petitioner - when the discovery order stated that it was to "be provided in a timely manner." [1]

Petitioner asserts that the one year AEDPA time limitation should be tolled from the time he filed his discovery motion on 7/13/11 through the time he received the first set of discovery from Ed Pomeroy on 6/27/12.

c. Equitable tolling applied because of petitioner's ignorance of AEDPA one year limitation reasonable, and petitioner diligently pursued his rights." Solomon v. U.S. 467 F. 3d 928, 933-34 (6th Cir 2006) Cua had no legal training or experience. Per People v. Duvall, 9 Cal.4th 464, 474 a petitioner must initially plead grounds for relief, then prove them."To petitioner, this meant that he had to obtain the evidence in post conviction discovery. After receiving the first set of police reports from his attorney, he studied them and the voluminous transcripts to the point where he felt he could file a habeas writ in the SM Superior Court.

d. The district court in its granting of respondent's motion for dismissal for untimeliness also denied petitioner's discovery motion as moot. In its Order to show cause of April 3, 2015, the court stated that "It does not appear from the face of the petition that it is not without merit." "Where specific grounds before the court show reasons that the petitioner may, if the facts are fully developed, be able to demonstrate entitlement to relief, it is the duty of the ocurt to provide the necessary facilities and procedures for an adequate inquiry." Harris v. Nelson, 394 U.S. 286, 300 (1968) "the district court abused its discretion in denying petitioner's discovery requests when essential for resolution of a claim." Pham v. Terhune,400

[1] In the 2015 order granting the respondent's motion to dismiss, the court states that "although the deprivation of legal materials may warrant equitable tolling, ... (petitioner) must point to where he needed a particular document." Waldron-Ramsey, v. Pacholke, 556 F.3d 1008, 1013-14 (9th Cir. 2010) All of the police reports and defense/defendant generated documents used as exhibits in Cua's filings were necessary to support his claims, and are listed on pp. 16-17 of his R. 60(d)(1) motion. Furthermore, his discovery motion filed concurrently with his 2015 habeas petition listed specific items he still needed and why they were needed, and shows that petitioner was still diligently trying to obtain discovery.

F. 3d 743 (9th Cir. 2005)

The district court's 2015 dismissal for untimeliness and denial of petitioner's discovery motion were abuses of discretion, since the rulings were contrary to the evidence, the decisions of other courts of appeals, its own rulings and those of the U.S. Supreme Court; as well as violations of petitioner's rights to due process under USCA 5, 14. Jurists of reason would find these issues debatable or disagree with the district court's rulings on these matters. Slack v. McDaniel, 529 U.S. 473 (2000)

II_ PETITIONER'S R. 60(d)(1) MOTION WAS AN INDEPENDENT ACTION, AND NOT A SUCCESSIVE HABEAS PETITION AS CLAIMED IN THE DISTRICT COURT'S DENIAL OF THAT MOTION.

The district court in its denial claimed that "Cua must mean Rule 60(b)(1) which allows relief from a final order of judgment based on mistake, inadvertence, surprise, or excusable neglect. Rule 60(d) requires the filing of an independent action." It also stated "Because Cua's motion contains claims that assert a basis for relief, it must be treated as a habeas petition." "A person may not disguise a second or successive habeas petition by styling it as a Rule 60 motion to avoid AEDPA's filing restrictions."

a. CUA'S R. 60(d)(1) MOTION WAS AN INDEPENDENT ACTION Elements of independent action include: (1) judgment which in good conscience ought not to be enforced; (2) good defense to alleged cause of action on which judgment is founded; (3) fraud, accident or mistake that prevents defendent from obtaining benefit of a defense." Bankers Mortgage Co. v. United States, 423 F. 2d 73, 79 (5th Cir. 1970) The basic requirements for Rule 60(b) and Rule 60(d)(1) are the same excepting for "Once one year limit for Rule 60(b)(1) has elapsed, relief may be had in independent action." Jones v. Anderson-Tully Co., 722 F. 2d 211, 212 (5th Cir. 1984); SEE U.S. v. Beggerly, 118 S. Ct. 1862 (1998) "Rule 60 (d)(1)makes clear that an independent action is preserved, and is available when time limitations to make motion expires." and "An independent action is available to prevent a grave miscarriage of justice." Petitioner in his R. 60(d)(1) motion asks to "reopen this case to rectify errors that resulted in a grave miscarriage of justice. (Quoting Beggerly) (R. 60(d)(1) @ p. 1)

Petitioner at no time attacked the substance of the court's resolution on the merits of his 2015 habeas petition (dismissed for untimeliness), but did challenge a defect in the integrity of the proceeding - that the ruling that presluded a merits determination was in error. U.S. v. Buenestro, 638 F. 3d 720, 722 (9th Cir. 2011) "It's the relief that's sought that determines a pleading." United States v. Nelson, 466 F.3d 1145, 1149 (9th Cir. 2011) "To the extent plaintiff asserts relief under Rule 60(d)(1) the court will treat his action as an independent action."

Mitchell v. Rees, 651 F. 3d 593, 594 (6th Cir. 1981) In Wood v. McEwen, 644 F.2d 797, 801 (9th Cir. 1981) the court stated: "...an independent action allows one to file an entirely new complaint under Rule 60(d)(1)."

Petitioner's R. 60(d)(1) motion conforms to clearly established law when (1) he asserted relief in his motion at (1:10-12) he asserts that "he is entitled to relief under Rule 60(d)(1)... from the court's ORDER TO DISMISS AS UNTIMELY (matching the title of the motion); (2) he asserts that he is entitled to relief... because his original petition was wrongly dismissed as untimely." (p. 1:17-20; (3) In his prayer for relief (p. 20) he "requests for leave to file an amended petition for writ of habeas corpus." Cua does not ask for review of old claims regarding his conviction; instead offers support fot his claims of actual innocence and ineffective assistance of counsel, and integrates new evidence that should have been used during trial by his counsel to prove his innocence.

b. PETITIONER'S Rule 60(d)(1) MOTION CANNOT BE DEEMED A SUCCESSIVE HABEAS PETITION

The ban on successive petitions permit review of a claim that has not been litigated. (28 U.S.C. 2244 (b)(2) Since the district court dismissed petitioner's 2015 habeas petition for untimeliness, the claims of his original petition were never litigated. Petitioner will show herein that "The district court decided incorrectly that defendant's first application was time barred, that application did not qualify as a first petition." Muniz v. United States, 236 F. 3d 122, 128-29 (2d Cir. 2001)[2]

Respondent stated in his opposition "The dismissal of a petitionfor untimeliness constitutes a decision on the merits for purposes of determining whether subsequent petitions are second or successive." McNabb v. Yates,576 F. 3d 1028, 1030 (9th Cir. 2009) However, respondent and the court did not read the entire case - fn 1 clearly states: "But cf. Gonzalez v. Crosby, 545 U.S. 524, 535-36 (2005)"A Rule 60(b) motion that challenges a district court's ruling on the AEDPA statute of limitations ... is not the equivalent of a successive petition." Phelps v. Alameida, 569 F. 3d 1120 (9th Cir. 2009) In Gonzalez, the Supreme Court ruled "In a federal habeas corpus case under §2244, a state prisoner's motion invoking Rule 60(b)for relief of judgment, is not to be treated as a second or successive petition - and so was not subject to §2244 restrictions, for the prisoner has not made a federal claim under §2244 (b) by merely asserting that the district court's prior limitations ruling was in error.

The district court's opinion on petitioner's R. 60(d)(1) motion not being an independent action and a successive habeas petition were the main bases for its

[2]The court admitted on p. 1 of its denial of 59(e), 60(b) (APPX.C) ;that his R. 60(d) motion might not be successive, but then stated that"Cua has failed to provide reason for his six year dealy in filing it." Counter: An independent action does not have a time limitation."Mitchell v. Rees, 651 F. 3d 593, 594 (6th Cir. 2011)

denial was an abuse of discretion since it was contrary to the decisions of other courts of appeals, its own decisions, and of the U.S. Supreme Court. Jurists of reason would find these issues debatable or disagree with the district court's opinion on these matters under Slack, supra. Due process violation under USCA 5, 14

III THE DISTRICT COURT'S FAILURE TO CONSIDER MATERIAL FACTS AND DISPOSITIVE LEGAL ARGUMENTS REGARDING INNOCENCE AND SPECIAL CIRCUMSTANCE UNDER P.C. 12022 (USE OF A KNIFE) WAS A VIOLATION OF DUE PROCESS AND AN ABUSE OF DISCRETION

On pp. 407 of his R. 60(d)(1) motion Cua contends that he is actually innocent, and that the disposition of his earlier petition should be reopened relying on McQuiggin v. Perkins, 569 U.S. 383 (2013): The Supreme Court held that "a state prisoner may invoke the miscarriage of justice exception to the one year statute of limitations prescribed by AEDPA. Petitioner is entitled to relief because with new evidence and without the exhorbitant amount of constitutional violations in his trial, it is more likely than not that no reasonable juror would have convicted him. McQuiggin at 1933 (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995) The following material facts pointing to innocence cannot be dismissed:

a. The exculpatory evidence pointing to an unknown perpetrator from which petitioner was excluded, raised reasonable doubt as to Cua's guilt, and is listed on p. 4 of the R 60(d) motion.

(a) bloody fingerprint on Suzanne's belt did not match known samples
(b) crime scene bloody footprints did not match five pairs of Cua's shoes
(c) Unknown 3rd party DNA found on Suzanne's breast
(d) Unknown 3rd party DNA found under fingernails on both hands
(e) Unknown 3rd party DNA found in diluted blood spot on toilet seat lid (someone washed and splashed onto the lid)
(f) Unknown 3rd party DNA found in blood spot on Fernand's shoulder
(g) Unknown 3rd party DNA found in blood on front and back of Fernand's pants
(h) Unknown 3rd party DNA found in blood spot on stairs

b. The prosecutor failed to prove that Cua had the opportunity to commit the crime. The prosecution theorized that he committed the crime around 9:30 a.m. on 6/13/06, and as shown on EXHIBIT 3b-d of the R. 60(d) motion and discussed on p. of this document, he elicited false testimony to prove that the Wagners were killed at that time, the only time Cua was known to be at the Wagner home. However, three witnesses disproved this testimony near the end of the trial. Yet, prosecutor still supported the false testimony he knowingly led the witness to. To convict Cua, the jury had to believe that Cua committed the crime at the time the prosecutor theorized since there was no other time of death was established during the trial. The jury could only speculate on this element of the crime, which cannot justify a conviction under the 14th amendment to the U.S. constitution.

c. Cua was convicted of a special allegation for use of a weapon under P.C. 12022, which is an element of the crime (means). No causal connection was made between Cua

and the weapons used in the commission of the crime (knife and blunt force instrument). The jury was told that the defendant had a cut on his finger, which ran lengthwise on the side of his ring finger, was wide and deeper towards the tip. EXHIBIT 4 which was not put into evidence, shows that there was no way for the cut to be sustained from wielding a knife. (pp. 6:4-9) Fernand was lying face down on the floor with a pool of blood to the left of his head (EXHIBIT 5) There was a cut that ran from his Adam's apple to below his left ear. A left hander made the cut; Cua is right handed. There was also no evidence linking defendant to a blunt force instrument (Pathologist Thomas Rogers said the numerous injuries to Fernand and Suzanne Wagner were caused by something like a bat or candlestick), and there was no bruising to Cua's knuckles as would happen if he had punched the Wagners multiple times abut the head and torso. (EXHIBIT 4:knuckles) There was a lot of bruising to Fernand's knuckles, indicating that he had fought hard. there was no bruising at all on Cua's hand, face or torso, as testified to by Det. Frank Taylor in his testimony during trial. If there was no causal connection between defendant and the knife or blunt force instrument, there was no basis for the conviction for special allegation for use of a knife (P.C. 12022), and without proving he had the means to commit the crime, the guilty verdict cannot be justified.

d. The jury misapplied the court's instruction on reasonable doubt/sufficiency of the evidence."Based on the evidence presented at trial, no trier of fact could have found proof beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 334 (1979) "When there is a likelihood that the jury misapplied the reasonable doubt standard, then the trial is infected with a structural defect that vitiates the jury's findings." Cage v. Louisiana, 498 U.S. 39, 41 (1990)

Calcrim 224 Circumstantial evidence/sufficiency of the evidence

> "... you must be convinced that the people have proven every fact essential to the conclusion beyond a reasonable doubt... If you can draw two or more conclusions from the circumstantial evidence, and one of these points to innocence and one to guilt, you must accept the one pointing to innocence." SEE also U.S. v. Berger, 224 f.3d 107 (2nd cir. 1997)

In light of the plethora of forensic evidence pointing to a 3rd party perpetrator, the failure of the prosecution to prove that Cua had the opportunity to commit the crime, and there being no causal connection between the defendant to the weapons used in the crime and the injuries sustained by the Wagners, there is no question that the jury misapplied the instruction given to them that is the foundation of the criminal justice system: guilt must be proven beyond a reasonable doubt.

Petitioner asserts that were it not for the prosecutional misconduct, court error and gross ineffective assistance of counsel by his trial attorney, he would not have been found guilty for the crimes he was charged with.

e. NEW EVIDENCE SUPPORTS PETITIONER'S INNOCENCE "A petitioner must produce sufficient evidence of his actual innocence implicating a fundamental miscarriage of justice, Schlup v. Delo 513 U.S. 314, 315 (1995) and "show that it is more likely than not thatno reasonable juror would have convicted him in light of the new evidence." id. at 327. A petitioner must support his claims with "new reliable evidence - whether it be scientific evidence, eyewitness accounts, or critical physical evidence that was not presented at trial." Id at 324. The following is evidence that should have been, but was not used by counsel, allowing prosecutorial misconduct and court error as stated on pp. 16-18 of Cua's R. 60(d)(1) motion:

"A petitioner must produce sufficient evidence of his actual innocence implicating a fundamental miscarriage of justice, Schlup v. Delo 513 U.S. 314, 315 (1995) and "show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id. at 327 A petitioner must support his new claims "with new reliable evidence - whether it be scientific evidence, eyewitness accounts, or critical physical evidence - that was not presented at trial." Id. at 324. The following includes evidence that should have, but was not used by defense counsel, that allowed prosecutorial misconduct and court error.

1. Counsel should have used /entered photo evidence of the bloody fingerprint on Suzanne's belt against Cua's fingerprint. People are visually oriented. This evidence alone should have been enough to raise reasonable doubt; but jurors forgot all about it since no defense instructions on defense theroy were given. (p. 4:12)

2. (EXHIBIT 2) should have been shown to the jury to support testimony of the crime scene footprint not matching Cua's shoes. It should have been pointed out by counsel that the crime scene print(2a) has an obvious v-shape to the front of the heel; whereas Cua's shoe imprints (2b-e) have flat or oval shaped heel fronts. This would have prevented prosecutor's stating in summation that Cua left footprints. (p. 11: 1) A picture's worth a thousand words/jurors would have remembered.

3.(EXHIBIT 3e)Report proving that Aronis' stated to his Sgt. that the last call came in at 11:36 a.m.... all calls after that were missed calls" disproved his testimony that "all calls on the caller ID were missed calls". This proves that Prosecutor, Aronis and defense counsel all knew that Aronis' testimony was perjured to prove that Cua committed the crime after his phone call with Edith Edmonds around 9:25. Even after the testimony was disproved by stipulation and testimony of phone calls answered by the Wagners and someone seeing Fernand much later in the morning, prosecutor still stated that Lorraine Peterson's call went unanswered and "we know that Cua had been there earlier." (p. 5:1-28) (p.9:17-23)

4. (EXHIBIT 4) shows the cut on Cua's finger that should have been shown to the jury by counsel because it shows that it could not have been sustained while wielding a knife, since a knife cut would have been across the palms if a knife slipped not a cut that's 5/8 inch long, lengthwise on the side of the ring finger. If the photo had been shown by counsel to the jurors, they could not have speculated that the cut they were told Cua had was caused by a knife slipping - he would not have been found guilty of the special allegation of use of a knife P.C. 12022(b) which was an essential element of the crime. Counsel should have aggressively insisted that the special allegation was not warranted since there was no connection proven between Cua and a cutting instrument. (p. 6:1-9)

5. (EXHIBIT 5) Shows Fernand's knuckles with bruising and abrasions. This indicates that he put up a fight; and Det. Taylor stated that Cua had no bruising on his

hand, face or body (SEE EXHIBIT 6,a,b) The second photo in(EXHIBIT 5) shows Fernand's position in the hallway, lying face down with a pool of blood to the left of his head. Thomas Rogers indicated that the cut to Fernand's neck was antemortem; Therefore, the photo should have been used by the defense counsel to explain that since the cut was from Fernand's Adam's apple to below his left ear, the assailant had to be left handed, which Cua is not. (p. 6:4-17)

(EXHIBIT 7) should have been utilized to show that contrary to prosecutor's statement that Cua hurt his foot when he kicked the Wagners. Ed Pomeroy should have shown the jury the imprint of the rollerblade boot top and straps. The prosecutor's act of kicking out repeatedly with his foot while stating that Cua hurt his foot while kicking them was highly damaging to the defense. (P. 6:18-22)

8. (EXHIBIT 8a:police reports) gave defendant information that he had not known earlier: (1). the affidavit for warrant was based on a phone call from Linda Desomber in Iowa with information that was double hearsay and uncorroborated. Cua could not have known thatthe affidavit referred to"Joy Cua reporting" that her husband was acting strangely; and had bruising to his face, ribs and hands - which the judge would take as Joy Cua saying those things; when it was Linda Desomber making the statement. Most importantly, the statement about the bruising to the face, hands and ribs would justify the warrants issued; however, Cua had none of the bruising two days after Sgt. Gibbons spoke with Linda Desomber, the informant. Without(EXHIBIT b,c) Cua could not have known that warrants were issued on 6/18/06 at 9:20 a.m. based on the false information given to Sgt. Gibbons. (p. 8)

9. (EXHIBIT 9a-c) indicates that Joy, the alleged source of the bruising information on the affidavits, was not interviewed until 6 hours after the warrants issued. On (EXHIBIT 9c), after being asked if there was any other injury on his body, and "You didn't see anything about his head, face or anything like that? Nothing on his chin, neck, forehead, nose, nothing like that?", she replied, "Not that I noticed." and "There was nothing really obvious." (p. 8)

Without seeing (EXHIBITS 8,9) Cua could not have known/proven that there was true justification to file motions to attack the warrants under P.C. 995 and suppression of evidence under P.C. 1538.5. (p. 7)

10. Trial counsel should have explained by eliciting testimony from Det. Taylor that Cua told him about being a passenger in the cadillac on 6/11/06 way before anyone knew that Cua's DNA was near the seat controls of the cadillac passenger seat per (EXHIBIT 11). He also should have had Natalie Wilson testify that she saw Cua as he came down from his 3rd floor unit around 1:35 p.m. (EXHIBIT 11) This would have prevented prosecutor's stating that Cua had no alibi between 1300-1430. (p.12:1-4) and (p. 14: 22-24)

11. Without (EXHIBIT 12a) Cua could not have known that his lawyer knew that Aronis' testimony should have been corrected from a hair being in the hand to being under a fingernail of Fernand's hand, which makes it much more relevant. Without (EXHIBIT 12b-i) he could not know that microscopic photos of hair had been taken that his counsel should have identified and obtained the results of a comparative analysis, or had the hair tested himself to ascertain that none belonged to his client. (Cua had repeatedly asked Pomeroy to conduct such testing and filed motions to obtain such - not knowing that the photographs already existed. (p. 12:28-13:7)

12. (Exhibit 13a,b) show that internal, external swabs of Suzanne's vagina were taken. Petitioner saw no results of the testing of such, and could not know that his counsel was deficient for not obtaining the results of such tests, since it is highly unlikely that the tests were not done.

13. (EXHIBIT 14) verifies the close of auction for Cua's sailboat on EBAY on 6/14/06 which was the main reason for his not taking a scheduled flight from Oakland to

Ontario, then take 101 down to Oxnard where the boat was berthed to clean and install some woodwork. This would have prevented Sean Gallagher from speculating that Cua drove down 101 to get rid of evidence along the way, and the instruction on flight being given to the jury, (p. 15:20-28) both of which were prejudicial.
14. (EXHIBIT 15) indicates that trial counsel knew of Marc Wagner's knowledge of his uncle's agreement with Cua for Cua to get rents from all the tenants and then give Wagner payment. Marc termed it as a "financial agreement" which indicates that consideration was involved between the parties. This would have mitigated prosecutor's claim that defnedant made up the concept of having a "master lease" The jury should have been told that the amount that Cua received was about the same as he would have gotten from managing the properties, which was undisputable. (p. 16:1-5)
15. Until petitioner received the police reports, he could not assess what his counsel should have recognized was missing; most importantly, (a) caller ID John Aronis testified to as listing only "missed calls", which Cua believes will show that many of the calls Aronis claimed were missed calls, were actually answered calls; (2) The voicemail that Phillipe Chagniot testified Cua left on his office line, saying that "he was in charge and would sell the buildings." Cua knows that the voicemail was never left by him. It was egregious for Pomeroy to not pursue the voicemail, when Cua requested that he do so in writing, knowing that it was important; (3) the results of the comparative analysis of crime scene hair vs. known samples, which Cua requested he do many times - and which Cua discovered already existed; it's highly unlikely that they were not compared. Trial counsel was ineffective for allowing the prosecution to commit "BRADY violations"

f. Conclusion In an extraordinary case constitutional violations have resulted in the conviction of one who is actually innocent, whereby a federal court may grant the writ even in the absence of a showing of a cause for the procedural default. Murray v. Carrier, 106 S. Ct. 2639 (1986) In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims, (here USCA 4, 5, 6, 14) on the merits, notwithstanding the existence of bars to relief. "this rule, or fundamental miscarriage of justice exemption, is grounded in the 'equitable discretion of habeas courts to see that fundamental errors do not result in the incarceration of innocent persons." Herrera v. Collins, 506 U.S. at 404 (1993) Petitioner shows in this petition that without the constitutional violations in his trial, "no reasonble juror would have convicted him pursuant to McQuiggin, 133 S.Ct. at 196.

The district court's failure to consider material facts and dispositive legal arguments in its opinion on petitioner's innocence was an abuse of discretion in light of the evidence presented, and contrary to findings by other courts of appeals, its own rulings, and those of the U.S. Supreme Court. Jurists of reason would find the issue of petitioner's innocence debatable, and when considering the new evidence, disagree with the district court's rulings on the matter.

IV THE COURT'S MANIFEST FAILURE TO CONSIDER MATERIAL FACTS AND DISPOSITIVE LEGAL ARGUMENTS IN PETITIONER'S R. 60(d)(1) MOTION REGARDING INEFFECTIVE ASSISANCE OF COUNSEL BY TRIAL AND APPELLATE COUNSEL WAS AN ABUSE OF DISCRETION

The Supreme court in Martinez v. Ryan, 566 U.S. 1, (2012) held that "A procedural default will not bar a federal court from hearing a substantial claim of IAC at trial, if the initial collateral review was IAC of post-conviction counsel." Accordingly, under Martinez, a petitioner may claim IAC of post conviction counsel to establish "cause" for procedural default of a habeas claim of IAC - that post-conviction counsel'a assistance was ineffective under Strickland v. Washington, 466 U.S. 668, 686 (1984) What the the respondent and the court in its denial of the R. 60(d)(1) motion put forth as "restating of claims" on p. 7-18 of the motion was in reality the supporting of the claims of innocence and IAC of trial attorney, and to conform to Schlup, 513 U.S. at 316; "The evidence of innocence is so 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 constitutional error."

Petitioner states on p. 7:14-16 of R. 60(d)(1)motion, "The following issues are framed as IAC of trial counsel, with subclaims of prosecutorial misconduct and trial court error as applicable." The following claims were raised as IAC claims:

A. TRIAL COUNSEL FAILED TO FILE MOTIONS WHEN WARRANTED UNDER P.C. 995 TO ATTACK THE VALIDITY OF SEARCH/SEIZURE WARRANTS ON DEFENDANT: AND P.C. 1538.5 TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE, VIOLATING PETITIONER'S RIGHTS TO DUE PROCESS UNDER USCA 5,14 AND TO EFFECTIVE COUNSEL UNDER USCA 6 STRICKLAND V. WASHINGTON, 477 U.S. 365 1984; KIMMELMAN V. MORRISON, 477 U.S. 365 (1986)

Search and seizure claims under the 4th amendment can be brought forth if trial and/or appellate counsel failed to adequately challenge an unconstitutional search and seizure claim. Kimmelman at 365, which makes clear that deficient representation by counsel renders the 4th, 5th, 6th amendment issues not barred under Stone v. Powell, 428 U.S. 465, 494 (1976) Trial counsel failed to attack the validity of the warrants on Cua in spite of numerous verbal and written requests (copies available) to file P.C. 995 motion by defendant. A subsequent P.C. 1538.5 motion would be automatic. The following makes references to EXHIBITS submitted in R.60(d)(1) motion.

Subclaim one

PETITIONER WAS ARRESTED/SEARCHED ON THE BASIS OF A WARRANT WHICH, APPLYING THE TOTALITY OF THE CIRCUMSTANCES TEST, WAS INSUFFICIENT TO DEMONSTRATE A SUBSTANTIAL BASIS FOR ITS ISSUANCE, VIOLATING RIGHTS AGAINST UNREASONABLE SEARCH/SEIZURE AS GUARANTEED BY THE 4th AMENDMENT TO THE U.S. CONSTITUTION. ILLINOIS V. GATES, 462 2113 (1983)

a. Police report: Sgt. Gibbons reported that on Friday night, June 16, 2006, she spoke by phone with Gary and Linda Desomber, who live in Iowa and are the parents of Joy Cua who was married to Joseph Cua. The affidavit states, "Joy Cua reported

that Joseph Cua returned to So Cal on Wednesday and was acting atrangely. Joy Cua reported that her husband had injuries and apparent bruising to his hands, face, and ribs." Based on the information provided to her she believes Joseph Cua is a suspect in the aforementioned homicide. (EXHIBIT 8a, 8b). On 6/18/06 at 9:20 a.m. arrest and search warrants were issued. (EXHIBIT 8c) The warrants were deficient because:

1. Joy Cua, the purported source of the information, was not interviewed until 3:45 p.m. on 6/18/06 - six hours after the warrants issued. (EXHIBIT 9a, b, c)

2. The information on the affidavit regarding Cua having bruising to his face, ribs and hands was false, as testified to by Det. Taylor (EXHIBIT 6a,b). Every falsehood makes an affidavit inaccurate. "If police learn information that destroys probable cause to arrest defendant, the arrest becomes illegal." U.S. V. Edwards,242 F. 3d (10th Cir. 2000)

3. There was no corroborative information implicating Cua's having the extensive bruising described on the warrants prior to the warrants' issuance., either from independent sources or from police investigation. Spinelli v. United States, 393 U.S. 410, 424 (1969)

4. "Officer lacked probable cause where they relied, without any investigation, on the double hearsay of informant who had no knowledge of the facts." Cortez v. McCauley, 478 U.S. (1969).

5. The afifdavits were facially deficient because, "the informant should declare that (1) he has seen or perceived the facts asserted; or (2) that the information is hearsay, but there is good reason for believing it." Neither of these requirements were met - failing the two prong test of Aguilar v. Texas, 108, 424 S Ct 1509 (1964)

6. The affidavits were facially deficient because there was no indication of the police having prior contact with Linda Desomber, establishing her record for reliability. Jones v. U.S. 257, 270-71 (1960)

7. The information was obtained by phone; not in person. "An important consideration is whether law enforcement had the opportunity to meet in person with an information was based on first hand knowledge; rather than rumor or inuendo." United States v. Nieman, 520 F3d at 839, 840 (8th Cir. 2008)

8. The affidavit was misleading. It clearly states, "Joy Cua reported that Joseph Cua had returned to SoCal on Wednesdayand was acting strangely. Joy Cua reported that she noticed injuries and apparent bruising to his face, ribs and hands." The wording would lead the magistrate to believe that Joy made these statements directly to affiant. "The Leon good faith exception does not apply when the issuing

magistrate was misled by information that the affiant included." United States v. Leon, 468 U.S. 923 (1984)

If the court finds that false/reckless statements were included in the affidavits, and after deleting the false/reckless statementd, there is insufficient cause to support probable cause, the warrants must be quashed." Franks v. Delaware, 438 U.S. 154, 156 (1978) All evidence obtained by searches and seizures in violation of the 4th amendment to the federal constitution is, by virtue of the due process clause of the 14th Amendment guaranteeing privacy, free from unreasonable intruaion, inadmissible in court.

9. INEFFECTIVE ASSISTANCE OF COUNSEL Trial counsel's failure to object to the validity of the warrants issued on Cua and to suppress illegally obtained evidence under P.C. 995 and 1538.5 constituted deficient performance and resulted in prejudice due to those failures. Wilson v. Henry, 185 F. 3d 986, 981 (9th Cir. 2000)

Jurists of reason would find the issues debatable or disagree with the district court's rulings on these matters of 4th, 5th and 14th amendment issues.

B. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO EFFECTIVELY IMPEACH FALSE TESTIMONY THAT COULD HAVE AFFECTED THE JUDGMENT OF THE JURY, KNOWINGLY INTRODUCED BY PROSECUTOR, VIOLATING PETITIONER'S RIGHTS TO DUE PROCESS UNDER USCA 5, 14; U.S. V. BAGLEY, 473 U.S. (1985); NAPUE V. ILLINOIS, 360 U.S. 264 (1969); STRICKLAND V. WASHINGTON, 466 U.S. (1984

1. Det. John Aronis testimony supported the prosecution's theory that Cua committed the crime around 9:30 a.m. on 6/13/06. (EXHIBIT 3a) is a press release regarding that theory. Edith Edmonds testified that she had spoken to Cua on the Wagner house phone at that time, as well as what they discussed. To support the theory that the Wagners were deceased soon after the Edmonds call, Aronis testified that he had reviewed all calls coming in on the caller id, and determined that the caller id listed only "missed calls". He discussed each call with the prosecutor and verified that every one of the calls he discussed with the prosecutor was a missed call. The conclusion being that the calls were missed because the Wagners were deceased. One of the calls was a 11:36 a.m. call that Aronis verified as a missed call. Another was a call at 9:53 a.m. from Norbert Wagner, Fernand's brother. Also discussed were calls at 9:46 and 9:29. The following evidence indicates that Aronis committed perjury in his testimony, and that Sean Gallagher, the prosecutor, knowingly led him to do so: (Aronis testimony was provided as EXHIBIT 3B in the R. 60(d)(1)motion)

a. Sgt. Gibbons reported, "Det. Aronis told her that the last call came in at 11:36 a.m. on Tuesday, June 13, 2006... All calls after that went unanswered.(EXHIBIT 3d: Aronis statement)

b. Near the end of the trial it was stipulated that Lorraine Peterson called around lunchtime and spoke at length with both Wagners, wishing Suzanne a happy birthday

and discussed health issues with Fernand. This call was likely the 11:36 call that Aronis testified to as a missed call, but referred to as "the last call came in at 11:36". in the police report.

c. It was also stipulated that Norbert Wagner called and talked to Fernand around 10:30 a.m. during the world cup match between France and Switzerland. The stipulation of the call being at 10:30 instead of 9:53 was a deliberate attempt to confuse the issue to the jury.

d. Near the end of the trial Donald Kent, who lived two doors down from the Wagners, testified that he saw Fernand around noon per the police report.

e. MATERIALITY: To convict Cua the jury had to believe that he commitetd the crime at the only time he could be placed at the house. There was no other evidence presented on the time of death or that Cua was present when the crime occurred; and the jury was heavily swayed by the prosecutor's supporting Aronis' testimony during his summation. The prosecutor knew that he was suborning false testimony from Aronis since he had access to the police report contradicting the testimony, the caller id log and investigation into the calls, police reports indicating that Lorraine and Norbert had both spoken to the Wagners hours after Cua was at the house, or he wouldn't have agreed to the stipulations regarding their phone conversations with the Wagners.

f. INEFFECTIVE ASSISTANCE OF COUNSEL Pomeroy's failure to impeach Aronis' testimony was IAC since he knew from the police reports that Aronis knew that the last call came in at 11:36, rendering Aronis testimony as perjury. Had he impeached Aronis' testimony as perjury, the entire dynamic of the trial would have changed. "Failure to impeach inconsistent statements of a witness has supported IAC claims." Moffett v. Kolb, 930 F. 2d 1156 (7th Cir. 1991). Counsel also knew about Lorraine's and Norbert's calls being answered or he wouldn't have entered the stipulations four weeks later. Had he utilized the information he had to his client's advantage, the prosecutor could not have supported the false testimony in his closing argument, which will be addressed later.

2. Phillipe Chagniot, nephew of the Wagners, falsely testified that Cua left a message on his office voicemail on the morning of 6/16/06:

> Q. And on that Friday, do you remember getting a message from Mr. Cua?
> A. Yes.
> Q. And do you remember what message saying?
> A. It said, "This is Joe. I'm in charge. And we'll get the property sold as soon as possible."
> Q. And in that statement, did you tell police that Cua said he was in charge and the executor of the estate?
> A. Correct.

a. There was no record of the call Phillipe testified that Cua made. Sean Gallagher

referred all other witnesses who had phone contact with defendant to a large poster next to the witness stand (Edith Edmonds, Robert Pollack, Dan Doherty, Marc Wagner, Barbara Chagniot); but did not do so with Phillipe since he was not listed on Cua's phone record. (EXHIBIT 10c: phone record)

b. MATERIALITY Phillipe's perjury impugned defendant's character by making him seem cold and heartles, and supplied a motive since Cua would receive a large commission if the properties were sold. Prosecutor knew that he was introducing false testimony since he knew that Phillipe's phone number wasn't on the list.

c. INEFFECTIVE ASSISTANCE OF COUNSEL Ed Pomeroy failed to impeach Phillipe's testimony when he had the wherewithal to do so. Cua knew that he hadn't made the call that Phillipe alluded to, and noticed that Phillipe's number wasn't on the list. He informed his counsel of this, but they failed to act, even though doing so would have exposed the false testimony and the prosecutor's willingness to present false testimony; which may have changed the outcome of the trial.

3. Sean Gallagher intentionally led criminalist, Mona Ten, to unknowingly give false testimony about a diluted blood spot on the toilet seat lid that revealed unknown 3rd party DNA:

> Q. And what were the results from the stain on the toilet seat?
> A. Suzanne was the primary source of the DNA presence, and excuse me, Fernand and Joseph Cua could be excluded as contributors.
> Q. And being a guest bathroom, would you expect that teh people who were guests would use the bathroom?
> Yes, I would assume so.

a. Mona was led to this testimony to counter the earlier testimony of Janet Patel:

> "No 99 refers to the stains on the toilet seat cover... the stains appear to be diluted. By diluted, it means that the blood was mixed with another liquid. How I came to that conclusion was because it was lighter in color, and the ring was actually darker with a lighter interior. so it appeared to be diluted."

b. Mona's testimony wasn't perjury since she didn't know that Gallagher was intentionally leading her into making a false statement. She wasn't part of the crime scene team, didn't know that the toilet was next to the sink, and that the sample tested came from a diluted blood spot. If it had been, Suzanne would never have left it uncleaned overnight.

c. MATERIALITY Mona's testimony was prejudicial because it negated strong exculpatory evidence on an unknown 3rd party washing up at the sink and splashing onto the toilet lid.

4. PROSECUTORIAL MISCONDUCT "It is a basic principle of theAmerican justice system that the deliberate deception of the court and jurors by the presentation of false evidence is incompatible with the rudimentary demands of justice." Giglio v. United

States, 405 U.S. 150, 153 (1972) "Prosecutor's knowingly introduction of false testimony violated due process." U.S. v. Agurs, 97, 103 (1973) The misconduct had an injurious effect in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637-38 n. 9 (1993) "A Napue violation requires that the conviction be set aside when there's a reasonable likelihood that the false testimony affected the jury." ..."We have gone on to say that "if it is established that the government knowingly permitted the introduction of false testimony, reversal is automatic." Hayes v. Brown, 399 F. 3d 972, 985 (9th Cir. 2005)

5. INEFFECTIVE ASSISTANCE OF COUNSEL Trial counsel's failure to impeach false testimony was ineffective assistance that prejudiced his client's trial. "Constitutionally deficient performance based on ineffective cross examination where counsel allowed inadmissible, damaging evidence before the jury or where counsel failed to cross examine witness who made grossly inconsistent statements." United States v. Orr, 636 F. 3d 944, 952 (8th Cir. 2011) "Given the weakness of the prosecution's case, and the prejudicial aspect of these witness testimonies, defense counsel's failure to impeach the witnesses with evidence undermines confidence in the jury's verdict. Strickland, supra, 466 U.S. at 694. Counsel's failure was objectively unreasonable and there's a reasonable possibility that but for counsel's erorrs the result of the proceeding would have been different. Strickland, at 668

Jurists of reason would debate or disagree with the district court's ruling/ opinion on the matter of IAC of counsel in allowing false testimony to go unchecked.

C. TRIAL COUNSEL FAILED TO OBJECT TO THE TESTIMONIES OF JOHN ARONIS AND PHILLIPE CHAGNIOT FOR LACK OF FOUNDATION, VIOLATING THE RIGHT TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL UNDER USCA 5, 6: STRICKLAND V. WASHINGTON, Supra 466 U.S. (1984) Subclaim: THE INTENTIONAL INTRODUCTION OF TESTIMONIES WITHOUT FOUNDATION VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS UNDER USCA 5, 14 RIGHTS TO NOT BE CONVICTED WITHOUT SUFFICIENT EVIDENCE. JACKSON V. VIRGINIA, 447 U.S. 307 (1979)

1. The caller id Det. Aronis alluded to in his testimony was not put into evidence for the jury to assess. (including the investigation into the calls)

a. Prejudice was derived because if the caller id investigation were put into evidence, the jury would have noted that there were inconsistencies in Aronis' testimony, since many of the phone calls Aronis testified as missed calls were actually answered by the Wagners. Norbert Wagner's call at 9:53 and Lorraine Peterson's call would have been revealed as answered calls. Petitioner asserts that Edith Edmonds' call she testified she made in which she spoke with Cua and both Wagners is on the caller id list, as would the call Cua made before 8:00 am in which he and Fernand decided to meet at the house. The testimony about the calls being missed (because Cua had already done the deed) was the only evidence given on when the crime occurred. In actuality, had the caller id investigation been put

entered into evidence, Gallagher would not been able to come up with another theory on Cua committing the crime at any time he was known to be at the house, resulting in Aronis not testifying, and there would have not been a case to prosecute.

b. INEFFECTIVE ASSISTANCE OF COUNSEL Ed Pomeroy's failure to object to Det. Aronis' testimony for lack of foundation was deficient performance because the prosecution's case depended on the jury believing that Cua committed the crimes at the only time he was known to be in the house.

2. The voicemail that Phillipe Chagniot referred to in his testimony was not entered into evidence

a. PREJUDICE Without the Chagniot voicemail in evidence, the jury couldn't verify of there were any inconsistencies or other factors that proved Chagniot's testimony false. The evidence points to the voicemail not existing since (1) Phillipe's phone # was not on Cua's phone log (EXHIBIY 10c); and (2) it would have been entered into evidence with alacrity had it existed. Cua's due process rights were violated because "once the tape recordings are admitted, defendant can seek to impeach them by such means as showing that the voice on the recording is not his, that tapes do not recount the entire event, that the tape has been altered, or that the tapes are untrustworthy or contradictory. U.S. v. Thompson, 130 F. 3d 676 (5th Cir. 1997)

b. INEFFECTIVE ASSISTANCE OF COUNSEL If Pomeroy had objected to Chagniot's testimony for lack of foundation since the voicemail wasn't entered into evidence, and shown that Phillipe's number wasn't on the phone record, Phillipe couldn't have testified, the prosecution couldn't have supported his testimony in his summation and another false/ perjurious testimony would have been exposed. The prosecution's case would have weakened and the defendant's case much stronger.

3. Without the Aronis caller id investigation and the Chagniot voicemail in evidence there was no way to authenticate the veracity of their testimonies. "jury's exposure to facts not in evidence deprives the defendant of the 6th amendment rights to confrontation, cross examination, and assistance of counsel embodied in the 6th amendment." Eslamania v. White, 136 F. 3d 1234 (9th Cir. 1998) There is a reasonable probability that but for the counsel's unprofessional errors, the result of the proceeding would have been different. Jurists of reason would debate or disagree with the district court's determination that counsel's allowing testimony without foundation was not an infringement of petitioner's rights to due process under USCA 5 and 14.

D. TRIAL COUNSEL'S PERFORMANCE WAS INEFFECTIVE ASSISTANCE OF COUSNEL WHEN HE FAILED TO OBJECT TO THE PROSECUTOR'S ARGUMENT TO THE JURY THAT REINFORCED THE THE DECEPTION OF THE USE OF FALSE TESTIMONY U.S. V. AGURS, 427 U.S. 97, (1976); STRICKLAND V. WASHINGTON, 466 U.S. 168 (1984)

1. The prosecutor's comments to the jury supporting false testimony "so infected the trial with unfairness as to make the resulting conviction a violation of due process." Darden v. Wainwright, 447 U.S. 168 (1986) Sean Gallagher supported the the false testimony he had elicited from John Aronis, Phillipe Chagniot, and Mona Ten.

a. To overcome the stipulations that Norbert Wagner and Lorraine Peterson had phone contact with the Wagners up to around noon; and Donald Kent seeing Fernand driving by around noon, prosecutor deliberately made the following statement to divert the jury away from that evidence to reestablish the theory that Cua had committed the murders around 9:30 a.m.:

> "A call from Lorraine Peterson that morning. Somewhere around her lunchtime. We don't know what her lunchtime was, but they weren't there at the house and no indication that Cua is or isn't there, but we know that he had been at the house earlier that morning."

PREJUDICE was derived because Gallagher's statement of Lorraine's call going unanswered contradicted the stipulation he had agreed to twenty minutes earlier about Lorraine speaking with the Wagners for about 15 minutes. He disputed factual evidence that the Wagners were alive well beyond the time he theorized Cua committed the murders and John's Aronis' testimony that the caller id listed only missed calls.

b. Gallagher supported the false testimony of Phillipe Chagniot about Cua leaving a voicemail stating that he was in charge and would sell the buildings.

> "There's more messages for Philllipe about the money and the trust. I'm the trustee. I'm the executor... He's got a role to play in giving out the money for the property... It's all about the money."

PREJUDICE was derived therefrom because Gallagher knew from the phone records that Cua had not made such a call, and that the voicemail was inadmissible hearsay that more than likely never existed.

c. Gallagher supported the false testimony he led Mona Ten to make.

> "DNA left on the toilet seat where guests use. They lift up the lid."

PREJUDICE was derived from this statement because Ghallagher knew that the DNA came from a diluted blood spot on the toilet seat cover (not seat). He knew that the was negating exculpatory evidence of a male leaving his DNA on the toilet lid by splashing while washing up at the sink.

d. INEFFECTIVE ASSISTANCE OF COUNSEL "Counsel's failure to object to improper comments constitute deficient performance in violation of petitioner's 6th amendment right to effective counsel." Matire v. Wainwright, 811 F.2d 1430 (11th Cir.1987)

In U.S. v. Watson, 171 F.3d 695, 700 (D.C. Cir. 1999) the conviction was reversed because defense witness' testimony substantially prejudiced defendant. Jurists of reason would debate or disagree with the district court regarding the matter of ineffective counsel for failure to object to improper comments supporting false testimony.

E. TRIAL COUNSEL FAILED TO OBJECT TO PROSECUTOR'S MISSTATEMENT OF FACT USED TO OBTAIN PETITIONER'S CONVICTION, VIOLATING HIS DUE PROCESS RIGHTS UNDER USCA 5, 14; STRICKLAND V. WASHINGTON, (1984) Underlying claim: PROSECUTOR'S COMMENTS "SO INFECTED THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS." DARDEN V. WAINWRIGHT, 447 U.S. 168 (1986)

1. Gallagher falsely stated that petitioner left the bloody crime scene prints:

> "And you leave footprints at the scene... It's not a sneaker. It doesn't have a rubber sole... It's a dress shoe."

a. This statement contradicted criminalist K. Pertulla's testimony:

> "So otherwise, they were all eliminated. All the shoes. The five pairs of shoes I'm talking about were eliminated as having made the impressions."

b. (EXHIBIT 2a-2f) is incontrovertible proof that the crime scene bloody footprint did not match defendant's shoes. The crime scene print has a v-shape to the front of the heel; whereas Cua's shoes have a rounded shape on the heel's front edge.

2. Gallagher contradicted evidence given that Cua had no bruising to his hand:

> "Mr. Pomeroy talked to you about the hands, weren't reddish or purplish by Sunday. Maybe the call came in on Wednesday or thursday morning. So we're what four or five days later. The important thing is that by Sunday, it's still there and Det. Taylor sees and photographs it."

a. Det. Taylor testified that he saw no bruising to Cua's hand at any time. (EXHIBIT 6a) This statement totally contradicted hard evidence.(EXHIBIT 4)is a photo showing that Cua's hand was not bruised.

3. Gallagher speculated against the evidence on Suzanne's body by stating that Cua set up the crime scene to look like a sex crime, and it was a certainty that she wasn't sexually assaulted:

> "She's naked on her back and killed right? She's staged that way to deflect on why she died... but we know she wasn't sexually assaulted. That was a gratuitous attempt to create a picture of something different that what's happening."

a. Gallagher's statement went against the evidence that was on Suzanne's body that excluded Cua: (1) unknown 3rd party DNA was found on Suzanne's breast and (2) under four of her fingernails.

b. His stating, "We know she wasn't sexually assaulted", was unfounded since pathologist, Thomas Rogers, when asked if he could determine if Suzanne had been raped or sexually assaulted, he replied, "No, I saw an incised defect to the opening of the vagina, and beyond that I wouldn't have an opinion."

4. Gallagher contradicted expert testimony regarding blood in multiple donor combinations:

> "Remember, the levels are the same suggesting that it's blood. Cua's blood, Fernand's blood on the door jamb. So that helps you to know about blood samples"

a. This statement contradicted a plethora of expert testimony about how it can't be determined if both contributions to a sample are blood, who left the blood, and who left another substance, and when the samples were left.

> 1)"Because of multiple combinations, there's no way to tell if a blood smear on the door included blood from both the defendant and the victim if the victim has blood on his hand; there's no way to tell if blood is from a certain individual."
> 2)"If blood is detected on the doorframe, you can't tell if it's all blood; only that it's a combination of fluids."
> 3)"It's not possible to tell how old DNA is, how long it's been on a particular surface."

Cua was at the Wagner home three times a week on average. He also remodeled the guest bathroom where the subject door frame was situated. His DNA would have been all over the bathroom woodwork and cabinets.

5. Gallagher kicked out violently and repeatedly for effect as he stated that Cua kicked the Wagners, hurting his foot.

> "And it takes a lot of pressure, impact and violence in order to fracture someone's ribs that way. And if they are lying down on the ground and someone is kicking them over and over again, you might end up with this kind of injury to your foot."

a. Cua had a shin injury; not a foot injury. One doesn't hurt his shin when kicking someone. Cua hurt his shin while lugging a large refrigerator up a steep flight of stairs, then in a rollerblade mishap. The imprint of the top of the boot and straps are clearly visible in photo of Cua's foot.

b. Gallagher was aware that it was Cua's shin that was injured since in Joy Cua's interview with Det. Taylor, Taylor refers to the "bruise on the shin about half way, then asks, if Cua had any other injuries, to which she replied, "Not that I saw."

6. Gallagher intentionally obfuscated the issue of Cua's single donor DNA found on the side of the passenger seat and Suzanne's DNA (single donor) found on her ring found under the passenger seat of Fernand's cadillac.

> "No mention of how the blood gets into the cadillac six inches away from the ring. It had Suzanne's blood on it, right? Single donor left the bloodstain, Suzanne's blood on the ring."

a. The words were jammed together to give the impression that Suzanne's DNA was on the passenger seat, when only Cua's was there. If Cua had handled the ring his DNA would have been on it since his DNA was on the passenger seat. Suzanne's DNA would have been on the passenger seat had Cua handled the ring.

b. The small swipe on the passenger seat is close to and runs in the direction of

the seat controls. Suzanne is 5'2 and Cua is 5'10. In (EXHIBIT 11) Cua tells Det. Taylor that on 6/11/06 Fernand had lunch with him at his apartment while watching a soccer match, after which Fernand drove Cua to Millbrae Ave on his way home so he could jog back to Burlingame Ave.-he adjusted the seat. This was way before there was any indication that his DNA would have been on that seat. Cua often drove the Wagner car since Fernand was recently ill and had night blindness.

7. PREJUDICE "to find prosecutorial misconduct, a two prong test must be met: (1) the remarks must be improper; and (2) the remarks must prejudicially affect the substantial rights of the defendant. U.S. v. Eyser, 948 F. 2d 1196 (11th Cir. 1991) Gallagher's misconduct "so infected the trial with unfairness that the resulting conviction was a denial of due process." Greer v. Miller, 483 U.S. 756, 765 (1987) "The alleged errors had an injurious effect on the jury's verdict." Brecht, supra "Prosecutor's closing statements may be grounds for reversal." Bill v. Evatt, 72 F. 3d (9th Cir. 1995)

8. INEFFECTIVE ASSISTANCE OF COUNSEL There was no reasonable trial strategy that would explain Ed Pomeroy's failure to object to the prosecutor's staements that (1) Cua left the bloody footprints - when the crime scene print didn't match Cua's shoes; (2) Cua had a bruised hand and Det. Taylor saw and photographed it - when Taylor testified that he saw no bruising to Cua's hand; (3) Cua set up the scene to look like a sex crime and "we know there was no sexual assault - when there was unknown 3rd party DNA on Suzanne's breast and under her nails, and a pathologist stated that he had no opinion on her being assaulted; (4) it was a fact that Cua's blood was on the doorjamb - when expert testimony contradicted that. In Washington v. Hofbauer, 228 F. 3d 421 (9th Cir. 1995) the court ruled,"Prosecutor's challenged statements and tactics amounted to prejudicial misconduct plainly meriting curative instruction; yet, counsel remained silent.. We conclude that his silence was due to incompetance and ignorance of the law rather than reasonable trial strategy." Washington v. Hofbauer, 228 F. 3d 421 (9th Cir. 1995) "Defense counsel's failure to object to improper comments that violated defendant's 5th amendment rights, violated his 6th amendment rights." Maitre v. Wainwright, supra There's a reasonable possibility that the result of the proceeding would have been different. Strickland, supra

Jurists of reason would debate or disagree with the district court's ruling on the matter of IAC herein under Slack.

F. DEFENSE COUNSEL'S FAILURE TO IDENTIFY AND INSIST ON OBTAINING IMPEACHMENT AND EXCULPATORY EVIDENCE SUPPRESSED BY THE PROSECUTION WAS IEFFECTIVE ASSISTANCE OF COUNSEL UNDER USCA 6; STRICKLAND V. WASHINGTON, SUPRA
UNDERLYING CLAIM: PROSECUTION FAILED TO DISCLOSE "BRADY MATERIAL" THAT WAS IN THE HANDS OF INVESTIGATING AGENCIES, VIOLATING DUE PROCESS RIGHTS UNDER USCA 5, 14; KYLES V. WHITLEY, 514 U.S. 419 (1995); BRADY V. MARYLAND, 373 U.S. 83 (1963)

1. Prosecution suppressed the caller id and investigation into the source of the calls that Det. Aronis testified to, supporting prosecutor's contention that Cua commited the murders around 9:30 a.m. on 6/13/06. Withholding this key evidence allowed Aronis to give false testimony with impunity.

a. IAC Of trial counsel for failure ot recognize the importance of having the caller id, then insisting on the prosecution releasing it to the defense.

2. The prosecution suppressed the voicemail Phillipe Chagniot referred to in his testimony - intentionally. There are two reasons for the prosecution to not release the voicemail to the defense: (1) it didn't support Phillipe's testimony, or (2) it didn't exist. It would have been entered into evidence with alacrity had it existed.

a. IAC: Had counsel insisted on having the voicemail, Phillipe would not have testified since it (1) didn't support prosecution theory, which would have led to Phillipe's not testifying or, the prosecution having to admit that there was no voicemail, also resulting in Phillipe not testifying.

3. The results of a comparative analysis of crime scene hair against Cua's and the Wagners' samples was suppressed. Det. Aronis testified that he saw a hair on Fernand's hand. Petitioner discovered in police report that the hair was under Fernand's fingernail, amking it much more relevant. Cua discovered microscopic photos of hair samples in the police reports (EXHIBITS 12a,b). It's inconceivable that specialized photos like these would not be tested/compared.

a. IAC for Pomeroy to not notice or ignore these photos, and seek the results of the testing, or test them himself. After being told that the hair didn't have enough root material to test for DNA, Cua asked in writing to conduct a comparative analysis of the hair.

4. The results of testing on the rape kit were suppressed from the defense. The police reports indicate that vaginal swabs were available. It's highly unlikely that the swabs weren't tested. If the results had indicated a 3rd party presence or condom related substances, the prosecution would have been forced to drop its case since it would have destroyed the theory of Cua setting up the crime scene to look like a sex crime. (EXHIBIT 13: police report regarding swabs)

a. IAC for failure to notice the lack of, and seek the results of the rape kit, which cannot be explained by any reasonable trial strategy.

Trial counsel had the responsibility to carefully review and determine if any reports were missing or if additional discovery is required. Had Pomeroy met this standard, Much of the prosecutorial misconduct wouldn't have occurred. Jurists of reason would debate or disagree with the district court that the prosecutor committed misconduct in suppressing discovery and that the defense counsel's performance was ineffective assistance of counsel.

G. COUNSEL'S FAILURES TO SUBJECT THE PROSECUTOR TO ADVERSARIAL TESTING ALLOWED PROSECUTOR TO COMMIT MISCONDUCT WITH IMPUNITY, MAKING FOR AN UNFAIR TRIAL, AND VIOLATING HIS RIGHTS TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL U.S. v. CRONIC, 466 U.S. 468 (1984)

Underlying claim: UNCONSTITUTIONAL MISCONDUCT OCCURRED WHEN PROSECUTOR ENGAGED IN ACTIONS THAT ""SO INFECTED THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS, TO THE LEVEL OF A "KENNEDY INFRACTION" WHERE DOUBLE JEOPARDY PRINCIPLES BAR RETRIAL. OREGON V. KENNEDY, 456 U.S. 667 (1982)

1. The double jeopardy clause bars retrial where the prosecution engages in "overreaching" or "harassment" i.e. misconduct that amounts to "intentional manipulation of the defendant's double jeopardy interests." (Kennedy, 456 U.S. at p. 683, 690) Sean Gallagher's misconduct was "deliberate, and created prejudice against him." U.S. v. Lewis, 368 F. 3d 254, 264-65 The prosecutor's duty is to present a forceful case to the jury; not to win at all costs. He would not have committed the extensive misconduct in the case unless he felt he need to do so to obtain a conviction. Gallagher's misconduct had an injurious, substantial effect in determining the jury's verdict. Without the misconduct, the result of the trial would have been different.

a. There's a connectivity between all the claims in this ground that indicates strategic planning, i.e. (1) suborning false testimony; (2) the knowing lack of foundation for the testimonies of Aronis and Chagniot; (3) supporting false testimony in summation; (4) arguing against and outside the evidence in summation; and (5) suppression of BRADY material.Sean Gallagher went os far as to violate P.C. 127 by knowingly eliciting false testimony from Aronis and Chagniot, causeing them to violate P.C. 118 (perjury).

b. IAC Each of Ed Pomeroy's failures in this ground allowed the prosecutor to violate constitutional law, and even the penal code to convict the defendant. There was no reasonable trial strategy for allowing false testimony to go unchecked; no reasson for not objecting to the Aronis and Chagniot testimonies for lack of foundation; No reason for failing to object to prosecutor's going outside and against the evidence and supporting false testimony in his summation,and getting curative instructions for that misconduct; and to identify and insist on suppressed material from the prosecution. Pomeroy's failures fell below an objective standard of reasonableness, and petitioner was prejudiced by that deficient performance. There's

a reasonable probability that the result of the proceeding would have been different but for the errors. Strickland, supra

Jurists of reason would debate or agree that the prosecution's misconduct and ineffective assistance of council prejudiced petitioner and that the misconduct met the standards of a Kennedy violation.

* The conviction must be dismissed due to retrial being barred under Oregon v. Kennedy. Procedural default is barred for this ground and all its subclaims due (1) a constitutional violation(s) resulted in the conviction of one who is innocent, Murray v. Carrier, 477 U.S. at 496 (1986) and (2) The constitutionally defective assistance of counsel that caused actual prejudice bars procedural default. Walker v. Martel, U.S. Dist. LEXIS 35908 N.D. Cal. Mar. 31, 2011

H. DEFENSE COUNSEL'S FAILURE TO OBJECT TO UNCONSTITUTIONAL INSTRUCTIONS THAT LESSENED THE PROSECUTION'S BURDEN OF PROOF AND TO CHALLENGE THE COURT'S FAILURE TO INSTRUCT THE JURY LESSENING THE PROSECUTION'S BURDEN OF PROOF VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS, FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL. USCA 5,6,14; STRICKLAND, Supra

Underlying claim: INSTRUCTIONAL ERRORS "SO INFECTED THE TRIAL THAT THE RESULTING CONVICTION VIOLATED DUE PROCESS." ESTELLE V. McGUIRE, 502 U.S. 62, 67-68 (1991)

Under Cal. Crim. Law Pract. §32.1, defense counsel has the duty to make sure that the court gives instructions that could support an argument that the prosecution has not proven its case beyond a reasonable doubt, and all instructions necessary to the jury's consideration of the case, which is the prosecutor's job, are given to the jury.

1. COUNSEL WAS INEFFECTIVE FOR FAILURE TO CHALLENGE COURT'S FAILURE TO ISSUE INSTRUCTIONS ON DEFENSE THEORY OF THE CASE, VIOLATING HIS RIGHTS TO DUE PROCESS, TRIAL BY JURY AND CONFRONTATION. USCA 5,6, 14; MATTHEWS V. UNITED STATES, 485 U.S. 58 (1988)

a) The prosecutor tried and failed to prove Cua committed the crimes around 0930 on 6/13/06 resulting in failure to prove "opportunity"; no connection was made between Cua and a blunt force instrumentor cutting device -resulting in a failure to prove "means"; there was no evidence of premeditation, deliberation and intent to kill since the time of death was never established; evidence pointing to a 3rd party perpetrator included: bloody fingerprint on a belt; Cua's shoes did not match crime scene prints; 3rd party DNA excluding Cua included (1) on Suzanne's breast, (2) under Suzanne's nails on both hands, (3)in diluted blood spot on toilet lid, (4) in blood on Fernand's shoulder, (5) blood on front and back of Fernand's pants, and (6) in blood on staircase.

b) Consequently, guilt was not proven beyond a reasonable doubt; meaning that if the court tests the prosecution's narrative against alternate hypotheses, and it's not possible to rule out other explanations there's reasonable doubt, and the

court must acquit. The minimum requirements to convict are that the defendant was at the scene of the crime, had the opportunity to commit the crime, had the means to do so, and other perpetrators can be ruled out. The prosecutor failed in all these respects. Jurists of reason would find it debatable or agree that counsel's performance in not effecting instructions on the defense theory was ineffective assistance under Slack, supra and Strickland, supra

2. COUNSEL WAS INEFFECTIVE FOR FAILURE TO CHALLENGE THE COURT'S FAILURE TO INSTRUCT JURY AS TO THE FACTUAL ELEMENTS NECESSARY TO SUPPORT ENHANCEMENT TOR USE OF A DEADLY WEAPON P.C. 12022 (b), VIOLATING RIGHTS TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL UNDER USCA 5, 14, 6 SULLIVAN V. LOUISIANA, 508 U.S. 275 (1993); STRICKLAND V. LOUISIANA, 466 U.S. 570 (1984)

a) Defendant was charged and convicted for "intentionally displayed in a menacing manner or struck someone with an instrument capable of inflicting great bodily injury or death. P.C. 12022 (b) (knife)

b) However, as stated on pp. 5-6, there was no evidence linking defendant to a knife and Fernand was cut by a left hander (Cua is right handed). The court was told that Cua had a cut on his hand; but(EXHIBIT 4), which was not evidenced, shows that the cut could not have possibly been made while wielding a knife. The slicing of Fernand's neck was the most disturbing and prejudicial of the Wagners' injuries. If this instruction had been given, at least one of the jurors may have questioned the use of a knife by Cua, the special allegation for use of a knife, and the charge of murder, since it was the "means" element of the crime - reversal is mandated if any element of a crime rendered the trial fundamentally unfair.

c) Jurists of reason would debate or agree that counsel committed IAC for not effecting instructions on the factual elements necessary to support P.C. 12022(b)

3. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S ERROR IN GIVING INSTRUCTION CALCRIMM 207 - PROOF NEED NOT SHOW ACTUAL DATE, WHICH RELIEVED PROSECUTION OF THE BURDEN OF PROOF OF PROVING EVERY ELEMENT OF THE CHARGED OFFENSE, VIOLATING PETITIONER'S DUE PROCESS RIGHTS UNDER USCA 5, 14: SULLIVAN V. LOUISIANA, SUPRA: STRICKLAND V. WASHINGTON, SUPRA

a) The jury was given the following instruction:

> "it is alleged that the crime took place on or about June 13, 2006. The people are not required to prove that the crime took place on that day, but only that it happened reasonably close to that day."

b) To consider TOD as ""give or take a day" allows for speculation as to when the crime occurred, and the element of "means" is removed from the equation.

c) This instruction was given after the prosecution failed to prove that Cua committed the crime around 0930 on 6/13/06 that was disproved by evidence that two people spoke on the phone with the Wagners, and a neighbor saw Fernand in his car up to around noon. The instruction amounts to giving the prosecution a "mulligan" after he had failed to prove that Cua had the opportunity to commit the crime.

d) Gallagher also stated in his summation:

"There's no alibi for this defendant. There's not one person who can say, "Oh I saw him at 1:00 o'clock. We had lunch together.'There's not one person who can say, "Yeah, I saw him pull into the parking lot in Burlingame around 2:30 or 2:30. That's where he was."

1) In the police report Cua told Det. Taylor that he saw Natalie Wilson outside the apartment she had just rented on the second floor around 1:35. She complained that the refrigerator in her unit was not clean. Cua asserts that Natalie is the reason the prosecution went with 9:30 as teh time Cua commited the crime.

e) Jurists of reason would debate or agree that CALCRIMM 207 lessened the prosecutions burden of proof, and that counsel's failure was ineffective assistance.

4. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO OBJECT TO THE COURT'S FAILURE TO ISSUE PROPER INSTRUCTIONS THAT GUARANTEED THAT WRITTEN QUESTIONS FROM TWO JURORS WERE ANSWERED, SO INFECTING THE TRIAL WITH UNFAIRNESS AS TO VIOLATE DUE PROCESS. ESTELLE V. McGUIRE, 502 U.S. 62, 67-68 (1991); STRICKLAND V. WASHINGTON, Supra

a) Supplemental instructions should have been given to the jury regarding the following written questions:
From juror #3 on 6/18/08:

(a) What time was the Southwest flight from Oakland to Ontario canceled or was Cua a no-show?
(b) What happened to the candlestick that was mentioned?
(c) What did Cua claim on his tax return?

From juror #9 on 6/24/08

(d) What size shoes does Cua wear?
(e) Did family suspect Marc Wagner of involvement?
(f) If fingerprints are wiped off an object, will non-identifiable prints remain?
(g) Was candlestick used to cut Suzanne's vagina?
(h) No dress found?

b) "If a note requires a response, ore tenus, the jury should be recalled, the note read and summarized by the court, supplemental instructions should be given, and counsel given an opportunity to object at sidebar. U.S. v. Sabetta, 373 f. 3d 75 (1st Cir. 2004) In this case, the jurors were told that the lawyers would answer the questions during their closing arguments; but this was not done. The importance of having these questions answered was vital to Cua's defense.

c) Answering these questions were important to Cua's defense because:

(a) Cua no showed the flight because there was no cancellation fee, as opposed to cancelling which would incur a fee. He decided to drive instead of flying because of being notified that his sailboat in Oxnard would be sold the next day on Ebay. He drove down 101 to Oxnard to clean the boat and install some woodwork. (EXHIBIT 14) is the close of auction page on EBAY on 6/14/06. This would have prevented an instruction on flight that was erroneous/prejudicial.
(b) It should have been obvious, but should have been explained that only Suzanne's DNA was on the candlestick.
(c) This was important because the prosecution theorized that Cua embezzled from the Wagners. Cua claimed the amount he got for his work for the Wagners on his Schedule C on his return.
(d) The size of the shoes had just been given and Cua's shoes did not match the crime scene prints. Answering this question might have prevented Prosecutor from stating in his summation that Cua left the bloody footprints in the house.

(e) It was futile to speculate if Marc Wagner was suspected by his family since he wasn't on trial
(f) Non identifiable fingerprints remaining after an object is wiped off? shows that some of the jurors were not qualified to determine guilt vs. innocence. All prints are probably removed when an object is wiped off.
(g) should have been explained that a candlestick would be a blunt force instrument and that only Suzanne's DNA was found on it.
(h) Joy Cua was supposedly the prosecution's "star witness", It was important to find out if she backed out from testifying or if the prosecutor decided to not put her on the stand since she had committed perjury numerous times during the preliminary hearing, as well as made numerous false and contradictory statements in the police reports.
(i) No dress found? There was no mention of a dress in the police reports.

d) Jurists of reason would find it debatable or agree that it was a violation of due process and ineffective assistance of counsel to not have written questions from jurors answered.

I. TRIAL COUNSEL FAILED TO INVESTIGATE AND ENTER INTO EVIDENCE EXCULPATORY, MITIGATING AND IMPEACHMENT EVIDENCE, RESULTING IN VIOLATION OF PETITIONER'S RIGHT TO EFFECTIVE COUNSEL UNDER USCA 6; WIGGINS V. SMITH, 123 S. Ct. 2527 (2003); STRICKLAND, Supra

1. Photos of the crime scene bloody footprint and imprints of Cua's shoes would have ingrained in the jurors minds that his shoes did not match the crime scene print. It would have prevented Gallagher from stating in his summation that Cua left the bloody footprints in the house.

2. The EBAY page showing that Cua's sailboat sold on 6/14/06, which is the reason why Cua chose to drive instead of taking a flight to So Cal. (EXHIBIT 14) evidenced would have prevented prosecutor from stating that Cua fled the scene taking 101 instead of I-5 in order to get rid of evidence along the way, and prevented an unwarranted instruction on flight. Pomeroy should also have made known that Cua needed his tools to make repairs on that boat, another boat in Wilmington, and effect repairs on his fathers house. Det. Taylor verified the tools as being in Cua's truck and Joy testified that he brought six large cane chairs with him that Suzanne had given him. The very fact that Cua had made a reservation to fly to Ontario makes clear that he had planned to go to his house in Hemet.(near Riverside)

3. Pomeroy should have used photo evidence of the bloody fingerprint on Suzanne's belt against Cua's fingerprint since people are visually oriented. This exculpatory evidence would have established reasonable doubt to the jurors.

4. (EXHIBIT 4) the photo of the cut on Cua's index finger would have established that it could not have been sustained while wielding a knife, preventing speculation that it had been. The photo also shows that there was no bruising to Cua's knuckles.

5.(EHIBIT 5) photo of the damage to Fernand's knuckles should have been shown to the jury so they knew that Fernand had fought back hard and have it explained

that there was no evidence of bruising on Cua from being the recipient of Fernand's punches, as testified to by Det. Taylor. (EXHIBIT 6a,b)

6. (EXHIBIT 5) shows Fernand's position in the hallway, lying face down with a pool of blood to the left of his head. Thomas Rogers, pathologist, stated that the cut on Fernand's neck was made ante-mortem. Therefore the picture should have been used to show that the cut had to be made by a left hander - Cua's right handed.

7. The photo of Cua's leg (EXHIBIT 7) should have been used to show that contrary to prosecutor's claim, Cua did not hurt his foot while kicking the Wagners.Pomeroy should have shown the jury the imprint of a roller blade boot top and straps which are clearly visible since they are indicators of Cua having a roller blade mishap.

8. The jury should have been told that Cua was arrested based on a call from his moter-in-law in Iowa who stated that he had bruising to his face, ribs and hands - which Det. Taylor testified as not seeing after Cua's arrest. The information on the affidavit was false, double hearsay, taken over the phone and not corroborated by police prior the warrants being issued.

9. (EXHIBIT 9a-c) indicates that Joy Cua wasn't interviewed until six hours after the warrants were issued, making them illegal. Pomeroy should have used this info to let the jury know that when asked, "You didn't see anything about his head, face, or anything like that? Nothing on his chin, neck, forehead, nose, nothing like that?" to which she replied, "Not that I noticed," and "There was nothing obvious." Pomeroy could have used this to question Det. Taylor to verify his report, and since if any information on an affidavit for warrant is wrong, it makes the warrant void. Det. Taylor should have released Cua upon seeing that the defendant had none of the bruising stated on the affidavits for warrants.

10. Counsel should have used(EXHIBIT 11) to ascertain from Det. Taylor that Cua had told him in his interview that he had been a passenger in the cadillac on 6/11/06 after he and Fernand had lunch at Cua's apartment. This explains why Cua's DNA was found near the seat controls of the passenger seat. Also on this exhibit Cua tells Det. Taylor about seeing Natalie Wilson at 1:35 which prosecutor knew about and still stated that Cua had no alibi for the time between 1:00 and 2:30 p.m. on 6/13/06.

11. To counter prosecutor's claim that Cua made up the concept of having a master lease to explain the funds he made from his work with the Wagners, Pomeroy should have questioned Marc Wagner about his knowledge of a financial agreement between Cua and his uncle as indicated on (EXHIBIT 15) and used schedule C of Cua's tax return to show that he claimed the funds as income, which he would not have done

had he embezzled those funds.

12. In totality during the trial, Counsel failed to represent his client's interests resulting in gross ineffective assistance of counsel and an unfair trial. Jurists of reason would debate or agree that Ed Pomeroy's actions/inactions that prejudiced his client was ineffective assistance of counsel under Slack, Supra.

J. DEFENSE COUNSEL'S FAILURE TO MOVE FOR A NEW TRIAL UNDER P.C. 1181(5)(6) WHEN IT WAS WARRANTED WAS INEFFECTIVE ASSISTANCE OF COUNSEL, VIOLATING RIGHTS TO DUE PROCESS AND EFFECTIVE COUNSEL GUARANTEED BY USCA 6 and 14. STRICKLAND V. WASHINGTON TON, 466 U.S. 468, 486 (1984)

Under penal code 1181, when a verdict has been rendered against defendant, the court upon application, grant a new trial in the following cases:

(5) When the court has misdirected the jury in amatter of law, or has erred in the decision of any question of law arising during the course of the trial,

and

when the district attorney prosecuting the case has been guilty of prejudicial conduct during the trial before a jury.

Defense counsel's failure to move for a new trial under P.C. 1181 prejudiced defendant since the motion was warranted for the following reasons:

1. Under P.C. 1181 (5) the court erred in a matter of law by: (SEE H - pp. 22-25)
   (1) failing to effect defense theory instructions when warranted. (p. 22)
   (2) failing to instruct jury as to elements necessary to support enhancement for use of a weapon P.C. 12022.(p. 23)
   (3) lowering the prosecution's burden of proof (opportunity) by instructing that it was not necessary to know exactly when the crime occurred (p. 23)
   (4) failing to effect answers/instructions regarding jurors questions (p. 24)

   and the prosecutor was guilty of prejudicial conduct before a jury by:

   (5) knowingly eliciting false testimony from three witnesses. (pp. 12-14)
   (6) knowingly eliciting that testimony without foundation(p. 15)
   (7) capitalized on the false testimony during summation (p. 17)
   (8) misstated facts during summation (p. 18)
   (9) committed Brady violation by suppressing evidence (p. 21)
   (10) when taken in totality prosecutor's misconduct so infected the trial with unfairness it met the level of a "Kennedy " infraction.

2. Under P.C. 1181(6) the verdict was contrary to law or evidence because, as related in Ground III(p. 5-6)

   (1) plethora of exculpatory evidence reased reasonable doubt: unknown donor to bloody fingerprint; unknown 3rd party DNA on Suzanne's breast, under her nails, in blood on Fernand's shoulder, in diluted blood spot on toilet lid, in blood on front and back of Fernand's pants, in blood on staircase; bloody footprints didnot match Cua's shoes.
   (2) prosecutor failed to prove that Cua committed the murders at 9:30 by using false testimony from a detective. No TOD was proven, opportunity not proven.
   (3) no connection was made between Cua and any weapons used in the crime (knife, blunt force instrument) - means not proven
   (4) insufficient evidence of intent to kill with premeditation or deliberation since Cua having the opportunity to commit the crime was unproven.

3. PREJUDICE Defendant was deprived of his due process right to a full and fair opportunity to contest the verdict and constitutional violations in his trial.

Counsel's failure to file this motion when it was warranted constituted deficient performance, and he was prejudiced by this failure. Under P.C. 1181(5) the judge would have noted that the court errors lessened the prosecutor's burden of proof; and that the prosecution presented a malicious prosecution violating constitutional law and even the penal code. Under P.C. 1181(6) if pointed out to him, he would have noted that the verdict was contrary to the evidence, which required that he review the evidence. People v. Davis, 10 C. 4th 463(1995) Filing this motion would have been self incriminating as to his performance; nevertheless, the motion was warranted for cause, and this failure resulted in the miscarriage of justice. Had counsel filed this motion using the information available to him, it is reasonable that the court would have ordered a mistrial or dismissal.

Jurists of reason would debate or agree that the filing of motion 1181(5)(6) was warranted, and that trial counsel's failure to file such motion was ineffective assistance of counsel under Slack v. McDaniel, supra; Strickland, Supra

K. PETITIONER'S APPELLATE ATTORNEY WAS INEFFECTIVE FOR FAILING TO ARTICULATE CLAIMS AND SHOW HOW PETITIONER SUFFERED PREJUDICE FROM THOSE CLAIMS, VIOLATING DEFENDANT'S RIGHTS TO EFFECTIVE COUNSEL ON APPEAL UNDER USCA 6, 14; SMITH V. ROBBINS,528 U.S. 259 (2000); MARTINEZ V. RYAN, 566 U.S. 1 (2012); STRICKLAND, SUPRA

Stephen Bedrick failed to raise claims in petitioner's first appeal, many which were obvious, and brought to his attention in writing to him by defendant. Petitioner wanted to raise IAC claims, and have him look at the police reports; but Bedrick responded with IAC claims are not usually raised on direct appeal, and appeals attorneys do not usually get police reports. Cua asked if he could file a habeas writ simultaneously with his appeal and Bedrick said it wasn't a good idea. Petitioner in his habeas petitions raised numerous IAC claims that he would nothave know about without having the police reports. Under Martinez, a petitioner may claim IAC of post-conviction counsel to establish cause to overcome procedural bars of habeas claims of IAC of trial attorney have merit.

1. Bedrick failed to raise the issue of actual innocence when it was warranted. Cua has copies ofhis correspondence to him where he asks, "Since there was more than reasonable doubt...due to the high amount of exculpatory evidence,"and "Did prosecution prove guilt beyond a reasonable doubt? In light of the exculpatory evidence, failure to prove means and opportunity, the obvious prosecutorial misconduct and court error, Bedrick should have noticed that the jury misapplied the instruction on reasonable doubt.

2. Bedrick failed to raise 4th amendment claims when he knew that Cua had none of the bruising that were claimed on the affidavits for warrants.

3. Cua asked in writing about hair and rape kit tests with no response.

4. Bedrick should have seen the discrepancy between Aronis' testimony and what he said about the last call coming in at 11:36, which reveals that Aronis knew that the caller id did not list only "missed calls" since he said in the police report that all calls after that call were missed calls.

5. Bedrick should have noted the instructional errors by the court, especially not having to know what day the crime occurred which lessened the prosecution's burden of proof by removing the element of opportunity.

6. He should have discovered that the Aronis caller id info and the Chagniot voicemail weren't in evidence making those testimonies hearsay for lack of foundation.

7. Cua asked in writing, "Why no defense theory instructions? Bedrick failed to raise the issue.

8. Jurists of reason would debate or agree that Stephen Bedrick was deficient in his performance in the direct appeal he authored, and that the district court's failure to consider material fact and dispositive legal arguments was a denial of due process and an abuse of discretion, under Slack v. McDaniel, at 484

V THE COURT'S DENIAL OF R. 60(d)(1) MOTION VIOLATED PROCEDURAL RULES AND WAS AN AN ABUSE OF DISCRETION

5/20/21 R. 60(d)(1) motion filed Mailbox rule)
6/29 21 Response filed by respondent (received 6/15/21)
6/28/21 Reply to response filed by petitioner (mailbox rule) filed by court 7/1/21
6/29/21 Order of denial filed by the court
7/12/21 Petition for leave to file 59(e) motion for reconsideration filed (L.R.7-9)
9/2/21 Letter to court asking for confirmation of L.R. 7-9 filing
9/13/21 Court clerk confirmed filing and stated petition would be responded to by the court. Sent docket register
11/18/21 After noting that he was not served with an Order re: due dates of response by respondent: 6/21/21, and his reply was due on 7/6/21, he immediately filed a Request for judicial notice that he had not been served with the ORDER setting the due dates; and although his response was filed in a timely manner, the court had issued a denial prior to the given due date of the response, and before the response was reviewed by the court.
3/7/22 Feeling that the court's not responding to his L.R. 7-9 motion was an abuse of discretion, petitioner filed a Rule 60(b) motion, incorporating the arguments raised in his reply, L.R. 7-9 motion, and Request for Judicial notice.
3/30/22 Order of denial issued for L.R. 7-9 and R. 60(b) motions

The court's not serving petitioner with the ORDER setting the due dates, denying the R. 60(d)(1) before the due date of a response and review of the response violated due process, especially since petitioner was able to refute most of the respondent's argumants.

At the very least, the above violated constitutional rights and shows a bias by the court to Deny petitioner's motion without due process, satisfying SLACK'S components. Jurists of reason would find this issue debatable or disagree with thedistrict Court under Slack, at 484.

REASONS FOR GRANTING THE PETITION

Petitioner sought relief in his Rule 60(d)(1) motion from a judgment which ought not, in good conscience, to be enforced (Granting of dismissal motion by the district court in 2015), and the denial of his discovery motion filed concurrently. Petitioner requested in his filing to file an amended habeas petition incorporating new evidence not for the most part available to him when filing in 2015, and not submitted in his trial in 2008.

Petitioner has shown that he filed an independent action that was not a successful habeas petition, that there were exceptions to the AEDPA time limitations that precluded a dismissal for untimeliness in 2015. "He has made a claim of actual innocence that is both credible and compelling." House v. Bell, 126 S. Ct. 2064, 2068 2077 (2006) A compelling showing of innocence can satisfy the miscarriage of justice exception to procedural default, allowing a court to review petitioner's otherwise defaulted claims on their merits. Schlup v. Delo, 513 U.S. 298, 315, 324 (1995) He has come up with new, reliable evidence that was not presented at trial. Schlup, at 324 In light of this new evidence it is nore likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. Schlup, at 327 Petitioner has shown that his trial counsel was grossly ineffective, and that ineffectiveness under Martinez v. Ryan was highly prejudicial since he allowed the prosecutor to commit misconduct at will, even though he had the perspicacity to prevent it. He failed to prevent instructional error and didn't object to his client's arrest when it was warranted on so many levels. He had the opportunity to move for a new trial under P.C. 1181(5)(6) for court error, prosecutorial misconduct, and a verdict that was contrary to the evidence, but did not do so.

The district court's denial of petitioner's R. 60(d)(1) motion was an abuse of discretion. Petitioner has nade a showing of the denial of his constitutional rights under the 4th, 5th, 6th, and 14th amendments to the U.S. Constitution. Reasonable jurists would debate or disagree with the district court's denial of his R. 60(d)(1) motion, or that the issue was adequate to deserve encouragement to proceed further. Slack v. McDaniel (2000) 529 US 473, 120 S. Ct. 1595 A...

This petition requests review of the district court's denial and the court of Appeals decision affirming that decision.

CONCLUSION

Petitioner requests that this honorable court grant a certificate of certiori.

Respectfully submitted,

October 19, 2023

Joseph Cua