No. ______________________

____

IN THE

SUPREME COURT OF THE UNITED STATES

____

Earnest C. Woods, II
______________________ — PETITIONER
(Your Name)

vs.

Ron Davis, Warden
______________________ — RESPONDENT(S)

ON PETITION FOR **EXTRAORDINARY WRIT OF HABEAS CORPUS**

____
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT **OF HABEAS CORPUS**

Earnest Cassell Woods II
____
(Your Name)

San Quentin State Prison,
____
(Address)

San Quentin, CA 94974
____
(City, State, Zip Code)

____
(Phone Number)

QUESTION(S) PRESENTED

1. The California Supreme Court has said that the felony-murder rule eliminates the need for proof of malice in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree felony murder and second degree felony murder. The felony murder rule renders irrelevant conscious disregard for life malice. The felony-murder rule acts as a substitute for conscious disregard for malice.

The second degree felony murder rule applies to all felonies that are inherently dangerous to human life. Whether a felony is inherently dangerous is determined from the elements of the felony in the abstract, not the particular facts. People v Chun, 45 Cal 4th 112. The U.S. Supreme Court struck down as violative of due process, the requirement that the defendant bear the burden of proving lack of malice. Mullaney v. Wilbur, 421 U.S. 684.

The due process clause protects the accused against conviction except upon "proof" beyond a reasonable doubt of every fact necessary to constitute the crime with which one is charged. In re Winship, 397 U.S. 364. Has the California Judicial system violated the due process clause by removing "proof" from their "beyond a reasonable doubt standard" in People v. Watson, 46 Cal. 2d 818; and does it violate the Brecht standard?

2. In 1981, the California Legislators enacted Senate Bill 54, it amended Penal Code section 28, to eliminate the diminished capacity defense, section 29, to limit psychiatric testimony regarding a defendant's mental state. The legislative also changed Penal Code sections 189's definition of premediation and deliberation and amended section 22 to restrict a defendant's use of evidence of voluntary intoxication to negate mental capacity.

The amendments were a direct response to the public outcry against the diminished capacity defense successfully used in trial of a San Francisco City, and County Supervisor who had killed the city's Mayor Harvey Milk, and another supervisor.

It was not until 1994, that the State Supreme Court ruled that Senate Bill 54, and

the amendments to penal code eliminating diminished capacity defense did not abolish doctrine of imperfect self-defense and remand was required to determine whether defendant had actual but unreasonable belief in need for self-defense when he shot victim as required for doctrine of imperfect self-defense to apply. In re Crhistian, 30 Cal. Rptr 2d 33.

The State Supreme Court did not apply Christian retroactively to convictions that are final on appeal. Has the California Judicial system violated the due process clause. "that no man shall lose his liberty unless the Government has borne its burden of... convincing the factfinder of his guilt," Hankerson v. North Caralina, 432 U.S. at 241? It also held that Mullaney was to have retroactive application. The Court followed Ivan v. Cty of N.Y, 407 U.S. 203, which held that Winship was retroactively applicable, but failing to make Christian retroactive, has the State Supreme Court violated petitioner's due process rights?

3. In 2009, People v. Chun, 45 Cal. 4th 1172, was heard, the court of appeals, Fourth Appellate Court destroyed People v. Woods, D006442, appeal that petitioner never received from his appellate counsel, but Chun was given retroactivity. On July 19, 2017, Attorney Howard Cohen, sent the petitioner a copy of People v. Woods, D006442, from his office, the Appellate Defenders Inc., 555 W. Beech Street, Ste. 300, San Diego, CA 92101.

The court of appeal ruled in People v. Woods, D006442, that CALJIC No. 8.11, was erroneously revised and cast in disjunctive language in an attempt to follow the language of People v. Watson, 30 Cal. 3d 290, thus permitting jurors to find implied malice without necessarily finding a defendant subjectively appreciated the risk involved under the first alternative definition, People v. Dellinger, 201 Cal. App. 3d 945, People v. Protopapas, 201 Cal. App. 3d 152 consequently, because at minimum CALJIC No. 8.11, is confusing on this issue, we assume error. However, Woods, was not prejudiced on the facts of this case, a determination we find supported beyond a reasonable doubt. Watson, 46 Cal. 2d 818.

QUESTION(S) PRESENTED

In 2009, the Court of Appeals destroyed the record, destroying People v. Woods, D006442, but in 2017, the record was revealed by Attorney Howard Cohen. Does the petitioner show that some objective factor external to the defense impeded his efforts to comply with state procedural rule? Murray v. Carrier, 477 U.S. 478, Wainwright v. Sykes, 433 U.S. 72.

4. In In re Christian, it states, Equally important is "the need for legislative attention to the second degree felony murder rule," People v Patterson, 49 Cal. 3d 615. Based on the view of many legal scholars that the doctrine incorporates an artificial concept of strict criminal liability that erodes the relationship between criminal liability and moral culpability. People v. Washington, 62 Cal 2d 777. The Legislature...has taken no action to alter this judicially created rule, and has declined our more recent suggestion in People v. Dillon, 34 Cal. 3d 441, that it reconsider the rules on first and second degree felony murder and misdemeanor manslaughter, People v. Patterson, 49 Cal. 3d 615 at 621.

This court's difficulty in deciding whether imperfect self survived legislative changes also can be laid to statutory ambiguities. A considered legislative re-examination of the mental states and acts associated with various types of lawful and unlawful homicide is needed. People v Nieto Benitez, 4 Cal. 4th 91. In a nutshell, when the legislature redefined the legal concept of "malice" in 1981, by amendment to Penal Code section 188, it completely uprooted the doctrinal framework for the "imperfect self-defense" doctrine and left nothing in its place to support it. (Accord comment, Dead or Alive. Did the California Legislature Abolish "Imperfect Self-Defense?")

The U.S. Supreme Court struck down the "residual clause," it contained an alternative definition of violent felony that included any felony involving conduct that presented a "serious potential risk of physical injury." The court held that the constitutional problem with the residual clause was that the analysis of risk was not based on actual

QUESTION(S) PRESENTED

facts, but on hypothetical facts. The result was that defendants were deprived of any meaningful advance notice of which felonies would eventually be denominated "violent" and which ones would not. The court stated, "Laws which prohibit the doing of things and provide a punishment for their violation should not have a double meaning," U.S. v Reese, 92 U.S. 214.

In his Johnson majority opinion, Justice Scalia carefully explained that the residual clause was vague because, given the categorical approach, it hinged the concept of risk onto hypothetical facts. It was vague because the clause, viewed through the "ordinary commission lens, required judges to imagine a set of facts presented a serious risk of inquiry: Two features of the residual clause conspire to make it unconstitutionally vague. The residual clause leaves grave uncertainty about how to estimate the risk to a judicially imagined "ordinary case" of a crime, not the real world facts or statutory elements.

Thus, Johnson's vagueness analysis turns on one main factor and two factors of lesser importance. The main factor is the intersection of risk and hypothetical facts. The less important factors are (1) Juxtaposition to enumerated felonies, inviting comparison, and (2) repeated judicial failures to craft a principled and objective standard. Johnson v. U.S. 135 S. Ct 2551. All three factors are abundantly present in California's "inherently dangerous felony" rule as it currently exists. Has the California Judicial System created another "residual clause" with the enactment of Senate Bill 54, CALJIC No. 8.11, or California Jury Instruction No. 8.11, and the "felony murder rule" and the "inherently dangerous felony rule?"

Is the felony murder rule a residual clause? Does the constitution apply to descendants of the Negro race?

LIST OF PARTIES

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

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

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TABLE OF AUTHORITIES CITED

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OTHER

University of California
Hastings College of Law
Hastings constitutional law quarterly, volume 43, number 1, "Why California's second degree felony murder rule is now void for vagueness."

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF **HABEAS CORPUS**

Petitioner respectfully prays that a writ of **Habeas** issue to review the judgment below.

OPINIONS BELOW

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

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

[ ] reported at Ninth Circuit Court of Appeals; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

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

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

[x] reported at State Supreme Court; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Court of Appeal/San Diego County Superior court appears at Appendix C to the petition and is

[x] reported at Appellate Ct/Super.Ct(8/28/17) (9/10/17); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was February 27, 2018.

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

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

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

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

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

The date on which the highest state court decided my case was 10-11-17. A copy of that decision appears at Appendix B.

[x] A timely petition for rehearing was thereafter denied on the following date: 8-28-17, and a copy of the order denying rehearing appears at Appendix C.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment right to petition the government for a redress of grievances.

The Second Amendment right to bear arms shall not be infringed.

The Fourth Amendment right of the People to be secure in their persons...shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation.

The Fifth Amendment right to not be deprived of liberty without due process of law.

The Sixth Amendment right to a speedy and public trial by an impartial jury of the state and to have the assistance of counsel for his defense.

The Eight Amendment right to be free from excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment right to not deprive any person of life, liberty or property, without due process of law nor deny any person within its jurisdiction the equal protection of the laws.

The Fifteenth Amendment right against laws which prohibit the doing of things and provide a punishment for their violations should not a double meaning.

STATEMENT OF THE CASE

Petitioner contends that the California Judicial system has created a new "slave system" with legal statutes that imply a distinction based on race. Plessy v. Ferguson, 163 U.S. 537. Where one in 87 White men is in jail or prison, for every African American men, the number is one in 12. The U.S. has less than five percent of the world's population, but nearly a quarter of its prisoners. The prison-guards union in California has long been one of the most feared political operations in the state. across the country, distressed rural communities have become as dependent on the local prison for jobs as an earlier generation might have depended on the local factory or mill.

Petitioner seeks permission to file a 2254 motion based on Johnson v. U.S., 135 S. Ct. 2251, Chun v. Lopez 652 F. App. 500, Brecht v. Abrahamson, 507 U.S. 619, Kotteakos v. U.S., 328 U.S. 750. The Ninth Circuit Court of Appeals, has denied his application to file a second or successive petition on February 27, 2018, (exhibit A.) Petitioner contends that the statute exceeds Congress's Exception Clause power and should be revisited because the Court of Appeals are adopting divergent interpretations of the gatekeeper standard that violates his constitutional rights and their own Circuit Court order in Chun v. Lopez 652 F. App. 500.

It denied him of seeking a remedy for a lost opportunity to present"nonfrivolous" or "arguable" legal claim, that official acts frustrated his litigation, a remedy that may be awarded as recompense but that is not otherwise available in a future petition, Christopher v. Harbury, 536 U.S. 403. The U.S. Supreme Court has long warned that this doctrine is nothing more than a "rule of judicial convenience," Benton v. Maryland, 395 U.S. 784. The court has never before "applied harmless error or the concurrent sentence doctrine in the context of an application to file a second or successive 2254 motion. Felker v. Turpin, 518 U.S. at 667.

Petitioner contends that the ruling in his appeal was erroneously based on (1946) People v. Watson, 46 Cal. 2d 818, the beyond-a-reasonable-doubt harmless error standard, involved an unreasonable application of the U.S. Supreme Court Brecht v. Abrahamson, 507 U.S. 619, and the Kotteakas v. U.S., 328 U.S. 750, standards. The California Judicial system has violated the Equal Protection Clause of the Fourteenth amendment which commands that no state shall "deny to any person the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike, Plyler v. Doe, 457 U.S. 202.

Petitioner's claims are based on the California Judicial system failure to

disclose evidence that is "favorable to him" and, "material to impeachment evidence" U.S. v. Bagley, 473 U.S. 667, of his appeal, People v. Woods, D006442, the coroner's autopsy report and medical records, a sua sponte jury instruction, CALJIC No. 7.45. That governmental interference prevented filing, Pace v. DiGuglielmo, 544 U.S. 488. He argues that he could not have known because his counsel did not send him a copy of his appeal and the law regarding the beyond-a-reasonable-doubt harmless error standard has been changed or that "some objective factor external to the defense" prevented him from bringing the claim earlier, Murray v. Carrier, 477 U.S. 478, and Brady v. Maryland 373 U.S. 83.

It wasn't until July 19, 2017, that he received a copy of his appeal, People v. Woods, D006442, from Attorney Howard Cohen, SB#53313, Appellate Defenders, Inc. 555 W. Beech Street, Ste. 300, San Diego, CA 92101 (Appendix G.) The court of appeal, Fourth Appellate District states that the record requested (People v. Woods, D006442, was destroyed in 2009, and no longer available from the court.) (Exhibit A.) He argues that he has demonstrated the existence of an agreement of the minds to violate constitutional rights, United Steelworkers v. Phelps Co 865 F 2d 1539, and it is based on racial discrimination, Griffin b. Breckenridge, 403 U.S. 88.

Petitioner contends that the California Judicial system are following "Jim Crow" laws with archaic terms as, "inherently dangerous," "conscious disregard for life" "reasonable doubt," "moral certainty," "malice aforethought," "implied malice" and the "felony murder rule," what once might have made sense to jurors has long since become archaic. That some of the phrases here in question confuse far more than they clarify. Jurors are asked to perform a task that can be of great difficulty even when the instruction are altogether clear.

The inclusion of words so malleable, because so obscure put the whole instruction at risk. The system has implemented or promulgated a "policy," Monell v. N.Y. Dept. of Soc. Servs, 436 U.S. 658, so deficient that the policy itself is a repudiation of constitutional rights that deprived the petitioner of "fair notice," Cty of Chicago v. Morales, 527 U.S. at 560. The policy of the use of the felony murder rule to eliminate the need for proof of malice violates the due process clause, that protects the accused against conviction except upon "proof" beyond a reasonable doubt of every fact necessary to constitute the crime with which one is charged, In re Winship, 397 U.S. 364, and Mullaney v. Wilbur, 421 U.S. 684.

Petitioner filed a writ of habeas corpus based on that "there has been a change in the law that substantially affects his rights,"that the state court's adjudication

STATEMENT OF THE CASE

of People v. Woods, D006442, involved an unreasonable application of U.S. Supreme Court law, Johnson v. U.S., 135 S.Ct.2551, Chun v. Lopez, 652 F.app 500 and Brecht v Abrahamson, 507 U.S. 619, and Senate Bill 1134.

Petitioner contends that People v. Woods, D006442, was erroneous. The trial court erred by instructing the jury on two alternative definitions of implied malice, one of which erroneously negates the element of subjective wareness of the risk of death; allowing into evidence uncharged misconduct and evidence of bad character during cross-examination; and failing to reweigh the evidence after he requested the court reduce his conviction to manslaughter.

The Court of Appeal, Fourth Appellate District agreed that CALJIC No. 811 was erroneously revised and cast in disjunctive language in an attempt to follow the language of People v.Watson 30 Cal.3d 290 (the felony murder rule,) thus permitting jurors to find implied malice without necessarily finding a defendant subjectively appreciated the risk involved under the first alternative definition People v. Dellinger 201 Cal. App. 3d 945, consequently, because at minimum CALJIC No.811, is confusing on this issue, we assume error. However, Woods was not prejudiced on the facts of this case, a determination we find supported beyond a reasonable doubt, People v. Watson (1956) 46 Cal. 2d 818.

Petitioner argues that Chun v. Lopez decision reverses People v. Woods, D006442, His "analogous or synonomous," Chun contnded that improperly giving the jury the felony murder instruction allowed the jury to convict him of second-degree murder without finding malice, an element of the crime. The California Supreme Court found that giving the erroneous instruction was federal constitutional error, but concluded that it was federal constitutional error, but concluded that it was harmless People v. Chun, 45 Cal 4th 1172. Chun sought a writ of habeas corpus from the district court, which denied it. The Ninth Circuit reversed...

The Ninth Circuit granted relief that the state court's adjudication was objectively unresonable, Davis v. Ayala, 135 S.Ct 2187. The California Judicial System and its Supreme Court has refused to address these issues but the U.S. Supreme Court has made it clear that in federal habeas proceedings, the beyond-a-reasonable-doubt harmless error standard set forth in People v. Watson, 46 Cal. 2d 818, and Chapman v. California, 386 U.S.18, "does not apply to trial errors," Brecht v. Abrahamson, 507 U.S. at p. 637, and O'Neal v McAninch, 519 U.S. at 2; Overturning final and presumptively correct conviction on collateral review because the State cannot prove

that an error is harmless under Chapman undermines the States' interest in finality and infringes upon their sovereignty over criminal matters...Rather than the Chapman beyond-a-reasonable-doubt harmless error standard the U.S.S.C. found that the "substantial and injurious effect "or""grave doubt" standard which applies when a federal court is reviewing non constitutional errors in criminal cases, is more suited to collateral review, Brecht 507 U.S. at p.637-638.

This more lenient standard was adopted in Kotteakos standard, Kotteakos v. U.S. 328 U.S.750. Petitioner contends that the California Legislature enacted Senate Bill 54, it amended several sections of the penal codes and direct response to the public outcry against the diminished capacity defense successfully used in the trial of a San Francisco City and County Supervisor, who had killed the city's mayor Harvey Milk and another supervisor, in 1981, (exhibit A). It wasn't until 1994, that the State Supreme Court ruled that Senate Bill 54, did not abolish doctrine of imperfect self-defense, in In Re Christian, 30 Cal. Rptr. 2d 33, but did not apply it retroactively to cases on collateral review. (S.B. 54, exhibit A).

Petitioner contends that the California Judicial System is a racial system, that his case is based on Dred Scott v. Sanford 60 U.S.(19 How), where government interference prevented filing, Pace v. DiGuglielmo, 544 U.S. 408, that it is "analogous or synonomous to Dred Scott, because Scott was a Black man who escaped a then legally correct judicial system. At the time of petitioner's 1987, conviction, the then-relevant law did not offer a reasonablebasis on which to challenge jury instruction placing on petitioner the burden of proving defenses of lack of malice and self-defense and hence, there was cause for failure to raise the due process issue via applicable state procedure, Reed v. Ross,468 U.S. 1. the imperfect self defense was legally sound and the evidence made it applicable, Beardslee v. Woodford, but the trial court refused to instruct the jury with CALJIC 5.17, and the error was not harmless, People v. Randle, 28 Cal. Rptr. 3d 725, and 134 Cal.Rptr 2d 670. Petitioner, just like Dred Scott was denied the "right to present a defense" and the jury was prevented from considering the defense, Conde v. Henry, 198 F.3d 734.

Petitioner's defense was based on his unreasonable belief in self defense, that he acted with imperfect selfdefense as he, a 60% disabled veteran was pulling out the nightclub parking lot, a car which Stone was a passenger backed out of the parking stall almost hitting his car and causing him to swerve to avoid a collision, upon stopping his car, petitioner heard Stone call him "a square mother-fucker and your

mother is too..." Petitioner saw Stone reach underneath the seat of his car and hold his jacket in a manner as if he was attempting to conceal something underneath it. Petitioner responded by retrieving the gun he kept in his glove compartment, Stone and Smith approaced his car so petitioner got out of his car at which time Stone repeated, "You are a square mother-fucker and your mother is too." Petitioner asked Stone if he was crazy? Sone lunged, reached into his waistband stating, "what are you going to do homeboy?" Petitioner fired at Stone, and turned toward Smith, who threw up both his hands, palms up and was not harmed.

The State coroner and a forensic pathologist both testified that the downward path taken by the bullet in Stone's body was consistent with the defense's theory that Stone was in a crouched position when he was shot. Petitioner contends that "the rights and privileges conferred by the constitutiton upon citizens do not apply to Negro race," Dred Scott v. Sanford, and that governmental interference prevented filing.

The State Supreme Court ruled that "the doctrine of imperfect self defense had been obfuscated by infrequent reference and inadequate elucidation" and thus, before the trial in People v. Fannel, 25 Cal. 3d 668, had not become a general principle of law requiring a sua sponte instruction. More imporant for our present purpose, though, is Flannel's, conclusion that in "furture cases" imperfect self-defense would be deemed to be so well-established a doctrine that it "should be considered a general principle for purposes of jury instruction," Thus by 1981, imperfect self-defense was demonstrably and firmly established In re Christian.

Petitioner contends that governmental interference has prevented his filing, that the prosecutor has committed "prosecutor misconduct," given false testimony to the jury with his theory of the case,"as Woods armed himself before he got out of his car, approached a nonaggressive unarmed victim whose hands were at his side, palms up." Smith was the guy who threw his hands up, not Stone. The prosecutor suppressed material exculpatory evidence in violation of Brady v Maryland, 373U.S. 83, that impeached his theory. U.S. Bagley, 473 U.S. at 87. The trial refused to instruct the jury regarding imperfect self-defense People v. Randle, 28 Cal.Rptr.3d and 134 Cal. Rptr. 2d 670, the prosecutor withheld the coroner's autopsy report which showed that the evidence proved that it was impossible that he harmed an unarmed victim whose hands were at his side, palms up. U.S. Bagley. The prosecutor withheld Smith from the last trial. Smith was with Stone during this incident, he had been released from prison days prior to this incident and he was given an undisclosed benefit in exhchange

for not testifying to cover-up the fact that two men accosted the petitioner, not one. (rptr. 298-300, exhibit B), and it allowed the prosecutor mischaracterize witness testimony. The prosecutor frauderlently impeached the state coroner and the independent pathologist stating, "these experts or so-called experts. They can only give you their educated opinions guesses, if you will. They weren't there...and he didn't examine it," (rptr. 408, lines 11-16)(exhibit C). The prosecutor withheld the autopsy report that enumerated "the entrance wound, path of bullet, recovery of bullet, and the course of the bullet," forensic facts that impeaches the prosecutor's theory. The prosecutor argued against imperfect self defense, he cited People v. Flannel or Flannel, "twice," (rptr. 405, line 21 and rptr. 406, line 8) (exhibit C.)

Petitioner contends that the prosecutor withheld the evidence to frame "an actually innocent" Black man and to avoid the truth. A witness testified that after the petitioner departed, that Smith "ran away from the scene." Petitioner contends that Smith destroyed Stones' gun. Petitioner has mad a substantial showing of deliberate falsehood or reckless disregard and established that without dishonesty included or omitted information, the conviction would not stand. Hervey Estes, 65 F.3d 784, and he asks for an evidentiary hearing, Franks v. Delaware, 438 U.S. 154.

A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain and which witnesses to call. Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his original decision. In these circumstances there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to ensure the neutrality of the judicial process in determining the consequences that his own earlier decision may have set in motion.

Petitioner contends this Court looked back 30 years to overturn Williams v. Pennsylvania, 2016 DJDAR 5552 regarding prosecutor misconduct and by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Kyles v. Whitley, 515 U.S. at 435.

He reasserts that improperly giving the jury instruction allowed the jury to convict him of second degree murder without finding malice, an element of the crime. The court was left with nearly total doubt about the effect of the error. This doubt

was reinforced by the real possibility, given inconsistent verdicts where the jury found him not guilty of voluntary manslaughter and not guilty of involuntary manslaughter, that the jury convicted through mistake or compromise, in which case proper instructions could easily have swayed the outcome; The state court's harmlessness decision was objectively unreasonable. Chun v. Lopez, 652 Fed. Appx.500.

Petitioner presents a copy of the coroner's autopsy report in which he believes shows that the coroner's testimony (rptr. 281-284) and the independent forensic pathologist testimony (384-391) that the downward path taken by the bullet in stone's body was consistent with the possibility Stone was in a crouched position when he was shot, (exhibit D.)

He also presents response letters from his trial counsel, Stafford Prante and Appellate counsel, Douglas C. Brown both stating that they never received a copy of the coroner's report and medical records, thus the prosecutor withheld impeachable material evidence from the defense, U.S. Bagley,473 U.S. 667, (exhibit E.)

Petitioner contends that the prosecutor has directed the verdict after the jury found him "not guilty of voluntary manslaughter-and not guilty of involuntary manslaughter" but "that did use a fire arm," the instruction was erroneous because the assault was integral to and included in fact within the resulting homicide," People Ireland, 70 Cal. 2d 539. The prosecution should not have been permitted to "bootstrap" the assault into murder, if there was no independent proof of malice aforethught. The trial court stated that, "it would appear under that Stone, Tone v. Supt.Ct, 31 Cal. 3d 503, instruction that they are a little confused" (rptr.495-499). The Court was left with nearly total doubt about the effect of the error.

This doubt was reinforced by the real possibility, given inconsistent verdicts that the jury convicted through mistake or compromise, in which case proper instruction could have easily have swayed the out come; the state court's harmless decision was objectively unreasonable within the meaning of 2254(d)(1). Chun v. Lopez 652 Fed Appx.

The jury's intent to acquit was to be recognized and thus double jeopardy principles precluded retrial of second degree felony murder rule, the issuance and implementation of CALJIC No.8.75, Stone instruction, Stone v. Superior Court, and Green v. U.S. 355 U.S. 184. The trial court ruled in People v. Woods, "In connection with the 8.75 instruction which I just gave you, is it the jury's verdict that the defendant is guilty of murder in the second degree and that he did use a firearm? The Foreman: Yes. (exhibit F.)

Petitioner contends that the expanded merger doctrine announced in People v.

Chun, 45 Cal. 4th 1172, that follows the language of People v. Watson, 30 Cal. 3d 290, which was shown to be erroneous in People v. Ireland, 70 Cal. 2d 539 has rendered him convicted of second degree felony murder entirely innocent.

The jury's verdict provides no indication that the jury rested its second degree murder verdict on a legally valid theory of implied malice. The California Supreme Court has said that the felony murder rule eliminates the need for proof of malice in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree murder and second degree murder. The felony murder rule renders irrelevant conscious disregard for life malice, it acts as a substitute for conscious disregard for life malice. The felony murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life.

Petitioner contends that he was denied effective assistance of counsel that is guaranteed by the Sixth Amendment. His counsel's representation fell far below the the objective standard of reasonableness and there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different, Strickland v. Washington, 466 U.S. 688.

Petitioner's trial counsel failed to motion the trial court to adhere to People v. Flannel's "sua sponte" instruction obligation for CALJIC No. 5.17. His counsel failed to object to the issuance of CALJIC No. 8.11, and instruction which unconstitutionally shifted the burden of proof to him by presuming malice or eliminating the need for proof of malice. Petitioner was convicted of second degree murder with implied malice in 1987.

Implied malice has "both a physical and a mental component. The physical component is satisfied by the performance of an act", the natural consequences of which are dangerous to life. The mental component is the requirement that the defendant "knows that his conduct endangers the life of another and acts with a conscious disregard for life." Implied malice requires that the defendant act with a wanton disregard for the high probability of death, there by requiring a subjective awareness of a high degree of risk. It is not enough that a reasonable person would have been aware of the risk. A finding of implied malice depends upon a determination that the defendant actually appreciated the risk involved i.e., a subjective standard.

Petitioner contends that People v. Woods, D006442, reveals that the Court of of Appeals, fourth Appellate District ruled that the CALJIC No.811, jury instruction

was erroneous thus permitting jurors to find implied malice without necessarily finding a defendant subjectively appreciated the risk involved under the first alternative definition. The court has assumed the error.

There has been a change in the existing law, the (1956) People v. Watson, 46 Cal. 2d 818, view has been overturned by Chun v. Lopez, citing Brecht, 507 U.S. at 637, O'Neal v. McAninch, 513 U.S. 432, and Cal. v. Roy, 519 U.S. 2. Petitioner contends that this was not a harmless error but a clear "miscarriage of justice." That his ability to form an intent to kill was negated by his unreasonable belief that he was in imminent danger of death or great bodily injury or "imperfect self defense", In re Christian, 30 Cal. Rptr. 2d 33, and People v. Flannel. His trial counsel failed to raise the issue even after the prosecutor cited Flannel twice (rptr.405, line 21, and rptr. 406, line 8, exhibits C), he stated that "the defense was inapplicable" and counsel allowed the prosecutor fraudulently impeach the coroner and the independent pathologist stating, "these experts are so-called experts they can only give you their educated opinions, guesses if you will, they weren't there.. he didn't examine it like he should have examined it" (rptr. 408, line s 11-16, exhibit C.)

This error was not harmless, People v. Randle. The error combined with the Brady violation based on the failure to disclose the coroner's autopsy report to the defense and the jury which supports or is favorable to defense prejudiced the petitioner. The failure shows that the adversarial process protected by the Sixth amendment requires that the accused have counsel acting in the role of an advocate and the right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. Trial counsel abandoned the petitioner, deprived him the ability to receive a fair trial. U.S. v. Cronic 466 U.S. 648.

The trial errors contributed to the verdict, it had a "substantial and injurious effect." Brecht and allowed the prosecution to direct the verdict and frame the petitioner, for second degree murder. Petitioner's appellate counsel failed to raise these issues on direct appeal which also shows abandonment because the defense was based on his claims were predicated on these facts that support his unreasonable belief in slf defense which shows unprofessional conduct, Evitts v. Lucey, 105 S. Ct 830. The failure to raise the "imperfect self-defense." Defense on appeal was a "structural error," Hedgpeth v. Pulido, 129 S.Ct 530, and was not harmless, People v. Randle, 28 Cal. Rptr. 3d 725.

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Petitioner's appellate counsel has a history of ineffective assistance of counsel regarding failure to investigate imperfect self defense or battered woman syndrome cases, in Inre Norm, 145 Cal. App. 4th 820, and in Goodman v. Busby, Ninth Circuit case no. 13-55010. Petitioner also presents a copy of a response letter from Appellate counsel, Attorney Douglas C. Brown, who stated: "The jury was instructed on self defense both orally and in writing," but it has nothing to do with imperfect self defense, it was dated November 30, 1987. (exhibt G.)

Petitioner presents response letters from the appellate defenders Inc, and and attorney Stephen Gilbert, the author of In re Christian, he asked, "why imperfect self defense instructions were not given?" Appellate counsel Brown replied that "he has little recollection of your case and sent the briefs and record to you." Petitioner presents response letters from his trial counsel, Stafford Prante and Appellate counsel both stating "that they never received a copy of the coroner's report or of the investigative report. (exhibits H.)

Petitioner's appellate counsel refused to raise the "prosecutor misconduct" claim even though it is clear that the prosecutor directed the verdict and framed the petitioner by failing to disclose material evidence that's favorable for him. Brady, the trial court misapplied clearly established law when it did not instruct the jury for imperfect self defense when the evidence supports petitioner's unreasonable belief in self defense. People v. Flannel, Appellate counsel allowed the prosecutor to lie to the jury, citing Flannel, twice and to coercing the court "not to instruct" on imperfect self defense he told the jury that Flannel, "I'm not conceding that the Flannel theory is applicable in this case. Quite the contrary; it is not applicale."

"There was no honest belief on the part of a man who armed himself before he even got out of his car and who faced an unarmed man whose hands were palms up, empty handed." The prosecutor knew that there were two men that accosted the petitioner, Smith and Stone, Smith threw his hands up and was not harmed, another failure to disclose material evidence that's favorable for the petitioner, Brady violation.

The failure to disclose the coroner's autopsy report allowed the prosecutor to mischaracterize the facts and suppress the forensic evidence that establishes that the prosecution withheld impeachable evidence that proves that his theory of the case, U.S. v. Bagley, was fraudulent, Hervey v. Estes, 65 F. 2d 784. Petitioner contends that the jury convicted through mistake or compromise, in which case proper instructions could easily have swayed the outcome. The State court's harmlessness decision was

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subjectively unreasonable within the meaning of 2254(d)(1). Petitioner contends that his case is synonymous or analogous to Scott v. Sanford, the California courts have refused to address the issues where People v. Woods, D006442, was affirmed based on the harmless error standard which has been changed in Chun v. Lopez, but because the petitioner is a Black Jewish prisoner, he is not a citizen and could not bring the action in the court because petitioner's family were slaves of African descent.

The California Judicial system has violated petitioner's Eight Amendment right to bail by having the trial court repeatedly exonerate based on fraudulent information, 1) A witness was killed (later found to die from cancer,) 2.) He was a light risk, (when he went to the airport to pick up his mother who attended the trial.) The trial court forced the petitioner to pay bail repeatedly and excessively to destroy his wealth to prevent him from financing a complete defense which he argues that "government interference" prevented Pace v. Digulielmo, 544 U.S. 408.

Petitioner contends that he has shown a court lynching based on 1946, "Jim Crow" People v. Watson, harmless error standards, laws with archaic terms that deprived him of "fair notice," that the notice and arbitrary enforcement prongs of the vagueness doctrine constituted independently sufficient reasons for finding a criminal law unconstitutional. Kalender v. Lawson, 461 U.S. 352. The federal court decision shows that the courts have failed to employ the "look through" doctrine. Ylst v. Nunnemaker, 501 U.S. 797, to identify the grounds for the higher court's decision as the Anti-terrorism and effective Death Penalty Act requires. The (AEDPA) of 1996, requires a prisoner who challenges in a federal habeas court, a matter "adjudicated on the merits in state court to show that the relevant state court decision in People v. Woods, D006442" was contrary to, or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Deciding whether a state court's decision "involved" an unreasonable application of federal law or "was based on" an unreasonable determination of fact requires the federal habeas court to "train its attention on the particular reasons-both legal and factual-why state courts rejected a state prisoner's federal claims" Hittson v. Chatman 576 U.S.

The issue presented here concerns how a federal habeas court is to find the state court's reasons when the relevant state court decision explicitly imposed a procedural default. Petitioner contends that the federal habeas court used the wrong method for determining the reasoning of the relevant state court decision. The Federal habeas

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reviewed his application for permission to file a second or successive habeas corpus petition. The court denied the application which was contrary to or involved an unreasonable application of Chun v. Lopez 652 Fed. Appx. 500, and the state post-conviction court's decision involved an unreasonable application of State Supreme Court precedent, People v. Chun 45 Cal. 4th 1172, and the beyond-a-reasonable doubt harmless error standard in People v. Watson, involved an unreasonable application of the U.S. Supreme court's decision in Brecht v. Abrahamson, 507 U.S. 619. Where the trial court erred by instructing the jury on two alternative definitions of implied malice, one of which erroneously negates the element of the subjective awareness of the risk of death, "the key element of second degree murder" Hedgpeth v. Pulido, 129 S.Ct 530, and a "structural error." Combined with the trial court's failure to instruct "sua sponte," CALJIC No. 5.17, People v. Flannel, 25 Cal. 3rd 668, petitioner was denied the "right to present a defense," Conde v. Henry, 198 F.3d 734. The jury convicted through mistake or compromise in which case proper instructions could easily have swayed the outcome and shows that the state courts harmlessness decision was objectively unreasonable, Davis v. Ayala, 135 S.Ct 2187, involved an unreasonable application of U.S. Supreme Court precedent, Brecht v. Abrahamson, 507 U.S. 619, and shows that the California Judicial system has employed some "Jim Crow" laws designed specifically to apply it's Thomas Malthus, "Malthusian racist economic thoery" or the creation of a new "slave system" with archaic terms that renders irrelevant the presence or absence of actual malice. People v. Chun, 45 Cal. 4th 1172. The "felony-murder rule" acts as a substitute for conscious disregard for life murder, "an archaic term."

Petitioner contends that there was no reasonable basis for the state court to deny relief, Wilson v. Sellers, 2018 DJDAR 3360, the federal habeas court must focus its review on the final state court decision on merits, not any preceding decision by an inferior state court, Greene v. Fisher 565 U.S. 34. The final state court decision in People v. Woods, D006442, was erroneous, petitioner is "actually innocent," McQuiggin v. Perkins, 569 U.S. 383. His claims rely on new rules of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable, and the factural predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the petitioner guilty of second degree felony

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murder.

Petitioner contends that he has shown that the prosecutor committed "Prosecutor misconduct," Williams v. Pennsylvania, 2016 DJDAR 5552, that the judgment of conviction should be set aside and the indictment with prejudice based on failure to disclose material evidence. Brady v. Maryland, 373 U.S. 83.

The government has breached its obligation of full disclosure under Brady and Giglio v. U.S. $)% U.S. 150, and breached its guarantee to effective assistance of counsel by the Sixth Amendment, Strickland v. Washington, 466 U.S. 688; denied the petitioner "the right of access to the courts in an aspect of the First Amendment right to petition the Government for redress of grievances," Bill Johnson's Rest. v. NLRB, 401 U.S. 31; denied the petitioner the "right to bear arms" in self defense under the Second amendment; the government has refused to protect the petitioner from cruel and unusal punishment from blatant "prosecutor misconduct" Williams v. Pennsylvania, that has resulted in a miscarriage of justice which has an exception to overcome various procedural defaults in cases in which new evidence shows that it is more likely than not that no reasonable juror would have convicted the petitioner. The exception survived the (AEDPA's) passage, Calderon v. Thompson, 523 U.S. 538.

Petitioner has shown that he has been pursing his rights diligently and that some extraordinary circumstance stood in his way, and prevented timely filing. Holland v. Florida, 560, U.S 631. He has shown that he is "actually innocent," which also serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, House v. Bell,547, U.S. 518.

Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is (AEDPA's) statute of limitations. Petitioner has presented "evidence of innocence so strong, that a court cannot have confidence in the outcome of the trial unless the court is satisfied that the trial was free of non harmless constitutional error." Schlup v. Delo, 513 U.S. at 316. The failure to consider this petition for untimeliness, the court thereby would be endorsing a 'fundamental miscarriage of justice' because it would require that an individual who is actually innocent remain imprisoned, Escamilla v. Jungwirth 426 F.3d 868.

Petitioner re-asserts that the California judicial system has been corrputed by hugh amounts of money, funneled through lobbying through the political system. It's creation of the mandatory minimum sentence, the felony murder rule, the archaic terms that made irrelevant the presence or absence of actual malice, its failure to apply

imperfect self-defense retroactively even though the state law mandated the giving of the "sua sponte" jury instruction after People v. Flannel, 25 Cal.3d 668. He re asserts that the California judicial system has created a new "slave system" with legal statutes that imply a distinction based on race, Plessy v. Ferguson, 163 U.S. 537.

Moreover, petitioner contends that the felony murder rule, the enactment of Senate Bill 54, that amended several sections of the Penal code and the archaic terms used that made irrelevant the presence or absence of actual malice should be void for vagueness and is synonymous and analogous to the Johnson v. U.S., 135 S.Ct 2551, "residual clause." The residual clause contained an alternative definition of violent felony that included any felony involving conduct that presented a "serious potential risk of physical injury. The Johnson court held that the constitutional problem with the residual clause was that the analysis of risk was not based on actual facts, but on hypothetical facts.

The second degree felony murder rule originally applied to all felonies but later restricted the felonies that are inherently dangerous to human life. Whether a felony is inherently dangerous is determined from the elements of the felony in the abstract, not the particular facts, penal code 246. The analysis under the residual clause is a totally abstract analytical exercise, for vagueness purposes under the rule of Johnson abstract is abstract. And abstract, when it forms the field of reference for a determination of risk in criminal law, is unconstitutional.

The lack of notice involved the discrimination of a Black voter, U.S. v Reese,, 92 U.S. 214. The Johnson vagueness analysis has three factors, all three factors are abundantly present in California's "inherently dangerous felony rule." The residual clause was declared vague based on the many different approaches and their failures just like "the need for legislative attention to the second degree felony murder rule," People v. Patterson, 49 Cal. 3d 615; explained in Flannel.

Petitioner presents a copy of the Hastings Constitutional law quarterly, volume 43, number 1, fall 2015, why California's second degree felony murder rule is now void for vagueness. He contends that the law school report enumerates his argument. (exhibit I.).

REASONS FOR GRANTING THE PETITION

Petitioner is "actually innocent," Petitioner contends that the enactment of Senate Bill 54, the amendments to the penal codes, the felony murder rule, and the definition of archaic terms as "inherently dangerous felony," "conscious disregard for human life," "moral certainty," "moral evidence," are analogous or synonymous to Johnson v. United States, 135 S.Ct. 2551, "residual clause." Both CALJIC No. 8.11, and the residual clause contain an alternative definition of violent felonies that included any felony involving conduct that presented a "serious potential risk of physical injury" were California's "inherently dangerous felony" under the felony murder rule. This court held that the constitutional problem with the residual clause was that the analysis of risk was not based on actual facts, but on hypothetical facts but the felony murder rule or whether a felony is inherently dangerous is determined from the elements of the felony in the abstract, not the particular facts, penal code 246.

In both cases, the trial court had to imagine the "ordinary" commission of the felony in question and then ask whether that set of hypothetical facts presented a serious risk of injury. The result was that both defendants were deprived of any meaningful advance notice under the Fifteenth amendment or that laws which prohibit the doing of things and provide a punishment for their violation should not have a double meaning, U.S. v. Reese, 92 U.S. 214.

The seeming unpredictability of results under the residual clause was not by itself what led this court to declare vague. It was also the fact that the court had tried so many different approaches and failed with all of them. Just as the California Supreme Court's numerous failures of "implied malice," People v. Nieto Benitez, 4 Cal. 4th 91, the equally important "the need for legislative attention to the second degree felony murder rule," People v. Patterson, 49 Cal. 3d 615. The legislature...has taken no action to alter this judicially created rule and has declined the recent suggestion in People v. Dillon, 34 Cal.3d 441.

Justice Kennedy has strongly condemned the "reasonable doubt instruction," Justice O'Connor forth rightly cautioned the use of "moral certainty," that "we do not condone the use of the phrase." As the court makes clear, what once might have made sense to jurors has long since become archaic. "In fact, some of the phrases in question confuse far more than they clarify." Though the reference to "moral certainty" is not much better California's use of "moral evidence" is the most troubling and to me seems quite indefensible. The derivation of the phrase is explained in the Court's opinion, but even with this help the term is a puzzle. And for jurors who have not had the benefit of the court's research, the words will do nothing but baffle.

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Petitioner contends that the state court's agreed that, "the jury was instructed on two alternative definitions of implied malice, one of which erroneously negates the element of subjective awareness of the risk of death. People v. Woods, D006442, the court has agreed to the error and ruled that the error," the beyond a reasonable doubt harmless error standard was a harmless error.

This court has made it clear that the harmless error standard "does not apply to trial errors" Brecht v. Abrahamson 507 U.S. at 637, and O'Neal v. McAninch, 513 U.S. 432. This court has never before, "applied harmless error" in the content of an application to file a Second or Successive 2254 motion, Felker v. Turpin, 518 U.S. at 667. The issue presented here concerns how a federal habeas court is to find the state court's reasons when the relevant state court decision explicitly imposed a procedural default.

He contends that the federal habeas court has used the wrong method for determining the reasoning of the relevant state court decision, the Circuit court decision was erroneous, contrary to its own decisions, it involved an unreasonable application of Chun v. Lopez 652 Fed Appx. 500, and People v. Chun 45 Cal 4th 1172. The state court decision in People v. Woods, D006442, was erroneous. The California judicial system has refused to address its removal of "proof" from the beyond a reasonable doubt standard established in In re Winship 397 U.S. 364, which "does not apply to trial errors," Brecht v Abrahamson, 507 U.S. at 637.

Petitioner contends that he has shown a "state-wide conspiracy," a demonstration of the existence of an agreement or meeting of the minds to violate constitutional rights, United Steel workers v. Phelps, 865 F2d 1539, quoting Adickers v. Kress & Co, 398 U.S 144. The state courts have refused to adhere to the "miscarriage of justice" and "actually innocent" gateways, official acts have frustrated petitioner's litigation violating his First Amendment right of access to the courts. Lewis v. Casey, 518 U.S. 343. That he has been denied the equal protection of the law based solely on invidiously discriminatory animus behind the official acts, Griffin v. Breckenridge, 403 U.S. 88, and shows that the California Judicial system has refused to treat him as a citizen of the United States, even though he served honorably in the U.S. Navy, based on his African descent, Scott v. Sanford, 60 U.S. 393.

Petitioner contends that the Ninth Circuit ruling is erroneous. The Antiterroism and Effective Death Penalty Act of 1996, time limitations apply to the typical case in which allegation of actual innocence is made. The miscarriage of justice exception applies to a severely confined category: cases in which new evidence shows that it is

REASONS FOR GRANTING THE PETITION

more likely than not that no reasonable juror would have convicted the petitioner, 28 U.S.C. 2244 (d)(1)(D). A court could grant relief on a second or successive petition the petitioner has shown that a fundamental miscarriage of justice has occurred based on the failure to entertain his claims. 28 U.S.C. 2244(b)(2)(B). He argues that he has shown with "clear and convincing" evidence that he meets the "actual innocence gateway" to allow him to pass the impediment of the procedural bar, House v. Bell 547 U.S. 518, and the court rejected that the AEDPA replaced the gateway.

Petitioner asks the court to apply the miscarriage of justice exception to overcome various procedural defaults, including "successive" petitions asserting previously rejected claims, Kulman v. Wilson, 477 U.S. 436, "abusive" petitions asserting in a second petition claims that could have been raised in a first petition. McClesky v. Zant, 499, U.S. 467, failure to develop facts in state court, Keeney v. Tamayo-Reyes, 504 U.S. 1, and failure to observe state procedural rules, including filing deadlines, Caleman v. Thompson, 501 U.S. 722.

Petitioner has been pursuing his rights diligently and that some extra ordinary circumstance (the Fourth Appellate Court) destruction of People v. Woods, D006442, stood in his way and prevented timely filing. Petitioner contends that the instructional error consists of a miss description of the burden of proof, which vitiates all the jury's finding, Sullivan v. Louisiana, 508 U.S. 275. The wrong entity (a judge and prosecutor) rather a jury determined the petitioner's guilt.

The prosecutor committed "prosecutor misconduct" by failing to disclose material evidence that impeached his theory of the case. The refusal of the court to give "sua sponte" jury instruction, People v. Flannel and the California Judicial system destruction of People v. Woods D006442 the same year the State Supreme Court ruled on People v. Chun has allowed California to forced him to spend the rest of his life in prison, based solely on the felony murder rule or a legalized hanging of an actually innocent Black man.

CONCLUSION

The petition for a writ of habeas should be granted.

Respectfully submitted,

[signature]

Date: 6/14/18

No.______________________________

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS FOR THE NINTH CIRCUIT

IN RE EARNEST CASSELL WOODS II, Petitioner

vs

RON DAVIS, Warden; et, al Respondents

San Quentin Prison

San Quentin, CA 94974

Petitioner respectfully request the court for leave to file his petition for extraordinary writ of habeas corpus. It shows how the writ will be in aid of the Court's appellate jurisdiction that shows "actual prejudice" that permits the court to exercise its appellate jurisdiction over orders cited in a pre-filing review order, In re Earnest Cassel Woods II, Ninth Circuit Court order, No-1480181, therefore denying application No-18-70070. (see appendix A). The denial in People v. Woods, D-006442, the case this case is based on involved an unreasonable application of U.S. Supreme Court case Brecht v. Abrahamson, 507 U.S. at 637, the states adjudication was erroneous. The adjudication was based on California's beyond a reasonable doubt harmless error standard, combined with an erroneously instruction of the law of implied malice, CALJIC 8.11 (1983 Rev.) Which provided two alternative definitions of implied malice, one of which erroneously negates the element of subjective awareness of the risk of death, it was erroneously revised and cast in disjunctive language in an attempt to follow the language of People v Watson, (1981) 30 Cal. 3d 290, "the felony murder rule" thus permitted jurors to find implied malice without necessarily finding a defendant subjectively appreciated the risk involved under the first alternative definition, People v. Delliger, 201 Cal. App 3d 945.

The pre-filing order is contrary to or involved an unreasonable application of Ninth Circuit order, Chun v. Lopez, 652 Fed. Appx, 500, where Chun asserted that improperly giving the jury a felony murder instruction allowed the jury to convict him of second degree murder without finding malice, an element of the crime. The court was left with nearly total doubt of the effect of the error. This doubt was reinforced by the real possibility, given inconsistent verdicts (in this case the jury found petitioner not guilty of voluntary manslaughter and not guilty of involuntary manslaughter) that the jury convicted through

mistake or compromise in which case proper instructions could easily have swayed the outcome. The state court's harmlessness decision was objectively unreasonable within the meaning of 2254(d)(1) Davis v. Ayala, 135 S. Ct. 2187.

The California Judicial system and its State Supreme Court has refused to address this issue but this Court has made it clear that in federal habeas proceedings, "the beyond a reasonable doubt harmless error standard set forth in People v. Watson, 46 Cal. 2d 818, and Chapman v. Cal, 386 U.S. 18, "does not apply to trial errors,"Brecht v. Abrahamson, 507 U.S. at 637. Overturning final and presumptively correct conviction on collateral review because the State cannot prove that an error is harmless under Chapman, it undermines the State's interest in finality and infringes upon their sovereignty over criminal matters.

Petitioner contends that the Chun v. Lopez decision was derived from People v. Chun, where the state supreme court found that giving the erroneous instruction was federal constitutional error but concluded that it was harmless but Chun v. Lopez reversed the state court decision. The court adopted the rule applicable to federal criminal law, which requires that judicial decisions that narrow the scope of criminal liability be applied retroactively to convictions that are final on appeal. Schriro v. Summerlin, 542 U.S. 348 and the court applied it to Chun.

The California Judicial System has followed "Jim Crow" laws with archaic terms as "inherently dangerous," "conscious disregard for life, reasonable doubt, moral certainty," malice aforethought, implied malice, all under the felony murder rule." The inclusion of words so malleable because they are so obscure put the whole instruction at risk.

The statutory definition of implied malice has never proved of much assistance in defining the concept in concrete terms. Accordingly, the statutory definition permits even requires, judicial interpretation. The California Supreme Court has interpreted implied malice as having both a physical and a mental component. The physical component is satisfied by the performance of an act.

The mental component is the requirement that the defendant knows that his conduct endangers the life of another and acts with a conscious disregard for life but the mental component is negated by imperfect self defense.

The felony murder rule of second degree murder with implied malice eliminated the need for the prosecution to establish the mental of conscious disregard for life malice. The felony murder rule acts as a substitute for conscious disregard

for life malice, thereby rendering irrelevant the presence or absence of actual malice. The felony murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life.

Whether a felony is inherently dangerous is determined from the elements of the felony in the abstract, not the particular facts. The felony murder rule is synonyms or analogous to the "residual clause" which contained an alternative definition of violent felony that included any felony involving conduct that presented a serious potential risk of physical injury. The analysis of risk was not based on actual facts but on hypothetical facts. Johnson v. U.S. 135 S. Ct. 2551, in which this court has also given retroactive application, and stated, "Laws which prohibit the doing of things, and provide a punishment for their violation should not have a double meaning." Taylor v. U.S. 495 U.S., 575.

Petitioner's claims are based on a new rule of constitutional law made retroactive to cases on collateral review by the U.S. Supreme Court that was previously unavailable and factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts underlying the claim if proven and viewed in light of the evidence as a whole would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the petitioner guilty of second degree felony murder with implied malice.

Petitioner's argument is based on the government's failure to disclose evidence that is "favorable to him" U.S. v. Bagley, 473 U.S. 667, as the prosecutor suppressed material exculpatory evidence to "frame" him, Brady v Maryland, 33 U.S. 83 and breached its guarantee to effective assistance of counsel by the Sixth Amendment, Strickland v. Washington, 466 U.S. 668.

It wasn't until July 19, 2017, that the petitioner received a copy of the direct appeal, People v. Woods, D006442 from Attorney Howard Cohen, SB#53313, Appellate Defenders Inc, 555 W. Beech Street, Ste, 300, San Diego, CA 92101. (appendix G).

The Court of Appeals, Fourth Appellate District states that "the record requested in People v. Woods D006442, was destroyed in 2009 and is no longer available from the court. (exhibit A).

The Court of Appeals, Fourth Appellate District Court created an "actual injury," Lewis v. Casey 518 U.S at 351, that official acts or omission "hindered

his efforts to pursue a non frivolous legal claim," preventing petitioner from filing the People v Chun argument based on "government interference," Pace v DiGualielmo, 544 U.S. 408, which Chun was heard in 2009, the same year People v. Woods, D006442 was destroyed.

The trial court prevented the petitioner from "presenting a complete defense" Conde v Henry, 198 F 3d 734, that was legally sound and the evidence made it applicable, Beardslee v Woodford, 358 U.S. 560. The trial court failed to instruct the jury on CALJIC No. 5.17, regarding the imperfect self defense doctrine.

In 1979, the State Supreme Court ruled that, the doctrine of imperfect self defense had been obfuscated by infrequent reference and inadequate elucidation and thus, before the trial in People v Flannel, 25 Cal 3d 668, had not become a general principle of lawrequiring a "sua sponte" instruction. More important for our present purpose though is Flannel's conclusion that in "future cases" imperfect self defense would be deemed to be so well established a doctrine that it should be considered a general principle for purposes of jury instruction.

The trial court allowed the prosecution to commit "prosecutor misconduct," Williams v. Pennsylvania, 2016, DJDAR 5552, as he argued against the imperfect self defense doctrine, citing Flannel "twice" I'm not conceding that Flannel theory is applicable in this case. Quite the contrary, it is not applicable.

There was no honest belief on the part of a man who armed himself before he even got out of his car and who faced an unarmed man whose hands were palms up, empty handed. You say, well Mr. Brown, what about the path of the bullet? (rptrs 405, line 21 and rptr 406, line 8 exhibit C.)

Petitioner contends that the transcripts show that the prosecutor committed perjury and he withheld exculpable evidence that impeached his theory and exonerates the petitioner. The forensic medical records and the coroner's autopsy report show a deliberate falsehood or reckless disregard for the truth and establishes that without dishonesty included or omitted information, the conviction would not stand, Hervey v. Estes, 65 F3d 784.

Petitioner contends that the prosecutor illegally impeached the state coroner and an independent pathologist stating, these experts or so called experts, they can only give you their educated opinions, guesses, if you will. They weren't there... And he didn't examine it"(rptr. 408, lines 11-16, exhibit C.)

The prosecutor withheld the coroner's autopsy report that enumerates "the

entrance wound, path of bullet, recovery of bullet, and the course of the bullet, and the course of the bullet" forensic evidence that impeached his theory of the case, U.S.v Bagley, 473 U.S. 87. (exhibit D)

The state coroner and an independent pathologist both agreed and opined that "the downward path taken by the bullet in Stone's body was consistent with the possibility Stone was in a crouched position when he was shot," (rptr.281-284,) (rptr. 384-391, exhibit D) which is consistent with the defense theory of the case.

At the time of 1987, conviction, the then relevant law did not offer a reasonable basis on which to challenge jury instruction placing on petitioner the burden of proving defenses of lack of malice and imperfect self defense and hence there was cause for failure to raise the due process issue via applicable state procedures, Reed v Ross, 468 U.S. 1, Murray v Carrier, 477 U.S. 488.

It was not until 1994, that the State Supreme Court ruled that "Senate Bill 54, and the amendments to Penal Code eliminating diminished capacity defense did not aboloish doctrine of imperfect self defense and remand was required to determine whether juvenile (under now Senate Bill 261) had actual but unreasonable belief in need for self-defense when he shot victim as required for doctrine of imperfect self-defense to apply. In re Christian, 30 Cal. Rptr 2d 33. This error was not harmless, People v. Randle, 28 Cal Rptr. 3d 725 and 134 Cal Rptr 2d 670.

The prosecutor withheld eye witness Anthony Meeks Smith, who was with Mr. Stone, during this tragedy and who was released from prison days prior to the tragedy but the prosecutor refused to call Smith to testify (rptr. 298-300, exhibit B).

Petitioner contends that Smith was the second person that accosted him, Smith was the unarmed man whose hands were palms up, empty handed who was not harmed and the prosecutor knew the facts, this case resulted in multiple trials and Smith testified during the first trial, but the prosecutor suppressed these facts, Brady v. Maryland, 373 U.S. 83.

Petitioner contends that he was denied effective assistance of counsel that is guaranteed by the Sixth Amendment. His trial counsels representation fell far below the objective standard of reasonableness and there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different, Strickland v. Washington, 466 U.S. 688.

His appellate counsel failed to raise these issues on direct appeals which show abandonment to claims predicated on petitioners' unreasonable belief in self-defense or imperfect self-defense, Evitts v. Lucey, 105 S.Ct. 830, which this failure is a "structural error," Hedgepeth v. Pulido, 129 S. Ct. 530. His appellate counsel has a history of ineffective assistance of counsel regarding failure to investigate cases of imperfect self defense or battered woman syndrome, in In re Norm, 145 Cal. App. 4th 820 and Goodman v Busby, Ninth Circuit case No. 13-55010.

Petitioner contends that he has shown "exceptional circumstances that warrant the exercise of the Court's discretionary powers. Adequate relief can not be obtained in any other form or from any other court based on a denial of a prefiling review order, In re Earnest Cassell Woods II, Ninth Circuit Court order No-1480181, therefore denying an application to seek permission to file a second or successive 28 U.S.C. 2254 habeas corpus petition therefore denying application No-18-70070.

Petitioner contends that the pre-filing review order failed to employ the "look through" doctrine, Ylst v Nunnemaker, 501 U.S. 797, to identify the grounds for the higher courts' decision as the Anti-terrorism and Effective Death Penalty Act requires.

The matter that has been "adjudicated on the merits in state court show that People v Woods, D006442, the relevant state court decision was contrary to or involved an unreasonable application of clearly established federal law, Brecht v. Abrahamson, 507 U.S. 619, and was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding Deciding whether a state court's decision "involved" an unreasonable application of federal... Why state courts rejected a state prisoner's federal claims, Hittson v. Chatman, 576 U.S. , Wilson v. Sellers, 2018 DJDAR 3360.

Adequate relief cannot be obtained unless the petitioner can show that he has obtained an order from the court of appeals authorizing the district court to consider a successive or second petition, the petition may not be filed in the district court. 28 U.S.C.2244(b)(3)(A).

Petitioner asks the Court to apply the "fundamental miscarriage of justice exception" to overcome the various procedure defaults, Coleman b Thompson, 501 U.S.722.

The exception survived the AEDPA'S passage Calderon v. Thompson, 523 U.S. 538, and House v. Bell, 547 U.S. at 537. Where "New evidence and the change or new rule of constitutional law made retroactive to cases on collateral review that shows," it is more likely than not that 'no reasonable juror' would have convicted the petitioner, Schlup v Delo, 513 U.S. 329.

He contends that he is entitled to equitable tolling because he has been pursuing his rights diligently, and that some extraordinary circumstance stood in his way and prevented timely filing, Holland v. Florida, 560 U.S. 631. As he is seeking permission to file a second habeas corpus petition because he is "actually innocent."

He argues that "the rights and privileges conferred by the constitution upon citizens donot apply to the negro race," Dred Scott v. Sanford, 60 U.S. (19 How).

Additional material from this filing is available in the Clerk's Office.