**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| In re<br>KENNETH EARL GAY<br>On Habeas Corpus | CASE NO. S130263<br>(Los Angeles Superior Court Case No. A392702 |

# PETITIONER'S REPLY TO THE INFORMAL RESPONSE

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**PETITIONER'S REPLY TO THE INFORMAL RESPONSE**

TO: THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF CALIFORNIA AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

## I. INTRODUCTION

Petitioner, through his counsel, the Habeas Corpus Resource Center ("HCRC"), hereby replies to respondent's Informal Response to Petition for Writ of Habeas Corpus ("Response"). From the outset, the Response is wrong. Contrary to respondent's assertion in the opening sentence of the Preliminary Statement (Response at 1), petitioner did not shoot or kill, or intend to kill anyone. Rather, respondent's recitation of the purported facts alleging petitioner's involvement in the homicide committed solely by his

co-defendant is falsely premised on the guilt phase record that resulted from trial counsel's incompetent, conflict-ridden failure to provide petitioner with even minimal representation. Petitioner could not have been convicted if counsel had merely subjected the state's case to obvious testing and confrontation. In turn, petitioner's actual innocence would have been palpable if counsel had affirmatively introduced the exculpatory evidence that was readily available.

Because respondent has no legal or factual bases for disputing petitioner's entitlement to relief on the merits of his claim, the Response instead relies primarily on a host of confused and confusing procedural arguments. Petitioner addresses each in turn.

## II. THE PETITION IS TIMELY

Respondent's timeliness objection is premised on the mistaken belief that this Court's Policies Regarding Cases Arising From Judgments of Death ("Policies") required HCRC to file the petition more than ten and a half years *before* it was appointed to represent petitioner in habeas corpus proceedings; that petitioner has not otherwise explained or excused the purported delay in filing the petition; and that the purported untimeliness of two claims requires that the entire petition must be dismissed as untimely. Response at 3-5. Respondent is wrong for at least five reasons.

First, although the heading of respondent's argument asserts that petitioner's *claims* are untimely (Response at 3), and the argument contends that the entire *petition* is untimely (Response at 3-9), respondent never explicitly identifies any particular claim to which the procedural bar purportedly applies. *See, id.* Instead, respondent explicitly acknowledges that "*most* of the Claims in the petition have previously been rejected by this Court in prior petitions or on appeal." Response at 10-11 (emphasis

added). Respondent specifically identifies Claims One, Two and Three as having been raised and rejected on the merits in earlier habeas corpus proceedings, and argues they should again be rejected on the merits. Response at 15, 17-18 and 20. Respondent also complains that Claims Six through Nine are the same as issues that were presented in a prior state habeas petition, and rejected as having been raised and rejected on appeal, but with the addition of *de minimus* constitutional grounds. Response at 38. Similarly, respondent acknowledges that Claims Ten through Seventeen and Nineteen through Twenty-Six are all identical to issues raised and rejected on direct appeal, with the addition of a *de minimus* constitutional basis for each issue. Response at 40 and 45. As with Claims Six through Nine, respondent does not complain that these previously raised 16 claims are untimely; only that petitioner failed to explain "why the addition of these legal bases should make any difference" to the merits of the claim. *Id.* at 38, 40 and 45. Accordingly, although respondent's timeliness objection is aimed at the entire petition containing numerous previously raised claims, it appears to rest on Claims Four and Five.

Second, the Court's Policies explicitly govern the filing of "*all* petitions for writs of habeas corpus arising from *judgments of death*, whether the appeals therefrom are pending *or previously resolved.*" Policy 3 (emphasis added). Pursuant to Policy 3, Timeliness standard 1-1.1, a petition is presumptively timely if it is filed "within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal, or within 24 months after appointment of habeas corpus counsel, whichever is later." The petition here, including Claims Four and Five, was presumptively timely under either measure: The judgment of death was imposed on December 4, 2000; HCRC was appointed as habeas corpus

counsel on December 31, 2002; and the last due date for the filing of the reply brief in the companion automatic appeal (Case No. S093765) was July 15, 2004. The filing of the habeas petition on December 28, 2004 was thus less than 24 months after HCRC's appointment and less than 180 days from the last due date for filing the appellant's reply brief. Respondent never suggests a date by which any counsel who were not appointed until 2002 could or should have filed the petition in order to be timely. Rather, respondent apparently seeks to impose a vague procedural deadline that is informed only by "the brutal absurdity of commanding a man today to do something yesterday." *People v. Collins*, 42 Cal. 3d 378, 389 (1986) (citation omitted).

Third, even if the petition were not presumptively timely (which it is), respondent mistakenly believes that under the Court's basic timeliness standard "[d]elay is measured from the time *petitioner* knew or should have known the information supporting the claims." Response at 4 (emphasis added). In fact, the Court's Policies measure delay from the time "petitioner *or counsel* (a) knew, or should have known, of facts supporting a claim *and* (b) became aware, or should have become aware, of the legal basis for the claim." Policy 3, timeliness standard 1-1.2 (emphasis added). The distinction is significant because, as respondent elsewhere acknowledges, excepting only Claims Four and Five, all the claims in the current petition were previously presented to the Court in the petition that was the subject of *In re Gay*, 19 Cal. 4th 771 (1998), or in the automatic appeal. The claims are being presented to the Court again either because respondent convinced the United States District Court for the Central District of California the claims were unexhausted, or because the district court directed petitioner to include even the fully exhausted claims in the

current petition to permit this Court to assess the cumulative effect of all petitioner's constitutional claims for relief. *See,* Petition at 7.

Pursuant to timeliness standard 1-1.2, a lay petitioner, unschooled in the law, reasonably cannot be expected to have appreciated the vagaries of the exhaustion doctrine in federal and state habeas corpus jurisprudence, or to have undertaken an investigation of potentially meritorious claims based on undisclosed evidence of state or juror misconduct. Accordingly, any delay in raising the allegedly new claims must be measured from the point at which trained *counsel* was aware of both the additional facts and their legal significance. In this case, however, petitioner was without the assistance of habeas counsel between 1998 and the date of HCRC's appointment in 2002. As reflected in the Declaration of petitioner's federal habeas corpus counsel, Robert R. Bryan, filed herewith as Exhibit 88, this Court's Automatic Appeals Monitor declined federal counsel's request to be appointed for the purpose of filing petitioner's exhaustion petition, because HCRC had been appointed to represent petitioner on all habeas corpus matters related to his judgment of death pending before this Court. Exhibit 88, Declaration of Robert Bryan at 2106-2107.

Fourth, the record before this Court in Case No. S093765, of which petitioner requested the Court to take judicial notice, demonstrates that petitioner has taken all reasonable steps to actively investigate and litigate the bases or additional bases for establishing his factual innocence – and a corresponding exception to any timeliness requirements for presenting such a claim – since the conclusion of his state habeas corpus proceedings in late December 1998. Beginning with his arraignment for the penalty re-trial in March 1999, petitioner sought an expeditious investigation and presentation of the evidence of his factual innocence. *See* 1 CT 2, 12, 16; 1 RT 11-17,

25-26. As reflected in the declaration of his re-trial counsel, Kenneth Lezin, which was filed with the petition in Case No. S130598, and a copy of which is attached hereto as Exhibit 89, petitioner agreed to waive time for trial only on condition that counsel investigate what turned out to be petitioner's "absolutely genuine" claim of innocence. Exhibit 89, Declaration of Kenneth Lezin at 2108. Counsel's investigation in preparation for the penalty re-trial, which concluded with the imposition of a death sentence in December 2000, identified much of the additional evidence that was in turn investigated by federal counsel after his appointment in November 2001 to represent petitioner in federal court. Following the filing of the federal petition in July 2003, and a ruling determining which claims were unexhausted, the district court issued an order in March 2004 directing petitioner to present his claims to this Court. Because petitioner had no other counsel to represent him in such proceedings, HCRC completed its investigation of all potentially meritorious claims affecting the guilt phase verdict and filed the current petition, including the claims that the district court ordered petitioner to present to this Court, approximately nine months after the district court's order. Respondent does not explain what else petitioner, proceeding with or without counsel, reasonably could have done to present the current petition in a more timely fashion.

Fifth, as to the only claims not presented in the earlier petition – Claims Four and Five – the record demonstrates that such claims reasonably could not have been presented earlier. The substance of Claim Four largely depends upon the ongoing investigation assisted by the discovery available pursuant to the provisions of Penal Code Section 1054.9, and the decisional authority of *In re Steele*, 32 Cal. 4th 682, 697 (2004), neither of which was

available prior to HCRC's appointment. As to Claim Five, prior habeas counsel were denied funds to investigate potential juror misconduct. As a result, and as documented in the exhibits filed in support of the current petition, the jurors were not interviewed by anyone until HCRC conducted its investigation of potential guilt phase issues. *See, e.g.,* Exhibit 77, Declaration of Jay Marc Cochetti at 2078-2079, ¶ 9; Exhibit 78, Declaration of Linda Comerford, at 2081, ¶ 8; Exhibit 84, Declaration of Margaret Stichweh at 2099, ¶ 8. The absence of prior funding to investigate this claim, or record indication of misconduct renders timely petitioner's presentation of the claims as soon as their factual bases were discovered in 2004. *See, In re Robbins*, 18 Cal. 4th 770 (1998). *See, also, Williams v. Taylor*, 529 U.S. 420, 442-443 (2000) (in light of state court's denial of funding for investigation and absence of indication on record of juror misconduct, state habeas counsel was not at fault for failing to discover relationship between juror and state's key witness).

## III. RESPONDENT'S PROCEDURAL ARGUMENTS ARE INTERNALLY INCONSISTENT

Having previously argued that the entire petition is untimely because petitioner took too long to present "the information supporting the claims," apparently referring to Claims Four and Five (Response at 4-5), respondent then argues that the entire petition is *successive* because, in fact, "most of the claims in the petition" have been previously presented to the Court, and their current versions do not present any "change in the law *or facts*." Response at 10-11 (emphasis added). Because the Court already determined that the prior petition was timely filed (*In re Gay*, 19 Cal. 4th at 779, n. 3), respondent's "successive" objection is fatally irreconcilable with the "timeliness" analysis. Moreover, in neither instance does respondent

identify any particular claim that is purportedly untimely or wholly successive.

This Court always retains authority to reconsider a petition "based on the same grounds as those of a previously denied petition" whenever it finds there has been a "change in the facts or law substantially affecting the rights of the petitioner." *In re Martin*, 44 Cal. 3d 1, 27, n. 3 (1987). The majority of the claims are being presented to the Court again only because the federal court wished to give this Court the opportunity to consider the cumulative effect of the constitutional violations set forth in the previously unexhausted habeas claims together with those in the exhausted claims. *See,* Petition at 7. Accordingly, the district court ordered petitioner to present all claims to this Court. If this Court concludes that the additional constitutional violations substantially change the legal effect of petitioner's previously presented claims, it may grant petitioner relief despite its previous rejection of such claims. *In re Martin*, 44 Cal. 3d at 27, n. 3; *see, also, People v. Holt*, 37 Cal. 3d 436, 458-59 (1984) (cumulating effect of errors); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993) (cumulative effect of instructional error and ineffective assistance of counsel).

## IV. THE *SEATON* BAR IS INAPPLICABLE TO PETITIONER'S CLAIMS

Respondent argues that pursuant to *In re Seaton*, 34 Cal. 4th 193, 200 (2004), petitioner cannot raise any claim on habeas corpus that trial counsel should have objected to at trial. Response at 12-13. The application of a procedural rule in 2004 to a trial conducted 19 years before, however, would serve no logical or legitimate state interest, nor would it afford petitioner a fair opportunity to effect compliance. *See, e.g., Ford v.*

*Georgia*, 498 U.S. 411 (1991). Neither would the rule, which is premised on trial counsel's actual or constructive knowledge of predicate facts, appear to have any logical application to Claims Four and Five, raising state concealment of evidence and jury misconduct.

If, however, trial counsel is deemed to have violated his duty to raise all issues at trial as comprehended by *Seaton*, both Claims Four and Five are cognizable as instances of ineffective assistance of counsel. *In re Seaton*, 34 Cal. 4th at 200. If, for example, trial counsel unreasonably failed to discover the documented acts of juror misconduct involving impermissible discussion of the case with third parties as well as premature deliberations and determinations of petitioner's guilt, the failure to discover such structural error could not be excused as either tactical or harmless. *See,* Claim Five, *post.*

## V. CLAIMS FOR RELIEF

### A. CLAIM ONE: PETITIONER IS ACTUALLY INNOCENT OF CAPITAL MURDER.

Respondent erroneously contends that the allegations and evidence supporting this claim are neither newly discovered nor sufficient to "undermine the prosecution's case and point unerringly to innocence or reduced culpability." Response at 6 (quoting *In re Clark*, 5 Cal.4th at 798, fn. 33 (internal citation omitted)). Respondent is wrong on both counts.

1. The Evidence of Petitioner's Actual Innocence Meets the Requirements for Newly Discovered Evidence.

In order to satisfy the requirement for newly discovered evidence, petitioner need only demonstrate that the evidence upon which he relied was not discovered at the time of his trial, and is sufficiently exculpatory

that it demonstrates his factual innocence. *In re Hall,* 30 Cal. 3d 408, 420 (1981).

> "It appears, however, that this information either was known or could have been discovered by diligent investigation before trial. It would therefore not qualify as "newly discovered evidence" for the purpose of a motion for new trial. Yet, in *In re Branch* (1969) *supra*, 70 Cal.2d 200, 214, 74 Cal.Rptr. 238, 449 P.2d 174, we considered similar evidence to be relevant to the new-evidence ground of habeas corpus relief, reasoning that 'it is so fundamentally unfair for an innocent person to be incarcerated that he should not be denied relief simply because of his failure at trial to present exculpatory evidence.'" *Id.*

Without explanation or citation, respondent baldly stated that petitioner failed to present newly discovered evidence. Response at 16. Respondent either ignored or misconstrued the evidence presented in support of petitioner's actual innocence claim that was not discovered until after petitioner was convicted and sentenced that "undermine[d] the entire prosecution case and point[ed] unerringly to innocence." *In re Clark*, 5 Cal. 4th at 798, fn. 33.

The newly discovered evidence upon which petitioner relied includes the following:

- Evidence of the virtual physical impossibility that petitioner shot the victim (Exhibit 17, Declaration of Kenneth Solomon, Ph.D. *See, also*, Retrial 27 RT 3549-3567 (testimony of Martin Fackler, M.D.); Retrial 25 RT 3273-3289 (testimony of William Sherry, M.D.));
- Evidence from Donald Anderson, Gail Beasley, James and Darrell Cummings, Richard Delouth, Eula Heights, Paul Michel, O.D., Shannon Roberts, and Cecilia Thompson that irreparably undermined the reliability and credibility of those eyewitnesses -

Gail Beasley, Marsha Holt, Shannon Roberts, and Robert Thompson - who testified they saw petitioner shoot the victim (Exhibit 20, Evidentiary Hearing Testimony of Donald Anderson (1996) at 223; Exhibit 75, Declaration of Gail Blunt at 2071-2073, ¶¶ 3-6, 9; Exhibit 64, Declaration of James Cummings at 166, ¶¶ 13-14; Exhibit 65, Declaration of Darrell Cummings at 1972-73, ¶¶ 11, 13 Exhibit 79, Declaration of Richard Delouth at 2084-86, ¶¶ 12, 14, 16; Exhibit 47, Los Angeles Police Department Interviews of Eula Heights at 1657; Exhibit 86, Los Angeles Police Department Interview of Eula Heights at 2103; Exhibit 21, Report of Paul B. Michel, O.D. at 238, ¶ 2; Exhibit 23, Declaration of Shannon Roberts at 243, ¶ 8; Exhibit 83, Declaration of Shannon Roberts at 2095-96, ¶¶ 4-6; Exhibit 85, Declaration of Cecilia Thompson at 2100-2102);

- Eyewitness Shannon Roberts's recantation of his identification of petitioner and admission that he was coached and instructed as to his testimony and erroneous identification of petitioner (Ex. 23 at 243, ¶ 8; Ex. 83 at 2096, ¶ 7);
- Eyewitnesses Martina Jiminez, Irma Esparza, Walter Roberts, Ejinio Rodriguez all of whom reported seeing a darker skinned man shoot the victim (Exhibit 27, Declaration of Martina Lizbeth Jimenez at 497-98, ¶ 4; Exhibit 13, Los Angeles Police Department Interviews of Irma (Rodriguez) Esparza at 162-63; Exhibit 44, Los Angeles Police Department Interviews of Walter Roberts at 1636; Exhibit 24, Declaration of Ejinio Rodriguez at 245, ¶¶ 6-8); and,
- Raynard Cummings's personal confessions to Deputy William McGinnis, David Elliot, Norman Pernell, and James Edward

Jennings (Exhibit 29, Declaration of William McGinnis at 501, ¶ 5; Exhibit 61, Identification of Witnesses Currently in Custody at Los Angeles Jail at 1957; Exhibit 5, Los Angeles Police Department Interviews of James Edward Jennings at 35).

As a result of trial counsel's utter failure to conduct an adequate investigation, counsel never discovered this exculpatory evidence because he never interviewed these witnesses. *See, also,* Claim C. regarding Shinn's ineffective assistance of counsel. Thus, petitioner has satisfied the requirement for newly discovered evidence. *In re Hall,* 30 Cal. 3d at 420.

2. Petitioner Has Stated A Prima Facie Case That The New Evidence Points Unerringly To Petitioner's Innocence.

Respondent contends that petitioner's claim of factual innocence must fail because he has not met "the high burden necessary to make a 'truly persuasive' demonstration of actual innocence. Response at 16 (no source cited for quotation). Respondent, however, confuses petitioner's burden at this stage of the habeas corpus proceedings to plead a prima facie case, with his burden at an evidentiary hearing to present evidence that would "undermine the entire prosecution case and point unerringly to innocence or reduced culpability." *In re Clark,* 5 Cal. 4th at 798 (citing *People v. Gonzalez,* 51 Cal. 3d 1179, 1246 (1990)).

As discussed below, petitioner proffered evidence that affirmatively demonstrated his innocence and destroyed the credibility of the prosecution's only witnesses against him. The burden of presenting a prima facie case of petitioner's actual innocence that, if true, would undermine the prosecution's entire case against petitioner, has been wholly satisfied.

a. The Prosecution's Theory of Petitioner's Culpability Was Virtually Impossible.

The prosecution presented the theory that after Cummings fired the first shot he gave the gun to petitioner who exited the car, before the victim could draw his gun and shoot, and fired five shots into the victim at close range. Petitioner has presented compelling factual allegations supported by undisputed expert evidence to establish the virtual scientific impossibility that petitioner could have committed the crime for which he was convicted. Ex. 17 at 179, ¶ 9. *See, also*, Retrial 27 RT 3549-3567 (testimony of Martin Fackler, M.D.); Retrial 25 RT 3273-3289 (testimony of William Sherry, M.D.). Respondent offered no evidentiary or legal support for his assertion that the jury may have rejected such evidence offered by Dr. Solomon. Absent a proffer of evidence conclusively rebutting petitioner's prima facie showing or a controlling principle of law that likewise defeats petitioner's claim, respondent's mere opinion is insufficient to rebut the prima facie case established by evidence of Dr. Solomon's scientific findings. *In re Romero,* 8 Cal. 4th 728, 740 (1994).

b. The Prosecution Witnesses Against Petitioner Were Not Credible.

The case against petitioner consisted solely of the eyewitness testimony of Robert Thompson, Gail Beasley, Marsha Holt, Shannon Roberts, and Pamela Cummings. Each of these witnessed testified that they saw petitioner shoot the victim. Petitioner presented a prima facie case that the testimony of Thompson, Beasley, Holt, and Roberts, implicating petitioner as the shooter, was demonstrably false and completely unreliable and incredible.

(1) Robert Thompson

Immediately and for several weeks after the shooting, Robert Thompson consistently held that he saw someone other than petitioner – a dark skinned man from the back seat of the car – shoot the victim. The trauma of witnessing the shooting exacerbated Thompson's pre-existing mental health problems, and he began to seriously deteriorate over time. Ex. 85 at 2100-01, ¶¶ 4-8. It was not until after Mr. Thompson's mental health had seriously deteriorated that he succumbed to police influence and adopted a false memory of petitioner being involved in the shooting, thus aligning his "memory" with the prosecution's theory of the case.

(2) Gail Beasley

Gail Beasley, who was a serious drug addict at the time of the shooting, was a completely unreliable and incredible witness. Petitioner pled a prima facie case that at the time of the shooting Beasley was under the influence of drugs (Ex. 79 at 2084-86, ¶¶ 12-16); in shock (Ex. 75 at 2071, ¶¶ 2, 5); unable to accurately recall what she may have seen (*id.*); and, rendered irrefutably biased by the influence of the codefendant's mother, Mary Cummings. Ex. 47 at 1658; Exhibit 49, Los Angeles County Public Defender Investigations Report of Mackie Como at 1666; Retrial 24 RT 3072.

(3) Marsha Holt

Likewise, petitioner has pled sufficient facts to establish that Marsha Holt was a patently unbelievable witness. Holt, who was also under the influence of drugs at the time of the shooting, admitted that she had not seen the shooting. Exhibit 19, Declaration of Richard Allen Delouth, Junior at 201, ¶ 14; Ex. 79 at 2085-86, ¶ 16 (Holt's drug use); Ex. 20 at 223 (confessed did not see shooting). Petitioner has corroborated Holt's

admission by demonstrating that she was physically unable to observe the shooting because a brick wall obstructed her view. Ex. 21 at 238, ¶ 2.

(4) Shannon Roberts

Shannon Roberts admitted that he did not know who shot the victim and that he lied under oath when he said that he saw petitioner do so. Ex. 83 at 2095-96, ¶¶ 5-6. This evidence plainly established a prima facie case that Roberts's testimony, implicating petitioner as the shooter, was nothing less than perjury, and thus patently unworthy of consideration by petitioner's jury.

(5) Pamela Cummings

The only remaining prosecution eyewitness was Pamela Cummings. Since she was an accomplice to the murder, no trier of fact could consider the testimony that she saw petitioner shoot the victim without sufficient corroborative evidence that "tend[ed] to implicate the defendant and ... relate to some act or fact which is an element of the crime[.]" *People v. Luker*, 63 Cal. 2d 464, 469 (1965) (internal citations omitted). *See, also,* Cal. Penal Code § 1111. Petitioner, however, undermined the corroborative value of the prosecution's only other evidence against petitioner – the testimony of Thompson, Beasley, Holt, and Roberts, thus leaving Pamela Cummings's testimony against petitioner with no evidentiary value.

Even if Pamela Cummings's testimony did not require corroboration, it would be rendered biased and unbelievable in light of the numerous, *credible* eyewitnesses who saw only a dark skinned man shoot the officer outside the car, and the expert scientific evidence that supports them by demonstrating petitioner could not have committed the shooting.

3. Several Credible Witnesses Established That Petitioner Was Not The Shooter.

Several eyewitnesses stated that petitioner was not the shooter. Martina Jiminez, Irma Esparza, Walter Roberts, Ijinio Rodriguez all reported seeing a darker skinned man shoot the victim. Ex. 27 at 497-98, ¶ 4; Ex. 13 at 162-63; Ex. 44 at 1636; Ex. 24 at 245, ¶¶ 6-8. Petitioner, a fair skinned man, was never described as a dark skinned man by any of the eyewitnesses to the shooting.

In addition to the eyewitnesses who saw only a darker skinned man shoot the victim, Raynard Cummings repeatedly confessed in vivid detail, to several witnesses, that he was the sole shooter. Cummings personally confessed to Los Angeles County Deputy William McGinnis, and Los Angeles County Jail inmates David Elliott, Norman Pernell, and James Edward Jennings. Ex 29 at 501, ¶ 5; Ex. 61 at 1957; Ex. 5 at 35.

Petitioner presented credible evidence that he could not have committed the crime; that the prosecution's eyewitnesses were wholly not credible; that other, more credible (and numerous) eyewitnesses saw a darker skinned man – someone other than petitioner – shoot the victim; and, that Cummings, who looked like the suspect described by the most numerous and credible witnesses, repeatedly confessed that he was the sole shooter. The sum of this evidence constitutes a prima facie case of petitioner's innocence of the crime for which he was convicted. Accordingly, petitioner is entitled to an evidentiary hearing on the issue of his actual innocence. *People v. Romero,* 8 Cal.4th at 737-38; Cal. Penal Code § 1476.

## B. CLAIM TWO: TRIAL COUNSEL'S REPRESENTATION WAS PREJUDICIALLY AND UNCONSTITUTIONALLY BURDENED BY MULTIPLE CONFLICTS OF INTEREST

Respondent's challenges to the sufficiency of petitioner's claim for relief based upon trial counsel's multiple conflicts of interests begin with an incomplete discussion of the controlling standards of prejudice, overlook or misconstrue the dispositive findings previously made by this Court in *In re Gay*, 19 Cal. 4th 771 (1998), and finally rely on an implausible rationale for dismissing the significance of the other undisputed conflicts that also burdened counsel's performance. Response at 16-20. The controlling law and settled and/or undisputed facts of this case demonstrate that respondent cannot offer any reason why petitioner is not entitled to a summary grant of habeas corpus relief.

Respondent's arguments are premised on the mistaken belief that petitioner is "a defendant who raised no objection at trial," and must therefore "'demonstrate that an actual conflict of interest adversely affected his lawyer's performance.'" Response at 17 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). To the contrary, petitioner specifically objected at trial that counsel was burdened by a conflict of interest as evidenced by his misconduct in misleading and inducing petitioner to make incriminating statements regarding the robbery charges. *See* 58 RT 6282-6285; 59 RT 6337, 6340-6348. This Court found that trial counsel's performance in this regard was professionally incompetent, the prejudicial impact of which "cannot be overstated." *In re Gay*, 19 Cal. 4th at 793, 799. The Court also found that at the time of counsel's incompetent and fraudulent behavior toward petitioner, trial counsel was the subject of a criminal investigation "by the office of the same district attorney who was his adversary in the

prosecution of petitioner." *Id.* at 828. Thus, petitioner's timely objection, and the trial court's error in forcing petitioner to proceed with conflict-ridden counsel require automatic reversal pursuant to *Holloway v. Arkansas*, 435 U.S. 475 (1978).

This Court's factual findings and the undisputed record, however, are also sufficient to require reversal under either the standard in *Cuyler* – requiring proof of an actual conflict and resulting adverse impact on counsel's performance – or under our State Constitutional standard requiring only that the record supports an "informed speculation" that counsel's performance was adversely affected by a conflict of interest. *People v. Kirkpatrick*, 7 Cal. 4th 988, 1009 (1994). Significantly, as with *Holloway*, neither standard requires the showing of probable effect on the outcome of the trial as required under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), because the standards governing conflicts of interests are intended "to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Mickens v. Taylor*, 535 U.S. 162, 176 (2002). This Court's findings also demonstrate that petitioner is entitled to relief under *any* conceivably applicable standard for measuring counsel's deficient performance.

First, while trial counsel labored under the conflict of interest resulting from his own criminal investigation, trial counsel "not only acted as a second prosecutor by creating evidence that led to petitioner's conviction of the robberies, his conduct permitted the prosecutor to portray petitioner as an admitted serial robber who killed a police officer to avoid arrest and prosecution for the robberies." *In re Gay*, 19 Cal. 4th at 793. Although the Court was assessing the penalty phase impact of trial

counsel's conduct in acting as a "second prosecutor," both the conduct and the conflict giving rise to it occurred pretrial. In turn, petitioner's purported motive to commit the charged homicide "to avoid arrest and prosecution" was the keystone of the prosecution's theory at the guilt phase. Thus, even if the record did not support application of the *Holloway* rule of automatic reversal, it clearly compels reversal based on the adverse effect of counsel's conflict, under *Cuyler*, or even a traditional *Strickland* analysis.

Second, this Court also found that trial counsel had a "conflict precipitated by the capping relationship" he had with Marcus McBroom and Dr. Fred Weaver. *In re Gay*, 19 Cal. 4th at 828. The Court's findings in this regard demonstrate that trial counsel's representation of petitioner was burdened *ab initio* by a conflict that adversely affected his performance. Assisted by McBroom, and motivated by mutual financial gain, trial counsel "defrauded the court in seeking appointment" to represent petitioner, and such "unethical conduct led directly to the retention of a mental health expert [Weaver] who the attorney agreed would not be called upon to do a thorough assessment of the defendant." *Id.* at 829. Thus, the conflicts affecting counsel's performance caused him both to act as a "second prosecutor" in providing the prosecution with its strongest theory for petitioner's guilt and to forego the investigation or evaluation of any potential mental state defenses. These findings by the Court clearly satisfy the *Cuyler* and *Kirkpatrick* standards for relief.

In the face of this Court's conclusive findings, and the undisputed allegations of additional conflicts based on trial counsel being the target of a murder and an arson investigation and state bar disciplinary proceedings, respondent offers only legal *non sequiturs* to dispute the existence and impact of the multiple conflicts. First, as to the embezzlement

investigation, respondent argues that "while *some* investigation occurred during petitioner's trial, it began *before the trial* and *continued after* the trial." Response at 18 (emphasis added). Respondent does not explain how this description of the ongoing investigation weakens petitioner's claim or the impact of the conflict. Rather, respondent has merely conceded that during the *entire time* trial counsel represented petitioner, counsel "was being investigated . . . by the office of the same district attorney who was his adversary in the prosecution of petitioner." *In re Gay*, 19 Cal. 4th at 828.

Respondent next observes that trial counsel was uncooperative with the criminal investigation, presumably thereby suggesting that such lack of cooperation is inconsistent with the suggestion trial counsel attempted to curry favor with the prosecution. Response at 18. As support for the fact counsel was uncooperative, respondent cites Exhibit 80, the Declaration of former Los Angeles Sheriff's Department investigator Charles Gibbons, filed in support of the petition. Respondent, however, apparently has overlooked Mr. Gibbons's explicit explanation that throughout the investigation trial counsel "*attempted* to *appear* cooperative while he stalled and evaded our requests for information." Exhibit 80, Declaration of Charles Gibbons at 2088, ¶ 3 (emphasis added).

Respondent similarly fails to explain the significance, if any, of the fact that the investigation did not lead to the filing of criminal charges because the statute of limitations eventually expired. Response at 18-19. In light of the current record, the logical inference to be derived from this fact is that trial counsel succeeded in stalling the investigation and/or currying favor with the District Attorney's Office so that it conveniently looked the other way until counsel escaped liability for his criminal behavior.

In two of the most bizarre arguments in the Response, respondent faults petitioner for not providing anything in addition to trial counsel's *sworn testimony* during his disbarment proceedings admitting he believed he was the target of the murder and arson investigation, and further suggests that to establish the existence of a conflict petitioner must show that the prosecutor in this case was aware of all of the other conflicts. Response at 19. Respondent cites no authority to support his criticism of petitioner's claim and supporting documentation. Trial counsel's subjective belief, as evidenced by his own admissions, is sufficient to establish the conflict. *See, e.g., In re Gay*, 19 Cal. 4th at 833 (Werdegar, J., concur.) ("Indeed, Shinn's own pending criminal investigations may help explain why he was so anxious to cooperate with the district attorney that he induced petitioner to confess to several robberies").

Petitioner has demonstrated, and respondent has offered nothing to dispute, that trial counsel labored under multiple conflicts that adversely affected the adequacy of his representation in numerous ways including but not limited to the acts and omissions detailed above. Accordingly, reversal of petitioner's conviction is constitutionally mandated. *Cuyler v. Sullivan*, 446 U.S. at 349-50.

## C. CLAIM THREE: PETITIONER'S CONVICTION IS A DIRECT RESULT OF TRIAL COUNSEL'S INEFFECTIVE ASSITANCE OF COUNSEL.

Petitioner's verified allegations, and supporting evidence, demonstrate that trial counsel's deficiencies spanned the entirety of the guilt phase trial as a result of his failure to conduct even a minimal investigation into petitioner's innocence or mental state at the time of the crime. Trial counsel's patently unreasonable errors and omissions forced petitioner's

jury to determine his guilt based on incomplete, inaccurate, and erroneous information.

Petitioner thereby demonstrated that "counsel's representation fell below an objective standard of reasonableness," and but for counsel's deficient performance, there is more than a reasonable probability that the result of the proceedings would have been different. *Strickland v. Washington,* 466 U.S. at 687-88, 694. *See, also, Avila v. Gonzalez,* 297 F.3d 911 (9th Cir. 2002) (counsel's failure to investigate petitioner's innocence reversible error); *Bloom v. Calderon,* 32 F.3d 1267 (9th Cir. 1997) (counsel's delay in obtaining, and failure to prepare, psychiatric expert witness mandates reversal of capital conviction); *Lord v. Wood,* 184 F.3d 1083 (9th Cir. 1999) (conviction reversed because counsel failed to adequately investigate and present evidence of petitioner's innocence); *Luna v. Cambra,* 306 F.3d 954 (9th Cir. 2002), amended 311 F.3d 928, (conviction reversed to remedy counsel's failure to call alibi witnesses and interview or obtain inculpatory statement from an exonerating witness). Respondent presented no evidence or controlling legal principle to contest petitioner's claim that trial counsel's errors and omissions were either objectively unreasonable or prejudicial. In fact, respondent conceded that counsel's errors and omissions were objectively unreasonable by failing to come forth with evidence that suggested otherwise.

Respondent's principle bases for disputing this claim are petitioner's asserted failure to provide a declaration from his disbarred trial lawyer, and the purported strength of the prosecution's evidence. Neither ground can withstand analysis. First, respondent does not and cannot explain what legitimate purpose would be served under the circumstances in this case by requiring petitioner to submit a declaration or other statement "where

counsel discusses what investigation he pursued or what tactical reason he may have had." Response at 22. Although respondent notes that trial counsel was previously deposed and testified at the evidentiary hearing, respondent overlooks the fact that the transcripts for each of those events are replete with trial counsel's statements that he no longer remembered why he undertook, or failed to undertake, specific actions. *In re Gay*, 19 Cal. 4th at 823 (fn.23) ("The referee observed that Shinn could not recall many substantial portions of petitioner's trial or his reasons for doing many things in representing petitioner. This observation is also confirmed by our review of Shinn's testimony.").

Moreover, the absence of memory is the most charitable explanation for trial counsel's inability to offer any reasonable tactical basis for his acts and omissions. The current record demonstrates that throughout trial counsel's unsavory career, he has consistently lied, evaded questions, concealed evidence and otherwise sought to frustrate official inquiries into his misconduct, which wholly establishes his "unwillingness to adhere to the most fundamental responsibilities of an attorney as embodied in the provisions of the Business and Professions Code and the Rules of Professional conduct. *In the Matter of Shinn*, 2 Cal. State Bar Rptr. 96, 107. *See, also*, Exhibit 8, Declaration of Howard R. Price at 57-58, ¶¶ 7-10; Ex. 80, at 2087-90. Indeed, this Court found that the delay in filing petitioner's first state habeas corpus petition was explained, in part, "on the basis of Shinn's refusal to cooperate with habeas corpus counsel and destruction and loss of records." *In re Gay*, 19 Cal. 4th at 779, n. 3. Petitioner's claims of ineffective assistance of counsel allege errors and omissions for which no tactical reason could exist. Yet, even if this were not the case, the fair and just resolution of these issues would not be

assisted by further cluttering the record with trial counsel's self-serving falsehoods.

Second, contrary to respondent's assertion, there was "strong evidence of guilt," (Response at 22) there was only *untested* evidence of guilt. Respondent's failure legally or factually to support his contention that this claim and sub-claims lacks merit leaves wholly untouched the verified allegation and supporting documentation showing that a minimally adequate representation by reasonably competent counsel would have resulted in petitioner's acquittal.

1. Trial Counsel Unreasonably And Prejudicially Failed To Investigate And Present Evidence Of Petitioner's Innocence.

If trial counsel had conducted even a minimal investigation, he would have uncovered, and been able to present to petitioner's jury, a wealth of evidence firmly pointing to petitioner's innocence. No tactical reason existed for Shinn's failure to present this evidence, because he had no basis on which to form a tactical reason due to his failure to interview witnesses or consult experts. *Strickland v. Washington*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

Respondent argues that the witnesses trial counsel failed to interview and call to testify "would have only been able to provide vague testimony that would not have aided in petitioner's defense." Response at 22. Respondent's argument, however, either ignores the most critical details of the potential testimony or misstates its import. But for trial counsel's failure to investigate and present this overwhelming evidence of petitioner's innocence, he would not have been convicted of capital murder.

a. Walter Roberts and Gustavo Gomez

Shinn's failure to interview and call Walter Roberts and Gustavo Gomez to testify on behalf of petitioner deprived petitioner of vital corroboration of the two eyewitnesses who saw someone other than petitioner shoot Officer Verna.

Respondent dismissed their potential testimony as "unhelpful" after failing to address the most important aspect of both statements – both Walter Roberts and Gustavo Gomez described someone other than petitioner as shooting or possessing a gun. Respondent failed to address the fact that Walter Roberts described the man he saw shoot the victim as a "male Negro, Black ... medium complexion, 3-4 inch Afro, clean shaven, thin, wearing a dark blue long sleeve shirt, blue jean pants, dark shoes." Ex. 44 at 1636. This description clearly excluded petitioner, whom other witnesses described as fair skinned or white, and wearing a light colored shirt. Exhibit 13 at 162; Exhibit 39, Los Angeles Police Interviews of Sabrina Martin at 1609; Exhibit 40, Los Angeles Police Department Interviews of Shannon Roberts at 1615; Exhibit 42, Los Angeles Police Department Interviews of Marsha Holt at 1624.

Similarly, respondent skipped over the fact that Gustavo Gomez described someone other than petitioner, as Mr. Gomez saw "a tall African American man with a gun." Exhibit 81, Declaration of Gustavo Gomez at 2091.

The case against petitioner was largely based on the testimony of four highly unreliable witnesses – Robert Thompson, Gail Beasley, Marsha Holt, and Shannon Roberts. Robert Thompson, the only prosecution witness who was in close proximity to the shooting, substantially changed his version of events at least three times. Mr. Thompson suffered serious

mental health problems and was rendered even more mentally unstable as a result of witnessing the shooting. Ex. 85 at 2100-01, ¶¶ 4-6. Gail Beasley and Marsha Holt were both notorious drug abusers at the time of the incident (Ex. 79 at 2084-86, ¶¶ 12-16); inside a house on the other side of the street at the time of the shooting (Ex. 42 at 1621; Exhibit 12, Los Angeles Police Department Interviews of Gail Beasley at 156); and, both gave such varied and unreliable accounts of the shooting that it is unlikely they saw the shooting at all (Petition at 105-110). Moreover, Marsha Holt denied actually seeing the shooting. Ex. 20 at 223. Only when he testified at trial, almost two years after he allegedly witnessed the shooting, was Shannon Roberts allegedly able to consistently describe the shooter or identify petitioner as the shooter.

Shequita Chamberlian and Oscar Martin both consistently reported that they saw someone other than petitioner standing outside of the car shooting the victim. Exhibit 37, Los Angeles Police Department Interviews of Shequita Chamberlain at 1601; 3 CT 850, 854-55 (Chamberlain's preliminary hearing testimony); 68 RT 7514, 7524-26 (Chamberlain's trial testimony); Exhibit 36, Los Angeles Police Department Interviews of Oscar Martin at 1597; 1 Supp. CT 249 (Martin's grand jury testimony); 1 CT 1714-16 (Martin's preliminary hearing testimony); 67 RT 7361-62 (Martin's trial testimony). Contrary to respondent's summary assertion of no prejudice, had trial counsel performed at a minimally competent level and presented the testimony of these four additional credible eyewitnesses who either saw someone other than petitioner shooting the officer – Walter Roberts (Ex. 44 at 1636), Ejinio Rodriguez (Ex. 24 at 245, ¶¶ 5-8), and Martina Jiminez (Ex. 27 at 497-98, ¶4) – or saw someone other than

petitioner with a gun – Gustavo Gomez (Ex. 81 at 2091, ¶ 1) – petitioner would not have been convicted of Officer Verna's murder.

b. Mackey Como

Curiously, respondent asserted that no prejudice resulted from Shinn's failure to present Ms. Como's testimony because it would have only supported the prosecution theory that Cummings fired only the first shot. Response at 23. If Cummings did in fact fire only the first shot from inside of the car as alleged by the prosecution, no one would have seen him well enough to identify him, and Mary Cummings would have had no need to be concerned about who may have seen her son murder the victim. That Mary Cummings exhibited such concern – after she was visited by her son – was strong circumstantial evidence that Cummings was concerned about being identified because he did, in fact, leave the car to shoot Officer Verna. Contrary to respondent's assertion that no prejudice resulted from Shinn's failure to present this testimony, had this powerful evidence of consciousness of guilt by Cummings been presented, it is more likely than not that petitioner's jury would not have convicted him of murder.

c. Eula Heights

By failing to address either prong of the *Strickland* test regarding counsel's failure to call Ms. Heights to testify on behalf of petitioner, respondent conceded that counsel's failures were both objectively unreasonable and sufficiently prejudicial to warrant reversal of petitioner's murder conviction.

d. Inmate Witnesses

Respondent claimed that petitioner suffered no prejudice from Shinn's failure to call Alfredo Montes to testify that Cummings confessed that he was solely responsible for the murder because Montes testified on

behalf of the prosecution. Response at 23. Even though when asked by Cummings's counsel if Cummings had ever confessed to him, Montes merely responded that Cummings "had said a few things" (64 RT 7014), Shinn refused to cross-examine this witness. 64 RT 7033. Had Shinn been minimally prepared by reviewing Mr. Montes's statements to the police, Shinn could have elicited highly exculpatory testimony that Cummings repeatedly confessed in a bragging manner to Montes about killing Officer Verna. Exhibit 87, Los Angeles Police Department Interview of Alfredo Montes at 2104. Alone and in conjunction with counsel's others errors, the failure to question Montes to elicit highly compelling exculpatory testimony severely prejudiced petitioner.

Respondent dismissed the remaining potential inmate witnesses by claiming that this Court previously held that counsel's failure to call Jack Flores, James Jennings, and Michael Gaxiola was not prejudicial. Response at 23. Respondent, however, misconstrued this Court's limitation of their 1996 Order to Show Cause to primarily penalty phase issues as a finding that those claims cannot give rise, in conjunction with other valid claims of error, to a finding that the resulting cumulative prejudice merited reversal of petitioner's conviction. In *In re Gay*, this Court explicitly stated that its guilt phase holding was limited to the claims and facts contained in the first petition. "Our limitation of the order to show cause to the penalty phase ineffective counsel issue reflects an implicit determination that the petition fails to state a prima facie case for relief on the remaining grounds." 19 Cal. 4th at 780, fn. 6. In conjunction with the other meritorious claims for relief stated in the current petition, counsel's failure to call these exculpatory inmate witnesses was sufficiently prejudicial to require reversal of petitioner's conviction as a result of cumulative error.

2. Trial Counsel Unreasonably And Prejudicially Failed To Present Impeachment Witnesses.

In light of trial counsel's failure to mount an affirmative defense of innocence through the presentation of witness testimony, Shinn had a paramount obligation to discredit the state's witnesses. A minimal investigation would have revealed several witnesses who could have critically impeached the credibility of the state's witnesses. Contrary to respondent's claim that trial counsel's failure was not prejudicial, had Shinn presented the testimony of these witnesses, the credibility of the prosecution's witnesses would have been so severely impeached as to give rise to, at a minimum, a reasonable doubt as to petitioner's guilt.

a. Shannon Roberts

Respondent argued that Shinn's failure to impeach Roberts resulted in no prejudice to petitioner because Roberts failed to identify petitioner until trial. Response at 24. Roberts, however, selected petitioner as the shooter at the most critical time – in front of petitioner's jury. That Roberts was unable to identify petitioner until several years after the shooting only increased the suspicion that his sudden ability to identify petitioner was the result of outside influence and not a refreshed memory. Had counsel elicited before the jury Roberts's strong desire to please the police – especially in light of the presented evidence of state agents pointing out petitioner to Roberts prior to his testimony (86 RT 9828-29), it is more likely than not that petitioner's jury would have completely discounted his selection of petitioner as the shooter, thus severely undermining the prosecution's case against petitioner.

b. Donald Anderson

Without support, respondent asserts that Shinn's failure to call Don Anderson to testify that his wife, Marsha Holt, admitted to him that she did not see the shooting was the result of a tactical decision. No tactical reason existed for Shinn to fail to call a witness, even if currently incarcerated, who could have given such highly exculpatory testimony.

Respondent also asserted that petitioner suffered no prejudice because Marsha Holt had several times selected petitioner as the shooter. Response 24. Mr. Anderson, however, would not have testified that his wife told him that she did not see petitioner; Mr. Anderson would have testified that Marsha Holt, confessed to him that she did not see petitioner, or anyone else, shoot the victim. This testimony is completely consistent with petitioner's innocence: petitioner admitted that after the shooting he left the car to retrieve a gun by the victim. Moreover, the part of Marsha Holt's story that is most consistent is that she saw someone who looked like petitioner retrieve the officer's gun after the shooting. Had Shinn presented this important witness, petitioner's jury would have returned a more favorable verdict.

3. Trial Counsel's Failure To Employ Necessary Experts Resulted In Petitioner's Conviction.

Trial counsel called no expert witnesses to testify on behalf of petitioner. In light of the contradictory eyewitness statements, it was incumbent upon Shinn to hire appropriate experts to explain to the jury why certain eyewitnesses were gravely mistaken and why petitioner could not have been responsible for the shooting. *Schell v. Witek,* 218 F.3d 1017 (9th Cir. 2000) (petitioner entitled to hearing on failure to consult and call necessary experts); s*ee, also*, *Bloom v. Calderon,* 132 F.3d 1267 (counsel's

delay in obtaining, and failure to prepare, psychiatric expert witness mandates reversal of capital conviction).

a. Identification expert.

Four witnesses testified that they saw petitioner shoot the victim. Two witnesses testified that they saw someone other than petitioner shoot the victim.[1] With such contradictory eyewitness testimony, it was incumbent upon counsel to explain to the jury why and how the prosecution's witnesses erred in their identification of petitioner as the shooter. Contrary to respondent's assertion that trial counsel's failure was not prejudicial, had trial counsel presented the testimony of an identification expert, such as Dr. Elizabeth Loftus, to explain the psychological factors that negatively affected the reliability of the reports of, and subsequent identifications made by, the state's witnesses, such testimony would have further supported petitioner's innocence and required the jury to return with a more favorable verdict.

b. Psychiatric expert.

Trial counsel's failure to investigate and present mental state evidence was prejudicially deficient. *See, Bloom v. Calderon,* 132 F.3d 1267; *Jennings v. Woodford* 290 F.3d 1006 (9th Cir. 2002) (guilt phase relief granted for counsel's failure to investigate petitioner's mental health and drug abuse). In large part, petitioner's penalty verdict was reversed because this Court found that the evidence of petitioner's mental impairments presented at the evidentiary hearing was sufficiently

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[1] As discussed above in section C.1., *ante*, had counsel undertaken minimal investigation, four additional witnesses – Ejinio Rodriguez, Irma Rodriguez, Walter Roberts, and Martina Jiminez - would have testified that they saw someone other than petitioner shoot the victim.

compelling that trial counsel's failure to investigate and present such evidence at penalty trial was prejudicial. *In re Gay*, 19 Cal. 4th at 802. Despite this finding, respondent merely alleged that petitioner suffered no prejudice from trial counsel's failure to investigate and present evidence regarding petitioner's mental state at the time of the crime. Response at 26. This Court's prior positive assessment of Dr. Foster's compelling mitigation testimony – testimony that encompassed petitioner's mental state at the time of the crime – is prima facie evidence that trial counsel's failure was sufficiently prejudicial to require reversal of petitioner's conviction.

c. Gun shot residue expert.

Petitioner was prejudiced by trial counsel's unreasonable failure to hire a gun shot residue expert. The prosecution argued that the shooter repeatedly fired the gun as he followed the victim. Trial counsel knew, or should have known, that witnesses reported seeing the gun emit amounts of smoke large enough to be visible from several hundred yards away. 2 Supp. CT 528; 3 CT 675; 69 RT 7710, 7788. Trial counsel also knew, or should have known, that the police possessed the clothing worn by petitioner and Cummings at the time of the shooting. Ex. 86 at 2103; 73 RT 8217. Shinn's failure to consult with an expert to examine the clothing petitioner and Cummings were wearing at the time of the shooting for the absence, or presence, of significant amounts of gun shot residue was patently prejudicial. Had Shinn undertaken such an investigation he could have presented evidence that the lack of such residue on petitioner's clothing and the large amounts on Cummings's clothing further supported the theory that it was virtually physically impossible for petitioner to have shot the victim.

d. Medical and Crime Reconstruction experts.

Shinn's failure to consult with and present the testimony of medical and crime reconstruction experts deprived petitioner of a compelling and successful innocence defense. Trial counsel's failure denied petitioner's jury vital information regarding the timing and sequencing of the shots fired at the victim. Had Shinn consulted with, and presented the testimony of experts such as, Dr. Martin Fackler, Dr. William Sherry, M.D., and Kenneth Solomon, Ph.D., petitioner's jury would have had the necessary information to understand that it was virtually physically impossible for petitioner to have fired any shots at the victim. But for counsel's failure to present such expert testimony, petitioner would not have been convicted of capital murder. *See, e.g.,* Ex. 17 at 179; Retrial 27 RT 3549 *et. seq.* (testimony of Martin Fackler, M.D.); Retrial 27 RT 3273-75 (testimony of William Sherry, M.D).

4. Trial Counsel's Failure to Adequately Cross-Examine Eyewitnesses Was Prejudicial.

The prosecution's primary witnesses against petitioner were Robert Thompson, Gail Beasley, Marsha Holt, and Shannon Roberts. Practically each time Holt and Beasley were questioned by the police or testified, their accounts of the shooting varied dramatically from their previous version of events. Robert Thompson's documented version of events remained consistently exculpatory until he testified at the preliminary hearing, at which time he wildly contradicted his earlier consistent version of events. Shannon Roberts demonstrated a marked inability to consistently describe the shooter and until the time of trial, he repeatedly failed to select petitioner as the shooter. Although Shinn did cross-examine these witnesses as respondent noted in alleging no prejudice (Response at 28),

Shinn failed to competently examine these witnesses on their many contradictory statements. Given Shinn's failure to call experts and other exculpatory witnesses to testify on behalf of petitioner, he had a heightened responsibility to petitioner to seriously undermine the credibility of the state's witnesses. As a result of Shinn's failure to adequately question these witnesses, petitioner's jury lacked vital information that would have led them to discount, as unreliable, the testimony of Thompson, Beasley, Holt, and Roberts. Without the damning, albeit erroneous, testimony of these witnesses, the jury would have had no other choice than to have acquitted petitioner because the prosecution failed to meet its burden of proof.

5. Trial Counsel Unreasonably Failed To Challenge The Prejudicially Tainted Eyewitness Identifications Of Petitioner As The Shooter.

Trial counsel had a duty to move to suppress the identifications of petitioner because they were all irreparably tainted as a result of suggestive line-up procedures, media exposure, or other outside influences. *Tomlin v. Myers,* 30 F.3d 1235 (9th Cir. 1994). In light of the importance of these identifications to the prosecution's case (*see, e.g.* 95 RT 10895-98) Shinn's failure to suppress them was both objectively unreasonable and extremely prejudicial.

Had it not been for the unconstitutionally suggestive line-up - petitioner was the only suspect who was obviously beaten (Ex. 75 at 2072, ¶ 7; Exhibit 76, Declaration of Shequita Chamberlain at 2075, ¶ 10; Ex. 81 at 2091, ¶ 3; Ex. 85 at 2100, ¶ 2) - and the constant media focus on petitioner as the shooter - petitioner's photograph and likeness saturated the media (Exhibit 70, News Article, *Officer's Killing recounted, Five Arraigned on Variety of Charges in Case*, Los Angeles Times (June 8, 1983) at 2018) -

none of the prosecution's witnesses could or would have purported to identify him as responsible for the victim's death. Respondent's assertion that Holt and Beasley's ability to identify petitioner only after seeing his photograph, and not at the physical line-up, is proof that the impermissibly suggestive line-up was not prejudicial is unsound. Response at 28. Beasley and Holt were only able to identify petitioner's photograph *because* he stuck out at the line-up. Beasley, as well as other witnesses believed that petitioner was the only person who appeared beaten specifically because the police wanted them to select him as the shooter. Ex. 75 at 2072, ¶ 7; Ex. 76 at 2075, ¶ 10; Ex. 81 at 2091, ¶ 3; Ex. 85 at 2100, ¶ 2. Holt and Beasley's belief that the police believed petitioner to be the shooter was reinforced further when, after stating they were unable to identify anyone, they were immediately shown a photograph of petitioner and again asked if he was the shooter. Ex. 12 at 159; 2 CT 574; 68 RT 7568. *See, e.g., Foster v. California*, 394 U.S. 440, 443 (1969) (multiple exposures to suspect impermissibly conveyed the authorities' belief that "This is the man").

Trial counsel knew that Shannon Roberts had been unable to identify petitioner as the shooter for almost two years. Despite this, counsel failed to request the suppression of any potential identification of petitioner made by Roberts. Moreover, prior to Roberts's testimony, trial counsel was aware of the likelihood that Roberts had been coached as to whom to identify as the shooter. 86 RT 9828-29. Similarly, Robert Thompson was unable to identify petitioner until his testimony at the preliminary hearing, and then he only identified him because petitioner was sitting at the defense table. 3 CT 707. Given the great weight juries give to in-court identifications, trial counsel's failure to suppress the irreparably tainted in-court identifications of petitioner was patently unreasonable. Had he done

so, it is more likely than not that petitioner's jury would have returned a more favorable verdict.

6. Trial Counsel Unreasonably Failed to Argue Relevant Exculpatory Evidence.

Contrary to respondent's assertion, petitioner did not allege that trial counsel failed to make an eloquent, good, or even a coherent closing argument. Rather, petitioner alleged that trial counsel failed to make a constitutionally adequate closing argument in light of his failure to conduct a minimal investigation and fashion a defense of petitioner based on that investigation. Shinn's failure to adequately investigate the case forced him to rely on a reasonable doubt closing argument. Therefore, it was incumbent upon him to give the jury all the facts and theories necessary to find reasonable doubt as to petitioner's guilt. Although Shinn attempted to demonstrate a few discrepancies in the prosecution witnesses testimony and prior statements, he completely failed to use the available evidence to significantly impeach the credibility of these witnesses by demonstrating how the ever-changing witnesses' statements and testimony only changed in support of the prosecution's theory of the case. *See, e.g., Gentry v. Roe*, 320 F.3d 891 (9th Cir. 2002) (trial counsel ineffective for giving a perfunctory closing argument that, *inter alia,* ignored evidence helpful to his client). Trial counsel's failure to lay out for the jury the pro-prosecution evolution of the witnesses' statements, the several ways in which these statements continued to vary from the prosecution's theory, and how evidence presented by adversary witnesses supported petitioner's innocence withheld from the jury a compelling and highly credible theory with which to find abundant reasonable doubt of petitioner's guilt. But for trial counsel's failures, petitioner would not have been convicted of capital murder.

7. The Cumulative Effect Of Counsel's Errors And Omissions Requires Reversal Of Petitioner's Conviction.

By failing to address it, respondent conceded that the cumulative effect of the above instances of Shinn's ineffective assistance of counsel is sufficiently prejudicial to require reversal of petitioner's conviction.

## D. CLAIM FOUR: THE PROSECUTION VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS BY COMMITTING EGREGIOUS ACTS OF MISCONDUCT.

Respondent has failed to introduce any factual or legal material to refute petitioner's showing that but for the many instances of state misconduct, he would not have been convicted of capital murder. Individually and cumulatively, misconduct committed by the police and the prosecution prejudicially undermined petitioner's constitutional right to a fair trial.

1. Petitioner Was Severely Prejudiced By Discovery Violations.

A prosecutor has a duty to turn over to the defense evidence that is either exculpatory or impeaching. *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963); *Kyles v. Whitley*, 514, U.S. 419, 437 (1995); *In re Brown,* 17 Cal. 4th 873, 879 (1998). Petitioner has stated a prima facie case that the prosecution failed to comply with this constitutional obligation, thus ensuring petitioner's conviction.

The police and prosecution conducted many undocumented contacts with witnesses. Although post-conviction discovery is still on going, the petition specifically identified several areas in which the state failed to document important contacts with witnesses or failed to give such information to petitioner. 68 RT 7557; 68 RT 7609; Ex. 75 at 2072, ¶¶ 6, 9; Ex. 83 at 2095, ¶ 4; Ex. 85 at 2101, ¶ 3. Several of these contacts resulted

in material changes in the witness's statement that further supported the prosecution's theory of the case. 68 RT 7609; Ex. 83 at 2095, ¶ 4; Ex. 85 at 2101, ¶ 3. The prosecution's failure to disclose these contacts deprived petitioner of valuable evidence of the gross unreliability of the prosecution's witness's observations. The prosecution's failure to disclose material, exculpatory witness statements sufficiently undermines the confidence in petitioner's conviction that reversal is required. *Kyles v. Whitley*, 514 U.S. at 436-37.

2. Petitioner Is Entitled to An Evidentiary Hearing On The State's Destruction of Known Material, Exculpatory Evidence.

The state had a constitutional obligation to afford petitioner the opportunity to a meaningful defense. *California v. Trombetta,* 467 U.S. 479, 485 (1984). In *Trombetta*, the Court interpreted this obligation to encompass "what might loosely be called the areas of constitutionally guaranteed access to evidence." *Id.* (inner citations omitted). The state's failure to preserve, or purposeful destruction of, exculpatory evidence gives rise to a federal due process violation when, as here, the evidence was clearly exculpatory; at all times relevant the state was aware of the exculpatory value of the evidence; the state failed to preserve or destroyed the evidence in bad faith; and, petitioner had no access to comparable evidence, if comparable evidence existed. *Id.* at 489; *Arizona v. Youngblood,* 488 U.S. 51, 55-56 (1988).

Within days of the shooting, the police were aware of the location of the shirt petitioner wore during the crime. Ex. 86 at 2103. Mrs. Heights specifically informed the police that the shirt she found the day of the shooting belonged to petitioner. By this time, the police were actively collecting items of evidence to test for gun shot residue. *See, e.g.*, Exhibit

73, Los Angeles Police Department, Property and Analyzed Evidence Reports regarding gunshot residue. The police, aware that several witnesses described the shooter as repeatedly firing the gun as he advanced on the victim, knew that the shooters clothing would contain a sizeable amount of gun shot residue. 2 Supp. CT 528; 3 CT 675; 69 RT 7710, 7788. Similarly, the police were aware of the contradictory eyewitness descriptions of the shooter – some witnesses described someone similar in appearance to petitioner, and others described someone clearly other than petitioner as the shooter. In light of these facts, the police were aware that the lack of gun shot residue on petitioner's shirt would be highly exculpatory.

Petitioner therefore has stated a colorable claim that the police acted in bad faith in destroying, or failing to preserve, known exculpatory evidence, and that no other comparable evidence existed, and thus is entitled to an evidentiary hearing. *California v. Trombetta,* 467 U.S. at 48.

3. The State Employed Impermissibly Suggestive Identification Procedures.

The prosecution's case rested heavily on the identity of the shooter. Petitioner has presented a prima facie case that the impermissibly suggestive and highly unreliable identification procedures used by the police ensured that petitioner would be erroneously selected as the person who shot the victim. Gail Beasley, Marsha Holt, Robert Thompson, and Shannon Roberts, all witnesses who either did not witness the actual shooting or whose recollection of the shooting was distorted as a result of state misconduct, fell prey to the suggestive identification procedures. As discussed in Claim C.5., *infra*, petitioner amply demonstrated that the in-court identifications of him were based on pretrial identification procedures that were "so impermissibly suggestive as to give rise to a substantial

likelihood of irreparable misidentification." *Simmons v. United* States, 390 U.S. 377, 384 (1968); *Foster v. California*, 394 U.S. 440 (1969).

4. The State Knowingly Presented Material, False Testimony.

Petitioner has presented a prima facie case that by knowingly presenting and/or failing to correct material, false testimony the prosecution violated petitioner's constitutional and California statutory rights. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (federal constitutional violation for prosecution to knowingly present false testimony); *In re Sassounian*, 9 Cal. 4th 535, 543 (1995) (California Penal Code § 1473(b)(1) requires only that the false testimony is "substantially material or probative on the issue of guilt").

The prosecution not only allowed Shannon Roberts to falsely testify that petitioner was the person he saw shoot the victim, the prosecution then bolstered Roberts's false in-court identification of petitioner by eliciting false testimony that Roberts had identified petitioner as the shooter in an earlier pre-trial hearing. 69 RT 7783. Respondent did not deny that the prosecution offered false testimony regarding Roberts's ability to identify petitioner as the shooter. Response at 32.

Conceding that the prosecution did elicit material, false testimony from Roberts, respondent merely claims that petitioner suffered no prejudice because trial counsel elicited, much later under cross-examination, that Roberts did not identify petitioner at the earlier hearing. 69 RT 7783. Respondent's contention that petitioner suffered no prejudice from the prosecution's knowing presentation of false testimony is simply incorrect. Roberts's perjured, in-court identification of petitioner was highly damning, and such false testimony was never corrected by the prosecution or through cross-examination. The prejudice was compounded

when the prosecutor argued in his closing the importance of Roberts's false in-court identification of petitioner, going so far as to argue that it alone was sufficient evidence with which to convict petitioner of murder. 95 RT 10898.

The prosecution also used the false evidence of a previous identification by arguing that Roberts had previously described petitioner as the shooter. *Id.* Even this slippery use of Robert's knowingly perjured testimony was sufficiently prejudicial to raise a reasonable likelihood that the perjured evidence contributed to petitioner's guilt verdict. *United States v. Augurs*, 427 U.S. 97, 103 (1976).

Petitioner has pled, at a minimum, a prima facie case that he suffered grave prejudice as a result of the prosecution's use of perjured testimony. Respondent failed to demonstrate that the false testimony did not affect the outcome of the trial. *Id.* at 103-107. Petitioner, therefore, is entitled to an evidentiary hearing and, ultimately, relief on this issue.

5. The Prosecution Knowingly Argued False Evidence.

Respondent failed to address petitioner's allegation and evidence that the prosecution's argument of known false evidence was prejudicial. Similarly, respondent failed to address the corollary claim that trial counsel's failure to object to the argument of known false evidence constituted ineffective assistance of counsel. *See, e.g., Crotts v. Smith*, 73 F.3d 861 (9th Cir. 1996). By failing to address these claims, respondent has conceded that petitioner has established a prima facie case that the prosecution knowingly argued false evidence, and that trial counsel was ineffective for failing to object to such. *See, e.g., People v. Duvall*, 9 Cal. 4th 464, 477 (1995) ("Conversely when the return effectively acknowledges or 'admits' allegations in the petition and traverse which if true, justify the

relief sought, such relief may be granted without a hearing on the other factual issues joined by the pleading").

Accordingly, respondent's failure to provide any legal or factual basis to refute the allegations and subclaims set forth above entitles petitioner to habeas corpus relief or an evidentiary hearing at which he can establish his claims. *See, id.* at 477, 482; *In re Sixto*, 48 Cal. 3d 1247, 1252 (1989); *In re Lewallen*, 23 Cal. 3d 274, 278 (1979).

## E. CLAIM FIVE: UNCONSTITUTIONAL AND PREJUDICIAL JUROR MISCONDUCT OCCURRED DURING TRIAL.

Respondent offers no plausible factual or legal basis for challenging petitioner's prima facie case of prejudicial juror misconduct, and apparently has no argument whatsoever for disputing that the presence of an alternate juror during deliberations requires reversal of petitioner's conviction. Although respondent acknowledges petitioner's allegations regarding the improper participation of the alternate during deliberations (Response at 34), the Response nowhere attempts to factually or legally dispute that the resulting structural error invalidates petitioner's conviction. *See, id.* at 34-38.

Respondent's discussion of the remaining, documented instances of juror misconduct similarly wholly ignores the controlling standard of review, which *presumes* prejudice resulting from such misconduct and places the burden of rebuttal on respondent. *See, e.g., People v. Holloway*, 50 Cal. 3d 1098, 1110-1112 (1990); *People v. Marshall*, 50 Cal. 3d 907, 951-952 (1990). Instead, respondent repeats the unremarkable, essentially tautological principle that hyper-technical instances of misconduct involving only "trifling," inconsequential lapses by jurors do not warrant reversal of subsequent verdicts. Response at 35-36 (quoting *People v.*

*Stewart*, 33 Cal. 4th 425, 510 (2004)). A comparison of the documented, undisputed facts in this case with those in this Court's controlling decisions demonstrates that respondent cannot overcome the presumption of prejudice.

1. Juror Maxfield slept during the trial, absenting himself from the proceedings.

The only case cited by respondent, *People v. Bradford,* (15 Cal. 4th 1229, 1349 (1997), provides no support for the suggestion that petitioner has failed to plead a prima facie case for relief based on Juror Mansfield having slept throughout the trial. Response at 34-35. In *Bradford*, this Court found that where the trial judge noted a juror had been asleep on two occasions the judge did not abuse his discretion by failing to conduct an inquiry into juror misconduct given "the absence of *any reference* in the record to the juror's inattentiveness over *a more substantial period*." *People v. Bradford*, 15 Cal. 4th at 1349 (emphasis added). This Court observed that its holding was consistent with the reported cases "declin[ing] to order a new trial in the absence of convincing proof that the jurors were actually asleep during material portions of the trial." *Id.*

By contrast, petitioner's undisputed allegations, supported by declarations from multiple jurors, establish that Juror Maxfield consistently, habitually and improperly slept *throughout* petitioner's capital trial, effectively absenting himself from the proceedings. Exhibit 77, Declaration of Jay Marc Cochetti at 2077-78, ¶ 4; Exhibit 84, Declaration of Margaret Stichweh at 2098, ¶ 4; Exhibit 78, Declaration of Linda Comerford at 2080, ¶ 5.) This evidence not only satisfies petitioner's prima facia pleading

requirements, it shifts the burden to respondent, to rebut the presumption of prejudice raised by this documented misconduct.[2]

2. Juror Cochetti prematurely discussed, deliberated and decided the case.

Respondent does not dispute the factual allegations in the petition, or the declaration of Juror Cochetti detailing how he knowingly violated his oath as a juror by speaking with his parents "about the case during trial" so he could have "their opinion and guidance." Ex. 77 at 2077, ¶ 2. Neither does respondent offer any basis to dispute that prior to instructions and the formal commencement of deliberations, Juror Cochetti and other jurors routinely "discuss[ed] testimony" and "each other's viewpoints on what [they] had heard that day or the day before." *Id. at* ¶ 3 Nor does respondent dispute that "from talking about the case this way [Juror Cochetti] knew early on that several of the younger jurors, like [himself], felt that Mr. Gay

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[2] Respondent suggests that in addition to providing declarations signed under penalty of perjury from jurors who observed Juror Maxfield sleeping, petitioner must also "explain how a sleeping juror escaped the notice of the two defendants, their three attorneys, the prosecutor, and the judge," as well as providing a declaration from Juror Maxfield himself. Response at 34. Respondent, of course, cites no authority to support this suggestion. Nor is there any. Pursuant to the requirements for filing an informal response pursuant to Rule 60 in general, and with respect to the duty to rebut the presumption of prejudice arising from juror misconduct in particular, it is respondent's burden to "*demonstrate*, by citation of legal authority *and* by submission of factual materials, that the claims asserted in the habeas corpus petition lack merit and that the court therefore may reject them summarily." *People v. Romero*, 8 Cal. 4th at 742 (emphasis added). While petitioner thus has no obligation to obtain a declaration from Juror Maxfield admitting or denying any conduct, petitioner's counsel can also represent to the Court that it is our understanding that, regrettably, Juror Maxfield is deceased.

was guilty." *Id.* Respondent does not, and apparently cannot dispute that Mr. Cochetti's on going discussions with "a few of the other younger jurors" informed him of the point at which they all "made up [their] minds that Kenneth Gay was guilty"; a "belief" they carried with them "going into deliberations" and caused them to feel there was no "need to go over all the evidence" before reaching a verdict finding petitioner guilty. *Id.* at 2078, ¶ 7.

Instead, respondent suggests that Juror Cochetti's declaration presents only "vague" assertions of misconduct that are nevertheless "trifling." Response at 35-36. The suggestion is absurd. The declaration details an ongoing course of conduct violative of the requirement "that the jurors shall not converse among themselves, or with anyone else, on any subject connected with the trial." Penal Code section 1122; *see, People v. Jones*, 17 Cal. 4th 279, 310 (1998). The presumed prejudice of the misconduct clearly cannot be rebutted:

> [B]ias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [citations omitted] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. [citation omitted] The judgment must be set aside if the court finds prejudice under either test.
>
> *In re Carpenter*, 9 Cal. 4th 634, 653 (1995).

Here, prejudice is established under both tests. First, the substance of Juror Cochetti's discussions with his parents was "inherently and substantially likely to have influenced" him because that was the very purpose for which he knowingly violated his duty as a juror by speaking to

them about the case: i.e., he "wanted their *opinions* and *guidance*." Ex. 77 at 2077, ¶ 2 (emphasis added).

Second, Juror Cochetti has explicitly admitted that he knowingly violated his oath as a juror by discussing the case, which is sufficient by itself to cast doubt on his ability to serve as an impartial juror (*see, In re Hitchings*, 6 Cal. 4th 97, 120 (1993)), and he also explicitly admitted that he in fact prejudged the case. Ex. 77 at 2077, ¶¶ 2-3. In light of Juror Cochetti's admission, petitioner has unquestionably met the standard of showing that such prejudgment was "reasonably probable," and he is therefore entitled to relief. *In re Hitchings*, 6 Cal. 4th at 120-121.

Juror Cochetti's explicit description of how he and other jurors discussed and decided upon petitioner's guilt early on in the trial is also corroborated by the declaration of Juror Comerford. Ex. 78 at 2088, ¶ 5. Contrary to respondent's repeated suggestions, such egregious misconduct is a far cry from the *de minimus* contacts between jurors and others that this Court has excused as "trifling," albeit technical violations of a juror's duty. *See, e.g., People v. Stewart*, 33 Cal. 4th at 510 (during chance encounter in the ladies restroom a juror told the defendant's former girlfriend that she was "'a very nice looking (or attractive) lady'"); *People v. Jones*, 17 Cal. 4th at 310 (counsel not ineffective for failing to remove two jurors who briefly greeted mother and husband of murder victim).

The multiple, undisputed instances of juror misconduct created an unrebuttable presumption of prejudice, rendered petitioner's convictions and sentence unreliable, and require a grant of relief. *In re Hitchings*, 6 Cal. 4th at 120-121.

## II. CONCLUSION

For the forgoing reasons, petitioner respectfully requests the Court to issue an Order to Show Cause and, after permitting petitioner an opportunity to conduct discovery and prove his claims at an evidentiary hearing, grant relief as prayed for in the Petition.

Dated: March 14, 2005 Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: GARY D. SOWARDS

PATRICIA DANIELS

KIMBERLY DASILVA

Attorneys for Petitioner:
KENNETH EARL GAY

## VERIFICATION

I am an attorney admitted to practice law in the State of California. I represent petitioner herein, who is confined and restrained of his liberty at San Quentin Prison, Tamal, CA.

I am authorized to file the Reply to the Informal Response to Petition for Writ of Habeas Corpus on petitioner's behalf. I make this verification because petitioner is incarcerated in a county different from that of my law office. In addition, many of the facts alleged are within my knowledge as much as or more than petitioner's.

I have read the Reply and know the contents of the Reply to be true.

Executed under penalty of perjury on this 14th day of March, 2005, at San Francisco, California.

GARY D. SOWARDS

## PROOF OF SERVICE

Re: People v. Kenneth Gay, (Capital Case No. S130263 (L.A. Sup. Ct. No. A392702)

I, Genia Brown, declare that I am a citizen of the United States, employed in the City and county of San Francisco; I am over the age of 18 years and not a party to this action or cause; my current business address is 50 Fremont Street, Suite 1800, San Francisco, California, 94105.

On March 14, 2005, I served a true copy of the following documents:

**PETITIONER'S REPLY TO THE INFORMAL RESPONSE**

on each of the following in said cause by placing a true copy thereof in a sealed envelope, with first class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

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101 Second Street, Ste 600
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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 14, 2005, at San Francisco, California.

Genia Brown