IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

CURTIS F. PRICE,

On Habeas Corpus.

S069685

(Related Cases Nos. S018328 and S004719)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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

INTRODUCTION

Pursuant to this Court's letter of April 22, 1998, respondent provides this Informal Response to the Petition for Writ of Habeas Corpus.

STATEMENT OF THE CASE

The previous procedural history of this case is provided in the Respondent's Briefs filed in petitioner's direct appeal, and subsequent habeas corpus action, (S004719, S018328).

Petitioner currently has pending a Petition for Writ of Habeas Corpus in the United States District Court, Case No. C 93-0277 CAL.

STATEMENT OF FACTS

Respondent relies on the statement of facts set out in the Respondent's Brief in the direct appeal of this case in S004719. Additional facts as relevant are provided in the body and attachments to this response.

PETITIONER'S CONTENTIONS

1. Petitioner's convictions and sentence of death were obtained in violation of his federal and state constitutional rights due to pervasive governmental misconduct including the knowing use of perjured testimony by three key prosecution witnesses and the suppression of constitutionally material exculpatory evidence.

2. Curtis Price is innocent of the murder of Richard Barnes, and his continued incarceration, and sentence of death for that murder violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

3. The prosecutor in this case engaged in unethical and inappropriate conduct by having out-of-court contact with a member of the jury during the trial in this case in violation of petitioner's rights to due process and a fair trial by an impartial jury.

4. A member of the jury was biased against the defendant, dishonest on voir dire, and engaged in misconduct during the trial, in violation of petitioner's right to a fair trial by an impartial and unbiased jury, and to due process of law.

5. A member of the jury was biased against the defendant and dishonest in voir dire, in violation of petitioner's rights to a fair trial by and impartial and unbiased jury, and to due process of law.

6. Petitioner was denied his right to a fair trial because his trial attorney, Bernard DePaoli, labored under an actual conflict of interest which adversely affected his performance at trial.

7. In this case a number of interrelated issues led to a complete breakdown in the adversarial process, and in combination deprived petitioner of his right to a fair trial and to due process of law.

8. Curtis Price is innocent of the murder of Elizabeth Hickey, and his continued incarceration, and sentence of death for that murder violates the Fifth, Sixth, Eights and Fourteenth Amendments to the U.S. Constitution.

9. The California Statutory scheme under which petitioner was sentenced to death is unconstitutional.

10. The actions or inactions of trial and appeal counsel deprived petitioner of his right to the effective assistance of counsel.

RESPONDENT'S ARGUMENT

1. Petitioner does not demonstrate any prejudicial misconduct by the prosecution.

A. Michael Thompson.

B. Clifford Smith.

C. Janet Myers.

D. Summary.

2. Petitioner's newly discovered evidence is legally and factually insignificant.

3. Petitioner shows no misconduct by the prosecutor in this case.

4. Petitioner shows no misconduct by juror Southworth, nor any mishandling of the issue by the trial court.

5. Petitioner shows no prejudicial misconduct on the part of juror Debra Kramer.

6. Petitioner shows no incompetence or conflict of counsel with regard to Mr. Depaoli's treatment of a potential juror.

7. Petitioner fails to show a complete breakdown in the trial process which would require reversal without a showing of prejudice.

8. Petitioner's claim of "actual innocence" is easily rejected.

9. The California death penalty law is constitutional.

10. Petitioner has failed to meet timeliness requirements for pleading numerous of the issues in this petition.

ARGUMENT

I.

PETITIONER DOES NOT DEMONSTRATE ANY PREJUDICIAL MISCONDUCT BY THE PROSECUTION

Petitioner begins by accusing the prosecution of misconduct in the handling of certain witnesses. Petitioner claims both that certain impeaching materials were suppressed, and that the witnesses were allowed to testify perjuriously as to the extent of benefits they received in exchange for their testimony. We will set out the law in detail on these issues, and we will discuss petitioner's meager factual showing. However, the bottom line of these issues is that no prejudice could possibly have accrued. The evidence spread before the jury emphatically impeached the credibility of these witnesses. Any question of whether supplemental impeachment, not directly contradicting any statement to which they testified, may have been available is insignificant.

A. Michael Thompson

Petitioner begins by attacking the prosecution handling of Michael Thompson. Thompson was apparently being housed in the Los Angeles County Jail before and after his testimony in this case. Petitioner claims that Thompson's jail conditions were unusually favorable, and that this situation was suppressed by the prosecution. Petitioner further claims that the prosecution knowingly allowed Thompson to deny on the stand that his living conditions were unusually favorable, and that this had any effect on his motivation to

testify. We will begin by setting out the legal background for the claims raised in this argument.

The case law first establishes two broad categories for analyzing such claims. Claims of suppression of evidence are examined to determine whether the evidence was material under *Brady* v. *Maryland* (1963) 373 U.S. 83, 87. On the other hand, evidence that perjured testimony was used is analyzed under a standard requiring the somewhat lesser showing that there is a reasonable likelihood that the false testimony affected the verdict. These standards are discussed in *United States* v. *Endicott* (9th Cir. 1989) 869 F.2d 452, 455 as follows:

> "Under the Due Process clause, criminal prosecutions must comport with prevailing notions of fundamental fairness. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). Indeed, the deliberate deception of the court by the presentation of false evidence is incompatible with rudimentary demands of justice. *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 765, 31 L.Ed.2d 104 (1972). Thus, if the prosecution knowingly uses perjured testimony, or if the prosecution knowingly fails to disclose that testimony used to convict a defendant was false, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury verdict. *United States v. Bagley*, 473 U.S. 667, 678-80, 105 S.Ct. 3375, 3381-83, 87 L.Ed.2d 481 (1985). On the other hand, in the absence of the prosecution's knowing use of perjury, new evidence is material under the *Brady* standard, warranting a new trial, only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *United States v. Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383."

The first category, knowing use of perjured testimony, is also divided into two categories. Where the perjury was known by prosecutors, or should have been known by them, the reasonable likelihood standard applies. In the absence of fault on the part of the

prosecutors, the standard reverts to the *Brady* type materiality analysis. The cases establish that, beyond knowing use of perjured testimony, where the actual prosecutors involved did not know of the perjury, but others on the prosecution team did have such knowledge, the knowledge is imputed to the prosecutors. In *In re Brown* (1998) 17 Cal.4th 873, 879, this Court stated that the prosecutor is responsible for others on the "prosecution team" in the "same government". *In re Brown, supra*, 17 Cal.4th at p. 879. There, the prosecutors in the district attorney's office were found to be responsible for exculpatory material known to the sheriff's department investigating the case. Similarly, in *United States* v. *Osorio* (1st Cir. 1991) 929 F.2d 753, 761 the United States attorney was found to be responsible for knowledge of agents of the FBI. In *United States* v. *Antone* (5th Cir. 1979) 603 F.2d 566 state agents made payments to a witness in a federal prosecution. However, the court there found that the case was a joint a federal and state investigation, with pooled resources. Examining the case on an individual basis, the court found that the state investigators were agents of the federal prosecutors, and therefore were part of their team. The court thus used the "no reasonable likelihood" standard, but concluded that the result would not have been different had the information been disclosed.

Thus, the questions here are as follows: First, petitioner must show the existence of facts about the treatment the witnesses received from the prosecutors and then, if so, petitioner must show that that information would have been material, and would have had a reasonable probability of changing the verdict. Next, petitioner may attempt to show that perjured testimony was in fact adduced at trial, and that the individual prosecutors at issue here were responsible for

that perjured testimony, because the prosecution team was so intimately tied with the Los Angeles County Sheriff's Department that the prosecutors were charged with knowledge of benefits afforded by the sheriff's department to the witnesses. Finally, even if petitioner can show imputed responsibility on the part of the prosecutors, petitioner must show that the disclosure of such evidence to the jury would, with reasonable likelihood, have had an effect on the verdict herein. We turn to these factual issues.

With regard to Michael Thompson, petitioner refers broadly to a large range of claimed benefits Thompson received from the prosecutors. However, when all of petitioner's exhibits are in fact examined, the claim of any possible benefits comes from only two sources. The first is self-serving hearsay in statements to the parole board by the alleged perjurer Thompson himself, in which Thompson brags of the benefits he received in the Los Angeles County Jail. (See Pet. Exhs. 20, 21, 22, 24.) The only other source of claimed first hand knowledge is the declaration of Thompson's wife, in which she brags about similar benefits received by Thompson. In particular, Thompson's wife, Patricia Porter, bragged that Thompson had a three-cell suite in the county jail, that Thompson had free access to those cells at all times, that Thompson received contact conjugal visits from Ms. Porter, that Thompson was allowed to use a laptop computer, and that Thompson had unlimited phone privileges. Porter describes certain other conditions, including a claim that Thompson was allowed to partake of a Thanksgiving turkey dinner which Porter provided in the jail cell, including the use of carving knives. (See Pet. Exh. 3.)

Beyond this, petitioner claims that he has established that Thompson received monetary benefits, but no real evidence of those is

present. Thompson claimed that he received some benefits from a business set up by Ms. Porter, that he was responsible for paying part of a down payment for a house, and that he himself paid for numerous college courses. However, no actual evidence of such money changing hands is present. While Thompson claims that he was in some way responsible for this money, he also admits that he was acting as an employee of Ms. Thompson's businesses on the outside of the jail, and that he received a nominal salary for his work. As such, there is nothing beyond speculation to show that any supposed contributions made by Thompson were anything more than paper transactions. Most emphatically, there is no evidence, beyond petitioner's raw speculation, that any money was funneled to Thompson by government authorities for any purpose other than the witness relocation and relative protection purposes about which the jury was informed.

We would note in particular the Declaration of Anthony L. Casas (Pet. Exh. 2), which at first seems somewhat impressive given Mr. Casas' apparent qualifications. But, on closer review it becomes obvious that Mr. Casas' declaration is based entirely on hearsay. Mr. Casas professes absolutely no personal knowledge of Thompson's jail conditions at any time.

Although it is meager, there is some evidence, stemming almost wholly from the affidavit of Thompson's own wife, that Thompson may have had unusually beneficial conditions in his Los Angeles County Jail cell. The declarations provided here by Thompson himself in his parole applications and hearings are wholly self-serving hearsay, and are thus untrustworthy and inadmissible in any forum. We would also note that many of the claims made about Thompson's jail conditions are unimpressive. For example, it will be recalled that petitioner himself

had a three-cell suite to prepare for trial in the Humboldt County Jail, a much greater amenity considering the much smaller facility in Humboldt County.

Petitioner points to certain questions answered at trial by Thompson in which he states that he had received no promises from anyone in law enforcement. (See Pet. at p. 30.) Further, Thompson testified that he was in protective custody, was locked down 24 hours a day, and that protective custody did not offer better amenities than a general prison cell would have. (See Pet. at p. 44.) Petitioner also points to what he claims is a memo from the log files of the Los Angeles County Jail (see Pet. Exh. 15) which claims that Thompson was demanding "some consideration" before he would testify against numerous ex-Aryan Brotherhood members. However, that memo states only that Thompson required "proper housing" so that he could have access to his resources and the peace and quiet required to prepare for complex trials. (Once again, these are exactly the demands petitioner repeatedly pressed during his own trial.) The memo concludes that "his requests are minor concessions to law enforcement and very necessary." The memo contains no hint of the alleged amenities that are described in the declaration of Thompson's wife, Ms. Porter.

Applying the proper law to these meager facts, the first question to be determined is whether the prosecution in petitioner's case in Humboldt County was chargeable with knowledge of any supposed additional amenities afforded Thompson in the Los Angeles County Jail. Petitioner has the burden of making a prima facie showing on this ground, and he wholly fails in so doing. (See *People* v. *Romero* (1995) 8 Cal.4th 728, 737.) It will be recalled that the Los Angeles County authorities had refused to prosecute petitioner on the Los

Angeles murder of Richard Barnes. While it is possible that the deputy attorney general and the Humboldt County Deputy District Attorney who prosecuted petitioner in Humboldt County may have visited Thompson in the Los Angeles County Jail, petitioner provides no documentation of such a visit. (We believe Mr. Bass did make one brief visit to Thompson in the Los Angeles County Jail.) More importantly, even had such a visit occurred, petitioner does not explain how those prosecutors would have had any reason to suspect that Thompson was receiving contact visits, turkey dinners, or any other amenities from the Los Angeles County Sheriff's Department. As such, on the issue of whether knowledge of any possible amenities granted to Thompson in Los Angeles County were known to the Humboldt County prosecution team, petitioner has made an inadequate showing. We therefore assert that any possible issues in this case must be analyzed only under the *Brady* reasonable probability standard. However, as we now show, the standard of review is really insignificant on the record in this case.

The entire premise of petitioner's argument is that had the jury known that he was receiving favorable treatment in the Los Angeles County Jail, it would have had reason to believe that his testimony was motivated by such treatment, and that therefore his testimony in the case would have been impeached. However, any such impeachment would have been insignificant compared to the mountain of impeachment evidence that actually was adduced against Thompson at petitioner's trial. It will be recalled that the direct appeal in this case was litigated to a monumentally vigorous degree by both sides. However, one of the very few facts emphatically agreed to by both petitioner and respondent in that direct appeal was that the credibility

of Thompson, Clifford Smith, and Janet Myers was virtually nil. For instance, in his argument asserting the thinness of the evidence in the case against him, petitioner's counsel in the direct appeal spent more than a dozen pages detailing the breadth and depth of the impeachment evidence adduced before the jury against Thompson. (See AOB at p. 711 et seq.) Included in that impeachment were the fact that Thompson admitted to numerous premeditated and cold-blooded murders, to numerous instances of perjury, to a massive ability to manipulate the criminal justice system to his own ends, to monumental treachery against his current and former colleagues which was additionally marked by an utter lack of conscience, as well as Thompson's continuing motivation to lie against Aryan Brotherhood gang members so as to please the prosecution, the prison authorities, and eventually parole authorities. Petitioner asserted there that, given the self-evident bankruptcy of Thompson's testimony, the case against petitioner to the extent it was based on that testimony, was insubstantial.

Respondent disagreed that Thompson was a crucial witness. However, respondent did not disagree that Thompson's credibility was bankrupt. In the Respondent's Brief, respondent affirmed and extended petitioner's indictment of Thompson's credibility. Respondent in particular pointed out that Thompson demonstrated before the jury that he still believed, even while he testified in petitioner's trial, that it did not constitute perjury to lie under oath if it was difficult to prove that the testimony was a lie. Further, Thompson stated that he still maintained hopes of pleasing parole authorities sufficiently to secure release from prison, so he could return to more lucrative forms of

organized criminal activity, such as extortion and murder. (See RB at p. 275 et seq.)

In sum, no rational juror could have convicted anyone of anything solely on the word of Thompson. Any arguments that any minor amenities in the Los Angeles County Jail were not disclosed to the jurors is completely insignificant given the murders, perjuries, and plans for future crimes to which Thompson freely testified in front of petitioner's jury. Further, neither petitioner nor the jury had any doubt that his testimony in the case would be useful to petitioner in future parole hearings, and to his treatment by prison authorities.

In sum, Thompson's credibility was thoroughly impeached. Any minor facts asserted here by petitioner add nothing to that reality. No issue is shown.

B. Clifford Smith

With regard to the previous claims as to witness Thompson, petitioner at least provided certain sworn statements by Thompson's wife in support. As to witness Smith, petitioner relies instead solely on speculation and sinister allegations. Petitioner concedes that Smith informed the jury that part of his deal included protection for his family members, specifically his mother and brother. Petitioner claims that, in addition, Smith was hiding the fact that authorities were offering him the benefit of a deal in which his brother would receive a beneficial plea bargain to outstanding charges. Petitioner provides no convincing evidence that these allegations are correct.

First, the materials petitioner provides as Exhibit 35 reveal that as early as 1984, long before Smith had turned on his Aryan Brotherhood members, trial courts sentencing his brother Jimmy were

aware that "snitches" such as Jimmy were in effect penalized for such testimony in terms of their sentence length. This was because a "snitch" would be housed in protective custody, where he would receive only one-third off of his sentence for conduct credits, as opposed to a mainline inmate who worked at a job, and was thereby afforded one half off of his total term. In that 1984 case, Jimmy received a two year mitigated term, rather than a longer sentence, to compensate him for the loss of credits he would suffer due to his protective custody status, which arose from his helping authorities. (See Exh. 35 at p. 5 et seq.)

The deal of which petitioner complains here occurred in 1985. Petitioner claims Jimmy was arrested for strong-armed robbery in Bakersfield on May 6, 1985. Petitioner's documentary basis for these claims is spotty. Petitioner does provide a transcript of a hearing on February 28, 1986, in which the trial court stated that it was changing Jimmy's sentence on a grand-theft-from-the-person count that was previously imposed on February 7, 1986. The trial court indicated that that earlier sentence was the low term of 16 months in state prison, concurrent with other parole violation terms. (Exh. 35 at p. 16.) The trial court indicated that pursuant to requests by the prosecution and the Los Angeles County Sheriff's Department, he was granting Jimmy's request to change that state custody to local custody, for reasons of Jimmy's safety. However, contrary to petitioner's implications, the trial court made it plain that it was attempting to match the length of the local probation term sentence with the actual time Jimmy would have spent in state custody on the previous sentence. As we have stated, the idea that a "snitch" should be compensated for the protective custody "penalty" with regard to his conduct credits was not controversial, and had nothing to do with Clifford Smith's testimony in this case. Jimmy

was thereby sentenced to one year in local custody, which the court believed was the equivalent of the previous prison term. Petitioner also points out that, pursuant to his request to be with his sick mother, Jimmy was released about two weeks early from his county jail term on that count.

Later in 1986, Jimmy was apparently arrested and sentenced for further crimes after his release from the local custody in April. According to a transcript provided by petitioner, on December 9, 1986, Jimmy was sentenced to a total term of five years and eight months for various crimes. Once again, Jimmy received a slight adjustment because of his expected housing in protective custody.

More importantly to petitioner, at that hearing, Los Angeles Sheriff's Sergeant Hayward Barnett testified that the previous judgment in February of 1986, had been the result of a plea bargain that had been motivated by promises to Clifford Smith. (See Exh. 35 at p. 43.) Specifically, Barnett testified that Jimmy had been offered "something less than robbery so he could be housed here at Lerdo for his safety . . . ." As was made clear in the February transcripts, the housing at Lerdo was a local county commitment, and was imposed rather than commit Jimmy to state prison for the same crimes. This reading of the transcript reveals nothing sinister. Clifford had specifically bargained for the safety of his brother, and Sergeant Barnett had attempted to secure that safety by inducing Kern County authorities to allow Jimmy to plea bargain down to a sentence which could be served locally. However, petitioner detects more sinister implications. Petitioner claims that the transcripts reveal that the main motivation in the plea bargain was not to allow local custody, but rather was to reduce Jimmy's total sentence significantly.

Unfortunately, the transcripts provided by petitioner provide no such showing. Barnett's testimony under oath was merely that local custody was the goal to ensure Jimmy's safety. Petitioner's entire argument on this point essentially consists of the sentence "Since Jimmy Smith had a prior felony commitment, and was on parole when he committed the strong-armed robbery, under normal circumstances, *he would probably have been sentenced to the maximum term.*" (Emphasis added; Pet. at pp. 71-72.) A statement of what "probably" might have happened is certainly far from the sort of proof which would carry petitioner's burden to show the heinous misbehavior petitioner postulates in this case. Further, petitioner admits that with a one-half reduction in his term, even a mid-term sentence would have left petitioner with a total of 18 months in state prison. Given that he was sentenced to a year in local custody, the entire amount of time at issue is well under one year in custody. It simply is not reasonable that so many prosecutorial authorities and law enforcement personnel would suppress significant evidence, risking their careers and perhaps worse, merely to hide a sentence reduction of less than one year. Petitioner's allegations of misbehavior by Sergeant Barnett, the Kern County Authorities, and the Humboldt County District Attorney, and the state Attorney General's Office on this ground are simply unproven.

At any rate, as petitioner points out, this Court has previously considered issues regarding suppression of evidence of inducements to Clifford Smith. This Court, on direct appeal, found that the trial court improperly limited defense questioning of Smith as to the extent of the prosecution's monetary and other efforts to protect his family members. However, this Court found that Smith had testified that he decided to cooperate with the prosecution because previously he believed he

would die within seven years "either as a result of conviction and execution for a capital crime or as a result of prison violence. Because of his decision to cooperate, Smith believed he now had 'something to look forward to.'" (*People* v. *Price* (1991) 1 Cal.4th 324, 423.) The Court concluded that in light of these "more substantial benefits" the limitation on cross-examination was harmless beyond a reasonable doubt. Similarly, Smith's belief that his life was now worth living was more significant than a possible one year reduction in a prison sentence for his jailbird brother, a brother who within months was back in prison for a substantial period of time. Further as discussed in Appellant's Opening Brief at pages 711 et seq. and in Respondent's Brief at pages 275 et seq., the jury well understood the questionable credibility of anything Smith might say. Further, descriptions of the impeachment of Clifford Smith are provided in the RB from the direct appeal at pages 29 et seq. and 184 et seq. Like Thompson, Smith was an admitted multiple murderer and liar who took pride in manipulating other inmates, and the criminal justice system as a whole. The jury was well aware that testimony by Smith, standing by itself, was worthless as proof against petitioner. On this ground as well, petitioner utterly fails to show any possible prejudicial effect from the exclusion of some speculative evidence of Smith's involvement in a slight reduction in his brother's jail term. Once again, no issue is established.

C. Janet Myers

Petitioner next claims that significant information was withheld from the defense which would have allowed a more effective attack on the credibility of Janet Myers. Myers was the heroin addict and Aryan

Brotherhood "runner" who testified she drove petitioner around the Los Angeles area shortly before the murder of Richard Barnes. (See Statement of Facts from Respondent's Brief on direct appeal at pp. 10 et seq.) Petitioner does not deny that the jury was aware that Myers was a habitual drug addict and jailbird whose convictions were numerous over her entire adult life. Further, the jury knew that Thompson had induced Myers to turn against petitioner by telling her that she would be surprised at what authorities could do for her if she cooperated. Myers specifically told the jury that her prison sentence had been shortened by about two months when she agreed to testify against petitioner. Myers also admitted monetary payments for relocation and protection. (See RB in direct appeal at pp. 30 et seq.)

Petitioner attacks the prosecution for failing to divulge that Myers had unadjudicated misdemeanor cases in San Bernardino County which, if all found true and all sentenced consecutively, could have resulted in an 18 month jail term. Whether or not the prosecution was aware of these cases is unestablished, but seems once again insignificant. Given the impeachment already adduced against Myers, the jury was aware that it could not rely on her for any information which was not thoroughly corroborated. Further, petitioner admits that the jury was aware that Myers had cases pending on which she had been convicted, and on which she was awaiting sentencing at the time she testified in this case. It seems plain that cases on which the witness had been convicted, but not yet sentenced, gave the witness a far greater motive to lie and curry favor with the prosecution than minor cases in which her guilt had not yet been adjudicated. As such, the supposedly suppressed information on which petitioner bases this claim is plainly cumulative and insignificant on this record. Once again, the

jury had all the tools it needed to evaluate Myers' credibility. No error is shown.

D. Summary

In sum, petitioner provides very meager evidence here, amplified by unsupported speculation, to assert that the prosecution suppressed certain evidence which could have aided the defense in impeaching Thompson, Smith and Myers. To the contrary, any evidence which was allegedly suppressed was decidedly cumulative. While the defense does not claim that any of the suppressed evidence directly impeached the *testimony* of Thompson and Smith, it is hard to imagine any witnesses being more thoroughly impeached as to their character for honesty. Both admitted numerous murders, numerous attempts to manipulate the system by committing perjury, a lack of understanding of the concept of truth (by the testimony that statements were not perjury if they could not be disproved,) and the obvious motivation to curry favor with prison and prosecution authorities so as to lessen their heavy prison sentences. Similarly, the jury knew Myers had sentencings to face, and had already received time off on a prison sentence.

Beyond this, we rely on the Statement of Facts either in the Respondent's Brief on direct appeal or in the court's own opinion in *People* v. *Price*, *supra*, 1 Cal.4th at p. 324. For example, it will be recalled that the presence of petitioner in Los Angeles around the time of the murder of Richard Barnes was not established solely through the testimony of Janet Myers. Beyond on the fact that other witnesses corroborated Myers' testimony, the most striking evidence was petitioner's own signature on gasoline charge slips, two of which

showed that he was within miles of Barnes' home both on the day of and the day before Barnes' murder. By contrast, such testimony as the "hit or miss" letter, and Myers' hearsay recollection of petitioner's statement that everything had gone all right, were plainly weak reeds on which to base a prosecution. Far more strength was provided by petitioner's own writings, such as the one in his wallet containing Richard Barnes' address, and the notation "send a subpoena to him," which the jury understood was Aryan Brotherhood slang for committing a murder.

In sum, the tall tales told by Thompson, Smith and Myers had no weight standing on their own. When corroborated by petitioner's writings, and such documents as oil company receipts, they gave some color to the prosecution's case. However, it was the documentary evidence and the other items discussed in the statement of facts which provided the conclusive proof in this case. Thus, any evidence petitioner imagines was suppressed by the prosecution was harmless both because it was decidedly cumulative, and because the testimony of these three jailbirds and liars needed no further impeachment. No issue is shown.

II.

PETITIONER'S NEWLY DISCOVERED EVIDENCE IS LEGALLY AND FACTUALLY INSIGNIFICANT

Petitioner next claims that he has newly discovered evidence which has some effect on his conviction. The standard for relief based on newly discovered evidence is extremely strict. Petitioner makes no serious showing of adequate new evidence.

In *In re Clark* (1993) 5 Cal.4th 750, 766 this Court stated the standard for relief based on newly discovered evidence:

> "For the same reasons, whether raised in a petition for writ of habeas corpus or by coram nobis, newly discovered evidence is a basis for relief only if it undermines the prosecution's entire case. It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury. (*In re Hall* (1981) 30 Cal.3d 408, 417 [179 Cal.Rptr. 223, 637 P.2d 690]; *In re Weber* (1974) 11 Cal.3d 703, 724 [114 Cal.Rptr. 429, 523 P.2d 229]; *In re Branch* (1969) 70 Cal.2d 200, 215 [74 Cal.Rptr. 238, 449 P.2d 174].) '[A] criminal judgment may be collaterally attacked on the basis of "newly discovered" evidence only if the "new" evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability.' (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246 [275 Cal.Rptr. 729, 800 P.2d 1159].)" (See also *Carriger* v. *Stewart* (9th Cir. 1996) 95 F.3d 755, rehg. granted 106 F.3d 1415.)

Here, petitioner presents the classic "newly discovered evidence" of a hearsay confession by a dead man. In particular petitioner asserts that a convicted murderer, career criminal and Mexican mafia prison gang member, Danny DeAvila, confessed to the crime. Petitioner asserts that DeAvila is now dead, and therefore cannot be examined about his confession. The confession is being relayed to this Court through the declaration of one Salvador

Buonrosto, another career criminal, murderer, and Mexican Mafia member. Buonrosto's affidavit (see Pet. Exh. 4) claims that, while in jail, DeAvila told Buonrosto that he had some drinks with "Steve Barnes' dad", and that he "went out and 'took care of him.'" Buonrosto stated that he "had no doubt" that DeAvila meant that he had killed Richard Barnes. Petitioner claims that the supposed confession has plausibility because Steve Barnes was threatening to "snitch" against not only the Aryan Brotherhood, but also the Mexican Mafia. Petitioner once again brings out the declaration of his prison expert, Mr. Casas, and claims that such an execution would be more likely on the part of Mexican Mafia members than Aryan Brotherhood members. (See Pet. Exh. 2.)

It seems plain that the supposed confession is both intrinsically and extrinsically unreliable. First, it is very questionable whether petitioner has in fact produced any "evidence" whatsoever. The only possible argument that the hearsay statement of DeAvila, as contained in Buonrosto's declaration, forms evidence (a point not discussed by petitioner) is that the statement is a statement against penal interest under Evidence Code section 1230. However, we do not believe that such argument would prevail. Section 1230 insists that the statement be so far against penal or social interests "that a reasonable man in his position would not have made the statement unless he believed it to be true." DeAvila allegedly made the statement to a fellow gang member, one who presumably, as with the Aryan Brotherhood, shared a blood oath of confidentiality and trustworthiness. Plainly, making a claim of commission of a crime to a fellow gang member would not reasonably lead the declarant to believe that he was in any risk whatsoever of criminal prosecution. (See *People* v. *Frierson* (1991) 53 Cal.3d 730, 745;

People v. *Blankenship* (1985) 167 Cal.App.3d 840, 848.) Further, far from subjecting DeAvila to the risk of social disapproval, it is plain that bragging to a fellow gang member that one had killed the relative of a "snitch" would only increase one's status within the criminal community. For these reasons, DeAvila's statement falls well without the exception for declarations against interest, and forms no evidence whatsoever in this case. Further, the extremely low level of trustworthiness of the statement plainly rules it out as the sort of evidence which could cast doubt on a valid criminal conviction.

A cursory examination of the content of the statement likewise shows it is weakness as evidence. DeAvila allegedly stated that he had drinks with Richard Barnes, and then "went out and 'took care of him'". This does not match the facts of the crime. In fact, it was plain that Richard Barnes travelled from the bar where he was drinking the night of his death, to a convenience store, where he purchased ice cream and alcohol, and then returned to his home. It will be recalled that the bag containing the quart of ice cream was found neatly on his kitchen counter, with the upright container of ice cream having melted but not spilled overnight. Thus, rather than having taken Richard Barnes out and killed him, as the DeAvila statement suggests, it is far more likely that Barnes' killer actually was waiting for him when he returned home from the convenience store. Thus, DeAvila's statement is not even internally probative of his guilt.

At any rate, given the high standard of proof necessary for relief on the basis of newly discovered evidence, petitioner's issue can easily be rejected. DeAvila's boast is probably so untrustworthy so as not to constitute evidence at all. It certainly is not trustworthy enough

to overcome the high standard required for relief based on newly discovered evidence. This issue may be rejected.[1/]

1. Petitioner tags on to this argument a claim that the impeaching evidence discussed in argument I is also newly discovered evidence requiring relief. For the reasons we discussed in that argument, that impeachment evidence was insignificant, and likewise will not call for relief under this different rubric.

III.

PETITIONER SHOWS NO MISCONDUCT BY THE PROSECUTOR IN THIS CASE

Petitioner next sets out a wholly unsupported, but gravely inflammatory accusation against the prosecutor, Ron Bass, in the trial in this case. Petitioner refers to a bartender in Eureka, one Robert McConkey. Petitioner claims that McConkey related to his attorneys a story concerning Bass and a sitting juror in the case Zetta Southworth. Petitioner accompanies the claim with no evidence, beyond hearsay statements from his attorneys. Petitioner also provides a sworn statement from his investigator, which quotes the bartender McConkey as completely disavowing the story. Petitioner nevertheless presents the inflammatory allegations for this Court. We believe it is obvious the allegations must be firmly rejected.

Summarily stated, petitioner alleges that one day during the trial, after court, Bass went to a bar in Eureka. There, Bass became aware that a sitting juror, Southworth, who plainly had problems with alcohol, worked in the kitchen. Bass allegedly sent drinks, and then money, back to Southworth, through the bartender McConkey. McConkey stated Bass told him to relate to Southworth that she should find petitioner guilty, and McConkey allegedly relayed that information to Southworth.

In support of these allegations, petitioner adduces only declarations by his counsel which claim to relate hearsay from McConkey describing these events. Petitioner notably also includes an affidavit from his own investigator, who, when he approached McConkey to sign a declaration, was firmly told by McConkey that the entire story was a fabrication, and had no truth. (See Pet. Exh. 10.)

Given that petitioner has no actual evidence, but merely rank hearsay, we believe the issue may be rejected out-of-hand. Nevertheless, considering the seriousness and scurrilous nature of the allegations, we felt investigation of the incident was required. Our Investigator, Special Agent Jeff Lierly went to Eureka, located the bartender McConkey, and attempted to interview him. In his report, regarding the interview, attached as exhibit A, Special Agent Lierly makes it plain that McConkey strongly stated that the incident never happened, that the entire story was a yarn, and that he never intended anyone to take it seriously. McConkey further related that he considered himself an alcoholic, that he "'wakes up drunk every morning'", and that he had no real memory of the years during which the trial took place. McConkey stated that when he told the "attorney" the story "'as a joke'", he had been drinking.

Thus, McConkey's credibility is nil. Although he perhaps told a yarn about incidents during the trial, he has twice denied the reality of those events, and, at least strongly implied, that the "attorney" to whom he related the story should have been aware that it was not to be taken seriously.

It is very difficult to understand how this issue can be labelled colorable. At the very minimum, petitioner has failed in his burden of proof in this habeas corpus proceeding showing any reasonable possibility that this issue can be proved based on the evidence he has cited. (See *In re Visciotti* (1996) 14 Cal.4th 325, 351; *People* v. *Duvall* (1995) 9 Cal.4th 464, 474.)

In sum, petitioner's allegations are entirely unsupported by plausible evidence. This Court may easily conclude that petitioner's

showing is deficient on this issue. No claim for prosecutorial misconduct is made out.

IV.

PETITIONER SHOWS NO MISCONDUCT BY JUROR SOUTHWORTH, NOR ANY MISHANDLING OF THE ISSUE BY THE TRIAL COURT

Petitioner here repeats allegations which are identical to those in his direct appeal, in which he sets out the alcohol-related history of one of the sitting jurors, Zetta Southworth. Apparently recognizing the weakness of his allegations, petitioner adds on the allegations in the previous argument, and claims that combined, an issue is made out. Petitioner is mistaken.

The claims as to the alcohol problems, and driving under the influence arrests, of juror Southworth were thoroughly discussed in the direct appeal. Petitioner set out his claims at length, and respondent responded at Respondent's Brief page 106. The primary points to be made as to the issue are two. First, all of the alcohol related problems and arrest history of the juror were thoroughly aired on the record in front of the trial court. The decisions made by the trial court were well within its area of discretion, and should be respected. Second, as this Court ruled in its previous opinion, the failure by defense counsel to exhaust his peremptory challenges waived the issue. (*People* v. *Price*, *supra*, 1 Cal.4th at p. 401.) As such, these allegations add up to nothing. To this vacuum, petitioner attempts to add the allegations set out in his previous argument in the petition. As we demonstrated in our response to that argument, see arg. III *supra*, those allegations similarly add up to nothing. The result of this attempted addition is that petitioner has utterly failed to set out a colorable issue.

V.

PETITIONER SHOWS NO PREJUDICIAL MISCONDUCT ON THE PART OF JUROR DEBRA KRAMER

Petitioner's next argument once again raises very complex legal issues, but ones which can be resolved by simple factual analysis. Petitioner claims a juror who sat only as an alternate during the guilt phase, but as the foreperson during the penalty phase, Debra Kramer, withheld material information during voir dire. In fact, petitioner does not establish that the juror concealed anything, much less anything material.

The facts petitioner claims were concealed may be divided into two parts, namely, facts regarding Kramer's relationship with the prosecution, and facts regarding Kramer's relationship with the defense. Beginning with the latter, petitioner's most sensational claim is that Kramer concealed that she and defense attorney Bernard DePaoli had a sexual relationship 10 years prior, and that DePaoli provided Kramer with undisclosed financial assistance. Under scrutiny, these facts lose their force.

Specifically, petitioner provides the affidavit of defense counsel Bernard DePaoli. (See Pet. Exh. 9.) In that affidavit, Mr. DePaoli states that he was a deputy district attorney 10 years before the trial in petitioner's case, and in that capacity he prosecuted a "gang rape" in which Ms. Kramer was the victim. These facts were, of course, thoroughly aired during the voir dire of Ms. Kramer at petitioner's trial. (See our discussion of the voir dire of Ms. Kramer at RB 107 et seq.) Note also that this Court found that petitioner's failure to exercise a peremptory challenge against Ms. Kramer waived all issues as to her

potential fairness as a juror. (See *People* v. *Price*, *supra*, 1 Cal.4th at p. 401.)

Petitioner attempts to add a lurid claim that Ms. Kramer concealed a romantic relationship with Mr. DePaoli. In fact, Mr. DePaoli's affidavit provides no such information. Mr. DePaoli's most titillating allegation was that, at a party after the returning of the guilty verdict against Ms. Kramer's rapists, "she and I went out to a bar to celebrate. . . . The night we went out to celebrate the verdict, I remember dancing very close to Mrs. Kramer, and also making out with her (i.e., kissing)." (Pet. Exh. 9 at p. 10.) Mr. DePaoli admits that in the 10 years after that incident, "I do not recall having seen [Mrs. Kramer]." (*Id.*, at p. 11.) Mr. DePaoli also states that during that long-past trial, he co-signed a note on a car loan for Mrs. Kramer. He recalls that after that time, he received a note in the mail indicating that she had paid off the car loan, but that aside from that one note, Mrs. Kramer and Mr. DePaoli had had no contact whatsoever in the 10 years after that trial experience.

Turning briefly to the law, it seems that it may be the law that the concealment by a juror of material information may be considered misconduct even if there is no intention to conceal. (See *In re Hitchings* (1993) 6 Cal.4th 116 et seq.) However, that lack of intentionality may be taken into account when evaluating whether any possible prejudice from the concealment was prejudicial. More to the point in this case, objections to the qualifications of a juror are waived absent timely objection. Here, there can be no claim that the defense was not fully aware of Mrs. Kramer's failure to mention the incidents referred to. As such, petitioner most definitely waived any right to complain about the

issues stated in Mr. DePaoli's current affidavit. (See *People* v. *Green* (1995) 31 Cal.App.4th 1001, 1016.)

If such is necessary, we briefly discuss the content of Mr. DePaoli's statements. Petitioner has plainly failed in his burden of showing that anything was concealed or that anything allegedly concealed was material. First, there is no showing whatsoever that Mrs. Kramer viewed the behavior at the celebratory post-verdict dinner 10 years previously as sexual or meaningful in nature. Ms. Kramer was completely honest about her gratitude towards Mr. DePaoli for his help in convicting her assailants. Similarly, petitioner does not establish that Ms. Kramer even remembered Mr. DePaoli's co-signing of the note, much less that she thought it was a significant act. The fact that the two had no contact whatsoever in the intervening 10-year period strongly argues that it was reasonable for Ms. Kramer to regard the incidents as insignificant. Absolutely no dishonesty or concealment is established. (See *People* v. *Majors* (1998) 18 Cal.4th 385, 417 (juror's belief as to whether prison guards were "close" friends justifiable); *People* v. *Duran* (1996) 50 Cal.App.4th 103, 115.) Further, for similar reasons, petitioner has not established that either of these supposed facts were material. And, for similar reasons, even should the court presume that the facts were actually concealed, and were material, the same factors show that no prejudice befell petitioner. Ms. Kramer's answers in voir dire plainly showed a willingness to set aside any possible prejudices with regard to Mr. DePaoli or anyone else and work hard at being a good juror. Ms. Kramer revealed a large amount of material which she thought bore on her impartiality. Nothing suggested by petitioner here directly bears on her knowledge of the case or her opinion of petitioner in particular. As such, Ms. Kramer's claims that

she would be fair rebut any reasonable probability of actual harm to petitioner. (See *In re Hitchings*, *supra*, 6 Cal.4th at p. 119.)

In sum, petitioner, by the knowledge of his defense counsel, waived any possible claim of bias on the part of Ms. Kramer with regard to her interactions with Mr. DePaoli. Next, petitioner does not show that Ms. Kramer actually concealed any current memory she may have had during voir dire, and petitioner fails to show that the claimed concealed facts would have been material to an evaluation of her fairness at trial. Ms. Kramer discussed her close relationship with and gratitude to Mr. DePaoli for his work at the rape trial. Even presuming misconduct, prejudice is rebutted, both because the material petitioner claims was concealed would only have been favorable to the defense, and because the facts were exceedingly minor, and occurred 10 years prior to the current trial. Ms. Kramer during voir dire revealed much more troubling material, and was thoroughly voir dired as to that material. The trial court, and apparently defense counsel, concluded Ms. Kramer would be a good juror, and any claims to the contrary were waived below.

In addition, petitioner makes a claim that Ms. Kramer concealed facts which showed that she was biased in favor of the *prosecution*. In particular, petitioner appends as exhibit 55 a copy of an order appointing the district attorney of Humboldt County to enforce child support from Ms. Kramer against a former husband. The order is dated May 15, 1985. (See Pet. Exh. 55.) Based on this document, petitioner makes the unfounded allegation that, during voir dire in September and October of 1985, "Ms. Kramer was at the time being assisted by the district attorney's office in collecting child support

. . . ." (Pet. 170.) Petitioner provides no support for this statement. Petitioner provides no evidence to show that the district attorney's office at any time ever acted in any capacity for Ms. Kramer, and especially not during the voir dire process. Petitioner's claim that the district attorney's office did more than seek an order four months prior to voir dire is thus pure speculation. Further, petitioner points to no answer by Ms. Kramer whose honesty is thrown into doubt by this preexisting order. Ms. Kramer was quite plain that she had contacts with the prosecution in this case, contacts stronger than a mere procurement of a standard support enforcement order. However, Ms. Kramer maintained that she would do her best to be an impartial juror. The fact that the district attorney's office may have acted in her behalf months before in no way casts doubt on Mr. Kramer's honesty as to her answer to the question that she did not believe anything she had not already revealed in any way cast doubt on her impartiality. Thus, once again, petitioner has failed to show any material concealment, and, based on the record, and the lengthy voir dire of Ms. Kramer, we believe any possibility of prejudice is firmly rebutted. Once again, no issue is shown.

VI.

PETITIONER SHOWS NO INCOMPETENCE OR CONFLICT OF COUNSEL WITH REGARD TO MR. DEPAOLI'S TREATMENT OF A POTENTIAL JUROR

Petitioner next rehashes the facts of the previous argument concerning the alternate juror Ms. Kramer, this time claiming incompetence and conflict of counsel. Petitioner's arguments are unavailing.

Petitioner points to the declaration by Mr. DePaoli in exhibit 9, wherein he claims that he declined to discuss with the court his prior relationship with Ms. Kramer. In fact, Mr. DePaoli and Ms. Kramer did reveal that they had an intense working relationship when he prosecuted her rapists. However, Mr. DePaoli claims that, for fear for his own reputation, he did not reveal that he had what he now terms was a sexual relationship with Ms. Kramer. Petitioner claims this set up a conflict, and that the failure to reveal the facts was incompetence of counsel.

We begin by noting that Mr. DePaoli's credibility is of course nil. Mr. DePaoli now stands as a convicted felon, and his felony stems exactly from an instance where he attempted to procure false evidence in support of a client. Further, Mr. DePaoli's statements do not jibe with reality. While Mr. DePaoli claims that, for fear of personal embarrassment, he did not reveal his previous relationship with Ms. Kramer, he wholly fails to explain why he did not use one of his numerous peremptory challenges to challenge the juror after the challenge for cause was denied. Given the entire absence of any explanation for this glaring omission, and in the absence of any claim by Mr. DePaoli that the failure to exercise the peremptory challenge

was in any way connected with his prior supposed relationship with Ms. Kramer, Mr. DePaoli's credibility on the issue seems completely destroyed. We also noted in the previous argument that Mr. DePaoli's claims for an "intimate" relationship are not supported by his own factual statements, which form a claim of no more than a few dinners, perhaps in the company of a third party, and one possible celebration after a major courtroom victory. Even that celebration resulted in no more than, possibly, some chaste kissing, which hardly qualifies as a major source for embarrassment or concealment. (See *People* v. *Price*, *supra*, 1 Cal.4th at p. 401.)

Further, it seems highly obnoxious to any reasoned idea of justice for a defense attorney to allegedly insert error into a trial, and then attempt 15 years later to overturn a major judgment based on that claim of inserted error. We would assert that the fact that Mr. DePaoli did not exercise a peremptory challenge against Ms. Kramer should, as in the normal course, completely waive any claim of error based on these facts. (See *People* v. *Price*, *supra*, 1 Cal.4th at p. 401.)

Turning to the legal analysis of the issue, we note that there is some conflict in the cases as to whether the proper standard for reviewing this claim is one of normal incompetence of counsel under *Strickland*, or one of conflict of counsel under *Cuyler* v. *Sullivan* (1980) 446 U.S. 335. On a *Strickland* analysis, the issue can be easily dismissed. The fact that Mr. DePaoli had peremptory challenges remaining, and did not use them against Ms. Kramer, completely rules out any possibility that the defense was prejudiced by Mr. DePaoli's failure to assert the facts disclosed herein as a basis for a cause challenge. Plainly Mr. DePaoli did not think Ms. Kramer was so

seriously deficient a juror as to justify a peremptory challenge. No incompetence or prejudice is shown.

Cases have held that the *Cuyler* conflict standard should not be used except in the very limited circumstances of multiple representation by a single defense counsel at trial. (See *Beets* v. *Scott* (5th Cir. 1995) 65 F.2d 1258.) This makes sense because the heightened scrutiny that *Cuyler* places on conflict of counsel stems from inability of a reviewing court to discern individual issues on which counsel may have made decisions based on his conflicted state throughout the course of a trial. To the contrary, in a case such as this, precisely one decision is claimed to have been based on factors relating to the specific conflict described. As such, there seems absolutely no reason to apply anything but the normal *Strickland* incompetence of counsel standard to this discrete incident. (See *Burger* v. *Kemp* (1987) 483 U.S. 776, 783 (evaluating tactical reasons for appellate counsel's failure to raise an issue in a brief, where that counsel prepared briefs for two petitioners with possibly conflicting interests).)

Certain Ninth Circuit cases seem to apply the *Cuyler* test to conflict cases other than multiple trial representation cases. (See *Maiden* v. *Bunnell* (9th Cir. 1994) 35 F.3d 477, *United States* v. *Mett* (5th Cir 1995) 65 F.3d 1531.) We believe here under the *Cuyler* test, petitioner fails to show that an "actual conflict" resulted in an "adverse effect" on his defense. This is true precisely because Mr. DePaoli had remaining peremptory challenges by which he could eliminate the juror, had he so wished. As we have stated, Mr. DePaoli does not assert that his failure to exercise the peremptory challenge in any way resulted from his alleged conflict. (See *United States* v. *Miskinis* (9th Cir. 1992) 966 F.2d 1263, 1268.) We do not believe a mere abstract theoretical

possibility of an adverse effect is endorsed by the cases as a reason for reversal. (See *United States* v. *Mett*, *supra*, 65 F.3d at p. 1531, cf. *United States* v. *Levy* (2d Cir. 1994) 25 F.3d 146, 157 (adverse effect shown in fact when a plausible alternative is not taken); *United States* v. *Bowie* (10th Cir. 1990) 892 F.2d 1494 (while cross-examination could have implicated defense counsel in wrongdoing, lack of that cross-examination was not subject of conflict because cross-examination was probably not helpful or admissible).)

In sum, we believe normal incompetence of counsel analysis shows there was no possible prejudice on this ground in this case. Further, even if a conflict is postulated, and that conflict had some effect on Mr. DePaoli's decision whether to reveal certain information, a premise which is far from proven, that conflict had no actual effect on the case. This is because Mr. DePaoli had peremptory challenges remaining and declined to use them on Ms. Kramer. As such, no actual effect whatsoever can be shown, even if one accepts petitioner's factual claims. On this record, no action by this Court is required.

VII.

PETITIONER FAILS TO SHOW A COMPLETE BREAKDOWN IN THE TRIAL PROCESS WHICH WOULD REQUIRE REVERSAL WITHOUT A SHOWING OF PREJUDICE

Petitioner next raises a hodge podge of issues which he claims, when combined, shows that there was a complete breakdown in the trial process in this case. Petitioner then claims that this breakdown requires reversal without any showing of prejudice. Petitioner thus seems to acknowledge that the individual issues, which range from prosecutorial misconduct to incompetence of counsel to bias by the trial court, do not raise any prejudice requiring reversal. We attempt to discuss all of petitioner's issues.

Petitioner begins by citing several cases which discuss the possibility that prejudice may not be necessary where the breakdown in the trial process is sufficient. Ironically, petitioner's first cited case, *United States* v. *Cronic* (1984) 466 U.S. 648, 658-661 rejected such an argument. In *Cronic*, defendant pointed out that the prosecution had prepared his case for over four years, but that his inexperienced trial lawyer had only one month to prepare a defense. The Supreme Court rejected the court of appeal's conclusion that such circumstances showed such unfairness that it was unnecessary to show incompetence of counsel and prejudice through normal legal arguments. The court concluded that no presumption of prejudice arose, and that:

> "That conclusion is not undermined by the fact that respondent's lawyer was young, that his principal practice was in real estate, or that this was his first jury trial. Every experienced criminal defense attorney once tried his first criminal case. Moreover, a lawyer's experience with real estate transactions might be more useful in preparing to try a criminal case involving financial transactions than would prior

> experience in handling, for example, armed robbery prosecutions. The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation.
>
> "The three criteria — the gravity of the charge, the complexity of the case, and the accessibility of witnesses — are all matters that may affect what a reasonably competent attorney could be expected to have done under the circumstances, but none identifies circumstances that in themselves make it unlikely that respondent received the effective assistance of counsel. . . .
>
> "This case is not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel. The criteria used by the Court of Appeals do not demonstrate that counsel failed to function in any meaningful sense as the Government's adversary. Respondent can therefore make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel." (*United States* v. *Cronic*, *supra*, 466 U.S. at p. 665 et seq.)

Thus, *Cronic* stands for two propositions relevant here. First, generally, it is only the rarest case in which it can be shown that the trial broke down so as to eliminate the need to show prejudice on specific issues such as incompetence of counsel. Second, specific to this case, mere inexperience in criminal matters does not disqualify an attorney from adequate representation. The latter point is relevant considering one issue raised by petitioner, which we will discuss, concerning inexperience by one of his attorneys.

In *Walberg* v. *Israel* (1985) 766 F.2d 1071, the court did find the trial process broke down to the point where a showing of prejudice was not required for reversal. However, in that case, the trial court specifically interfered with defense counsel's ability and motivation to vigorously defend the defendant. The court there wrote:

> "In judging the fairness of a trial it is sometimes helpful to adopt the vantage point of the defendant and ask whether a rational albeit criminal individual could be persuaded that he had had a fair trial, by which we mean here simply a trial in which an innocent defendant would be reasonably assured of acquittal. We do not think it would be possible to convince Walberg of this even if he were capable of appraising the situation objectively. What he saw in the dock was that his lawyer got in trouble with the judge because the judge thought his client too obviously guilty to merit such strenuous efforts on his behalf; that after being rebuked for his ingratitude to the judge the lawyer managed at trial to avoid the judge's wrath; that the jury brought in a verdict with great haste for which the jurors received the judge's congratulations; and, that the judge proceeded to impose an exceedingly harsh, albeit legal, sentence on him. The appearance was of a judge who had made up his mind at the start that the defendant was guilty and who proceeded to intimidate the defendant's lawyer so that the proceeding could be got over with and Walberg shipped off to prison for many years." (*Walberg* v. *Israel*, *supra*, 766 F.2d at pp. 1077-1078.)

To the contrary, in this case, what defendant saw was two tremendously committed lawyers vigorously defending him over a period of several years. Further, despite the raised emotions during the trial between both sets of counsel and the trial court, petitioner saw his counsel vigorously cross-examine each and every prosecution witness, and themselves call more witnesses than are called by even the prosecution in most serious cases. The very bulk of the record in this case shows that there was no breakdown in normal trial procedures; to the contrary, this case stands as a testament to the amazing solicitude afforded defendants by the courts in this state. Given the record in this case, it beggars reason to argue that there was a breakdown sufficient to eliminate the need to show prejudice on any particular issue. Nonetheless, despite the bankruptcy of petitioner's basic point, we

briefly review each of the numerous points he makes in his rambling argument.

First, petitioner asserts that his trial counsel were incompetent. Primarily, he asserts that lead counsel Bernard DePaoli was an alcoholic, and that this hampered DePaoli's trial performance. However, as this Court is well aware from the direct appeal, Mr. DePaoli, while certainly having problems with alcohol during the trial, was vigorous and committed throughout all aspects of the preparation and conduct of this trial. This Court has had massive briefing on numerous issues of incompetence of counsel, see e.g., petitioner's previous Petition for Writ of Habeas Corpus (filed 11/13/90) at argument IV. Those arguments, our responses to them, and this Court's resolution of them, show that there was no serious incompetence of counsel, nor any prejudice. Given the vigorousness of Mr. DePaoli's representation, it cannot be argued that, in the absence of any prejudice, reversal is required.

Petitioner next discusses discovery issues. It seems impossible to determine whether discovery errors prevented a fair trial without discussing the content of the documents which were allegedly withheld. Such discussion has been had repeatedly in this case, most recently in our response to argument I in this brief. Further, this Court examined the discovery and the sealed materials retained by the trial court in the direct appeal in this case. (See *People* v. *Price*, *supra*, 1 Cal.4th at p. 492.) Petitioner's current generalized claims that discovery was withheld prove nothing.

Petitioner next lodges several complaints against the trial court in this case. First, this Court has previously reviewed the entire record of this trial and concluded in a number of contexts that the trial court's

rulings were appropriate. Such rulings included the shackling of petitioner, the court's ordering the petitioner to be absent from the guilt phase of the trial, and numerous other rulings on complaints by petitioner. (See Respondent's Brief, args. VII, IX and X.) The fact that the trial court, like counsel, may have occasionally allowed his voice to rise in this lengthy and hard fought trial does not show a breakdown in the adversarial process. Rather, by and large, the trial court's rulings were judicious and reasonable. There seems no reason to depart from legal analysis and discard a requirement for prejudice given this record.

Next, petitioner criticizes Judge Buffington for recording an on the record notation of his suspicions that DePaoli had falsified names and other information on defense subpoenas in the case. Petitioner characterizes Judge Buffington's action as "bizarre". However, Ms. Klay's affidavit, see exhibit 8 at page 3, admits that DePaoli did in fact forge the subpoenas, and so makes Judge Buffington's reaction to this dilemma wholly reasonable. The fact that Judge Buffington withheld his suspicions from the jury and from defense counsel undercuts any argument that the defense was hindered by Judge Buffington's discovery of this reprehensible behavior. Petitioner can certainly show no prejudice, and he is far from showing any breakdown in the trial process.

Petitioner next turns to the issue of his competency during trial. That issue was litigated at excruciating length at trial and afterwards. (See args. I & II of Petitioner's 1990 Petition for Writ of Habeas Corpus.) The record shows the trial to have been thorough and fair on this issue. Nothing is added in this rambling argument.

Next, petitioner once again turns to discovery issues. Petitioner fails to uncover any malicious behavior, fails to identify any prejudice, and in fact admits that in almost every instance he eventually received the appropriate discovery. Once again no breakdown in the trial process, nor any prejudice is shown.

Next, petitioner turns to allegations concerning prosecution investigator Paul Tulleners. First, it must be emphasized that there is absolutely no proper evidence before the court on this score. Petitioner has failed to provide a sworn declaration nor in fact any declaration at all from Mr. Tulleners. Next, petitioner's allegations with regard Tulleners begin by merely rehashing allegations that the prosecution withheld or delayed discovery. We have previously discussed discovery issues on numerous occasions, and petitioner has failed to show any prejudice from any particular items that were allegedly withheld. Further, as stated in argument I, *supra*, the main subject areas on which petitioner claims discovery was withheld are in fact insignificant given the way the proof came out in this case. As such, petitioner is far from showing any prejudice on these topics.

Next, with regard to the alleged claims by Tulleners, we have attached the declaration of our investigator, Jeff Lierly, who extensively interviewed Mr. Tulleners. Those interviews reveal that Mr. Tulleners' claims show only disagreements between prosecutors and the investigator Mr. Tulleners as to what documents were discoverable, what the legal standards for discovery were, and other issues which were obviously controlled by the attorneys, not by Mr. Tulleners. Mr. Tulleners freely admits that he is an investigator, not an attorney, and that he is unaware of the precise legal standards for discovery. Mr. Tulleners admits he was unaware of large portions of the proceedings

in that he was doing his job as an investigator, and was not present in court, or at all strategy meetings.

Further, Mr. Tulleners does not allege that any material evidence was ultimately withheld from the defense. While Mr. Tulleners is a first-rate investigator, his absence from numerous meetings, and his lack of sophistication as to the law of discovery may explain weaknesses in his allegations against certain of the prosecutors.

In particular, Mr. Tulleners specifies two specific pieces of evidence which he believes were handled improperly by the prosecutors. These two items were a tape recorded interview of Berlie Petry by Officer Dwayne Fredrickson, and, second, a transcript of an interview by Investigator James Hahn of an inmate Larry "Turtle" Jones. We discuss each of these items.

First, with regard to the Petry interview tape, Mr. Tulleners seems to be simply mistaken. Mr. Tulleners alleges that great pains were taken to discover the allegedly lost interview tape, and that the court was informed the tape was lost. Mr. Tulleners goes on to state that after the trial, he believes Ron Bass revealed in a joking manner that he had had such a tape all along. These allegations simply do not match the record in this case.

First, the record makes plain the defense was in possession of such a tape all through the trial. During the examination of Berlie Petry, both the prosecution and the defense made plain that they had copies of the tape, as well as transcripts of the tape, in their possession, and were freely using it in attempts to support or impeach Mr. Petry. Thus, on January 21, 1986, at RT 13,489 et seq. the following appears:

> "MR. DIKEMAN: You know, it occurs to me that you don't get the true flavor of Mr. Petry's testimony unless you

actually listen to it. The court has had the opportunity to listen to him on direct and cross-examination in 1986.

"I have the original Fredrickson tape of February 19th, '83, and I think it would be more appropriate for the court to listen to the tape.

"MR. DEPAOLI: We agree.

"MR. DIKEMAN: Then to listen to the transcript.

"THE COURT: Mark them both so I can read along while I listen." (RT 13,489-13,490.)

The tape was marked as court's exhibit 126.

As such, this allegation by Mr. Tulleners seems to be based wholly on misremembering, and has no actual substance.

The second allegation seems similarly wrong-headed. Mr. Tulleners alleges that a report of an interview by Officer Hahn of Larry "Turtle" Jones was somehow suppressed. To the contrary, this interview was the subject of much litigation before trial. (See e.g., RT 1446 et seq.) Note that that discussion, which took place on March 13, 1985, occurred at a very early moment in the pretrial motion stage of this extremely lengthy trial. After briefing, and the lengthy evidentiary hearing, the trial court issued an order on March 26, 1985. In that order, the trial court specifically found that "The failure to reveal the name[] of . . . Jones, was at the worst, negligence. Once they had been interviewed in January of 1985, there were valid fears calling for a §§ 1040, et seq. Evidence Code hearing." (CT 5037.)

In the colloquy on the subject in open court, Mr. Dikeman openly spoke of Mr. Tulleners' investigation of the possibility of Jones' possession of information. Mr. Dikeman stated, and the court agreed, that Mr. Tulleners' investigation only the previous January had revealed that discoverable material might be present. Mr. Dikeman readily admitted some negligence in passing the information along to the defense, and the court agreed that only negligence was shown. Further,

there has never been any claim, either in petitioner's massive direct appeal of this case, nor here, that any of Jones' evidence was in any conceivable way helpful to petitioner.

The only remaining residue of Mr. Tulleners' claims is perhaps that some prosecution investigators improperly conspired to suppress some of this material. Given that very little, if any, actual suppression occurred, it is hard to understand why such conspiracy would have been necessary. Neither petitioner nor Mr. Tulleners has provided any convincing proof that such a conspiracy existed, that such a conspiracy was necessary, nor that any actual suppression of materials the prosecution believed was discoverable was in fact attempted or achieved.

In sum, Mr. Tulleners made it plain in his interview that the defense has wholly misinterpreted, for whatever reason, the bulk of his statements. As to the only statements Mr. Tulleners claims were intended to directly impugn the prosecution, we believe the record shows Mr. Tulleners was simply honestly mistaken as to his claims. Whatever undercurrents of humor or bravado may have been present in this extremely hard fought prosecution, Mr. Tulleners' interpretation of the events is belied by the record, and perhaps shown to be colored by his own particular notions of how a case should be tried. However, as Mr. Tulleners admits, he has no expertise in that area, and his allegations do nothing to cast any doubt on the good faith and legal propriety of the prosecutors in their carrying out of their discovery duties in this case. Finally, absolutely no prejudice is shown. Even Mr. Tulleners flatly states that all of the evidence he believed should have been discovered was in fact discovered. The fact that nothing was made of these issues in appellant's massive direct appeal further shows

the issues to be without substance. For all of these reasons, Mr. Tulleners' statements certainly argue forcefully against appellant's premise that the adversary process was subverted in this case. To the contrary, Mr. Tulleners merely shows the case was fought in a hard but fair manner by the prosecutors. No issue is shown.

Finally, we turn to alleged gender bias by Judge Buffington against attorney Klay. First, this Court is familiar the record of this case, and is therefore familiar with the tenacity and vigor with which Ms. Klay litigated this case. Given the record it is absurd to argue that Ms. Klay or Mr. DePaoli failed to make arguments or motions because they were intimidated by Judge Buffington. Rather, both argued tenaciously from beginning to end of this trial. This fact is only made more clear by the fact that petitioner at this stage fails to point to any motion, objection, or any other action Ms. Klay would have made but did not because of the trial court's manner.

Counsel cites to *Catchpole* v. *Brannon* (1995) 36 Cal.App.4th 237. There, a particular court of appeal panel found Judge Buffington had inadequately analyzed a sexual harassment claim. The debatable opinion of one court of appeal panel that Judge Buffington was unduly hostile to a particular sexual harassment claim does not in any reasoned way imply that Judge Buffington was unable to function with a female attorney in his courtroom. Rather, the record of this trial shows that all attorneys involved, and the court, litigated this case forcefully for a period of years. It was inevitable that tempers should rise. Given petitioner's inability to pinpoint any particular prejudice, which is, after all, the rationale for this entire argument, no issue is shown.

VIII.

PETITIONER'S CLAIM OF "ACTUAL INNOCENCE" IS EASILY REJECTED

Petitioner next appends a claim that he is "actually innocent" of the murder of Elizabeth Hickey. The claim is legally and factually baseless.

Petitioner cites to *Schlup* v. *Delo* (1995) 513 U.S. 298 and *Herrera* v. *Collins* (1993) 506 U.S. 390 as support for this Court's consideration of a claim of actual innocence. Petitioner does not discuss how these cases support his claim. *Herrera* presumably discusses a freestanding claim of actual innocence, whereas *Schlup* concerns the standard of innocence which must be shown to avoid a procedural default. Petitioner does not explain which of these cases actually applies, nor why. In any event, the standard under *Schlup* is quite stringent. Petitioner must show that he is "probably" innocent. Plainly, on the facts here, petitioner can make no such showing.

The statement of facts in our Respondent's Brief sets out the overwhelming facts condemning petitioner as guilty of the Hickey homicide. Further, in a claim of actual innocence, petitioner's testimony at the penalty phase would be relevant. That testimony, as we have related, was fatal to any claim of innocence. It was further fatal to any possibility of sympathy from the jury, given it was obvious that petitioner was lying under oath to the jury from the witness stand. Petitioner's claims of actual innocence are baseless.

Oddly, petitioner adds a seemingly unrelated issue at the end of this argument. Petitioner notes that certain bloody fingerprints were found on the body of the victim after her death. Petitioner claims that he did not receive in discovery the FBI report discussing its evaluation

of the useability of those blood smears. Petitioner's argument on this count is puzzling. In petitioner's own exhibit no. 57, two copies of that FBI report are provided. One of this copies is plainly stamped "received June 6, 1985 Anna N. Klay." That FBI report plainly states that the bloody smears on the victim's body, as contained in the film strips sent to them by Humboldt County authorities were not useable. This issue was discussed precisely at the points in the transcript cited by petitioner, RT 1879, 2176. Petitioner points to no place in the record where the defense specifically requested possession of the negatives of the pictures of these bloody smears for further analysis. This seems obviously reasonable, considering the expertise of the FBI lab and the desire on the part of the prosecution to identify those fingerprints, which it plainly believed were made by petitioner. However, as the prosecutor pointed out, even if those bloody smears turned out to have been made by the victim's boyfriend Petry, such would not have been helpful evidence for petitioner. Petry admitted that he handled the body when he returned from work the morning after she was murdered. As such, his fingerprints on the body would not be remarkable. This being the case, petitioner shows no discovery violation whatsoever, and no conceivable harm. (Petitioner also claims that ridges may be used for elimination purposes "even if there are an insufficient number of characteristics necessary to make a positive identification". Petitioner provides absolutely no authority for this scientific claim.)

In sum, far from being in doubt, petitioner's guilt of the Hickey homicide was open and shut. Petitioner further shows no discovery error, nor any possibility that such error could have affected the trial. Petitioner's claims are without basis.

IX.

THE CALIFORNIA DEATH PENALTY LAW IS CONSTITUTIONAL

Petitioner next claims that the California Death Penalty Law is unconstitutional because it inadequately narrows the class of death eligible first degree murderers. This Court recently rejected this claim in *People* v. *Ochoa* (1998) 19 Cal.4th 353, 479 . No issue is shown.

X.

PETITIONER HAS FAILED TO MEET TIMELINESS REQUIREMENTS FOR PLEADING NUMEROUS OF THE ISSUES IN THIS PETITION

Petitioner closes with a argument that is a mixture of several claims. First, petitioner claims that each of the previous issues he has raised is being raised here in a timely manner. Petitioner then appends certain extraneous incompetence of counsel claims. We discuss these issues.

First, this Court is aware of the stringent requirements for pleading facts showing timeliness in the context of a successive capital habeas corpus petition. As this Court wrote in *In re Robbins* (1998) 18 Cal.4th 770, 787-788:

> "A petitioner does not meet his or her burden simply by alleging in general terms that the claim or subclaim recently was discovered, or by producing a declaration from present or former counsel to that general effect. He or she must allege, with *specificity*, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time — and he or she bears the burden of *establishing*, through those specific allegations (which may be supported by relevant exhibits, see *post*, fn. 16), absence of substantial delay. (Policy 3, *supra*, std. 1-1.2['A petition . . . may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after 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.' (Italics in original.)].)" (See also *In re Gallego* (1988) 18 Cal.4th 825; *In re Clark*, *supra*, 5 Cal.4th at pp. 783, 791.)

As to petitioner's claims nos. 1 and 8, petitioner relies on the allegedly newly discovered information which was received pursuant to discovery in a Oregon case in 1994. However, petitioner does not

explain why he delayed years before bringing this information to the attention of this Court. The issue is more clear with regard to claims 2, 3, 4, 5, 6 and 7. As to those claims, petitioner is essentially mute as to how and when he became aware of the specific factual basis of those allegations. Such pleading is inadequate, and these claims are therefore procedurally barred.

Finally, petitioner abruptly shifts direction and raises four claims of incompetence of trial counsel. As to three of these claims, labelled (b), (c) and (d), the facts underlying these claims were fully known by all parties, and were explored by petitioner's counsel on his direct appeal in this case. As such, to the extent counsel did not believe them worthy of being raised in petitioner's first appeal in this case, they are procedurally barred. As to the fourth claim, designated (a), we believe we have thoroughly discussed the lack of basis for, and harmlessness of petitioner's claims based on his attorney's alleged prior relationships with one of the jurors. No issue is raised on any of these grounds.

CONCLUSION

WHEREFORE, for the reasons stated herein respondent respectfully request this Court deny all relief and dismiss the petition.

Dated: March 31, 1999

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

GEORGE WILLIAMSON
Chief Assistant Attorney General

RONALD A. BASS
Senior Assistant Attorney General

RONALD E. NIVER
Supervising Deputy Attorney General

DAVID H. ROSE
Deputy Attorney General

Attorneys for Respondent

DHR/gm

EXHIBIT A

DECLARATION OF SPECIAL AGENT JEFF LIERLY

JEFF LIERLY declares under penalty of perjury:

1. I am a Special Agent in the Bureau of Investigations of the California Department of Justice. I was assigned to interview Robert McConkey regarding allegations made in *In re Curtis F. Price*.

2. The attached report is an accurate description of my phone conversation of December 15, 1998, with Mr. McConkey.

Executed at Shasta County, California on MARCH 23, 1999.

JEFF LIERLY
Special Agent

INTERVIEW REPORT

State of California
Department of Justice
Bureau of Investigation

BI Case No. 98-10102-01

Subject: Price, Curtis

Name: McConkey, Robert **Driver's License:** P0557455

322 14th Street, Eureka, California 95501 (707) 445-9318

Residence Address **Telephone No.**

Business Address **Telephone No.**

Additional I.D. DOB: 9-4-44

(i.e., physical description, DOB, SSN)

Location of Interview:

Date of Interview: 12-15-98 **Tape Recorded: Yes** ___ **No** x

Type of Interview: In person ___ **By telephone** x

Special Agent(s) Jeff Lierly

DETAILS:

On December 15, 1998, at 0845 hours, Special Agent (SA) Jeff Lierly telephoned McConkey's residence in response to a message McConkey had telephoned SA Lierly's office. When the male individual answered the telephone, SA Lierly asked if this was Mr. McConkey. McConkey answered affirmatively. The following is a summary of McConkey's statement.

McConkey began the conversation by asking SA Lierly why he (Lierly) had called him. As SA Lierly began to explain the purpose for the call, McConkey interrupted and said, "Curtis Price." SA Lierly confirmed that the Curtis Price investigation was indeed the reason for his telephone call and indicated he wished to speak with McConkey about a statement he had given in connection with the Price case. McConkey responded by saying that the whole thing had been a "joke" and that "none of that shit happened." McConkey became irritable and said he had already spoken with two investigators over the last ten years. Every few years, McConkey said he has been contacted by someone about Curtis Price and complained that a lot of taxpayer money was being wasted. McConkey again reiterated that his statements had been "bullshit" and that he "made up" the story. To be clear about what McConkey was saying, SA Lierly explained to McConkey that of particular concern were McConkey's statements that the prosecutor in the

Price case bribed a juror. SA Lierly then asked McConkey if that really happened. McConkey responded, "Absolutely not," and went on to say that he never told that to any investigator. SA Lierly asked McConkey if he had ever made that statement to anyone. McConkey replied that he "told that to an attorney as a joke." McConkey later added that he had been drinking when he made that statement to the attorney.

McConkey said he drinks vodka so much he can't remember things anymore and characterized himself as an "alcoholic." McConkey said he has been drinking for 40 years and "wakes up drunk every morning." He said President Clinton can not remember what happened a couple of years ago and questioned how he could be expected to remember what happened ten or fifteen years ago.

McConkey expressed surprise that any investigation was still ongoing. He said Price murdered two people and was convicted, adding that the police found jewelry belonging to one of the victims in Price's possession.

SA Lierly explained to McConkey that McConkey's "joke" was being used by Price's defense counsel as a means of appealing the case and requested McConkey speak with him in person regarding the statements he had just made or, at a minimum, tape record a telephone conversation with McConkey as a means of getting the truth on the record. McConkey said he did not want to be recorded and did not want to talk about it anymore. McConkey asked if he had to talk to SA Lierly. When SA Lierly told him he did not, McConkey said, "It's over," and hung up.

12-18-98
JEFF LIERLY
Special Agent

APPROVED: 12/22/98
STEVEN S. HIRIGOYEN
Special Agent Supervisor

EXHIBIT B

DECLARATION OF SPECIAL AGENT JEFF LIERLY

JEFF LIERLY declares under penalty of perjury:

1. I am a Special Agent in the Bureau of Investigations of the California Department of Justice. I was assigned to interview Paul Tulleners regarding allegations made in *In re Curtis F. Price*.

2. The attached report is an accurate description of my ~~phone conversation~~ INTERVIEW of January 20, 1999, with Paul Tulleners.

Executed at Shasta County, California on MARCH 23, 1999.

JEFF LIERLY
Special Agent

INTERVIEW REPORT

State of California
Department of Justice
Bureau of Investigation

BI Case No. 98-10102-01

Subject: Curtis Price

Name: Paul J. Tulleners **Driver's License:**

Residence Address **Telephone No.**

901 N. Monroe, Suite 100, Spokane, Washington, 99201-2149 (509) 324-2595

Business Address **Telephone No.**

Additional I.D.

(i.e., physical description, DOB, SSN)

Location of Interview: 901 N. Monroe, Suite 100, Spokane, Washington, 99201-2149

Date of Interview: 1/20/99 **Tape Recorded: Yes** X **No** ___

Type of Interview: In person X **By telephone** ___

Special Agent(s) Jeff Lierly

DETAILS:

On January 20, 1999, Special Agent (SA) Lierly interviewed retired Department of Justice Special Agent Paul Tulleners. Prior to the interview, SA Lierly mailed Tulleners photocopies of the following documents: pages 207 through 211 of Curtis Price's defense petition encompassing paragraphs 42 through 55, the five-page declaration of Robert L. McGlasson, and a seven-page, unsigned declaration under the name of Paul J. Tulleners. SA Lierly and Tulleners reviewed these documents paragraph by paragraph to clarify what portions were accurate or inaccurate. The following is a summary of some of the more significant statements made by Tulleners during this review.

Another prosecutor was originally assigned to the Price prosecution, but, when that prosecutor was appointed to the bench, Deputy Attorney General (DAG) Ronald Bass from the San Francisco office was assigned to prosecute the case with co-prosecutor Worth Dikeman, a deputy district attorney from Humboldt County. District Attorney Investigator Barry Brown, Eureka Police Department Sergeant Frederickson, and Tulleners completed the prosecution team.

Tulleners was assigned to the Special Prosecutions Unit (SPU) in 1979 when the unit was formed. Supervising Assistant Attorney General John Gordinier was appointed as the supervising attorney and Special Agent in Charge Hugh Allen supervised the investigative personnel, including Tulleners.

Tulleners described the unit's mission as a team effort to accomplish vertical prosecution. In the Price case, Tulleners said his job was to work with the prosecutors to identify witnesses, evidence, and any other investigative needs so that the case could be presented in court and ultimately prevail in a prosecution.

Tulleners said that his testimony was, is, and will always be that when Price was sentenced to death he got a "completely fair trial." From his "layman's viewpoint," the defense received everything they should have been entitled to. Tulleners remains firmly convinced Price was guilty of the murders he was convicted of and knows of nothing that would result in a reversal of that sentence.

Curtis Price Defense Petition, pages 207 -211, paragraphs 42 through 55:

Paragraph 42. Tulleners said he did not know who the legal representatives of the California Department of Corrections (CDC) were; he did know, however, that people from CDC and CDC's Special Services Unit (SSU) talked on a daily basis with Hugh Allen and John Gordinier about the discovery of documents in conjunction with the Price case. Regarding the defectiveness or improper service of subpoenas, Tulleners asked rhetorically, "How in the heck would I know anything about that?" He said he was never present during the service of any subpoenas, nor was he present during any discussions of subpoenas. He said that CDC's position was that they wanted to disclose as little information from their intelligence files as possible, and John Gordinier and Hugh Allen worked to protect those CDC documents from discovery. This was especially true for Gordinier, particularly when Gordinier felt the information sought by the defense was "cumulative."

Paragraph 43. Tulleners wanted to make it clear that it was Bass, Gordinier, and Allen, not "others" on the prosecution team, who wanted to keep some information, not "as much information as they could" from the defense. This information consisted primarily of the CDC files of "rolled out" members of the Aryan Brotherhood regarding the Aryan Brotherhood conspiracy to murder Stephen Barnes' father and their statements concerning Price. In the end, Tulleners said the defense did receive all of the relevant information within the CDC files of which he became aware.

Tulleners said he was never given any reason why his duties were limited. He said Allen and Gordinier gave "edicts," not explanations. He was told only that he was not to interview any inmates or witnesses. When he did accompany other agents who conducted interviews, Tulleners was told not to take any notes or write reports. Not only does Tulleners have these instructions documented in his case notes, he purports to have memorandums from Gordinier and Allen to that effect. Tulleners said other members of the prosecution team, specifically Barry Brown, Duane Frederickson, Worth Dikeman, and Humboldt County District Attorney Terry Farmer, can verify his assertions regarding the limitation of his duties. At one point, Tulleners was removed from the case entirely. After District Attorney Farmer complained to the Department of Justice (DOJ) hierarchy

about Tulleners' removal, Tulleners said he was reinstated with "tight controls." He said the reason for his removal was because of what he wrote in his reports, adding that he wrote everything in his reports, including information potentially helpful to the defense.

Paragraph 44. Tulleners said he could not testify that Bass "took steps" to keep information from the defense because he did not know specifically what Bass did or did not do toward that end.

The references to Tulleners' "daily logs" were a misnomer, he said. In fact, the logs were the case notes he completed when information came in, such as when he conducted an interview, spoke with someone over the telephone, and information from other homicides he learned about through informants. Also included in his notes were confidential informant names, addresses, and telephone numbers, and protected witnesses. After Tulleners' notes became an issue during the Price trial, he periodically copied them and sent them to Allen and Gordinier. He would also go in-camera with the trial judge, Judge Buffington, and discuss each line of his notes with the judge. Judge Buffington would then determine what information was irrelevant and could be redacted. After Judge Buffington made those decisions, Tulleners literally cut those portions out with an exacto knife. The notes were then copied and discovered to the defense. These copies were what McGlasson was apparently referring to as the "second set" of logs kept by Tulleners.

Tulleners said that a couple of times, as documented in his logs, Bass told him to lie to Price's defense attorneys about discovery issues. Bass told Tulleners to tell the defense attorneys he did not know the answers to specific questions. Tulleners considered that to be a lie if he did know the answer to the questions posed. He could not recall any specific situations where that occurred, but said they would be documented in his notes. He said the content of these instances was not as important as was the fact that Bass was willing to "hide the ball from the defense."

To protect himself, Tulleners said he wrote comments on the back side of his logs regarding his "personal reflections" about the procedural and administrative problems that were coming up through the interjection of Allen and Gordinier through Bass. He had been told by some of the inmate informants he used that Allen and Bass were trying to solicit information to "dig up dirt" on him and "get rid of him." He said too much of the information CDC did not want disclosed was getting out and he speculated that a "hatchet job" was in the making. These logs are currently in the care of a trusted friend and Tulleners said he would provide them to someone he trusts, like DAG Gary Schons, when he can be assured the information will be properly used. He said he did not let McGlasson read the logs nor did he provide him with a copy of the logs. Tulleners took offense to the reference that he voluntarily provided these logs to the McClure defense. He said that was not true and opined that the material obtained by the McClure defense came from either the clerical staff at the Los Angeles Regional Office or Price's defense counsel.

Paragraph 45. Tulleners stated Bass knew about the Tulleners' references on the back side of the logs because Bass had seen him writing them in court. Furthermore, Bass directed Tulleners to keep his personal notes separate from the rest of the notes because he was tired of getting "chewed out" by Gordinier. Tulleners clarified that these logs were simply his private notes written on standard notebook paper and did not involve any timekeeping purpose.

Tulleners said he did not know what the prosecution's discovery tactics were; he had no idea what they were doing while he was out doing his job.

Paragraph 46. Tulleners reiterated that he did not know what the prosecution's discovery tactics were because frequently he was not present during those types of discussions and was often in Los Angeles during different stages of the trial. Tulleners explained that he could only state what he testified to during discovery motions because he was not present when other witnesses testified. He said he did read transcripts of some of the discovery motions, including James Hahn's, Oscar Pena's, and Hugh Allen's testimonies regarding the interview of Larry "Turtle" Jones.

He knew nothing about the reference to Los Angeles Police Department Detective Morck's notes and said one would have to speak with Detective Morck or Ron Bass regarding that reference.

Paragraph 47. Tulleners explained he and his partner, Gene Dagle, met with Oscar Pena, the head of SSU and the prison gang task force, who told them about prison inmate informants, including Larry "Turtle" Jones. Tulleners subsequently interviewed Jones, who stated Curtis Price sent Jones a message in prison slang indicating he (Price) had to kill a female in Eureka. Tulleners said it was his job to corroborate that statement which could have been learned by Jones through other informants within the prison system. Jones told Tulleners during their interview that he had told the same things about the Price case to SSU Special Agent James Hahn when previously interviewed by him in San Quentin. That made sense to Tulleners, who knew that SSU did interview prison gang "roll outs." Tulleners requested SSU provide him with the interview of Jones so that he could corroborate what Jones told him about the Price case. He was told Jones was never interviewed. The same issue later came up during the trial and Hahn, Pena, and Allen testified Jones had never been interviewed. Tulleners said he accepted that. Months later, Tulleners saw Bass reading a transcript in their courtroom office. Tulleners said he was intimately familiar with the case and asked Bass what he had. Bass responded that he did not have anything and threw the document into his briefcase. Tulleners told Bass he wanted to know what it was if it was something that dealt with the Price case. Bass responded that Tulleners could not see it because he (Bass) would get into trouble with Gordinier. Tulleners persisted and Bass eventually showed him the document, which Tulleners estimated was approximately 60 pages in length. The transcript was the interview of Larry "Turtle" Jones by James Hahn which Tulleners said had "numerous" references to the Eureka homicide. Bass told Tulleners they "had a way around this"; they would say Jones was not

interviewed but rather "debriefed." Tulleners said James Hahn and Oscar Pena had both perjured themselves in the Price case and he has retained evidence obtained after the case was adjudicated wherein Bass admits that. He stated that, in his opinion, the information contained in the CDC interview of Jones would not have changed the outcome of the trial but insisted it is up to the trier-of-fact of the habeas proceeding or the trial to make that determination.

Once Tulleners discovered the transcript of the Jones interview existed, he gave Bass the option of going to Judge Buffington with that evidence or else he said he (Tulleners) would. Tulleners said he could not remember whether it was he or Bass who informed Judge Buffington of the existence of the transcript, however, when Tulleners went in-camera with Judge Buffington, he said Judge Buffington "went through the ceiling" and ordered the relevant portions of the interview immediately discovered to the defense. Bass later told Tulleners he got his "ass reamed by the judge." Nothing came of the information disclosed to the defense because there was nothing that was exculpatory.

On one occasion, while at the Downtowner Motel where Tulleners lived during the trial, he overheard Oscar Pena and "others" on the balcony below him talking about how they were going to testify the following day. He heard them talk of their plan to testify that Jones had been "debriefed" and not "interviewed." This was after the judge issued a gag order forbidding witnesses to discuss their testimony with one another.

Paragraph 49. Tulleners agreed with the contents of this paragraph and added that what was missing was the fact that Bass told Tulleners that Gordinier had reviewed the document (the transcript of the Larry "Turtle" Jones interview by SSU Special Agent Hahn). After his review, Gordinier decided "it was cumulative" and not necessary for the defense to see. Tulleners took offense because Gordinier was not the trier-of-fact and should not have been making those types of decisions.

Tulleners pointed out that to the best of his recollection, Gordinier was never in Eureka during the Price trial and generally conveyed his thoughts and directives to Allen or Bass who, in turn, relayed them to Tulleners.

Paragraph 50. Tulleners said the last sentence in the paragraph, which states, "Tulleners viewed Bass' coaching of witnesses to lie or shade the truth as an example of abominable prosecutorial misconduct," were not his words. He said he did not know if Bass coached witnesses; he was only aware that Bass knew Hahn and Pena persisted in this "deliberate deception" concerning the debriefing/interviewing of a witness. From his perspective, Tulleners said he did not view that as "abominable prosecutorial misconduct" because the co-prosecutor, Worth Dikeman, was "totally ethical" and "aboveboard."

Paragraph 51. On the same day following Price's death sentence, Tulleners, Bass, Worth Dikeman, Barry Brown, and Duane Frederickson were sitting in the office inside the courthouse they occupied during the trial. Bass leaned back in his chair and pulled an approximate five-inch reel of tape out of his leather accordion-style briefcase and laughingly said something to the effect of, "Look what we just found." The tape was a recording of Frederickson's interview of Berlie Petry, the common-law husband of murder victim Elizabeth Hickey. Tulleners said he, along with Brown, Frederickson, and Dikeman, was "pissed." Tulleners said there was no question in his mind that the tape produced by Bass was the Berlie Petry interview tape. He said Bass stated it was the Berlie Petry interview tape because it was marked as such. It was also later discussed among "the group" that the tape produced by Bass was the Berlie Petry interview tape.

He explained that a transcript of the Berlie Petry interview tape had been previously discovered to the defense. During the trial, the defense asked for a copy of the actual tape and the judge order the prosecution to produce the tape. Tulleners, Brown, and Frederickson searched their office in the courthouse, the police department, and the District Attorney's Office to no avail. Finally, they appeared before the trial judge and reported to him that the tape had been lost.

Tulleners asked Bass why he had done this (conceal the tape). Bass responded that it would have just slowed down the trial and they did not need it because they had the transcript. Tulleners said it was totally unnecessary for Bass to have concealed the tape because there was nothing in the tape that would have helped the defense impeach Petry.

Paragraph 54. Tulleners disputed the contention that the "prosecution" as a whole purposefully frustrated the defense's ability to defend Price. Tulleners felt it was Bass and Gordinier who were responsible and not Dikeman. The latter part of that sentence describing the prosecution's "deceitful, self-righteous portrayal . . . " was "literary rhetoric" used by McGlasson.

Bass came to Tulleners one day and told him Price's defense counsel, DePaoli, wanted to interview him. Bass told Tulleners to tell DePaoli he didn't want to be interviewed. On another occasion Bass told Tulleners to tell DePaoli to "go fuck himself." Tulleners could not recall whether or not he did eventually meet with DePaoli and said the answer to that question would be in his notes. He did recall, however, that DePaoli did extensively cross-examine him on the witness stand.

Paragraph 55. Tulleners said the references to the prosecution "turning the trial into a sporting event" and "suppressing critical evidence" were attorney rhetoric. He did not think Bass ever relied on anything to which Hahn testified because the prosecution never used any of the testimony. It was the defense who made an issue of Hahn's testimony during a discovery motion. The only false testimony of which Tulleners was aware was the testimony of Hahn and Pena regarding the interview of Larry "Turtle" Jones. He referred to this paragraph as "an argument by McGlasson"

and was not factual in basis. The remark regarding Judge Buffington confiding in the prosecution was "100 percent false," according to Tulleners. He said Judge Buffington was outraged several times over Bass' conduct.

Declaration of Robert McGlasson:

Paragraph 3. Tulleners said Robert McGlasson showed up at Tulleners' place of employment unannounced on November 4, 1997 and spoke with McGlasson from 1530 - 1830 hours that day and from 1100 - 1615 hours on November 5, 1996. During the interview, Tulleners did not observe McGlasson take any notes. Following the interview, Tulleners had no further contact with McGlasson for 17 months until March 27, 1998 when he received a declaration, which was "full of crap," in the mail.

Paragraph 5. Tulleners stated he was never threatened by Bass, whom he has not spoken to since October 1989, and was never told not to talk about the Price case. He perceived that he was probably criticized by members of the Attorney General's Office due to his testimony in the McClure case. Tulleners does, however, fear vindictiveness from Gordinier toward Tulleners' daughter, , but has received no indication that will happen.

Paragraph 7. At the point Tulleners was forbidden to conduct interviews, take notes, or write reports, other agents, including Phil Morrison and Bud Bennett, were assigned to conduct these interviews. According to Tulleners, these agents did not know anything about the case and consequently did not know what questions to ask. Occasionally, these agents would call Tulleners in advance of the interview and ask him what to do since they did not understand what was or was not relevant to the case. To the best of Tulleners' knowledge, these agents never deliberately did anything wrong; they simply did not understand the case and what was relevant.

Paragraphs 10 and 11. Tulleners said he did not respond to McGlasson in March 1998 because he was not their witness and found the declaration under his (Tulleners) name "fraught" with mistakes. He was irritated because he had not heard anything for 17 months and then received an unsolicited document with "tons of mistakes." At that point, Tulleners said he felt he owed McGlasson nothing if he could not even accurately reflect what he had been told in the first place.

Declaration of Paul J. Tulleners (unsigned):

Tulleners wished to make it clear that he did not author this declaration and did not agree with most of its contents.

Paragraph 6. Tulleners said the statement that the prosecution wanted to keep "as much information from the defense as possible" was untrue for Bass or anyone. The emphasis was to protect CDC interests at the request of Gordinier and Allen.

Paragraph 7. Everything Tulleners became aware of was disclosed to the judge in-camera, except for two things he learned of after the sentence was handed down. One event involved Bass' disclosure of the Berlie Petry interview tape. The other instance Tulleners declined to speak about. Tulleners estimated he went in-camera with the judge three or four times, one of which involved the Berlie Petry interview tape. He could not recall what he discussed with the judge on the other occasions but said they would be public record now.

Paragraph 9. Regarding the topic of discovery issues between the defense and prosecution, Tulleners said these subjects were outside his "bailiwick of knowledge." He added that the official record would contain what discovery issues were raised and how they were resolved. Likewise, he said he was in no position to know whether or not subpoenas duces tecum were defective.

Paragraph 12. Tulleners disagreed with the statement that Bass had coached witnesses on how to handle the prior interviewing of Larry "Turtle" Jones. He said he had no knowledge Bass had ever done such a thing. He did, however, perceive Bass' willingness to participate in conduct exemplified in the interview of Jones as "outrageous" and prosecutorial misconduct.

Paragraph 14. Tulleners did not know what transpired with CDC regarding subpoenas duces tecum and was in no position to comment on their defectiveness or manner of service.

Paragraph 15. Tulleners said he was not present when discovery motions were held and did not know what the trial judge was told about CDC files. Tulleners also pointed out that Curtis Price has been an inmate of the correctional system for many years and knows CDC keeps a confidential file on inmates. Price himself should have told his attorneys about the files and their importance during his trial.

Paragraph 16. Following Tulleners' testimony in the McClure case, he never had any contact with Bass, Allen, or Gordinier. Being called a traitor "never happened" and was untrue.

2-17-99

JEFF LIERLY
Special Agent

APPROVED: 2/18/99

STEVEN S. HIRIGOYEN
Special Agent Supervisor

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S-02/17/99
T-02/17/99

DECLARATION OF SERVICE

Case Name: **In re Curtis F. Price** No.: **S069685**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 2, 1999, I placed the attached

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

in the internal mail collection system at the Office of the Attorney General, 50 Fremont Street, Suite 300, San Francisco, California, 94105, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Karen S. Sorensen
Attorney at Law
929 Sir Francis Drake Blvd., Ste. C
Kentfield, CA 94904-1548

Robert L. McGlasson
Attorney at Law
1024 Clairemont Ave.
Decatur, GA 30030

California Appellate Project
One Ecker Place, 4th Flr.
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 2, 1999, at San Francisco, California.

GLORIA MILINA

Signature