IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	Case No.: S069685
CURTIS F. PRICE ,	Related to Nos. S004719 & S018328)
On Habeas Corpus,	

SUPREME COURT
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INFORMAL REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re CURTIS F. PRICE , On Habeas Corpus,	)	Case No.: S069685 Related to Nos. S004719 & S018328)

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

INFORMAL REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

Petitioner CURTIS F. PRICE, by and through his appointed counsel provides this Informal Reply to respondent's Brief in Opposition to the Petition for Writ of Habeas Corpus.

In this Reply, petitioner will address the claims in the order in which they are discussed by the respondent. In the last section of this Informal Reply, section X, petitioner will provide the detailed factual showing required by this court's decision in *In re Robbins* (1998) 18 Cal.4th 770, to establish the absence of substantial delay or to establish that there was good cause for any such delay. Robbins was decided after petitioner filed his exhaustion petition.

CLAIM I

PETITIONER'S CONVICTIONS AND DEATH SENTENCE 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

Petitioner filed his habeas corpus petition to exhaust state remedies in this Court on April 21, 1998. Over 1000 pages of exhibits accompanied the petition. The vast majority of those exhibits were offered in support of the present claim. This claim presents two related but separate grounds for why petitioner's convictions and death sentence must be reversed: 1) the prosecution knowingly used false testimony or failed to correct testimony when it appeared, that the prosecution knew or should have known was false, and 2) the prosecution suppressed constitutionally material evidence. At the center of these claims are three key prosecution witnesses, Michael Thompson, Clifford Smith and Janet Myers – who directly or indirectly implicated petitioner in the alleged conspiracy by the Aryan Brotherhood (AB), and in the overt acts of the conspiracy, which included all counts in the Information.

Respondent took almost a full year to file the Informal Response to the exhaustion petition. Despite having that amount of time, respondent's briefing on Claim I is notable for its numerous and significant factual errors, its failure to address or even mention key evidence that petitioner filed in support of the petition, and its misstatements of law and flawed legal analysis.

This reply to respondent's brief is divided into a number of sections. In section A of this reply, petitioner provides an overview of the applicable federal law governing his *Napue* and *Brady-Bagley* claim. In section B, petitioner will show that the prosecutors had imputed or actual knowledge that their key witnesses, Michael Thompson, Clifford Smith and Janet Myers testified falsely at petitioner's trial. In the next three sections, petitioner will address respondent's contentions concerning petitioner's evidentiary showing. In Section C, petitioner discusses his evidentiary showing as to Michael Thompson; in Section D, petitioner discusses his evidentiary showing as to Clifford Smith, and in Section E, petitioner discusses his evidentiary showing as to Janet Myers. And, in Section F, petitioner demonstrates that he has established constitutional materiality under both the *Bagley* standard and the *Napue* standard, and that respondent's cumulative impeachment arguments are without merit.

A. Overview of the Applicable Decisional Law

Federal law is well settled that if the prosecution either knowingly used perjured or false testimony to convict the defendant, or failed to correct what the prosecution knew or should have known was false testimony, the conviction must be set aside if there is "any reasonable likelihood that the false testimony could have affected the jury verdict." (*Napue v. Illinois,* 360 U.S. 264 (1959)(emphasis added); *Giglio v. United States,* 405 U.S. 150 (1972).) This standard of materiality for *Napue-Giglio* claims was reaffirmed in *United States v. Bagley,* 473 U.S. 667, quoting *United States v. Agurs,* 427 U.S. 97, 103 (1976). The standard is equivalent to the *Chapman v. California,* 386 U.S. 18 (1967) "harmless beyond a reasonable doubt" standard. (*United States v. Bagley, supra,* at 679, n. 9.) In *Napue-Giglio* cases, a standard of materiality that is the most favorable from the defense standpoint is applied "not just because [such

cases] involve prosecutorial misconduct, but more importantly, because they involve a corruption of the truth-seeking function of the trial process." (*United States v. Agurs, supra,* 427 U.S. at 104.) "'In short, they affect 'the honor and integrity of the sovereign's administration of justice . . . because they are subversive to the institution of fair trial itself.'" (*In re Jackson,* 3 Cal. 4th 578, 635 (1992) [disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, n. 6] *(dissenting opn. by* Mosk, J.*) (quoting Link v. United States,* (8th Cir. 1965) 352 F.2d 207, 211.)

A more prosecution-friendly standard of materiality applies to cases in which the prosecution suppressed favorable evidence but did not engage in conduct that violated *Napue-Giglio*. In such cases, undisclosed evidence is material 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, supra,* 473 U.S. at 682.)[1]

In his Informal Response, respondent's entire discussion of the decisional law applicable to petitioner's *Napue-Giglio* and *Brady-Bagley* claims consists of one quoted passage from *United States v. Endicott* (9th Cir. 1989) 869 F.2d 452 (a *Napue-Giglio* case.) (*See Inf. Resp. at 6.*) As *Endicott* correctly states, the materiality standard for *Napue-Giglio* claims is different than the materiality standard for *Brady-Bagley* claims. In turning to petitioner's case and in specifying the questions at issue here, respondent fails to make that distinction and misstates the applicable law in the process.

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[1] This Court has held that a similar standard of materiality is applicable to false evidence claims based on state law. (See In re Sassounian, 9 Cal.4th 535 (1995) [false evidence is "substantially material or probative" under Penal Code section 1473 if there is a "reasonable probability" that had it not been introduced, the result would have been different.].)

First, respondent states that "petitioner must show the existence of facts about the treatment received from the prosecutors, and then, petitioner must show that the information would have been material **and** would have had a reasonable probability of changing the verdict." (*Id. at* 7, emphasis added.) Respondent does not indicate whether he is referring to petitioner's *Napue* claims or to his *Brady-Bagley* claims, but in either event, respondent has misstated the law. There is no legal authority, and respondent can cite none, for the proposition that petitioner must show that his evidence satisfies the reasonable "probability" standard before he can prevail on his *Napue* claims. That is not the showing required for such claims. Respondent also misstates the showing required for petitioner's *Brady-Bagley* claims. Petitioner is not required to establish both materiality and prejudice to prevail on those claims, as respondent appears to suggest. The United States Supreme Court has made clear that if a defendant establishes that there is a reasonable probability that the result would have been different, in other words, a probability sufficient to undermine confidence in the outcome, he has shown constitutional materiality and is entitled to a new trial. No further showing of prejudice is necessary. (*Stricker v. Greene,* ___ U.S. ___. 119 S.Ct. 1936 (1999); *Kyles v. Whitley,* 514 U.S. 419 (1995).

Second, respondent states that in addition to meeting his burden of showing that perjured testimony was in fact adduced at trial, petitioner must also show that the prosecutors are responsible for the perjured testimony. That is only partially correct, since as discussed *supra*, the prosecution has a duty to correct testimony they should have known was false, even if they are not directly responsible for the witness' commission of perjury. Respondent also contends that petitioner must show that the prosecution team was "so intimately tied" with the Los Angeles County Sheriff's Department (hereafter "LASD") before knowledge of benefits afforded to

the prosecution's witnesses by that department is chargeable to the trial prosecutors. (*Inf. Resp.* at 8.) Respondent has not cited any authority for his "so intimately tied with" test, and neither the *Napue* nor the *Bagley* jurisprudence on the issue of imputed knowledge require such a heightened showing. (*See e.g. Strickler v. Greene, supra,* [knowledge of law enforcement agent initially involved in investigation of case imputed to prosecutor from different county in which case was prosecuted]; *In re Jackson, supra*, 3 Cal.4th at 596 [knowledge of deputy sheriff "handling" the informant witness imputed to prosecution].) Moreover, as petitioner discusses *infra*, members of LASD substantially assisted the prosecution's efforts to obtain a conviction against petitioner, and their knowledge is chargeable to the prosecution even under respondent's "so intimately tied" test.

Third, respondent asserts that even if petitioner can show imputed responsibility on the part of the prosecutors, he must also show that "disclosure of such evidence to the jury **would**, with reasonable likelihood, have had an effect on the verdict herein." (*Inf. Resp* at 8, emphasis added.) Once again, respondent has misstated federal law. As the Eleventh Circuit observed in *Brown v. Wainwright,* (11th Cir. 1986) 785 F.2d 1457, application of a standard of materiality for *Napue-Giglio* claims that is couched in the term "would" have affected the verdict rather than the term "could" have affected the verdict is contrary to United States Supreme Court precedent. (*Id.* at 1464.) In *Brown*, a death penalty case, the petitioner sought habeas relief on grounds that the prosecution failed to correct false testimony by a key prosecution witness concerning benefits promised for his cooperation. The district court held that Brown had not met his burden of showing that the false testimony about benefits was material. In so holding, the district court relied on *United States v. Phillips* (5th Cir.1981), 664 F.2d 971, in which the standard of materiality for

knowing use claims was articulated as whether it is reasonably likely that the truth would have affected the outcome of the trial. In reversing Brown's conviction and death sentence, the Eleventh Circuit held that the materiality standard applied by the district court was erroneous. As the court noted, the use of "would" instead of "could" in *Phillips* is different than the standard uniformly applied in knowing use cases by both the United States Supreme Court and the Eleventh Circuit. The court then stated that "to the extent *Phillips* states a different standard than the one in *Giglio*, it has been implicitly overruled by *Bagley* in the Supreme Court and by *McCleskey v. Kemp* [753 F.3d 877 (11th Cir. 1985)(*en banc*) in this court." (*Brown v. Wainwright, supra,* 785 F.3d at n. 10.).

Petitioner will return to the decision in *Brown v. Wainwright* later in this brief when he addresses the issue of constitutional materiality and respondent's cumulative impeachment arguments. The respondent in *Brown*, like respondent here, contended the witness who furnished false testimony was not important to the state's case and that his false testimony was not material because it was merely cumulative of other impeachment that had been introduced. The Eleventh's Circuit's decision rejecting those contentions is equally apposite in the present case.

B. The Prosecutors Had Imputed or Actual Knowledge That Their Key Witnesses, Michael Thompson, Clifford Smith And Janet Myers Testified Falsely at Petitioner's Trial.

Respondent asserts that "any possible issues in this case must be analyzed only under the *Brady* reasonable probability standard." (*Inf. Resp. at* 11.) Respondent bases this assertion on his contention that petitioner has not shown that the prosecutors either knew or should have known that any of the witnesses who are at the center of this claim testified falsely at petitioner's trial. (*Ibid.*)

Respondent makes this assertion in the section of his brief devoted to Michael Thompson. Respondent contends that petitioner has failed to make out a prima facie case that the prosecutors are chargeable with knowledge of any unusual amenities afforded Thompson in the Los Angeles County jail. (*Id.* at 10.) Respondent relies on the fact that Los Angeles County declined to prosecute petitioner on the Barnes murder. Respondent also argues that petitioner has not proven that either of the two prosecutors ever visited Thompson at that jail. Then respondent argues that even if Bass and Dikeman did visit Thompson there -- a fact respondent essentially concedes –petitioner has not shown that either of them had any reason to suspect from their own personal observations that Thompson was receiving anything unusual at the jail, such as conjugal visits, turkey dinners and the like. (*Id.* at 11.)

In so arguing, respondent fails to take two critical factors into account. First, respondent ignores the fact that even though the Los Angeles County District Attorney decided not to prosecute petitioner, members of the Los Angeles County Sheriff's Department provided substantial and indeed invaluable assistance to the prosecution's efforts to convict petitioner in Humboldt County and obtain a death sentence against him. Second, respondent ignores the well settled doctrine that the knowledge of law enforcement agents who provide substantial assistance to the prosecution will be imputed to the prosecutors, and that this is true even where the agents are from a different jurisdiction than the one in which the trial is held. (See *United States v. Antone* (5th Cir. 1979) 603 F.2d 566 [information known to state law enforcement agents imputed to federal prosecutors in *Napue-Giglio* case]; *In re Jackson, supra*, 3 Cal.4th 578, [knowledge of sheriff's deputy imputed to prosecutor in *Napue* case]; *Kyles v. Whitley, supra,* [information known to police and investigative agents imputed to prosecution in *Brady-Bagley* case;] *Strickler v. Greene, supra,*

[information known to police in one county imputed to prosecutor handling trial in another county in *Brady-Bagley* case].)

The substantial assistance provided by LASD in this case is set forth in the exhaustion petition and supporting exhibits and in the trial record. That assistance took various forms. For example, LASD detectives Ross and Morck handled the investigation of the Barnes murder, developed investigative leads and interviewed witnesses, including Alice Barnes and George Noriega, who testified for the prosecution. (RT 11638-11647, 11734-11747.) Detective Ross was himself a witness for the prosecution, as was LASD Sgt. Christiansen, who handled the ballistics examination of the bullets used in the Barnes murder. (RT 12077.)

Other LASD members, including Sgts. Hayward Barnett and Roger Harryman, of LASD's gang task force (hereafter LASO) also provided significant assistance to the prosecution's efforts against petitioner. Barnett and/or Harryman were involved and/or conducted interviews with all three of the witnesses who are at the center of this Claim. (See RT 11750-11752 [Thompson]; 13837 [Myers], 14810-1 [Smith].) Barnett and/or Harryman also participated in orchestrating the events that turned Janet Myers and Clifford Smith into witnesses against petitioner.

The events that led to Janet Myers becoming a prosecution witness began with a plan worked out between Michael Thompson and LASD to obtain Myers' cooperation. (RT 11753.) Under that plan, Myers was removed from CDC custody and transported by LASD Sgts. Detectives Ross and Morck to a sheriff's substation in Tehachapi, where LASD Sgt. Barnett and Michael Thompson were waiting. Then, with Barnett, Ross and Morck present, Thompson, who was acting as their agent, used scare tactics to get Myers to agree to cooperate against petitioner. (RT 13837.) Those tactics were successful, and Janet Myers became cooperating with law enforcement against petitioner. (RT 11753-11754)

The events that led to Clifford Smith becoming a witness against petitioner also began with a plan in which Barnett and Harryman were also involved. The plan was worked out between them and Paul Tulleners, the lead investigator in this case from the Special Prosecutions Unit of the Attorney General's office. Tulleners contacted Barnett and Harryman and asked for their assistance in arranging and paying for a special visit by Clifford Smith's mother, Helen Smith, with Clifford at San Quentin State Prison. (Pet., Exh. 34 at 5.) Their plan was to have Helen Smith persuade her son Clifford to defect from the AB and join MLT as a witness for the prosecution against petitioner. Barnett and Harryman agreed to PJT's request, and they personally transported Helen Smith to San Quentin for the visit, which had its hoped for results. (*Id.* at 22) Clifford Smith agreed to defect and cooperate in the prosecution's efforts against petitioner. Barnett and Harryman were also present with Tulleners and Ron Bass on October 18, 1985 when Clifford Smith was removed from San Quentin Prison, taken to a secret location in Marin County, and debriefed about the AB and the alleged AB murder conspiracy with which petitioner was then on trial. (*Ibid.*)

Barnett and Harryman also played a major role in ensuring that Michael Thompson would remain a cooperating witness against petitioner. Thompson had threatened to cease his cooperation in this case among others, unless certain conditions were met. (Pet., Exh. 15.) Thompson demanded that he be removed from CDC custody and housed in a facility in Los Angeles County, and that Barnett and Harryman take over the role of acting as his "handlers," otherwise known in the subculture of informants as his "juice men." (See *In re Jackson*, *supra*, 3 Cal.4th at 622, n. 4 [dissenting opn. by Mosk, J.]; (Pet., Exh. 15.) Barnett and Harryman gave Michael Thompson what he wanted, and after they became his "handlers"

and secreted him in a module within the Los Angeles County jail, the special privileges Thompson enjoyed there began to flow.

As Michael Thompson's "handlers" Barnett and Harryman were responsible for providing all forms of assistance to him while he was in their custody at the LA County jail, including taking care of all of his needs. (RT 16431 & Pet., Exh. 15) They were also responsible for his security and for transporting him to and from court proceedings, including to Humboldt County to testify against petitioner. (Pet., Exh. 15.) They also served as liaisons between Thompson and members of the prosecution team, and they coordinated Thompson's visits at the LA County jail, including visits by Tulleners, SPU Special Supervising Agent Suazo, and Ron Bass, among others. (See Pet. Exh 43.) Barnett and Harryman were also responsible for approving all of Thompson's civilian visitors (Pet., Exh. 52, at 79-80). One of those civilian visitors was Michael Thompson's girlfriend, Patricia Porter, whom respondent repeatedly and mistakenly calls Thompson's wife. (*Inf. Resp. at* 8, 9.)[2] In her declaration filed in support of the exhaustion petition, Ms. Porter described an array of special privileges and benefits Michael Thompson received while he was in LASD custody and being "handled" by Barnett and Harryman. (See Pet, Exh. 3.)

Given the substantial assistance LASD provided for petitioner's prosecution, and given the fact that LASD was the source of the special privileges and benefits Michael Thompson received while he was in LASD's custody and being handled by Barnett and Harryman, their knowledge of Barnett and Harryman and the knowledge of others in LASD is chargeable to the prosecution for *Napue* purposes. This court's decision is *In re Jackson, supra,* is on point. *Jackson* is another case, like this one, that involved false testimony by a prosecution informant who was housed

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[2] Respondent's mistake in this regard is a significant one, and petitioner will explain why later in this brief.

at the Los Angeles County jail, was received undisclosed inducements from his "handler," a Los Angeles County deputy sheriff. In *Jackson,* however, the prosecutor was completely unaware of the inducements given the witness or of the fact that the witness testified falsely concerning them. The Court concluded that the prosecutor nonetheless had a duty to correct the informant's false testimony, because the knowledge of the deputy sheriff, who was the source of the inducements about which the informant lied and who had brought the informant to the prosecution's attention, is imputed to the prosecutor. This Court's decision on the issue of imputed knowledge was based on United States Supreme Court precedent:

> . . . .The United States Supreme Court has held that the state's duty to correct false or misleading testimony by prosecution witnesses applies to testimony which the prosecution knows, or should know, is false or misleading (see *United States v. Agurs, supra*, 427 U.S. at p. 103 [49 L.Ed.2d at pp. 349-350]), and has concluded this obligation applies to testimony whose false or misleading character would be evident in light of information known to other prosecutors, to the police, or to other investigative agencies involved in the criminal prosecution. (See, e.g., *Giglio v. United States, supra*, 405 U.S. 150, 154 [31 L.Ed.2d 104, 108-109] [information known to prior prosecutor]; *United States v. Bagley, supra*, 473 U.S. 667, 670-672 & fn. 4 [87 L.Ed.2d 481, 486-488] [information known to federal investigators]; *Barbee v. Warden, Maryland Penitentiary* (4th Cir. 1964) 331 F.2d 842, 846 [information known to investigating police officers]. See also Comment, The Prosecutor's Duty [to] Disclose: From Brady to Agurs and Beyond (1978) 69 J.Crim.L. & Criminology 197, 205-206; 2 LaFave & Israel, Criminal Procedure (1984) § 19.5, pp. 553-554 & fn. 9.)

(3 Cal.4th at 595.)

As in *Jackson*, the knowledge of Michael Thompson's "handlers" Barnett and Harryman and others in LASD is chargeable to prosecutors Bass and Dikeman, whether or not the prosecutors had personal knowledge

of the inducements Michael Thompson received from LASD to continue his cooperation in this case or a reason to suspect based on their personal observation that he was receiving any such inducements is not controlling. (*Id.* at 596.) Both prosecutors had a duty mandated by the federal due process clause to correct Michael Thompson's false testimony concerning those inducements, and both prosecutors failed to meet their obligations in that regard.

Both prosecutors also failed to meet their constitutionally mandated duty to correct the false testimony given by Clifford Smith concerning an undisclosed benefit given to him in return for his cooperation in this case. The benefit was charging and sentencing leniency for Clifford's brother Jimmy Smith in return for Clifford's testimony against petitioner. Once again, LASD Sgt. Hayward Barnett, who had played a role in delivering Clifford over to the prosecution as a witness in the first place was the individual who negotiated this benefit for and on Clifford Smith's behalf. In this regard, Barnett personally contacted the Kern County Superior Court judge assigned to the criminal case involving Jimmy Smith, and requested that Jimmy Smith be sentenced to something less than robbery, and that he be given county jail time and not sentenced to state prison.[3] (See Pet., Claim I, at p. 73.) Sgt. Barnett testified at a proceeding in Jimmy Smith's case that he (Barnett) made that request as part of the deal made with Clifford Smith in return for Clifford's cooperation against petitioner. (*Id.*) Barnett obviously had actual knowledge about the deal with Clifford involving Jimmy Smith. Given Barnett's close cooperation and substantial assistance to the prosecution with respect to Clifford Smith, among others, Barnett's knowledge of this benefit about which Clifford testified untruthfully is imputed to the two prosecutors.

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[3] Petitioner will discuss this benefit to Clifford Smith in more detail later in this brief.

As noted above, Barnett also played a role in delivering over Janet Myers as a witness for the prosecution. However, it is unnecessary to resort to the doctrine of imputed knowledge to conclude that the prosecution had a duty to correct her false testimony denying that she had any pending "open" cases, in other words, cases in which she had not yet entered a guilty plea. As Mr. Bass acknowledged to the trial judge, he had reports on all six of Ms. Myers' outstanding warrants. (RT 13767.) Those reports caused the trial judge to believe, correctly so, that Ms. Myers did have several "open" under-the-influence cases pending against her. (RT 13768.) The judge asked Ms. Myers if that was correct, and she responded affirmatively, but later changed her answer in response to leading questions by Bass. (RT 13766-13768.) Bass and Dikeman either already knew or should have been alerted by Ms. Myers' initial affirmative response to the court's inquiry and by the reports that caused the judge to correctly believe that Ms. Myers did have open cases pending against her, that her subsequent testimony denying that she did was false.[4] Under the circumstances the prosecutors clearly had a duty to correct her perjury.

In view of the above and foregoing, respondent's contention that petitioner has "wholly" failed to meet his burden of showing that the prosecutors knew or should have known about the perjury of their witnesses is "wholly" without merit. Respondent's attempts to avoid application of the *Napue-Giglio* standard of materiality to petitioner's false testimony claims must be rejected, because respondent's position is contrary to applicable federal law.

[4] A comment Mr. Dikeman made to the trial judge right after the judge stated that he thought Ms. Myers' did have pending open cases is quite telling. Rather than stating that the judge was mistaken, Mr. Dikeman's only response was to say that Ms. Myers' cases were all misdemeanors. (RT 13770.) The implication of this comment was that it did not matter whether or not those cases were open or not, because Ms. Myers could not be impeached with this information. In fact this was the prosecution's basis for refusal to furnish the defense with any information about Ms. Myers' non-felony charges, and for its failure to disclose the warrant report that the prosecution provided to the trial court.

C. Petitioner Made A Substantial Evidentiary Showing that Michael Thompson Received Significant Undisclosed Benefits As A Reward Or Inducement for His Cooperation in This Case And That He Lied To Conceal Those Benefits.

Respondent contends that petitioner's evidentiary showing in support of his *Napue* and *Bagley* claims is at best meager with respect to Michael Thompson, based only on speculation and sinister allegations with respect to Clifford Smith, and insignificant with respect to Janet Myers. (See *Inf. Resp. at* 5.) Respondent's contentions are factually flawed and without merit.

After purporting to have "in fact" examined all of petitioner's exhibits, respondent asserts that petitioner's claim of benefits to Michael Thompson come from only two sources: Thompson and Thompson's own wife. (*Inf. Resp. at* 8.) Respondent obviously did not bother to read the petition or the supporting documentation with any care. As the petition and Ms. Porter's declaration filed in support of the petition correctly state, she is a former girlfriend of Michael Thompson. (See Pet., Claim I, para. 47; Exh. 3.) She is not his wife, nor has she been. Michael Thompson's wife is Patricia Ann Pavlik, a tattoo artist, who did contract work for the LASD, and who was introduced to Thompson by LASD. (Pet. at 51-53.) Ms. Pavlik and Thompson worked together in various tattooing-related business ventures beginning around 1985. (Pet., Exh. 44 at 183.) They eventually married in a ceremony in 1988 at the LA County jail that was arranged by LASO. (Pet., Exh. 22 at 34, Exh. 27.)

Respondent's erroneous assertion that Ms. Porter is Michael Thompson's wife, an assertion respondent repeats a number of times in his brief, is a significant mistake and underscores respondent's casual attitude towards petitioner's governmental misconduct claims. In an obvious attempt to minimize the importance of Ms. Porter's information, respondent

accuses her of bragging about the benefits her "husband" received at the jail. (*Inf. Resp. at* 8.) It is of course impossible for respondent or any one else for that matter to determine from the cold face of a declaration that Ms. Porter was bragging about the special benefits afforded to Michael Thompson, as opposed to simply describing them. Respondent's characterization of Ms. Porter's statements as bragging appears to be based on respondent's underlying assumption that Michael Thompson's wife would naturally be proud of and even boastful about the special consideration her husband received from the authorities. That assumption is obviously misplaced with respect to Ms. Porter.

The fact that Ms. Porter was **not** Michael Thompson's wife is a significant factor for the present claims. As petitioner has alleged, for Michael Thompson to get to have sex in his cell with a woman (Ms. Porter) to whom he was not married shows how far law enforcement authorities were willing to bend the rules to accommodate and placate him so that he would be willing to continuing cooperating in this and other high profile cases. Conjugal visits with a non-spouse were not available to Thompson while he was incarcerated in CDC, and conjugal visits even with a spouse were normally unavailable to county jails inmates in California.

Another factor that is important to the instant claims is that Ms. Porter was not required to undergo a search of either her person or the bags of items she brought into the jail for Thompson. As the petition alleges, one of Thompson's primary grievances against the CDC was its policy of requiring his visitors and those of other informants in the PHU at Tehachapi, where Thompson was housed before his change of address to the LA County jail, to undergo strip searches. (See Exh. 18.) Paul Tulleners was aware of Thompson's complaints about CDC's visiting policies, as were LASO Sgts. Barnett and Harryman. Once they moved Thompson from CDC custody and placed him in his secret module at the

Los Angeles County jail, Thompson's former problems concerning his visitors were solved. He no longer had any reason for concern that his visitors would be subjected to strip searches. Indeed, not only was Ms. Porter not subjected to a strip search before she visited Thompson at the LA County jail, she was not subjected to a search of any kind. (Pet. Exh. 3.) Furthermore, she was allowed to visit him in his module for as long he wanted, including on at least one occasion until the wee hours of the morning. (*Id.*) It is reasonable to infer from this dramatic change in Thompson's visiting privileges that the understanding about "proper housing" that he worked out with Barnett and Harryman as a quid pro quo for continuing his cooperation in this case included unrestricted visiting privileges at the LA County jail. Further support for this inference comes from a statement Thompson made to Ms. Porter while he was in the process of negotiating his deal for "proper housing" with Barnett and Harryman. Thompson told Ms. Porter at the time that he was in the process of working out arrangements that would make it easier for her to visit him. (Pet, Exh. 3.)

Respondent's portrayal of Thompson's privileges at the jail as minor amenities (see *Inf. Resp.* at 13) is palpably absurd. Respondent calls many of petitioner's other claims about Thompson's jail conditions "unimpressive", comparing them to the conditions respondent alleges petitioner had in the Humboldt County jail. (*Inf. Resp. at* 11.) For example, respondent asserts without providing any citation to the record that petitioner was afforded a three-cell suite to prepare for his trial. (*Id.* at 10.) While it is true that petitioner was allowed to meet with his attorneys in an area separate from his cell, to compare petitioner's accommodations at the Humboldt County jail with Thompson's in Los Angeles County borders on the ridiculous. Petitioner was housed in a dimly lit cell that had poor ventilation. Indeed, his living conditions were so bad that a mental

health expert opined that petitioner was suffering from sensory deprivation and that his living conditions were contributing to the deterioration in his mental state. Furthermore, even if Thompson's housing conditions were comparable to petitioner's, which of course they are not, that in no way alleviates the prosecution's obligation to correct Thompson's false testimony about those conditions. Michael Thompson was a prosecution witness; petitioner was on trial for his life. Thompson had long since lost his presumption of innocence and, as a convicted double murderer, most of his constitutional rights as well. By contrast, while petitioner was incarcerated in Humboldt County, he was presumed innocent and with limited exceptions, was entitled to a full panoply of constitutional rights, including the right to counsel, the right to prepare and present a defense and the right to cross-examine the witnesses against him. Moreover, respondent seems to have forgotten that during the time period when Michael Thompson was sipping Perrier water with Ms. Porter, eating Thanksgiving turkey with her and a guard in Module 1310 and indulging in such luxury food items as Hagen Daz ice cream, petitioner had to file a writ just to obtain *inter alia* minimally adequate nutrition at the Humboldt County jail.

Respondent also ignores the fact that these unusual benefits were received by Michael Thompson while he was in the custody of LASD, the same department that came under heavy fire after the Los Angeles County jailhouse informant scandal came to light. Thompson was housed in that jail during the time period covered by the LA County Grand Jury's Report (hereafter "Report') concerning that scandal. Petitioner filed that Report in its entirety as part of his evidentiary showing for his exhaustion petition. (See Pet, Exh. 45.) This Court granted the petitioner's request to take judicial notice of that Report pursuant to Evidence Code section 452, 459 in

In re Sassounian, supra, (9 Cal.4th 535, at n.4) and petitioner requests that the Court take such notice here.

As petitioner has indicated, that Report covers the time period when Michael Thompson was being housed at the LA County Jail, and it chronicles *inter alia* the misappropriation of funds, designated for witness protection, to pay off jailhouse informants. (Pet. Exh. 45.) As part of his evidentiary showing, petitioner filed records showing that Michael Thompson was a recipient of such funds. (See Pet, Exh. 31.) As the Report indicates, a number of informants (not identified) who were housed at the LA County jail during the same time period as Michael Thompson was housed there testified before the LA County Grand Jury concerning the scandal. Those informants described various kinds of undisclosed benefits they received from LASD officials, among others. The kinds of special privileges Michael Thompson enjoyed went far beyond anything described in the Grand Jury's report which only underscores Thompson's importance as a cooperating witness in this and other high profile prosecutions.

Respondent denies that Thompson was an important witness in petitioner's case – a denial petitioner will address in considerable detail *infra* in the section of his brief devoted to the issue of constitutional materiality. Respondent also argues that the statements Thompson made in his parole applications and testimony before the parole board about his favorable treatment at the LA County jail amount to "wholly self-serving hearsay that is untrustworthy and would be inadmissible in any forum." (*Inf. Resp. at* 9.) This is yet another sweeping assertion by respondent for which no legal authority is cited. Besides that, respondent is wrong. Michael Thompson told the parole board that his housing status at the Los Angeles County jail was minimum security in every sense, except for the fact that he did not come into contact with other inmates (See Pet, Exh. 20, 14-15). That statement is inconsistent with the testimony he gave in

petitioner's case. At petitioner's trial, Thompson testified that life in protective custody status was no better than in general prison population status[5], and in his case, considerably more bleak. (See RT 16781, 17020-1 – 17020-2.) Were Thompson to testify at an evidentiary hearing on this claim, if one is ordered, that his trial testimony was true, his inconsistent statements would be admissible as substantive evidence and as impeachment evidence under state and federal law. (See Cal. Evid. Code § 1235, Fed. Rules Evid. § 801(d); e.g. *People v. Collup*, 27 Cal. 2d 829 (1946).)

Other attacks respondent makes on petitioner's evidentiary showing are equally unpersuasive. For example, respondent claims that petitioner has presented no real evidence that Michael Thompson received any monetary benefits for his cooperation beyond those disclosed to the jury. (*Inf. Resp. at* 8-9.) Respondent is wrong once again. Petitioner presented evidence, not heard by his jury, that Thompson was allowed to engage in outside business ventures from his module at the LA County jail before, during and after petitioner's trial, and used the new identity given to him by LASO officials to do so. (See Pet., Exh. 24, 25 .) Petitioner's evidence was based not only on Thompson's testimony to the parole board about those ventures, but also on documents filed with the California Secretary of State (Pet. Exh. 25) and on a letter from a high ranking LASD official corroborating Thompson's information. (See Pet. Exh. 23.) Thompson's outside business ventures were a far cry from only working for pennies an hour in prison-related industries, like other inmates. Moreover, Thompson's business ventures appear to have been very lucrative. In testimony before the parole board in 1989, Thompson indicated that he had

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[5] It is important to note in this regard that Thompson was serving a life sentence for two first degree murders during the time he was being housed in protective custody at the Los Angeles County jail. For that reason, he would not have been even been eligible for minimum security status in the regular general population.

significant financial assets, including an interest in a personal residence. (See Pet., Exh. 22 at 40-43.) In 1986, according to Thompson's sworn statements made in connection with his divorce action, he indicated he had no financial assets of any kind. (See Pet., Exh. 28.)

Respondent contends that petitioner has only presented Thompson's word for his testimony that he had managed to amass considerable financial assets during the time he was housed at the Los Angeles County jail. However, that contention by respondent is not correct either. As noted above, as an exhibit to his petition, petitioner filed a letter from LASD A/Captain Larry D. Bodenstedt, of the Special Investigations Bureau in which he confirms Michael Thompson's involvement in a very successful business venture in Orange County. (Pet., Exh. 23.) Bodenstedt also confirms that Thompson and Thompson's wife were partners in this business, and that they jointly own a residence in Orange County where Thompson plans to live when he is paroled. (*Id.*) Respondent makes no mention of this exhibit in his briefing, and his omission in this regard is quite telling. Obviously, respondent cannot seriously contend that it is normal for an inmate sentenced to life for two first degree murders to be personally involved in negotiations for and in the joint purchase of a personal residence.

Respondent does at least mention Thompson's statements to the parole board that he had personally contributed about one third of the down payment for this residence. However, to try to rebut the inference that these funds came from law enforcement, respondent suggests that any supposed contributions by Thompson might be attributable to his employment in business outside of the jail for which he admittedly received a nominal salary. (*Inf. Resp. at* 9.) It is difficult to comprehend how Thompson managed to save up the $15,000 to $18,000 he contributed to the down payment from only a nominal salary. Moreover, respondent completely

ignores Thompson's testimony before the parole board that his wages were deferred and put back into the businesses. (See Pet., Exh. 21 at 72). Moreover, even assuming that Thompson did use his salary from these outside business ventures for his share of the down payment, this was still a product or fruit of the undisclosed benefits he was receiving from LASD. LASD permitted Thompson to transact such outside businesses from his jail cell in the first place while he was in their custody and control.

Respondent also contends that petitioner is only speculating that any supposed contributions by Thompson to the house down payment and to the numerous college courses he told the parole board he took were anything other than paper transactions. (*Inf. Resp.* at 9.) It is not clear what respondent means by "paper transactions." However it is clear that at this stage in the case, as respondent well knows, petitioner lacks access to the records that would confirm the amounts and sources of any such contributions. Such records, including Thompson's personal financial records, and official records of LASD, the California Department of Justice, and the other law enforcement agencies that were dealing with Mr. Thompson during the proceedings in petitioner's case, can only be obtained through discovery and/or by subpoena duces tecum. Under this court's habeas corpus rules, discovery and subpoena power are not available to petitioner until and unless this Court issues an order to show cause. (*People v. Gonzalez* (1990) 51 Cal.3rd 1179, 1260-1261.) The evidence available to petitioner at this time, which he has filed in support of his petition, is sufficient to establish the bona fides of his *Napue* and *Bagley* claims. No more is required of him at this stage in the case. (See e.g. *People v. Duvall*, (1995) 9 Cal. 464.) Respondent's attempts to block the issuance of a show cause order with arguments that petitioner has not shown that there was anything more than "paper transactions" and no proof that the government was the source of Thompson's share of the house down

payment and the tuition costs, should be rejected. This is a blatant effort by respondent who is under a continuing duty to disclose exculpatory evidence, including monetary payments to the prosecution's witnesses, to prevent petitioner from gaining access to the very record and other information that would help him prevail on his claims.

Lastly, respondent attacks the declaration of prison gang expert Anthony L. Casas, which was submitted by petitioner in support *inter alia* of his *Napue* and *Bagley* claims. (See Pet, Exh. 2.) Respondent does not attack Mr. Casas' credentials or argue that Mr. Casas is not a highly qualified expert. That is not surprising. Mr. Casas is a twenty-two year veteran of the California Department of Corrections, and set up the first prison gang task force in the State of California. He worked in various capacities in CDC, including as a Special Security Unit agent, a parole administrator, and a classifications officer. He eventually rose to the rank of Associate Warden of San Quentin Prison and the California Men's Colony and was at one time Assistant Deputy Director of the CDC. (*Id.*) Given such impressive qualifications, respondent is left to argue that Mr. Casas' declaration should count for very little because it is based entirely on hearsay. (*Inf. Resp. at* 9.) That argument completely misses the mark. An expert witness is clearly entitled to rely on hearsay information in rendering an expert opinion. (See Evid. Code § 801.) The opinions Mr. Casas has reached are obviously not favorable for respondent's case.

For example, Mr. Casas, who has had years of experience dealing with prison gang informants, indicates that, in his opinion, LASD's treatment of Michael Thompson is extraordinary by any measure. (Pet., Exh. 2 at 12-15.) In reaching that opinion, Mr. Casas relied *inter alia* on the declaration of Ms. Porter who had first-hand knowledge of that treatment. Unlike respondent, Mr. Casas read Ms. Porter's declaration with care, gleaned that Ms. Porter was not married to Mr. Thompson, and

recognized that her conjugal visits with Thompson at the Los Angeles County jail were therefore exceptional benefits that ran completely counter to CDC regulations. (See Pet., Exh. 2 at 12.)

Mr. Casas also states, based on his professional experience, that it is highly unusual that LASD allowed Michael Thompson to remain at the Los Angeles County jail for years on out-to-court status, and kept information about his whereabouts from CDC officials. (*Id.* at 11.) On the latter point, Mr. Casas relied on testimony furnished by inter alia Charles Stowell, then Associate Warden at the California Correctional Facility at Tehachapi, where Thompson had been housed in protective custody prior to his removal to the Los Angeles County jail in January 1985. (*Id.*) Mr. Casas indicates that normally CDC inmates who are testifying for the prosecution are allowed to remain on out to court status in a local facility for short periods of time, usually only when their presence is actually required in court. (*Id.* at 10.) Petitioner would point out here that even though respondent has ready access to records and other information proving that Michael Thompson was in fact housed at the Los Angeles County jail beginning in January 1985 and until long after his trial testimony against petitioner,[6] respondent will not as much as even concede that fact. Instead, respondent states only that Thompson was "apparently" being housed in the Los Angeles County jail before and after his testimony in this case. (*Inf. Resp. at* 5.) Respondent's attorneys are clearly playing games here, and this should be of great concern to this Court.

Mr. Casas also mentions what he concludes, based on his professional experience, were very serious breaches of security involving Mr. Thompson at the Los Angeles County Jail, as described by Ms. Porter. In light of such security breaches, Mr. Casas states his opinion that to the

[6] Petitioner notes that according to the Tulleners's notebook, Mr. Bass not only visited Thompson at that facility, but he was also in daily phone contact with him there. (See Pet. Exh. 43 at p. 23).

extent that prosecution has claimed witness security as a basis for their non-disclosure of the privileges Michael Thompson was being afforded at the LA County Jail, such a claim would not be credible. (*Id.* at 13.)

Finally, Mr. Casas states that in his opinion Thompson's denials that he received any benefits in return for his cooperation other than immunity and protection for his family are also not credible. Mr. Casas based that opinion on several factors. One was the array of unusual privileges that Thompson was afforded at the Los Angeles County jail, as described by both Thompson and Ms. Porter. Another was the information provided to Mr. Casas by Michael Gaxiola, an individual known to him to be a highly reliable informant. Mr. Gaxiola informed Mr. Casas that he (Gaxiola) had overheard Mr. Thompson say that he had been rewarded with many benefits while at the Los Angeles County jail in return for cooperation against Mr. Price, among others. Petitioner was recently able to obtain a declaration from Mr. Gaxiola in which he confirms that information. (See Supp. Exh. 68.)

Mr. Casas' opinions, coming as they do from a highly qualified former California Department of Justice official are clearly devastating to respondent's attempts to characterize the amenities afforded Michael Thompson at the Los Angeles County jail as "minor" and insignificant. (*See Inf. Resp. at* 13.) Indeed, judging from the comments of Parole Board member Joe Aceto, who said Thompson's "well padded" lifestyle at the LA County Jail were "unheard of" for any inmate in California, (Pet., Exh 21 at 62), if respondent had made the same arguments about Thompson's benefits before that tribunal that respondent is making before this Court, respondent's contentions would have been found laughable.

Petitioner's showing that Michael Thompson provided falsely at petitioner's trial is not limited to his concealment of the extraordinary benefits he was given as a reward and inducement for continuing his

cooperation against petitioner. His showing also included the declaration of Lloyd Cunningham, a highly qualified questioned documents expert, who examined the "hit or miss" urine message that Thompson claimed petitioner had written in urine on the border of a letter he sent to Thompson. Mr. Cunningham described the numerous differences that existed between petitioner's hand printing and the hand printing of the person who wrote the urine message. (Pet., Exh. 7.) Mr. Cunningham explained that neither petitioner nor the writer of the message would have been aware of the individual characteristics shown in their own hand printing. He concluded that in all probability petitioner did not write the message in question. The only reason why he could not conclusively rule petitioner out as the writer is the same reason why he could not rule out anyone with the basic skills to do copy book printing, which he indicated was almost everyone in the population. (*Id.*) That would probably include Michael Thompson. However, petitioner could not obtain an expert opinion about whether Thompson was the person who forged this message because petitioner has no exemplars at this time of Michael Thompson's normal hand printing.

In view of the above and foregoing, and in light of the massive amount of documentary support concerning Michael Thompson that petitioner filed in support of the present claim, respondent's contention that petitioner's evidentiary showing with respect to Thompson is only meager is not based on reality.

D. Petitioner's Evidentiary Showing that Clifford Smith Provided False and Materially Misleading Testimony at Petitioner's Trial is More than Adequate to Establish the Bona Fides of Petitioner's *Napue* and *Bagley* Claims.

Respondent contends that petitioner has not presented even meager evidence to support his claims of *Napue* and *Bagley* errors as to Clifford

Smith. Respondent contends that instead, petitioner's showing is based entirely on speculation and sinister allegations. (*Inf. Resp.* at 13.) It is important to emphasize here that in his brief respondent never once mentions Clifford Smith's CDC visiting records for 1983, which the prosecution suppressed, but which petitioner obtained from counsel in a 1994 Oregon prosecution, and filed in support of his petition. (See Pet., Exh. 40.) Those records contradict Clifford Smith's and Janet Myers' testimony that Janet Myers visited him at Palm Hall on the day of the Barnes murder, and the records impeach his testimony and Myers' that she conveyed an incriminating message from petitioner to Smith during that visit. Petitioner's showing about the records, his allegations that Smith and Myers provided false testimony concerning the alleged visit and his allegations that the prosecution suppressed these records is based on anything but speculation.

Respondent's assertion that petitioner's showing is purely speculative concerns only petitioner's allegations that Clifford Smith testified in falsely and/or in a materially misleading manner to conceal charging and sentencing leniency extended to Jimmy Smith, Clifford's brother in return for Clifford's cooperation against petitioner. As petitioner demonstrates below, there is nothing speculative about his showing on these allegations either.

Before addressing respondent's specific contentions, petitioner will first summarize the relevant facts. As part of his cooperation agreement with the prosecution in this case, Clifford Smith was promised a deal for his brother Jimmy on his pending robbery charge in Kern County. (Pet., at pp. 70-73.) At the time Clifford Smith obtained the deal for Jimmy, which involved both charging and sentencing leniency, Jimmy had already demonstrated poor performance on probation and parole, and had an extensive criminal record. (*Id.* at 71-72.) In fact, Jimmy was on parole

when he was arrested and charged with robbery in Kern County Superior Court case number 29445. (Supp. Exh. 69) On October 25, 1985, Jimmy failed to appear for a scheduled court date in that case, because he was in custody on charges in Butte County. (*Id.*) On January 10, 1986, pursuant to a plea agreement negotiated by Clifford, the robbery count against Jimmy was dropped, and he was allowed to plead guilty to an amended charge of grand theft from the person. (Pet. at p. 72.) The deal Clifford obtained for his cooperation against petitioner was a very favorable one for Jimmy. The negotiated agreement was that Jimmy, who at the time of the plea was already serving one year in county jail for violating his parole on an earlier felony case, would receive a sentence of one year in the county jail that would run concurrently with his parole violation term. (See Supp. Exh. 68.) In other words, Jimmy would receive no additional jail time for his new offense unless he violated his probationary term of three years that was imposed on the new charge.[7] On February 7, 1986, the trial court mistakenly sentenced Jimmy to state prison for a 16 month term on the grand-theft-from-the person charge. On February 28, 1986, the trial court recalled the sentence, at the request of *inter alia* the Los Angeles County Sheriff's Department, and modified it to conform to the original plea agreement. (See Pet. Exh. 35 at pp. 15-24.) Despite respondent's assertion otherwise, the trial court did not adjust the sentence downward to compensate Jimmy for the good time credits he would have lost in CDC because of the need to house him in protective security. (*Inf. Resp. at* 14.) That was done in his earlier case. (See Pet. Exh. 35 at pp. 1-9.) As respondent acknowledges, Jimmy served even less time than he was supposed to because he obtained an early release from county jail in order to assist his mother. (See Pet. Exh. 35 at pp. 28-33.) Jimmy's favorable deal, including the agreement that he would receive only concurrent time

[7] Jimmy subsequently did violate his probation later in 1986. (See Pet. Exh. 34 at 44-46.)

for his new offense was made before Clifford took the stand against petitioner at his trial. Jimmy's early release from custody occurred shortly after Clifford completed his testimony in the prosecution's rebuttal case, and before petitioner's guilt phase deliberations began. (See Pet. at p.79.)

Turning now to respondent's specific contentions, respondent claims first that petitioner has no convincing evidence that Clifford Smith hid the fact that authorities offered him the benefit of a deal in which his brother would receive a beneficial plea bargain to outstanding charges. (*Inf. Resp. at* 13.) According to respondent, Clifford Smith only bargained for his brother's safety and that fact was disclosed to the jury. (*Id.* at 15.) Respondent misstates the record.

During his testimony in the prosecution's case in chief, Clifford Smith testified that one of the benefits he was promised in return for his cooperation was protection for his family. (RT 14859.) However, he did not specify which of his family members and neither did prosecutor Bass. (See RT 14859; 14595.) When trial counsel asked which family members were covered by the promise, Bass objected on relevancy grounds, and stated that he did not want any names or locations revealed. (RT 14859-14860). The trial court erroneously sustained the objection to an inquiry that was indeed relevant and, as this Court recognized, one which petitioner was entitled to explore pursuant to his Sixth Amendment right to confront the witnesses against him. (*See Delaware v. Van Arsdale*, 475 U.S. 673 (1986); *People v. Price*, 1 Cal.4th 324 (1991.) Petitioner's counsel then asked Clifford Smith a question specifically about his brother: – "Any promises not to prosecute your brother?" Rather than disclosing this information, Clifford responded: "no one has mentioned a word about that to me." (RT 14860.) This answer was untrue and, in substance, misleading. At the time he gave that answer, Clifford knew that he had been promised that his brother Jimmy would not be prosecuted for robbery

– the charge pending against Jimmy up until the time Clifford obtained the deal for him. Petitioner notes that defense counsel did not ask Clifford whether he had been promised that his brother would not be prosecuted at all. His question was not so limited, and thus encompassed a promise not to prosecute Clifford's brother on his pending robbery charge.

As indicated above, Jimmy Smith was also in custody in October of 1985 on charges in Butte County. (Supp. Exh. 69.) Petitioner's efforts to obtain court records from Butte County on the nature and disposition of those other charges was unsuccessful because those records, which dating back to 1985, have been routinely destroyed. (Supp. Exh 70.) Without access to Jimmy Smith's rap sheet, which petitioner can only obtain through discovery or through subpoena, petitioner does not know whether Jimmy's Butte County charges were also dismissed, and if they were, whether the dismissal was part of the package Clifford was given for Jimmy in return for his own cooperation in this case. That is certainly a possibility, however, given the other evidence showing that Clifford Smith concealed the full extent of his agreement with the prosecution and its agents, as it related to his brother Jimmy.

Respondent asserts that petitioner concedes that Clifford Smith informed the jury that part of his deal included "protection for his family members, specifically his mother and brother." (*Inf. Resp. at* 13, emphasis added.) Like many of respondent's assertions in the Informal Response, this assertion is unfounded. Petitioner has never conceded that Clifford specified that his brother and mother were family members who would be protected under his deal with the prosecution. As indicated above, Clifford did not identify which family members were covered by the protection promise, and the prosecution effectively precluded that information from coming to light by its erroneous relevancy objection.

Respondent calls petitioner's allegations that inmate security was used as a pretext to obtain a favorable deal for Jimmy Smith in return for Clifford Smith's cooperation against petitioner "sinister" and speculative. (*Id.* at 13.) Respondent also takes issue with petitioner's analysis of the sentence that Jimmy Smith would probably have received had Clifford not worked out the deal for him in return for his cooperation against petitioner. (*Id.* at 16.) Irrespective of whether witness protection was the true reason behind Jimmy Smith's plea arrangement, the fact remains that Clifford Smith could have and should have disclosed on cross-examination that he was promised that Jimmy would not be prosecuted for robbery, but he failed to do so. It would have been possible for Clifford Smith to answer defense counsel's question truthfully without compromising his brother's safety. He could have declined to specify the type and location of the facility where Jimmy would be incarcerated, and the trial court would in all probability have allowed him to do so. Petitioner and the jury were entitled to disclosure of information showing the full extent of the deal that Clifford Smith had been promised and to disclosure of the fact that Clifford Smith's response to defense counsel's question was untrue and misleading. (*Napue v. Illinois, supra*, 360 U.S. at 269; *Brown v. Wainwright, supra.*) As petitioner discusses in detail *infra,* disclosure of such information would obviously have significantly damaged Clifford Smith's credibility, and would have demonstrated convincingly that Clifford was not the incredibly great witness Bass proclaimed him to be, and that Clifford was not in fact telling the truth for the first time in years. (RT 20846- 20848; 20862; 20434.)

Petitioner would like to clarify that although he included allegations in his petition that witness protection was a pretext used to obtain charging and sentencing leniency for Jimmy Smith, petitioner did not intend to imply that he had to prove the pretextual basis of the plea arrangement to prevail

on his *Napue* claim. Petitioner does not believe such proof is necessary. However, in light of respondent's briefing challenging petitioner's allegations about the pretextual nature of the arrangement, petitioner will make the following comments in response.

Several factors suggest that petitioner's arguments about the pretextual nature of the arrangement worked out for Jimmy Smith by Clifford Smith are reasonable and not unfounded. First, whatever concerns Clifford Smith and the authorities may have had about Jimmy's personal safety, those concerns would not have evaporated once Clifford Smith had finished his testimony in this case. Indeed, the prosecution's entire case on the Barnes murder was based on the premise that family members of a prison gang informant were at risk even long after the informant had testified for the government.[8] Yet, in December of 1986, when Jimmy Smith was sentenced on new charges and was also ordered to serve the remainder of his three year term in case 29445, following the revocation of his probation, neither the prosecution, nor Sgt. Barnett, who testified at the sentencing hearing, nor even Jimmy's own attorney argued that it was necessary that he be housed in the local county jail facility for his personal safety rather than in state prison. (See Pet, Exh. 35, at pp. 34-46.)

Second, as prison gang expert, Anthony L. Casas indicates, ordinarily a county jail facility is not a particularly safe place in which to house a witness who requires a high level of protection because of gang-related considerations. (See Supp. Exh. 67.) As Mr. Casas explains: "County jails, such as the Lerdo facility in Bakersfield, where Jimmy Smith was housed, normally have a large transient inmate population. A high turnover in population increases the chance that the protected witness may come into contact with another inmate who poses a threat to him.

[8] Petitioner notes that Steve Barnes had testified against Robert Griffin in 1982. His father was not killed until February of the next year.

Typically, county jails also lack the resources available in state prison for protecting prison gang related witnesses. In addition, county jail personnel are usually not as well trained as their counterparts in the CDC in protecting such witnesses." (*Id.* at 2.) For that reason, Mr. Casas, who has years of experience in security matters involving prison gang related inmates, finds the claim that Jimmy Smith was given a deal for local county jail time for reasons of security highly dubious. (*Id.* at 1.)

Third, in 1986, when Jimmy Smith entered his plea to reduced charges and was sentenced to the Lerdo county jail facility, CDC had a high security level PHU unit for inmate witnesses with gang affiliations right in Kern County, at the state prison in Techachapi. Michael Thompson had been housed safely in that unit before his transfer to a secret module at the Los Angeles County jail, and Clifford Smith was being housed safely in that unit when Jimmy was given the deal to county jail time. (RT 14603.) There is no plausible reason why Jimmy could not also have been housed safely in that PHU unit as well.

Fourth, it is significant that the person who arranged the plea and housing for Jimmy Smith on Clifford Smith's behalf was none other than Sgt. Hayward Barnett. Sgt. Barnett is the same individual who arranged for Michael Thompson to be housed in the LA County Jail, not to protect his safety, but rather so that he could have "proper" housing to prepare his testimony against petitioner and other defendants. It now has become clear that "proper" housing meant a place where Michael Thompson received a host of special benefits, which were kept hidden from CDC officials, from petitioner's defense team and from the jury.

Fifth, respondent states that there was nothing controversial about the idea that a "snitch" should be compensated for the good time credits that he would lose by virtue of being housed in protective custody. (*Inf. Resp. at* 14.) Respondent goes on to assert that Jimmy Smith was thereby

sentenced to one year in county jail, "which the court believed was the equivalent of the previous prison term." (Id. at 14-15.) Respondent does not provide any record citation for that assertion, and the record of the proceedings at which the trial court sentenced Jimmy Smith to one year in county jail does not support respondent's claim. (See Pet., Exh. 35, 34-46.) Notably, after petitioner's trial, when Clifford Smith was no longer in a position to obtain a bargain on Jimmy's behalf in return for his own cooperation in the present high profile case, Jimmy received a consecutive rather than a concurrent sentence. (*Id.*) Moreover, although Jimmy's attorney requested that his client receive a downward adjustment in his prison sentence to make up for good time he would lose because he would be housed in a protective custody unit in state prison, the trial court denied that request. (*Id* at 44-45.) Respondent's assertion that Jimmy Smith received a slight adjustment because of his expected protective housing status is also not borne out by the record.[9]

E. Petitioner's Showing that Janet Myers Committed Perjury at His Trial is Based on Substantial Evidence

Respondent's briefing on petitioner's evidentiary showing concerning Janet Myers is quite minimal. Respondent devotes the bulk of his argument on Ms. Myers to the materiality issue, which petitioner will address later in this brief.

With regard to petitioner's evidentiary showing, respondent mentions only petitioner's allegations that the prosecutors failed to correct Janet Myers' testimony that she had no unadjudicated cases pending against her, which they knew or should have known was false. (*Inf. Resp.* at 18.) Respondent argues that petitioner has not established whether or not the prosecution was even aware of those unadjudicated cases. (*Id.)* Respondent

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[9] The only adjustment in Jimmy Smith's sentence was credit for 21 days for the time he had previously served in prison on the case and 35 days of good time and work time. (Pet., Exh. 34 at

has conveniently chosen to ignore, however, that Mr. Bass acknowledged in open court that he had copies of the reports on Janet Myers' six outstanding warrants, and that the trial court correctly discerned from the reports that Myers' did indeed have some open cases pending against her. (See RT 13767-13768.) The notion that only the trial judge, but neither of the prosecutors, had the ability to correctly construe these reports correctly is absurd.

Petitioner also alleged in his petition that Janet Myers committed perjury when she testified that she had no "open" cases. As for Ms. Myers', there is no doubt that she knew the true status of her pending cases, given her initial affirmative answer to the trial court's question about whether she had any pending cases in which she had not entered a guilty plea. (RT 13766.) Respondent never mentions this. Moreover, respondent ignores the fact that once Ms. Myers' perjury appeared, the prosecution had an affirmative duty under the federal constitution to correct the testimony, which it either knew or should have known was false. (*Napue v. Illinois, supra*).

The law is clear that the prosecution cannot avoid its duty on grounds that it did not have the relevant information. If the prosecution did not already have the information, which is doubtful, it could have ascertained the truth by running a check of the California Department of Justice's computerized records system or by contacting San Bernardino County authorities. The information was in possession of some arm of the state and was readily available to the prosecution. The prosecution could and should have sought it out. (*Kyles v. Whitley, supra*, 514 U.S. 419; *United States v. Perdomo* (3rd Cir 1991) 929 F.2d 967 [reversal under *Brady* for prosecution's failure to disclose key prosecution witness' criminal records]; *Crivens v. Roth* (7th Cir. 1998) 172 F.3d 991 [same].)

45.)

Petitioner also alleged that Janet Myers received a favorable disposition on her three pending unadjudicated San Bernardino cases after she testified against petitioner at his trial. (See Pet. at p. 84.) Two of these cases were dismissed outright. On the third case, she was given a short jail sentence followed by summary probation. (Supp. Exh. 72.) Had the prosecution corrected Myers' false testimony and disclosed her perjury, the defense could have pursued a devastating line of cross examination, and could have suggested that Myers' deliberately concealed the true status of her pending cases to hide that leniency she had been promised in those cases in return for her trial testimony against Mr. Price. (See *United States v. Smith*, (D.C. Cir. 1996) 77 F.3d 511.)

Petitioner also alleged that Myers testified falsely in claiming that she visited Clifford Smith at Palm Hall the same day as the Barnes murder and passed along a message to Clifford from petitioner. The prosecution maintained that this message was sent to petitioner's co-conspirators at Palm Hall through Myers to inform them he had carried out the Barnes murder – the object of the alleged conspiracy. The defense sought disclosure of Clifford Smith's visiting records, and served a subpoena duces tecum on the CDC to obtain Smith's prison file, including his visiting records. However, the records were never disclosed. (RT 15060.) Petitioner obtained them fortuitously nine years after his trial after they had been provided to defense counsel in an Oregon case in which Clifford Smith was a witness. The copies furnished to the Oregon attorneys had the names of Clifford Smith's visitors blacked out. (See Pet. Exh. 40.) As petitioner alleged, however, it is still possible to see from the blacked out records that the first name of the visitor at the bottom of the records begins with a J, and the first two letters in the last name of this visitor appear to be "My." These letters are consistent with the visitor in question being Janet Myers. Moreover, as petitioner also alleged, both Clifford Smith and Janet

Myers testified that they had a falling out in 1983, and that Myers stopped visiting Smith at the end of April. That is the same time frame in which the visitor in question last visited Smith. Based on this consistency and on the discernable letters in the name of this visitor, petitioner alleged that the visitor in question is Janet Myers.

Respondent's brief contains no mention of the suppressed visiting records or of their value as new impeachment of both Janet Myers and Clifford Smith. Respondent's failure to mention the visiting records in his brief is troubling and raises substantial concerns that respondent does not take petitioner's governmental misconduct allegations seriously. Equally disturbing is the fact that respondent has failed to furnish petitioner's habeas counsel with a non-redacted copy of the records, which would confirm the identity of the visitor in question as Janet Myers. Respondents' attorneys have been reminded during these habeas proceedings of their ongoing constitutional duty to provide petitioner with exculpatory evidence even at this stage of the proceedings. (See Petn, at p. 8; citing *Thomas v. Goldsmith,* 979 F.2d 746, 749-750 (9th Cir. 1992) (prosecution has duty to turn over exculpatory evidence relevant to a habeas corpus proceeding) Moreover, respondent has been on notice since April 1998, when the exhaustion petition was filed, of petitioner's allegations concerning the existence of these CDC records and of the records themselves. Respondent has also been on notice that these records contradict testimony given by both Janet Myers and Clifford Smith, and are obviously exculpatory in nature. Under the circumstances, respondent should have made a diligent effort to obtain these records and disclose them to petitioner's counsel in a non-redacted form. Respondent's failure to do so constitutes a continuing violation of petitioner's federal constitutional rights.

F. Respondent's Contention That Petitioner Has Not Demonstrated Constitutional Materiality for Either His Napue or His *Bagley* Claims Is Not Supported By the Relevant Case Law Authority.

Respondent contends that regardless of whether the *Napue* or the Brady *Bagley* standards of materiality are applied, petitioner has not satisfied either standard. (*Inf. Resp. at* 11.) Respondent engages in a piecemeal analysis of materiality, witness by witness, and does not analyze the cumulative impact of the undisclosed evidence. This is contrary to established United States Supreme Court precedent, at least on the issue of *Bagley* materiality. (*Kyles v. Whitley, supra.*)

Respondent makes two related arguments in contending that petitioner has failed to establish constitutional materiality under any standard. Respondent argues that Thomson, Smith and Myers were not essential witnesses for the prosecution. (*Inf. Resp* at 19-20.) Respondent also argues that these three witnesses were all extensively impeached with multiple prior felony convictions, with admissions of perjury on prior occasions, and with their immunity agreements. Respondent also argues that in addition to the impeaching evidence concerning their prior criminal histories, the jury heard that Janet Myers was a heroin addict, and that Clifford Smith was promised that a favorable letter would be sent on his behalf to the parole board. (*Id.*) Respondent asserts that any further impeachment of these non-essential witnesses would therefore have been cumulative and thus constitutionally immaterial. (*Id.*)

A number of courts have considered and rejected similar arguments in either the *Bagley* or *Napue* context, applying United States Supreme Court precedent. Petitioner will discuss four of these cases below, and will do so extensively, because, while the kind of undisclosed evidence may vary from case to case, there are striking parallels between these cases and

petitioner's. After completing his discussions of those cases, petitioner will then discuss the specific factors in his case that make those decisions equally apposite to his *Napue* and *Bagley* claims.

The first case on point here is *United States v. Smith, supra,* 77 F.3d 511, a recent *Brady-Bagley* decision from the D.C. Circuit. In *Smith*, the defendant was charged and convicted of various drug-related offenses. One of the witnesses called by the prosecution at Smith's trial was a witness, M, who had originally between charged as Smith's co-defendant. The government disclosed that in return for M's substantial assistance, and his guilty plea, the government agreed to recommend a downward departure on sentencing, to dismiss all other federal counts against him, and to not charge M with additional non-violent crimes he committed before entering into the agreement. However, the government failed to disclose the full extent of its deal with M, namely, its agreement to dismiss two felony charges that were pending against him in the D.C. Superior Court in another case. The government also failed to disclose M's psychiatric history. Smith found out about the undisclosed information after his trial, and he filed a motion to vacate his judgment of conviction on *Bagley* grounds. The trial court denied the motion. It ruled that although the information should have been disclosed, its non-disclosure did not deprive Smith of a fair trial, because the defense had already established that M was a "suspect" witness. The D.C. Circuit disagreed, and reversed Smith's conviction.

In its legal analysis of Smith's *Bagley* claim, the D.C. Circuit relied on the United States Supreme Court's recent decision in *Kyles v. Whitley, supra*, and quoted the following language from *Kyles* on the issue of materiality:

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of

> the suppressed evidence would have resulted ultimately in the defendant's acquittal. . . . Bagley's touchstone of materiality is a "reasonable probability" of a different result and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

(77 F.3d at 514)

The court in *Smith* then applied *Kyles* in analyzing whether the undisclosed benefits to M were constitutionally material. In arguing that the undisclosed evidence was immaterial, the government made the same two related arguments that respondent has made in petitioner's case. First, the government argued that further impeachment of M was not material because M's testimony was not essential to the government's case. The government argued that even if the jury had completely discounted M's testimony, testimony of other witnesses, as well as the physical evidence presented at trial, would have been sufficient to convict Smith. The court rejected this argument, concluding that it basically ran afoul of *Kyles*. Recognizing that additional evidence indicating guilt was not dispositive of the court's inquiry, the *Smith* court stated that under *Kyles*, it was required instead to determine whether the undisclosed information could have substantially affected Smith's efforts to impeach M, thereby calling into question the fairness of the ultimate verdict. (77 F.3d at 515.)

The government's second argument was that any further impeachment of M would have been only cumulative and thus immaterial, because M had been extensively impeached at the trial. The government pointed to the fact Smith's attorney through his cross-examination of M

regarding the dismissed federal charges, had established M's possible motivation to lie. The government also pointed to the defense closing argument in which Smith's counsel referred to M as a "crackhead", a "drug broker" and "a five-time convicted criminal," and argued that M was biased because he was facing a substantial sentence of selling drugs.

In addressing this contention by the government, the court stated that the proper focus of its inquiry must be not on the ways the defense was able to impeach the witness, but on the ways in which the witness' testimony was allowed to stand unchallenged. (*Id.* at 515.) The court cited language from the Eighth Circuit's decision in *United States v. O'Connor* (8th Cir, 1994) 64 F.3d 355, 359, which in turn cited *Napue* for this principle. (See also, *United States v. Cuffie* (D.C. Cir. 1996) 80 F.3d 51 [reversing under Bagley and rejecting government's cumulative impeachment argument, stating that "undisclosed impeachment evidence can be immaterial because of its cumulative nature only if the witness was already impeached at trial with the same kind of evidence"].)

The court then turned to the questions and answers on cross-examination about whether M had any expectations of favors from the government that were not disclosed in the plea letter. M answered those questions in the negative. His answers were untrue. The government denied that M was intentionally concealing the agreement to dismiss the two pending charges not disclosed in the letter, claiming he may have been mistaken about the contents of the letter. The court held that M's good faith did not make the non-disclosure of the full extent of his deal with the government any less material for purposes of *Brady*. The court indicated that it must assume that M would still have testified exactly as he did, even if the government had disclosed the information in question. Pointing to M's assertion that he was only testifying to "get a fresh start," the court found that armed with full disclosure, Smith's attorney could have pursued

devastating cross-examination, challenging that assertion and suggesting that M might have deliberately concealed the other favors that were not included in the written plea agreement. (*Id.* at 516.) The court concluded that the potential impact of such cross-examination was sufficient to undermine its confidence in the jury's verdict, and the court held that a new trial was therefore warranted.

Another case on point is *United States v. Scheer* (11th Cir. 1999) 168 F.3d 445, in which the Eleventh Circuit recently reversed the defendant's convictions for *Bagley* error, relying on *Kyles.* Scheer was charged and convicted of fraud-related charges concerning a savings and loan association (Sunrise) that subsequently failed. At trial, the government called Jacoby as a witness against Scheer. The jury was made aware of the fact that Jacoby had committed perjury in his own separate trial on related charges, that he had been convicted by a jury on those charges, and that he had been granted immunity from further prosecution in return for his truthful testimony against Scheer.

The fraudulent scheme in *Scheer* involved certain real estate loans that the government contended were scam transactions. Scheer was an attorney who had assisted in closing real estate loans on behalf of Sunrise. Jacoby had been the president of Sunrise. He had been convicted of charges relating to his role in the fraudulent scheme in a separate trial. At that trial, Jacoby testified in his own defense and shifted blame away from him and on to others. At his sentencing, government counsel asserted that Jacoby had committed blatant perjury at his trial. Information that the government had accused Jacoby of committing perjury at his trial, and Jacoby's acknowledgment that the accusation was true came out during his testimony at Scheer's trial. In that testimony, Jacoby implicated both himself and Scheer in the fraudulent scheme.

The *Bagley* claim in *Scheer* stemmed from the government's non-disclosure of a threat made to Jacoby during a recess break in his testimony. At the meeting, one of the prosecutors made a comment to him that if he did not come through for the prosecution, he would be put in cuffs and taken out of there in 45 seconds.[10] At a post-trial evidentiary hearing on Scheer's *Bagley* claim, Jacoby suggested that he understood these remarks as directing him to admit his own role in defrauding Sunrise, which was contrary to the position he had taken at his own trial. He acknowledged that he found the prosecutor's remark threatening. However, he also testified that it did not influence or make him change the testimony he gave against Scheer. He also maintained that he did not lie during that testimony as a result of the threat.

The district court denied relief on Scheer's *Bagley* claim, finding that in view of Jacoby's testimony at the evidentiary hearing, there appeared to be no nexus between the threat and his testimony. The district court also found that even if Jacoby had altered his testimony as a result of the intimidation, other evidence against Scheer was sufficiently compelling to convict him. The Eleventh Circuit reversed, concluding that the district court's analysis of the materiality issue ran afoul of *Kyles*. The court explained that "[a]though an evaluation of whether there is a reasonable probability of a different result may necessitate an examination of the other evidence presented at trial, the Supreme Court has expressly disavowed a simple 'sufficiency of the evidence' test in the *Bagley* context. (168 F.3d at 452.)

The Eleventh Circuit concluded, based on its review of the trial record, that the evidence of the threatening remark was material, and that its non-disclosure undermined confidence in the verdict. In reaching this

[10] Jacoby was out of custody and on probation when he testified against Scheer, but he had apparently received some prison time for his involvement in the alleged fraudulent scheme.

conclusion, the court emphasized that even though there may have been other compelling evidence that supported Scheer's conviction, this other evidence was less specific and conclusive than the testimony given by Jacoby. The court found that Jacoby was a critical witness for the prosecution's case, on the basis of several factors. First, Jacoby was an "insider" in the fraudulent scheme with knowledge of all the key facts. Second, Jacoby implicated himself in the scheme. Third, Jacoby testified that he had discussed key information with Scheer, that Scheer had attended meetings at which the fraudulent scheme was devised, and that Scheer had personally selected the individuals who were used to perpetrate the scheme. And fourth, the government used Jacoby as a vehicle for introducing a memorandum written by Scheer, that Jacoby in turn placed in an incriminatory light.

The court observed that given his importance to the prosecution's case, Jacoby's credibility was a key issue for the jury, and the extent to which the jury should credit his testimony was a recurring theme at different points in the case. The court pointed to the following factors in this regard. Jacoby testified repeatedly that he had been given immunity from future prosecution if he testified truthfully at Scheer's trial. Jacoby also testified that he had no other agreements with the government in exchange for his testimony, but hoped that his testimony would result in a sentencing reduction. The prosecution expressly presented Jacoby as a witness who had lied at his own trial but had no reason, motive or inclination to lie in Scheer's case. The court reasoned that because the government had elicited information from Jacoby regarding his previous history of giving perjured testimony, "it was reasonable for the jury to assume that it now knew the most damaging available information about Jacoby's believability." (*Id.* at 457.) The court also pointed to the fact that the prosecution relied heavily on Jacoby's testimony during summation,

and argued that the jury should credit his testimony. The court concluded that had the information about the intimidating threat to Jacoby been disclosed, Scheer could have used it to undermine the credibility of this critically important witness -- a witness whose credibility was a prominent issue in the case and had been called into question by the government. The court held therefore that had Smith been able to use knowledge of this incident to impeach Jacoby, there is reasonable probability that the outcome of Scheer's trial would have been different.

Another case on point is *Brown v. Wainwright*, *supra*, 785 F.2d 1457, in which the Eleventh Circuit reversed the defendant's conviction and death sentence for rape-murder under *Napue-Giglio.* In *Brown*, the *Napue-Giglio* claim involved false testimony by Ronald Floyd, a key prosecution witness concerning his immunity agreement with the government. Floyd was a criminal associate of Brown's. The court found that Floyd was the "keystone" of the prosecution's case because he provided the only evidence that placed Brown at the crime scene and the only evidence that Brown made admissions that he committed the rape-murder. At the trial, the defense attempted to cast doubt on Floyd's credibility by impeaching him in several ways. First, the defense elicited information showing that Floyd had a prior criminal record. Second, the defense elicited information showing that Floyd had reason to seek revenge against Brown who implicated Floyd in a robbery committed after the rape-murder. Third, the defense inquired about whether Floyd had obtained a favorable deal from the government. In response to a question about whether the state had made any promises to him or agreements in the case, Floyd testified that he had "no knowledge of it whatsoever." (*Id.* at 1461.) Brown's defense attorney then asked Floyd whether he decided to testify just to cleanse his soul and to take his chances on whether or not he would

be charged with the murder. Floyd answered these questions in the affirmative.

The Eleventh Circuit noted that beyond Floyd's testimony, the state's evidence linking Brown to the crimes was scant. There was no fingerprint evidence, and the only physical evidence pointing to Brown was a gun to which he had access. After Brown's trial, Floyd provided Brown's attorney with an affidavit in which he retracted his trial testimony implicating Brown in the murder-rape, and admitting that he had been offered "favorable consideration" in return for his cooperation. At a subsequent evidentiary hearing, Floyd recanted his affidavit, except for the fact he had testified against Brown because he had been offered favorable consideration. Brown's attempts to have his conviction and death sentence overturned on *Giglio* grounds were unsuccessful in both the state court and in the federal district court. The Eleventh Circuit granted relief, and reversed the district court's denial of Brown's federal habeas corpus petition.

In granting habeas relief on *Giglio* grounds, the Eleventh Circuit emphasized that state prosecutors had breached their constitutional duties in the case in four different respects. They failed to disclose evidence of their understanding or agreement with a key prosecution witness. They knowingly presented and used false testimony. They failed to correct testimony that they knew to be false, and they also exploited false testimony during argument. In rejecting the state's argument that its agreement with Floyd did not embrace a promise of leniency, the Eleventh Circuit observed that "[t]he thrust of *Giglio* and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony [citations omitted] . . . which testimony 'could . . . in any reasonable likelihood have affected the judgment of the jury." [*quoting Giglio* and *Napue*]. The court went on to state that "[t]he constitutional

concerns address the realities of what might induce a witness to testify falsely, and the jury is entitled to consider those realities in assessing credibility." (785 F.2d at 1465.)

The court also rejected the state's argument that Floyd's false testimony was merely cumulative of his possible bias, given the other evidence impeaching him. In rejecting this argument, the Eleventh Circuit stated that "[I]n the normal evidentiary sense, cumulative evidence is excluded because it is repetitious. The testimony here does not merely reinforce a fact that the jury already knew; the truth would have introduced a new source of potential bias." (*Id.* at 1466.) The court concluded that there was a reasonable likelihood that disclosure to the jury that Floyd was testifying under an agreement that might save him from prosecution for the rape-murder could have affected the jury's verdict. The court therefore reversed Brown's convictions and sentence of death.

Yet another case on point is *United States v. Sutton* (4th Cir. 1976) 542 F.2d 1239, in which the Fourth Circuit reversed the defendants' convictions for conspiracy to commit bank robbery for *Napue* error. The error stemmed from the government's failure to disclose evidence that would have impugned the veracity of a prosecution witness whose testimony furnished evidence of criminal intent in what otherwise was a wholly circumstantial case.

In *Sutton*, three defendants, Jesse Lee, Charles Sutton and Paul Sutton, were charged as co-conspirators in the case. At their trial, the prosecution introduced evidence that both Jesse and Paul were seen in and around the bank on the day of the planned robbery. Their conduct suggested that they were casing the bank. Also, Paul was wearing a knit watch cap even though the weather was warm. When bank employees came outside of the bank to get a better look at the two, Jesse and Paul drove away from the bank at a rapid speed. They returned later in the day in

another car, which was driven by Charles Sutton. Charles parked the car in a lot near the bank and also near where FBI agent Smith was standing. Smith apprehended Paul and Jesse as they were approaching the bank, and also obtained the license plate number of the car. At the time of his arrest, Paul was found to have a black nylon stocking beneath his knit watch cap, and a folded white plastic bag tucked in his sock. Jesse was found to have a concealed loaded gun in his pocket. Charles, who sped away after he noticed that Smith was watching him, also was wearing a woolen knit hat.

As part of its case, the prosecution called Reddus Cannon who owned the car used by the three accused conspirators. Cannon testified that the three had borrowed his car to go "stick up the place." The defendants testified that they were in the vicinity of the bank because they were looking for work at a nearby office. In closing argument, the prosecutor supported Cannon's credibility by telling the jury that no one had threatened him. Although the prosecutor had no actual knowledge of the threat, his argument was in fact untrue. Agent Smith had told Cannon that he knew Cannon was driving the car. He made that accusation knowing it was false to get Cannon to come clean – a tactic that was successful. Smith acknowledged in testimony at a post-trial hearing that his false accusation may have had an intimidating effect on Cannon. This undisclosed threat to Cannon formed the basis of the *Napue/Giglio* claim raised by the defendants in post-trial litigation.

In deciding their claim, the Fourth Circuit read the decision in *United States v. Agurs*, 427 U.S. 97 (1976) to require it to distinguish between two different types of *Brady* cases. The first type, the "veracity" (or perjury) cases involved prosecutorial misconduct or a corruption of the truth-finding process. The second type, the "discovery-based" cases, involved only a failure to disclose exculpatory evidence and not prosecutorial misconduct or corruption of the truth-finding process.

Because the prosecutor in *Sutton* made a false statement to the jury that served to shore up Cannon's credibility, the court determined that the case was a "veracity" case, in which the *Napue-Giglio* standard of materiality was applicable. The court made the determination even though the prosecutor was not personally aware that his statement denying that any threats had been made to Cannon was untrue. The court noted that legally, the knowledge of Smith, the agent who made the threat, must be imputed to the prosecutor. (*Id.* at 1241, n. 2 (citing *Giglio.*)

On the issue of materiality, the court emphasized that Cannon was a key witness for the prosecution, because his testimony supplied evidence of criminal intent on the part of the defendants, and thereby turned what was a circumstantial case into an overwhelming one. The court found that without Cannon's testimony, there was no evidence of the defendants' intent to rob the bank except for what the court called "bizarre circumstances that are not necessarily inconsistent with the possibility of innocence." (*Id.* at 1242; see also *United States v. Iverson* (D.C. Cir. 1980) 637 F.2d 799 [conviction reversed for false testimony by witness whose testimony supplied evidence of criminal intent not furnished by defendant's confession].)

The government argued that there was no reasonable likelihood that the verdict would have been different had there been disclosure of the false threat made by Cannon by the FBI agent. The government pointed to the fact that Cannon acknowledged on cross-examination that it was possible that he was told he would be indicted or arrested for attempted bank robbery, that he was scared, and that he been told that things would go better for him if he made a statement. In rejecting the government's argument, the court reasoned that it was for the jury to determine what effect the false threat might have had on Cannon's self-interest and motive to testify favorably for the government. Finding that "as in *Napue*, the

prosecution allowed a false impression to be created at trial when the truth would have directly impugned the veracity of its key witness" (*id* at 1243), the court concluded that because the threat to Cannon might reasonably be viewed as impugning his veracity, and because the case was otherwise wholly circumstantial, the government's failure to disclose the truth rendered the trial fundamentally unfair and in violation of Due Process.

G. The False Testimony and Undisclosed Evidence In This Case Was Constitutionally Material, and Was Not Merely Cumulative Impeachment

The same factors that the courts in the foregoing cases relied upon in finding constitutional materiality and in rejecting the government's cumulative impeachment arguments are all present in petitioner's case. The parallels between those cases and petitioner's case are obvious, and the same conclusions reached by the courts in those cases on the issues of materiality whether under *Bagley* or *Napue* are also compelled here. Petitioner will first discuss the reasons why Michael Thompson, Clifford Smith and Janet Myers were all critical prosecution witnesses, whose credibility was an important issue in this case. Next petitioner will discuss why the undisclosed evidence concerning these essential witnesses introduced a new source of potential bias, and was not cumulative of anything the jury already knew. Then petitioner will discuss the prosecution's exploitation of the false testimony and undisclosed evidence in its summation to the jury.

1. Michael Thompson, Clifford Smith, and Janet Myers Were Critical Prosecution Witnesses Whose Credibility Was An Important Issue in This Case.

For the same reasons that prosecution witness Jacoby was found to be a critical witness by the Eleventh Circuit in *United States v. Scheer,*

supra, Michael Thompson and Clifford Smith are critical witnesses in this case. As in *Scheer*, Michael Thompson and Clifford Smith were both admitted "insiders," in this case in the AB murder conspiracy. They both implicated themselves in the conspiracy, and in its aims, which they testified included the Barnes murder in Southern California and also the crimes committed in Northern California in furtherance of the conspiracy. (See Pet, at pp. 23-24 & citations to record therein.) Those crimes included the Moore burglary, various robberies and the Hickey murder, which were charged against petitioner as overt acts of the conspiracy and as substantive counts. As in *Scheer*, Thompson and Smith provided testimony that petitioner had knowledge of the conspiracy and its aims. Thompson testified that he was present and a participant in a meeting at Palm Hall at which he and other conspirators allegedly told petitioner about the goals of the conspiracy and gave him directives for carrying out its aims. Thompson also testified that petitioner willingly agreed to join the conspiracy and carry out its goals. (See *id.*)

In addition, as in *Scheer*, the prosecution in this case used its "insider" witnesses, Thompson and Smith, as vehicles to get before the jury various incriminating statements by petitioner. These statements were in the form of messages allegedly sent by petitioner to his fellow co-conspirators to inform them of his progress and success in carrying out the goals of the conspiracy. The prosecution introduced the "Everything went well. I am going back north" message (an alleged reference to the Richard Barnes murder) through Clifford Smith and Janet Myers. (RT 14694, 13845.) The prosecution introduced the "sent the girl to the country" message (an alleged reference to the Elizabeth Hickey murder) through Michael Thompson and Clifford Smith. (RT 14783, 16909). The prosecution introduced petitioner's alleged admission that he killed Hickey, through Michael Thompson. (RT 16898-16898). In fact, Thompson

peppered his testimony with references to petitioner's alleged involvement in the Hickey murder. (See e.g. RT 16915; 17132.) The prosecution used Thompson as the vehicle for introducing the alleged "hit or miss" urine message, which Thompson claimed was written by petitioner. As petitioner's evidence at trial and in support of his exhaustion petition indicates, the urine message was in all probability a forgery. (See RT 18545, Pet., Exh. 7.) As in *Sutton*, the testimony of these witnesses constituted the only evidence that petitioner made any of foregoing statements and the only evidence that messages containing the alleged statements were conveyed to petitioner's alleged co-conspirators.

In addition to being the only source of those statements, to being "insiders" and to implicating themselves in the conspiracy and its overt acts, Clifford Smith and Michael Thompson were critical witnesses for the prosecution in other respects as well. Like the witnesses in *Scheer* and *Sutton* who were found to be critical prosecution witnesses, Thompson and Smith supplied otherwise missing evidence on the issue of petitioner's criminal intent, and they supplied a criminal explanation for petitioner's presence in Southern California on the weekend that Richard Barnes was killed. Thompson also supplied motive evidence for the Hickey murder, tying that murder to the earlier burglary of her parents home and to the AB conspiracy. Thompson and Smith also provided motive evidence for the other Northern California crimes with which petitioner was charged, through their testimony that petitioner had been directed to commit such crimes in furtherance of the conspiracy. In view of such testimony, and for all the other reasons specified above, Michael Thompson and Clifford Smith were unquestionably critical witnesses for the prosecution, and as the courts recognized in *Scheer* and *Sutton*, being critical witnesses, their credibility was an important issue in the case.

Although not as critically important as were Thompson and Smith, Janet Myers still provided important testimony for the prosecution's case. Her testimony was the only testimony that petitioner had personally been at the Barnes residence where Barnes was later murdered. Her testimony was also the only testimony that petitioner was absent and unaccounted for on the night Barnes was killed, and the only testimony that petitioner had physical possession of firearms, one of which appeared consistent with the kind of weapon used in the Barnes murder. Like Ronald Floyd, who supplied similar evidence for the prosecution in *Brown v. Wainwright, supra*, Janet Myers was a key prosecution witness, and her credibility, like Thompson's and Smith's, was an important issue in the case.

In view of the above and foregoing, respondent's assertion that these three "jailbirds and liars" only gave some color to the prosecution's case (*Inf. Resp. at* 20) is palpably absurd. So is respondent's claim that it was the documentary evidence and other items discussed in the statement of facts in respondent's appeal brief that provided conclusive proof in the case. (*Id.*) Respondent does not specifically identify these other items of evidence. However, earlier in his argument, respondent does mention the gas receipts, the note to send "Nate" a subpoena (Nate being Steve Barnes), and the paper containing the address of the Barnes family residence. (*Id. at* 19-20.) Those items, however, are not themselves incriminatory.

For example, a gas receipt showing that petitioner purchased gasoline in Anaheim on the weekend Richard Barnes was killed in Temple City does not prove that petitioner was in Temple City that weekend or that he killed Barnes. The same is true of the evidence that petitioner had the address of the Barnes family residence. The address was not found, as respondent asserts, in petitioner's wallet (*Inf. Resp. at.* 20), but was instead located along with other documents in a bookshelf in petitioner's room. (RT 17357.) The possibility that petitioner may have already had this

address before he came to California in the summer of 1982 and allegedly became involved in the Barnes murder conspiracy was not ruled out by the prosecution, and Clifford Smith's testimony suggested that might have been the case. (See RT 19703.)[11] As for the evidence that petitioner charged gasoline at several gas stations in Northern California, none of which were in Humboldt County, on the day of the night Elizabeth Hickey was murdered in Eureka, does not prove that petitioner was in Humboldt County when Hickey was killed. Likewise, petitioner's possession of weapons belonging to Hickey and Petry does not prove he obtained them from her through force or at the time she was killed. These circumstances, like those in *Sutton*, while suspicious, are not necessarily inconsistent with the possibility of petitioner's innocence.

The same is true of the evidence that petitioner had been subpoenaed to Palm Hall shortly before his release but was never called to testify. That evidence does not prove that petitioner was part of a conspiracy allegedly hatched there by Michael Thompson, Clifford Smith and others. Petitioner's presence and the presence of the other alleged co-conspirators does not prove either the existence of an AB conspiracy, or that Richard Barnes was the target of that conspiracy, or that petitioner had agreed to join the conspiracy and personally carry out its goals. Evidence showing that petitioner traveled to Northern California, where his family was located, after his release from Palm Hall does not prove that he went there for the purpose of committing crimes in furtherance of the conspiracy, or that he had been instructed to commit such crimes there by his alleged co-conspirators. The prosecution relied on testimony by Michael Thompson and Clifford Smith to supply the necessary proof for each of those facts.

[11] Petitioner explained at penalty phase that he had the address since 1980 when he and Steve Barnes were housed together at San Quentin. (RT 22564-22656.)

Beyond the testimony provided by Michael Thompson, Clifford Smith, and Janet Myers, the prosecution's evidence that petitioner committed the Barnes and Hickey murders and the other crimes charged against him and did so pursuant to an AB conspiracy was scant, and wholly circumstantial. No fingerprint evidence connected him to either murder scene, and there was no eyewitness testimony connecting him to the murders either. Petitioner's case is therefore readily distinguishable from both *In re Sassounian*, *supra*, in which the prosecution's case on guilt was overwhelming and consisted of eyewitness testimony placing the defendant at the crime scene, and *Strickler v. Greene*, *supra*, where the evidence linking the defendant to the murder was overwhelming.

In short, Michael Thompson, Clifford Smith and Janet Myers were all critical witnesses for the prosecution's case, and their credibility was as important in petitioner's case, as was the credibility of the key witnesses in *Scheer*, *Smith*, *Brown* and *Sutton*. Respondent's contentions otherwise lack merit.

2. The undisclosed evidence concerning these essential witnesses introduced a new source of potential bias, and was not cumulative of anything the jury already knew, and respondent's argument otherwise is contrary to the *Napue* and *Bagley* jurisprudence.

The decisions in *Smith*, *Sheer and Brown* provide compelling authority for rejecting respondent's cumulative impeachment argument in this case. Respondent's argument is that any further impeachment of Michael Thompson, Clifford Smith and Janet Myers is immaterial, because those witnesses were already thoroughly impeached, and their credibility severely damaged. (*Inf. Resp. at* 19.) Respondent relies on the fact that the jury was made aware that Clifford Smith and Michael Thompson had multiple felony convictions for murders and other serious crimes, and that Janet Myers also had a prior felony conviction. Respondent also relies on

the fact that all three witnesses admittedly had given perjured testimony on previous occasions. (*Id.*) Respondent also points to the fact that the jury was made aware that all three witnesses were promised immunity from prosecution, and in Clifford Smith's case, a promise that a favorable letter would be submitted on his behalf to the parole board. Finally, respondent points out that these witnesses were all promised protection for themselves and their family members. According to respondent, the jurors therefore had all the information they needed to meaningfully assess the credibility of these witnesses. (*Id.*)

The evidence on which respondent places such reliance is no different in kind than the impeachment evidence heard by the jurors in *Scheer* and *Smith*. For example, in *Scheer*, prosecution witness Jacoby was also impeached with a felony conviction, as well as with his immunity agreement, the government's accusation that he had committed blatant perjury at his own trial, and his own admission that the government's perjury accusation was true. In *Smith*, prosecution witness, M, was also impeached with numerous felony convictions, as well as with evidence that he was a dope fiend (like Janet Myers) and a drug dealer. Although M's agreement with the government did not include immunity from prosecution, Smith's jury was informed that M received substantial charging and sentencing benefits, including the dismissal of numerous federal charges against him, in return for his guilty plea to one count and for his cooperation against Smith. As in the present case, Smith's jury was not informed however that this key witness had testified falsely about the full extent of his agreement with the government. Instead, the jury heard testimony from M that his motivation for testifying against Smith was so that he could "get a fresh start." The *Smith* court concluded that disclosure by the government that M testified falsely about his cooperation agreement would have enabled the defense to pursue devastating cross-examination.

As the court observed, with such disclosure, the defense could have challenged M's assertion that he was testifying to get a fresh start on life and suggested to the jury that M had deliberately concealed other favors that were not included in his written plea agreement.

Disclosure by the prosecution that Michael Thompson, Clifford Smith, and Janet Myers had provided similar false testimony during petitioner's trial would have enabled his defense attorneys to pursue equally devastating cross-examination of each of these three witnesses. Michael Thompson, like witness in *Smith,* gave false testimony that was highly self-serving. Thompson testified that he was not personally benefiting from his testimony against petitioner. He even went so far as to tell the jury that he had not allowed and would not allow the prosecution or law enforcement to give him anything for his cooperation beyond immunity and protection for his family. (RT 16792, 16902.) Instead, he maintained that his reasons for testifying against petitioner were purely altruistic -- he wanted to help put the criminal organization he had helped form out of business. (RT 16898.) Had the prosecution disclosed the fact that Michael Thompson was in fact receiving an array of unusual personal benefits, the defense would have been able to show that Thompson's claimed altruistic motives for cooperating against petitioner were not credible. Had the prosecution also disclosed that Thompson's testimony that he was not receiving anything for himself beyond immunity were false, the defense would have been able to demonstrate convincingly that Thompson not only had a past history of committing perjury, he was in fact testifying falsely in this very case. The defense would also have been able to demonstrate convincingly that Thompson was deliberately concealing the extraordinary benefits he was being given as a reward and inducement for testifying against petitioner. There is no question that Thompson had personal knowledge about those benefits, since they included his getting to have sex in his jail cell with his

girlfriend and to run an apparently lucrative business from his jail cell under the new government-provided identity. The undisclosed evidence about Thompson's benefits and about the fact that he testified falsely in denying any such benefits was obviously not cumulative. This undisclosed evidence "did not merely reinforce a fact that the jury already knew; the truth would have introduced a new source of potential bias." (*Brown v. Wainwright, supra*, 785 F.2d at 1466.)

The same is true of the undisclosed evidence impeaching Clifford Smith and Janet Myers. The jury did not know for example that as part of the "protection" promised to him for his family members, Smith was allowed to negotiate significant charging and sentencing leniency for his brother Jimmy. The jury also did not know that Clifford Smith had provided a false and materially misleading answer to defense counsel's question about benefits promised him for his brother. Clifford's false and misleading response to defense counsel's inquiry, "no one's mentioned a word to me about it" is reminiscent of Ronald Floyd's false answer in *Brown v. Wainwright, supra*, "I have no knowledge of it whatsoever" to a question about whether he had made any deals with the government. (*Id.* at 1461.) The jury also did not know about the CDC visiting records, which contradicted the story told by both Clifford Smith and Janet Myers. Had the prosecution disclosed rather than suppressed those records, the defense could have made a strong argument that Janet Myers not only did not visit Clifford at Palm Hall on February 13, 1983, the day Richard Barnes was murdered, she never conveyed an incriminating message from petitioner to Smith.

Had the prosecution disclosed the fact that Clifford Smith had obtained charging and sentencing leniency for his brother Jimmy in return for Clifford's cooperation against petitioner, the defense could have presented evidence to dispute any claim by Clifford and the prosecution

that this was done solely for Jimmy Smith's protection. The defense could also have argued persuasively that the promise to "protect" Clifford Smith's family members, was a guise, and that what Clifford was really being given was a sweetheart deal for his brother.

Armed with disclosure of information indicating that Clifford Smith was given a sweetheart deal for Jimmy and that Michael Thompson was given sweetheart benefits for himself at the LA County Jail, the defense could have backed up their argument to the jury that these witnesses had been bought and paid for with some evidence. In the absence of any such disclosure, the defense was relegating to making only arguments that this was true. In addition, armed with disclosure of information that Clifford Smith testified falsely and in a materially misleading manner in denying that he had knowledge of any promises not to prosecute his brother, the defense would have been able to effectively challenge Clifford's testimony about how good it felt to him to be come into court for the first time in ten years and finally tell the truth. (RT 14780.) In the absence of any such disclosure, this testimony by Clifford went unchallenged. Like the undisclosed information concerning Michael Thompson, the undisclosed information concerning Clifford Smith did not merely reinforce facts the jury already new. The truth would have introduced new sources of potential bias on Clifford Smith's part.

The prosecution also failed to disclose that like Thompson and Smith, its other key witness, Janet Myers, also committed perjury at petitioner's trial. Had the prosecution disclosed the information about the true status of her pending cases, and corrected her false testimony, the defense would have been able to show that Myers committed perjury in this case, and did so in response to leading questions by prosecutor Bass. This in turn would have provided the defense with powerful support for their argument that Myers would say anything she thought the prosecution and

its agent Michael Thompson wanted her to say, even when she knew that what she was saying was untrue. In addition, if Myers' perjury been made known to the jury, the defense could have argued that the reason she lied about the true status of her pending cases was to conceal the full extent of her agreement with the government. The defense could have suggested that Myers' original agreement with the prosecution had been supplemented with a promise that she would receive a favorable disposition on one or more of her pending unadjudicated San Bernardino County cases. That is of course what happened after her favorable testimony against petitioner at his trial. The undisclosed evidence impeaching Myers and showing that she lied would have introduced a new source of potential bias on her part. It was not evidence that the jury had already heard.

As petitioner has indicated above, the jury also did not hear about Clifford Smith's undisclosed 1983 visiting records. This undisclosed evidence would have introduced another new area of impeachment of both Clifford Smith and Janet Myers. Armed with disclosure of the visiting records, the defense would have been able to make a convincing argument that those records, together with the evidence that there was a strong probability that the "hit or miss" urine message was a forgery showed that all three of these prosecution witnesses were fabricating evidence against Mr. Price. Had the jury known that in addition to fabricating evidence against petitioner, Michael Thompson and Clifford Smith also lied to the jury about the full extent of their arrangements with the prosecution, and that Janet Myers lied about the true status of her pending cases, the impact on the prosecution's case would have been devastating.

3. In Their Closing Arguments to the Jury, Both Prosecutors Exploited Their Non-Disclosure of Impeachment Evidence and The Uncorrected False Testimony of Their Witnesses, And

Significantly Relied On The Testimony of Those Witnesses in Urging the Jury to Convict Petitioner on All Counts.

In addressing Napue and Bagley claims, courts have looked at the closing arguments made by the prosecution when deciding the question of constitutional materiality. When prosecutors in closing argument have exploited false testimony by their witnesses, or have significantly relied on the testimony of such witness, or have capitalized on their own (the prosecution's) failure to disclose exculpatory evidence, courts have considered such arguments highly relevant in finding *Napue* or *Bagley* error. (See *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011; *United States v. Scheer*, *supra*, *Brown v. Wainwright*, *supra*). In petitioner's case, both prosecutors exploited their non-disclosure of exculpatory evidence and the false testimony of their witnesses, and relied heavily on testimony by those witnesses in arguing petitioner's guilt.

For example, in his closing argument, Bass exploited the non-disclosure of the benefits given to Michael Thompson, Clifford Smith, and Janet Myers that are at issue here by telling the jury that "the defense gets everything we have in the way of discovery, police reports. As soon as we get anything, you know, has to go to them..." (RT 20874.) Bass added that the best the defense can come up with to try to impeach Michael Thompson and show why the jury should not believe him is his small mistake about the source of the Barnes murder weapon. (RT 20880-20881.) Based on this remark, it was reasonable for the jury to assume that it now knew the most damaging available information about Thompson's believability, when, as Bass knew or should have known, such an assumption was wrong. (See *United States v. Scheer, supra.*)

Dikeman also capitalized on the prosecution's failure to disclose those benefits, by suggesting to the jury that the prosecution's witnesses

had not received benefits of any real significance in return for their testimony. For instance, Dikeman countered defense counsel's suggestion (made without evidentiary support) that Michael Thompson and Clifford Smith had been bought off and paid for or had received great favors, by pointing out the remoteness of the benefits they actually received:

> Clifford Smith is eligible for parole. It doesn't mean he is going to get out. It means he goes to a hearing to find out if maybe he gets out in the year 2007. **He didn't drive a real hard bargain.**
>
> Michael Lynne Thompson goes before a board again having already testified at the preliminary hearing in this case, having already agreed to cooperate with law enforcement. Again, he goes before the board three years from now because the last time he went in, the D.A. and the sheriff of Orange County and the judge who sat in on the original hearing came in and said "Don't let him out. Keep him in there."
>
> Neither one of those men nearly expects to see the street – I think Thompson said maybe he expects it and Clifford said he would like to, but they have no – nothing concrete that they will ever be free men again.

(RT 20355-20366 [emphasis added].

Dikeman did not tell the jury about the benefits that were given to Thompson and Smith, which had a present and real value to them. For instance, Dikeman left out the fact that Thompson's cushy lifestyle at the Los Angeles County jail afforded him many of the privileges of a free man. Dikeman also left out the fact that the deal for reduced charges and concurrent time given to Clifford Smith on his brother's behalf made it possible for Jimmy to be on the streets only a few months after Clifford Smith was promised that deal. Although Clifford Smith knew he would not be free any time soon, as Dikeman pointed out to the jury, Clifford obtained

a bargain in exchange for testifying against petitioner that ensured that his brother Jimmy would soon be free.

At another point in his argument, Dikeman further undercut suggestions by the defense that Michael Thompson was receiving special favors in return for his cooperation. Dikeman told the jury that Thompson's allegations in his habeas petition about his improper treatment by CDC officials at Tehachapi did not have a great deal to do with petitioner's case. (RT 20357.) This argument exploited the non-disclosure by Thompson and the prosecution about the special benefits Thompson began receiving at the Los Angeles County Jail once his demands for "proper" housing were met – which had a great deal to do with petitioner's case, on the issue of Thompson's potential bias.

Dikeman also minimized any impeachment value that Thompson's immunity agreement might have had, by reading the entire immunity order, including the language that the trial court believed that all of the allegations in the petition were true, and that granting Thompson immunity was not contrary to the public interest. (RT 20356.) This argument and its reference to the court were obviously calculated to enhance Thompson's credibility as a witness, and to suggest that his testimony was truthful. By this argument, Dikeman exploited the prosecution's failure to disclose that Michael Thompson had testified falsely both at petitioner's trial and also at his preliminary hearing.

Bass and Dikeman also made arguments that were calculated to enhance Clifford Smith's credibility and persuade the jury that they should credit his testimony against petitioner. Bass told the jury was what a great and impressive witness he thought Clifford Smith was. (RT 20846, 20848.) Bass also told the jury that Clifford was not truthful when he was "working for" petitioner's defense counsel, Mr. DePaoli. (RT 20862.) Bass then referred to Smith's testimony that this (his testimony for the prosecution)

was the first time in ten years that he told the truth, and what a great feeling this was for him. (Id.) Bass also told the jury that they could give a lot of weight to Smith's testimony because none of the defense witnesses had come in and testified that he had a reputation in the prison community as a liar, as they had said of Michael Thompson. (RT 20883.) For his part, Dikeman came right out and told the jury that Clifford Smith had told the truth at petitioner's trial:

> Now Mr. Smith came in at the preliminary examination with a mission different than the one he had here. His mission here was to tell the truth for the first time in ten years. **He told the truth**. . . .
>
> (RT 20434.)

What both Bass and Dikeman of course left out was that Clifford Smith had not told the truth on this occasion either, as the suppressed visiting records and his false and misleading answer concealing the deal he negotiated for his brother reveal.

Finally, both prosecutors also emphasized testimony provided by all three witnesses in their arguments, in urging the jury to convict petitioner. Although respondent is now claiming that the testimony of these witnesses only provided some "color" for the prosecution's case against petitioner, and that it was the other evidence that provided the conclusive proof against petitioner, Ron Bass said something quite different to the jury. He told the jury that all they needed was some slight evidence pointing to the existence of the conspiracy, and then they could "wheel back wheel back in the testimony of Clifford Smith and Michael Thompson. (RT 20849-20850)

The cumulative impact of the undisclosed evidence and/or false testimony, coupled with the above-described arguments by prosecutors is sufficient to undermine confidence in the outcome of petitioner's guilt and penalty phase trials under *Bagley.* The prosecution's knowing use of that

false testimony and/or its knowingly failure to correct such testimony is more than sufficient to satisfy the less stringent materiality standard under *Napue-Giglio*.

Conclusion

In conclusion, respondent's briefing on petitioner's *Napue* and *Bagley* claims is marred by its numerous factual errors and by its failure to correctly state and apply the applicable federal law in addressing these claims. For instance, in addressing the question of materiality for *Bagley* purposes, respondent analyzes the undisclosed evidence item by item, witness by witness. Respondent's approach is an incorrect one under applicable United States Supreme Court precedent, which requires that for *Bagley* claims the cumulative impact of the undisclosed evidence be considered. (See *Kyles v. Whitley, supra*.) Respondent's analysis of *Napue* materiality is practically non-existent because respondent erroneously fails to recognize that knowledge of law enforcement agents who substantially assisted the prosecution can be imputed to the prosecution for purposes of *Napue*.

Lastly, petitioner would point out that in their tone and in the positions they have taken in their briefing, including their staunch support of Ron Bass as prosecutor, respondent's attorneys have conducted themselves much like the government's attorneys in *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, in which the defendant's conviction was reversed for *Bagley* error.

Writing for the court in *Kojayan*, Judge Kozinski issued a scathing opinion criticizing the prosecutor's actions during the trial, which were found to constitute misconduct, and also criticizing the prosecutor's failure to acknowledge any wrongdoing on his part and his shifting blame away from himself and onto defense counsel. In addition, Judge Kozinski criticized the failure of the prosecutor's supervisors to take an independent

objective look at the claim of alleged misconduct, which Judge Kozinski pointed out turned on entirely verifiable facts. Finally, Judge Kozinski faulted the government's briefing on appeal, in which the government showed no appreciation of the seriousness of the misconduct, and no hint of contrition.

The same criticisms can be made with respect to the government's actions in this case at trial and in these post-trial proceedings. As petitioner has demonstrated, the prosecutors engaged in misconduct by failing to disclose exculpatory evidence, they also used and failed to correct testimony by Clifford Smith, Michael Thompson, and Janet Myers – testimony they knew or should have known was false. As in *Kojayan*, the prosecutors did not acknowledge any wrongdoing on their part, but instead shifted blame away from themselves and onto the defense, accusing defense counsel of fault in the discovery-related disputes that arose with frequency during the pretrial and trial proceedings. (See Pet., at 203-206.) They also demonstrated by their actions and remarks that they did not take seriously the allegations by the defense that the prosecution was suppressing exculpatory evidence, including evidence that would have impeached Thompson, Smith and Myers.

Respondent's attorneys, including Senior Assistant Attorney General Ron Bass, continue to maintain that the prosecution did nothing wrong. They also have shown that they do not take the prosecutorial misconduct allegations raised in this and other claims in the exhaustion petition seriously. For example, although this Court gave them almost a full year to prepare and file their Informal Response, the sloppiness of their brief with its numerous factual mistakes shows that they neither read the petition, the supplemental exhibits and relevant portions of the trial record with any care nor bothered to review their own brief for factual errors before filing it with this Court. Moreover, they are still playing the hide-the-ball, catch us if

you can games that Bass and others connected to the prosecution were playing at petitioner's trial. For example, respondent's attorneys have yet to provide petitioner with a non-redacted copy of Clifford Smith's visiting records – something they are constitutionally obligated to do even at this stage in the proceedings. In addition, they have shown their unwillingness to acknowledge facts about which, as they know or can reasonably verify, there can be no serious dispute. One example is the fact that Michael Thompson was being housed on out-to-court status at the Los Angeles County jail for years, including during the proceedings in petitioner's case, except when he was briefly absent to attend court proceedings. Yet rather than acknowledge that fact, respondent states only that Thompson was "apparently" being housed at the Los Angeles County jail. (*Inf. Resp. at* 5.)

The California Attorney General has been on notice about the allegations of misconduct by Bass and others in the AG office since April of 1997, when petitioner filed his federal habeas petition. However, here, as in *Kojayan*, there does not appear to have been any independent objective investigation by the California Attorney General of anyone else in a supervisory role over Bass into the alleged misconduct by him and others in that Office. Petitioner asked this Court over a year and half ago to decide itself whether Bass, who heads the criminal division of the San Francisco office of the Attorney General, and others in his office have a disqualifying conflict of interest, which would preclude them from participation as counsel for respondent in this matter. The court has yet to act on petitioner's motion, and instead, has allowed respondent's current counsel, including Mr. Bass, to continue to act on respondent's behalf in this matter. This has served to compound the violations of petitioner's federal constitutional due process rights that occurred at his trial, and has jeopardized the fairness of these proceedings. In order to prevent any further harm to petitioner in this matter, this Court should act to remove

Mr. Bass and others in his Office from handling these proceedings, and petitioner hereby renews his motion to disqualify them.

Petitioner has established a prima facie case that his federal due process rights were violated and that he is entitled to habeas corpus relief.

CLAIM II.

CURTIS PRICE IS INNOCENT OF THE MURDER OF RICHARD BARNES AND HIS WRONGFUL CONVICTION OF THAT MURDER VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ANALOGOUS PROVISIONS OF THE CALIFORNIA CONSTITUTION AND TAINTS THE ENTIRE JUDGMENT AGAINST HIM AND HIS SENTENCE OF DEATH

In his brief, respondent suggests that this Claim that someone other than petitioner murdered Richard Barnes is inherently suspect, because petitioner's evidence is based on what respondent's calls "classic" newly discovered evidence of the confession of a dead man who cannot be cross-examined. (*Inf. Resp. at* 21.)

Respondent argues that it is very questionable whether petitioner has in fact produced any evidence whatsoever, since according to respondent, DeAvila's confession to his fellow gang member, Salvador Buenrostro, is both intrinsically and extrinsically unreliable. (Id. at 22.) Respondent cites *People v. Frierson* (1991) 53 Cal. 730, 745 and *People v. Blankenship* (1985) 167 Cal. App.3d 840, 848) for the proposition that DeAvila's hearsay confession would not be admissible as a declaration against penal interest. Both cases are distinguishable.

In *People v. Blankenship,* the hearsay confession was allegedly made by a third party to the defendant himself. The appellate court upheld the exclusion of the defendant's proposed testimony about the confession. The appellate court held that the defendant's testimony was inherently suspect both because the defendant had a motive to falsify and because accurate

details about the crime could be explained by the defendant's knowledge and guilt rather than that of the hearsay declarant.

In *People v. Frierson*, the confession was made by the hearsay declarant to Frierson's defense investigator years after the murder. Frierson had attempted/ to call the declarant as a witness, but he exercised his 5th Amendment rights and refused to testify. The defense then sought to introduce his confession as a declaration against penal interest under Penal Code section 1230. The trial court excluded the evidence on grounds that it was not trustworthy because it was not apparent that White had a sufficient belief that he could be punished at that late date. This Court held that the trial court had not abused its discretion in excluding the declarant's confession as unreliable under the circumstances. Those circumstances included the fact 1) that the declarant was a friend of Frierson's; 2) the declarant made his confession 14 years after the crime, and 3) at the time he made the confession, he knew that Frierson had already been tried more than once, and had been adjudicated by the court to be the shooter. This Court concluded that it was reasonable to conclude that in confessing, the declarant wanted to help his friend at little risk to himself, and his confession was insufficiently reliable.

In petitioner's case, there is no evidence suggesting that DeAvila was a friend of petitioner's or even knew him. Richard Barnes was murdered in February of 1983, and DeAvila was himself murdered in May of 1986. DeAvila's confession to Salvador Buenrostro in the Los Angeles County Jail therefore occurred within a few year time frame after the Barnes murder. In addition, there is nothing to suggest that DeAvila knew that petitioner had even been charged with the Barnes murder when DeAvila confessed to Buenrostro.

While it is true that DeAvila and Buenrostro were both members of the Mexican Mafia, that does not mean that DeAvila did not have any

reason to believe that he would never face any risk of criminal prosecution by telling Buenrostro about his role in the Barnes murder, as respondent is contending. (*Inf. Resp. at* 22.) Anthony Casas, an expert on prison gangs and on the Mexican Mafia, indicates that by the time DeAvila made his confession the Mexican Mafia had already suffered a number of defections by members who, despite their blood oaths, betrayed the confidences of their fellow gang members and became witnesses for the prosecution against them. (See Supp. Exh. 67 at pp. 2-3.) As Mr. Casas also indicates, the risk of fellow gang members dropping out and becoming snitches was a matter of great concern to the Mexican Mafia, and a subject that was frequently discussed by members of the gang. (*Id.*) Thus, when DeAvila told Buenrostro that he had "taken care" of Steve Barnes' father, namely killed him, DeAvila would have been aware that there was a possibility that his confidence might be betrayed, and that his information might wind up in the hands of law enforcement. Unlike the circumstances in *Frierson*, the circumstances here make DeAvila's confession that he had killed Richard Barnes sufficiently trustworthy to be admissible under Penal Code section 1230 as a statement against penal interest.

Respondent makes several additional arguments about DeAvila's confession in arguing that it constitutes no evidence at all, or at best, very weak evidence. Respondent characterizes DeAvila's statement to Buenrostro that he killed the relative of a "snitch" as "bragging" and would only have enhanced DeAvila's status within the criminal community rather than subjecting him to any risk of social disapproval. Once again, respondent purports to be able to divine from the cold face of a document that the declarant was bragging. In any event, since petitioner has demonstrated that DeAvila's statement that he killed Richard Barnes qualifies as a statement against penal interest, petitioner does not also have

to establish that the statement comes within other provisions of Evid. Code section 1230.

Respondent also claims that DeAvila's confession is untrustworthy because it does not match the facts of the Barnes murder. (*Inf. Resp. at* 23.) Respondent points to the fact that Barnes went from the bar where he was drinking to a convenience store and then returned home in arguing that Barnes was killed by someone waiting for him at his home. (*Id.*) Respondent contends that these facts are inconsistent with DeAvila's statement that after he and Barnes had drinks at a bar, he went out and "took care" of Barnes.

Petitioner disagrees with respondent's conclusion for the following reasons. DeAvila, who lived in a nearby community, told Buenrostro that he ran into Steve Barnes' dad at a bar, and had some drinks with him. Police reports confirm that Barnes was drinking at a local bar shortly before he was killed, and that someone, unidentified in the reports, bought him a drink. (See Pet. at pp. 139-140.) DeAvila's information about Barnes' presence in a bar and drinking with him is not something DeAvila would have known except from his own personal knowledge. The police reports also show that in addition to ice cream, Barnes bought a bottle of Vodka on the night he was killed. However, during the search of his residence, the police found only an empty Vodka bottle and one that had been mostly consumed. As petitioner alleged this evidence and the evidence of Barnes' blood alcohol level suggests that the bottle of Vodka Barnes bought that night was consumed that night by him and someone he knew, as opposed to a stranger lying in wait for him. (See Pet. at pp. 140-141.) Furthermore, DeAvila's statement that he went out and "took care" of Barnes does not imply that he necessary did so immediately after the two left the bar. Moreover, even assuming arguendo that DeAvila's statement was inconsistent to some extent with other evidence, any such discrepancy does

not negate all possibility that in claiming to be the murder, DeAvila was telling the truth. (*People v. Cudjo* (1993) 6 Cal.4th 585, 608.)

Respondent also suggests that petitioner's evidence concerning DeAvila's statements is untrustworthy because it is being relayed by Salvador Buenrostro, who respondent suggests is a witness of dubious credibility, because he is a career convicted criminal. (*Inf. Resp. at* 22). As this Court held in *People v. Cudjo, supra*, except in rare instances of demonstrable falsity, doubts about the credibility of the witness who relates the hearsay in question should be left to the resolution of the fact-finder. Such doubts do not afford a ground for refusing to admit evidence under the hearsay exception for statements against penal interest, because it is the reliability of an unavailable hearsay declarant, not the witness who relays the hearsay, that is relevant.

As petitioner has alleged, the "newly discovered" evidence that DeAvila confessed to the Barnes murder does cast fundamental doubt on the accuracy of petitioner's conviction, particularly in light of the evidence in Claim I, showing that the prosecution's evidence upon which petitioner's conviction was based was provided by witnesses who committed perjury at his trial, and who fabricated a story to implicate petitioner in the crime.

Claim III

THE PROSECUTOR IN THIS CASE ENGAGED IN UNETHICAL AND INAPROPRIATE 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

In Claim III of the exhaustion petition, petitioner alleged that during his trial, prosecutor Ron Bass engaged in improper conduct with Zetta Southworth, one of the jurors in petitioner's case. The conduct was described to petitioner's habeas counsel, Robert L. McGlasson and to Sandra Michaels, an attorney who was assisting Mr. McGlasson, by Robert McConkey, a bartender at the bar where the incident occurred. Mr. McConkey told Ms. Michaels that Bass came into the bar one evening during the trial, began ordering drinks, and eventually sent back drinks to Ms. Southworth and later, two $10s or a $20 bill along with the message that this was for a guilty verdict on the Price case. (See Pet., Exh. 11). Mr. McConkey said that he knew Bass was the prosecutor on the Price case, and that Ms. Southworth was a juror on the case. Mr. McConkey also said that it was he who took the drinks and later the money from Bass back to Ms. Southworth and at the same time relayed to her Bass' message about bringing in a guilty verdict. Mr. McConkey confirmed that on an earlier occasion, he had given Mr. McGlasson the same account of the incident. (*Id.*)

In their response to this Claim, respondent's attorneys accuse petitioner of setting out a "wholly unsupported" and "gravely inflammatory" accusation against Ron Bass. (*Inf. Resp. at* 25.) They also call the accusations "scurrilous." (*Id.* at 26.) They state that petitioner

"claims" that Robert McConkey, a bartender in Eureka, related a story to petitioner's attorneys involving Mr. Bass and a juror Southworth. (*Id.*) They then assert that the declaration of petitioner's investigator (Bob Cloud) quotes Mr. McConkey as "completely disavowing the story." (*Id.*) In so asserting, respondent's attorneys have done here what they did with petitioner's other misconduct claims involving Ron Bass. They have misstated petitioner's evidentiary showing, and the tone of their argument makes it apparent that they are personally offended by petitioner's allegations against one of their own. It is also apparent from their response that they are seeking to have this Court reject petitioner's contentions out of hand based on an adverse credibility assessment of McConkey. If successful, their tactics would deprive petitioner of the opportunity to question Bass and McConkey under oath concerning the incident and have their credibility determined by a trier of fact.[12] The contentions respondent has advanced to justify such a result lack merit.

A. Respondent's Assertion Is Untrue that Petitioner's Investigator Was Firmly Told By Mr. McConkey that The Entire Story About Mr. Bass and Ms. Southworth and The Story Was A Fabrication and Had No Truth

Respondent makes several assertions about the information contained in the declaration of petitioner's investigator, Bob Cloud, which petitioner filed in support of his exhaustion petition. (See Pet. Exh. 10.) First, respondent asserts that Mr. Cloud quotes Mr. McConkey as "completely disavowing" the story about the Bass-Southworth incident. (*Inf. Resp. at* 25.) Next, respondent expands on that allegation, and, citing to Mr. Cloud's declaration, asserts that when Mr. Cloud approached McConkey to sign a declaration, he was **"firmly told by McConkey that the entire story was a fabrication, and had no truth."** (*Ibid, emphasis*

[12] Petitioner's attempts to question Mr. Bass informally have been rebuffed.

added.) Respondent has seriously distorted the plain meaning of Mr. Cloud's declaration. Nowhere in his declaration does Mr. Cloud say that Mr. McConkey told him firmly or otherwise that the entire story about Mr. Bass and Ms. Southworth was a fabrication and had no truth. While Mr. McConkey did tell Mr. Cloud that the whole incident was a joke, he then went on to state that **Bass** was just kidding around. (See Pet. Exh. 10 at p. 2; emphasis added.) The latter statement makes no sense at all if Mr. McConkey had really fabricated the entire incident himself as a joke and had so indicated to Mr. Cloud. Read in context, the only reasonable interpretation of Mr. McConkey's statements to Mr. Cloud is that the incident happened but Mr. McConkey viewed it as a joke because, in his opinion, Mr. Bass was just kidding around. This is consistent with what Mr. McConkey had previously told Ms. Michaels. (See Pet., Exh. 11.)

Second, notwithstanding his alcohol-based disclaimers otherwise, Mr. McConkey has demonstrated an amazing ability to recollect the Bass-Southworth incident. His comments to Mr. Cloud demonstrate that although he claimed that he had too many brandies and couldn't remember a damned thing about the incident, he then went on to comment about the incident without any need to refresh his recollection with the proposed declaration prepared by petitioner's counsel. Furthermore, during his conversation with Ms. Michaels, Mr. McConkey was able to recollect, correctly, that he had previously talked about the incident to Mr. McGlasson, a discussion that occurred almost a year earlier. (See Supp. Exh. 66 at p. 5.) Moreover, in talking to Ms. Michaels, the description Mr. McConkey gave of the incident was consistent with the description he had previously given to Mr. McGlasson. It defies logic to believe that Mr. McConkey's problems with alcohol have really impaired his memory about the Bass-Southworth incident. Instead, it appears that Mr. Mr. McConkey

is simply feigning a failure to recollect on the basis of problems with alcohol in an attempt to avoid further involvement in this matter.

Mr. McConkey used the alcohol-impaired memory excuse when Mr. Cloud went to his home in an attempt to obtain a signed declaration from him concerning the incident. That excuse did not work, however, to prevent him from being contacted again about this matter, this time by the investigator working on behalf of respondent's attorneys, including Mr. Bass. Mr. McConkey then came up with something new – his story that he had made up the entire Bass-Southworth incident as a drunken joke.[13] Although respondent apparently credits this new version as true, there are a number of reasons why Mr. McConkey's new story is inherently incredible.

In the first place, the Bass-Southworth incident, involving as it does a prosecutor and a juror in a high profile death penalty case, is simply not something that anyone, including Mr. McConkey, would make up, even as a joke. Second, Mr. McConkey admitted to respondent's investigator that he had in fact told an attorney (whom he did not name) that Mr. Bass bribed a juror, but claimed he (McConkey) was drunk at the time he said that. (See *Inf. Resp.*, Exh. A at p. 2.) Third, if, as Mr. McConkey now claims, he had fabricated the entire incident, he certainly had no reason or motive to withhold that information from members of petitioner's legal team. He certainly had ample opportunity to set the record straight in one of the face to face meetings he had with Mr. McGlasson, Ms. Michaels and Mr. Cloud. Moreover, the fact that he did not tell members of petitioner's legal team that he had fabricated the incident clearly cannot be attributed to any desire on his part to help Mr. Price. To the contrary, Mr. McConkey has made no secret of the fact that he is extremely biased against Mr. Price.

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[13] Respondent's claim that Mr. McConkey has "twice denied the reality" of the incident (see *Inf. Resp. at* 26) is unfounded. He only said that to respondent's investigator, not to anyone on petitioner's legal team.

Finally, by telling third persons, including attorneys McGlasson and Micheals about the Bass-Southworth incident, Mr. McConkey exposed himself to a potential civil lawsuit by Senior Assistant Attorney General Ronald Bass. Likewise, by admitting that he acted as the conduit between Mr. Bass and juror Southworth, in what arguably amounted to jury tampering, Mr. McConkey exposed himself to a potential civil suit by petitioner and possibly to criminal proceedings. A reasonable person under the circumstances would not be expected to make such a statement if the entire story were indeed a fabrication. That is why statements like these are deemed to be inherently credible, and are admissible as an exception to the hearsay rule if the declarant is unavailable to testify. (See Evidence Code § 1230.) Respondent's contentions that this Court should reject this claim out of hand on grounds that petitioner's allegations are "entirely unsupported by plausible evidence" and based on "rank hearsay" should therefore be rejected. It is of course too early to know whether Mr. McConkey will be unavailable to testify, thus making his hearsay statements admissible as substantive evidence. However, petitioner has certainly alleged facts sufficient to make out a prima facie case of serious prosecution and juror misconduct, and he has supported his factual allegations with the information that is reasonably available to him at this time. No more is and can be required of him at this pre-order-to-show cause stage of the proceedings. As respondent is well aware, unless and until this Court issues an order to show cause (OSC), mechanisms, such as discovery, subpoena power and an evidentiary hearing, that would enable petitioner to further develop the facts on this claim, are all unavailable to him. (See *People v. Gonzalez, supra* .)

Respondent's contention that this Court should reject this claim on the basis of Mr. McConkey's alleged lack of credibility should also be rejected. As this Court has often recognized, an appellate court is not in a

position to meaningfully assess the credibility of a witness, much less of a hearsay declarant. (See e.g. *In re Hitchings* (1993) 6 Cal.4th 97) Instead, assessments of credibility are best left to a referee who has the opportunity to observe the witness as he testifies and observe his demeanor. (*Id.*) In any event, rather than creating a valid basis for rejecting petitioner's claim out of hand, the hearsay statements by McConkey offered by respondent have only created a material factual dispute that cannot be properly resolved without an evidentiary hearing. Petitioner has requested as part of his prayer for relief, that this Court issue an OSC on this and petitioner's other claims, grant him discovery and subpoena power, and order an evidentiary hearing on this claim inter alia. Petitioner renews those requests here.

CLAIM IV

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 RIGHTS TO A FAIR TRIAL BY AN IMPARTIAL AND UNBIASED JURY, AND TO DUE PROCESS OF LAW

This claim is related to Claim III, and the arguments set forth in this Informal Reply in response to respondent's briefing on that claim are equally applicable to this claim, and petitioner incorporates them here by this reference.

Respondent is correct that petitioner did raise juror Southworth's alcohol problems and driving under the influence arrests in his direct appeal. However, it is inaccurate for respondent to claim that those issues were discussed thoroughly on appeal and aired thoroughly on the record before the trial court. (See *Inf. Resp. at* 28.) Neither petitioner's direct appeal counsel nor his trial attorneys had any inkling that one of the prosecutors, Ron Bass, accompanied by Gerry Johnson, the wife of Worth Dikeman, the other prosecutor, went into the bar where Ms. Southworth was working after jury duty had finished for the day. Nor did they know that Ms. Southworth accepted the drinks and money that she knew had been sent back to her by Mr. Bass along with the message about her bringing in a guilty verdict against Mr. Price. Thus, when the defense raised Ms. Southworth's probation revocation problems and the fact that she was seen hugging Gerry Johnson in the hallway of the courtroom during the trial and renewed their motion to challenge Ms. Southworth for cause, they lacked crucial information bearing on their motion. Likewise, the trial court in denying the motion was in the dark about Ms. Southworth's cozy relationship with the prosecution team, since Mr. Bass and juror

Southworth failed to inform the court about the Bass-Southworth incident at the Waterfront bar. Disclosure about the incident would surely have resulted in Ms. Southworth's removal from the jury, and probably in a mistrial. (Find case re prosecutorial misconduct resulting in a mistrial). Respondent's hyberbolic incantation that petitioner has "utterly failed to set out a colorable issue" is without merit.

CLAIM V

A MEMBER OF THE JURY WAS BIASED AGAINST THE DEFENDANT AND DIS-HONEST ON VOIR DIRE, IN VIOLATION OF PETITIONER'S RIGHTS TO A FAIR TRIAL BY AN IMPARTIAL AND UN-BIASED JURY, AND TO DUE PROCESS OF LAW

Claim V of the exhaustion petition alleged that Debra Kramer, the foreperson of his penalty phase jury, committed misconduct during jury selection by concealing material information about her relationship at the time with the local district attorney's office and about the nature of her former relationship with lead defense counsel, Bernard DePaoli.

Ms. Kramer's relationship with the Humboldt County District Attorney's office involved the Family Support Division of that Office which was appointed to enforce child support against Ms. Kramer's former husband, Robert Lee Balsley, Jr. (See Pet. Exh. 55.) Ms. Kramer's relationship with DePaoli arose from their joint involvement in a rape trial ten years before petitioner's trial in which Ms. Kramer was the victim and DePaoli the prosecutor. Their relationship turned into one that was not strictly professional.

In the declaration he provided for the exhaustion petition, DePaoli revealed that he and Ms. Kramer talked a great deal with one another, went out to dinner on several occasions, and when a guilty verdict was returned in the rape case, they went out to a bar where they danced closely and also "made out." (Exh. 9 at 10.) In his response to Claim VI, respondent asserts that all that was involved was "some chaste" kissing. (*Inf. Resp.* at 35.) DePaoli who engaged in the conduct did not say that however. DePaoli described the relationship with Ms. Kramer as "sexually flirtatious." (Pet.

Exh. 9 at 10.) DePaoli also provided Ms. Kramer with financial assistance in the form of personally co-signing a note for her car purchase. (Id.)

Ms. Kramer did not reveal any of this information during voir dire or in her answers on the jury questionnaires. Yet, respondent claims that petitioner has not established that she concealed anything, but less anything material. (*Inf. Resp. at* 29.) Without providing any citations to the record, respondent asserts that Ms. Kramer was "completely honest about her gratitude towards Mr.DePaoli for his help in convicting her assailants." (*Inf. Resp. at* 31.) Respondent also states later that Ms. Kramer "discussed her <u>close</u> relationship and gratitude to Mr. DePaoli for his work at her rape trial." (*Inf. Resp. at* 32.) This is another example of respondent's misstatements of fact. The record of Ms. Kramer's voir dire indicates she made no such discloses. On voir dire, she mentioned only the fact that DePaoli had been the prosecutor at her rape trial. She volunteered nothing else about the relationship they had at the time or whether it was a "close" one. (See Pet., at 164-172.) On her jury questionnaire, she acknowledged that she knew both DePaoli and Anna Klay. (Supp. Exh. 73) In response to a question on the form about whether she had any particular opinion about the defense attorneys or prosecutors one way or the other, she answered yes, but furnished no explanation. (Id.) Neither the defense nor the prosecution asked her whether her opinion was favorable or unfavorable. She did indicate on the questionnaire that she was satisfied with the ultimate conclusion in her rape trial. (Id.) However, she was not asked to indicate and she did not indicate how she viewed DePaoli's handling of the case, nor did she express her gratitude to him, as respondent asserts.

Respondent points to the fact that DePaoli and Ms. Kramer had little to no contact in the years following the rape trial. Respondent construes this to mean that Ms. Kramer did not regard what had occurred between her and DePaoli when they celebrated the verdict in that case as either sexual or

meaningful, and did not view his co-signing of the car loan as a significant act either. (*Inf. Resp. at* 31.)

Another even more plausible explanation for the collapse of their relationship is that Ms. Kramer was not comfortable with DePaoli's sexual interest in her, and did not want any further contact with him. She was after all recovering from the trauma of a brutal rape, and he was the prosecutor in the rape case. Her failure to disclose that she had non-professional dealings with the prosecutor in her rape case, including accepting financial assistance from her, and making out with him at a bar, suggests that not that she considered this information unimportant and meaningless, but rather that she considered it embarrassing and questionable. Her discomfort about the subject even years later may explain her refusal of petitioner's request that she provide a declaration in this matter. (See Supp. Exh. 65.)

In arguing that petitioner has established "absolutely no dishonesty or concealment" by Ms. Kramer, respondent relied on two cases, *People v. Majors* (1998) 18 Cal.4th 385, and *People v. Duran* (1996) 50 Cal.App.4th 103. Both cases are distinguishable. In *Majors*, a juror responded in the negative to a question about whether he had close friends or relatives in the California Department of Corrections. After trial, he revealed to the defense investigator that he had some "buddies" in the department. That led to a hearing on whether he had engaged in misconduct. In holding that no misconduct was shown, this court pointed to the fact that the juror testified at a hearing that he considered the CDC employees to be only acquaintances, not close friends, and therefore answered the question asked of him during voir dire truthfully. The court also pointed to the fact that the defendant did not challenge this testimony at the hearing. By contrast, Ms. Kramer's prior relationship with Bernard DePaoli, while it lasted, was obviously more than one between casual acquaintances.

In *Duran*, a juror failed to disclose that she had several dates and a relationship that lasted only a few weeks with a man whose cousin was a murder victim. In holding that no misconduct was shown, the court pointed to the fact that the juror was asked whether she had a close relationship with anyone who had been the victim of a crime, and man she briefly dated was not himself a crime victim nor was he someone with whom she had a close relationship. By contrast, the relationship between DePaoli and Ms. Kramer was a close one. In addition, the questionnaire mentioned DePaoli's name specifically.

Respondent also cites *People v. Green* (1995) 31 Cal.App.4th 1001 for the proposition that petitioner waived any right to complain about the juror misconduct issues stated in DePaoli's declaration concerning Ms. Kramer. *Green* is inapposite because the waiver issue there was not attributable to any ineffective assistance of counsel or conflict of interest on the part of counsel, which is the case here. (See Claim VI infra.)

Respondent argues that even presuming misconduct by Ms. Kramer, prejudice is rebutted because the concealed information would only have been favorable to the defense and the concealed facts were "exceedingly minor." *Inf. Resp. at* 32. Petitioner disagrees on both points. It is pure speculation on respondent's part to argue that Ms. Kramer's concealment of a potentially embarrassing and unprofessional relationship with the prosecutor handling the rape case against her assailant would only have been favorable to the defense. The fact that Ms. Kramer refused petitioner's request to provide a declaration for his exhaustion petition suggests that she was not favorably inclined either to petitioner or to his trial counsel.

Respondent challenges petitioner's allegations that Ms. Kramer concealed her relationship with the District Attorney's Office concerning the enforcement of child support order and the collection of child support

payments from her former husband. Respondent argues that petitioner has not provided any evidence that the local District Attorney's Office at any time ever acted in any capacity for Ms. Kramer. As respondent acknowledges, however, the Humboldt County District Attorney was appointed to enforce a child support order against Ms. Kramer's former husband. (Pet., Exh. 55.) In an apparent typographical error, respondent refers to this order as enforcing support "from" Ms. Kramer, rather than on her behalf. (*Inf. Resp. at* 32.) The date of the order is May 15, 1985, which is within months of the time Ms. Kramer appeared in this case as a prospective juror, yet she failed to reveal the information. The payment of child support is an ongoing duty, and Ms. Kramer's former husband was the support obligor. There is reason therefore to assume that the appointment of the district attorney's office to enforce the support order against him was an idle act or that the office took no actions on Ms. Kramer's behalf pursuant to its role as the support enforcement and collection agent.

Respondent's contention that petitioner has not shown any concealment by Ms. Kramer of material information is wrong, as is respondent's contentions that any presumption of prejudice is firmly rebutted.

CLAIM VI.

PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL BECAUSE HIS TRIAL ATTONEY BERNARD C. DEPAOLI, LABORED UNDER AN ACTUAL CONFLICTOF INTEREST WHICH ADVERSELYAFFECTED HIS PERFORMANCE AT TRIAL

In his reply to the preceding and related claim, petitioner discussed the facts and issues that are also relevant to this claim. Rather than repeating that discussion, petitioner will simply incorporate his briefing on Claim V here by this reference.

In this Claim, petitioner has alleged that his lead defense counsel Bernard DePaoli had an actual conflict of interest stemming from his prior but undisclosed personal and unprofessional relationship with juror Kramer. Petitioner also alleged that DePaoli rendered ineffective assistance of counsel in failing to disclose that information at all to his client, in waiting until after the trial to disclose part of the information to his co-counsel, and in allowing Ms. Kramer to remain on the jury by not exercising a peremptory challenge against her after two defense challenges for cause were denied.

Respondent viciously attacks DePaoli's character and credibility, and suggests that given the nature of his felony conviction, he is making a baseless claim for purposes of injecting an error in petitioner's case at this time in an attempt to overturn a major judgment. (*Inf. Resp. at* 34-35.) Petitioner has several comments to make in response. To begin with, it is unfair to visit DePaoli's sins on petitioner. It is not as if petitioner chose DePaoli to be his counsel. He didn't. DePaoli was selected by the court to represent him. It is also not as if petitioner made no effort to have DePaoli

removed as his counsel. He did. However, the court refused that request and required DePaoli to continue on. It is also not as if DePaoli's problems with alcohol and their potential adverse effect on his exercise of sound judgment on petitioner's behalf was an unknown at petitioner's trial. It was not. The trial court was aware that DePaoli had a drinking problem, that he had exercised poor and indeed unprofessional judgment during the course of representing Mr. Price, and that his abuse of alcohol may have been a possible cause. In his declaration, DePaoli admits what the trial court already knew years ago in that regard.

In his declaration, DePaoli also admits that he should have but did not exercise a peremptory challenge against Ms. Kramer. Respondent argues that DePaoli never once explains why he failed to do so. What matters however is that DePaoli does not claim that he had any valid tactical reason for keeping her on the jury. And no valid tactical reasons existed for the decision not to exercise a peremptory challenge against her. In fact, Ms. Kramer herself doubted her suitability to be on the jury on this case, pointing to her husband's involvement as a consultant to the district attorney about a case-related matter and as an expert appointed by the court to examine petitioner for mental competency to stand trial, and to a host of other reasons. (See Pet. at 164-172.) Under the circumstances, it is DePaoli's statements in his declaration that "do not jibe with reality" (*Inf. Resp. at* 34), it is his unreasonable decision to leave Ms. Kramer on the jury after the challenges for cause against her were denied.

Respondent misunderstands petitioner's allegations about the impact of DePaoli's conflict of interest on the ultimate decision not to exercise a peremptory challenge against Ms. Kramer. As a result of divided loyalties and to avoid personal and professional embarrassment to himself, DePaoli kept the information that he had had more than a prosecutor-crime victim relationship with Ms. Kramer and had co-signed a loan for her to himself.

By his silence, he deprived his client of additional grounds that would have strengthened petitioner's challenges for cause against Ms. Kramer, and he also prevented his non-conflicted second counsel and petitioner from making a knowing and intelligent decision to exercising a peremptory challenge against Ms. Kramer, even without DePaoli's concurrence. Had DePaoli revealed the undisclosed information to Ms. Klay, she would have done whatever she could to ensure that Ms. Kramer did not serve on the jury, including revealing the information *in camera* to the trial judge. (Pet. Exh. 8 at 3.)

Relying on DePaoli's failure to use a peremptory challenge against Ms. Kramer, respondent contends that petitioner has not shown that any conflict of interest on DePaoli's part had an actual effect on the case. (*Inf. Resp. at* 37.) Respondent misstates the test. To establish that a conflict adversely affected counsel's performance, a defendant need only show that some effect on counsel's handling of a particular aspect of the trial was likely. (United States v. Mett (9th Cir. 1995) 65 F.3d 1531, citing United States v. Miskinis (9th Cir. 1992) 966 F.2d 1263, 1268.) Here, petitioner has shown that DePaoli's conflict of interest did have an effect in his handling of jury selection. He concealed relevant information about his prior relationship with a prospective juror from his own client and from second counsel, Ms. Klay that was relevant not only to strengthen the defense challenges for cause against Ms. Kramer but also to the intelligent exercise of a peremptory challenge against her. As a result, she remained on the jury, and this harmed petitioner.

CLAIM VII

IN THIS CASE A NUMBER OF INTER-RELATED 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

In Claim VII of his exhaustion petition, petitioner alleged that a number of factors contributed to a breakdown in the fairness of his trial. Respondent states that petitioner seems to acknowledge that none of the individual issues presented in this Claim standing alone raises any prejudice requiring reversal. (*Inf. Resp. at* 38.) Petitioner wants to make clear that he is making no such concession. As respondent is aware, petitioner raised some of the sub-parts of this claim either in his direct appeal, his initial habeas petition, or in his exhaustion petition, and he asserted that those issues constituted prejudicial error requiring a reversal. (See e.g. [shackling issue], ineffective assistance issue [habeas] and knowing use of perjured testimony and suppression of constitutional material evidence. [Exh. Pet, Claim 1.) Petitioner has included those issues in this claim because they are part of the totality of circumstances surrounding the breakdown of the fairness of the trial process in his case. Three entities, the trial court, the prosecution, and defense counsel, all had a role in the breakdown in the fairness of petitioner's trial.

A. The Trial Judge's Role in the Breakdown in The Fairness of the Trial Process

Respondent misconstrues the import of petitioner's allegations in this Claim concerning the trial judge, Judge John Buffington. Respondent attempts to unduly narrow the scope of this claim by relating the various

allegations concerning the trial judge back to trial counsel's performance, and then arguing that none of the court's actions adversely impacted defense counsel's performance. However, the complete breakdown in the fairness of petitioner's trial, as alleged in this claim, is not attributable solely to defense counsel's performance. The trial court's actual and/or apparent bias constituted an independent violation of petitioner's federal due process rights. (See *Delvecchio v. Illinois Dept. of Corrections* (7th Cir 1993) 8 F.3d 509.)

In Delvecchio, the Seventh Circuit addressed the issue of judicial bias in a capital case involving the grizzly murder of a six year old child and of the murder-rape of the child's mother. In *Delvecchio,* the judicial bias issue stemmed from the trial judge's conflict of interest which he failed to disclosed. The Seventh Circuit began its analysis of the issue by reiterating the principle that trial before an impartial judge is one of the most basic values in our constitutional system. Thus, "'[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law.'" [*Id.* at 514, quoting *Tumey v. Ohio* (1927) 273 U.S. 510, 532.)

As the Seventh Circuit recognized, trial before an impartial judge is particularly important in a capital case:

> It violates a defendant's due process rights to subject his life, as well as his liberty and property, to the judgment of a court in which the judge is not neutral or fair. Suggestions of judicial impropriety always receive our highest attention because they undermine respect for law. But particularly in a capital case where the consequences of error are so grave, a court must be especially vigilant that the defendant received a fair trial. "Because the death penalty is qualitatively and morally different from any other penalty, 'it is of vital

> importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures.' " Sawyer v. Whitley, 120 L. Ed. 2d 269, 112 S. Ct. 2514, 2530 (Stevens, J., concurring) (quoting Smith v. Murray, 477 U.S. 527, 545-546, 91 L. Ed. 2d 434, 106 S. Ct. 2661 (Stevens, J., dissenting)).

(8 F.3d at 514).

The court then turned to the question of whether a defendant, to prove a due process violation, must show that the trial judge was actually biased against him or whether it was sufficient to show that the judge appeared to be biased. In concluding that it was sufficient for the defendant to show the appearance of bias on the part of the judge, the court relied on United States Supreme Court jurisprudence. As the Seventh Circuit noted:

> [T]he Supreme Court has repeatedly answered this very question by noting that the appearance of justice is as important as the reality of justice, or at least important enough that its absence violates due process. In Taylor v. Hayes [418 U.S. 488] the Court held in a criminal case that a defendant should not be tried by the same judge who appeared prejudiced against him in an initial trial. After quoting Tumey v. Ohio, the Court said, "In making this ultimate judgment, the inquiry must be not only whether there was actual bias on respondent's [judge's] part, but also whether there was 'such likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.'" Id. at 501 (quoting Ungar v. Sarafite, [376 U.S. 575, 588]). And in In Re Murchison, the Court said: Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. * * * Such a stringent rule [as set out in Tumey] may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its

> high function in the best way "justice must satisfy the appearance of justice." [349 U.S. 133, 136] (quoting Offutt v. United States, [348 U.S. 11, 14]).
>
> (8 F.3d at 514)

The Seventh Circuit observed that the requirement that judges recuse themselves whenever there is an appearance of impropriety also makes practical sense:

> There is also a practical reason to demand that judges recuse themselves whenever there is an appearance of impropriety: proving actual bias is frequently impossible. Of course judges have personal feelings about the cases they try; one cannot expect and should not desire a lack of humanity. But since even a judge with the strongest distaste for a defendant is hardly likely to blurt out, "I am out to get you," the only practical way to demonstrate partiality or conflict is by circumstance and inference. To require a criminal defendant to prove actual bias would ensure that no one could ever succeed in showing that their Fourteenth Amendment rights have been transgressed by a partial judge. [footnote omitted]
>
> (8 F.3d at 515)

In the present case, petitioner has alleged Judge Buffington's lack of neutrality as shown by his antagonism toward petitioner, and his antagonism toward petitioner's attorneys, and as shown not only by his comments but by his partial actions directed against Mr. Depaoli, petitioner's lead court-appointed counsel, in particular.

Petitioner pointed to two incidents involving actions taken by Judge Buffington relating to DePaoli that showed a lack of impartiality on the judge's part. Both incidents stemmed from conduct by Depaoli done in the course of his representation of Mr. Price. There is no suggestion that petitioner had any complicity in this conduct, and respondent does not suggest otherwise.

One of these incidents occurred during the guilt phase proceedings and stemmed from DePaoli's representations to the court concerning a defense ballistics expert's alleged unavailability to testify. Suspecting DePaoli's representations, Judge Buffington launched an immediate investigation into the matter. He turned to District Attorney investigator Barry Brown, a member of the prosecution team, to conduct the investigation on the court's behalf. By using an investigator who was assisting in the prosecution of petitioner to investigate acts done by petitioner's counsel in the course of representing petitioner, Judge Buffington failed to "hold the balance between vindicating the interests of the court and the interests of the petitioner." (*Taylor v. Hayes* (1974) 418 U.S. at 501) and "the balance nice, clear and true between the state and [petitioner]" (*Tumey v. Ohio, supra*), thereby denying petitioner his federal due process rights.

Judge Buffington also failed to hold that balance earlier in the proceedings in connection with other actions done by DePaoli in the course of representing petitioner. Suspecting that DePaoli had altered dates on certain subpoenas duces tecum, Judge Buffington conducted his own personal investigation of the matter, rather than referring it to a judge who was not like himself, presiding over petitioner's case, and then shared this information with prosecutors Bass and Dikeman. (See Pet., at p. 198.)

It is noteworthy that respondent never once mentions Judge Buffington' use of the prosecution's investigator Barry Brown to investigate petitioner's lead counsel. It is also noteworthy that in discussing the actions Judge Buffington took in connection with the subpoena alteration matter, respondent mentions only that the judge memorialized his suspicions for the record. Respondent states that what the judge did was "wholly reasonable" given the fact that petitioner does not

dispute that DePaoli did in fact alter the subpoenas.[14] (*Inf. Resp. at* 42.) Respondent omits mention of the fact that the judge shared the information from his own private investigation into the matter and his belief that DePaoli may have acted illegally with the two prosecutors who were handling the case against petitioner.

Petitioner was unaware that the court had imparted this information about his court-appointed attorney to the very prosecutors whose legally erroneous insistence that they had no duty to obtain discoverable information in the hands of other agencies had made it necessary for DePaoli to seek subpoenas duces tecum for that information in the first place. However, petitioner did sense that Judge Buffington appeared to harbor a negative view of petitioner's attorneys in their handling of his case, and petitioner therefore moved Judge Buffington to remove DePaoli and Ms. Klay as his attorneys. Judge Buffington denied the motion even though, based on his secret inquiry into DePaoli's alteration of the subpoenas, he knew that there was good cause to doubt the soundness of DePaoli's judgment in carrying out his duties as petitioner's counsel. Judge Buffington did not so inform petitioner, however, and in failing to do so, he implied that there was no reason for petitioner to be concerned about DePaoli's performance, when in fact, quite the opposite was true.

Judge Buffington subsequently denied a joint motion filed by DePaoli and Klay to be relieved as petitioner's attorneys. Judge Buffington denied the motion even though he was aware of DePaoli's alcohol-related problems and of his declining physical and mental health. In fact, later on in the case, Judge Buffington stated that the "record should reflect that Mr.

[14] Petitioner notes that respondent has again misstated the record by suggesting that DePaoli falsified "names and other information." (*Inf. Resp. at* 42) The only evidence is that he changed the dates he himself had previously written on the subpoenas before he submitted them to the court. Whether his after-the-fact alteration of the dates amounted to forgery is debatable, and BCD was possibly cleared of any wrongdoing in this regard by the State Bar Court. (See Petn., Exh. 9-10.)

DePaoli is slowly but surely flipping out." (RT 21012). Whether Judge Buffington's motivations in requiring DePaoli and Klay to continue on as petitioner's counsel stemmed from his own long-standing dislike for DePaoli (see Pet, Exh. 9 at pp. 2-3), or from his admitted strong dislike for petitioner, which the judge acknowledged in a private conversation with Ms. Klay (see Pet, Exh. 8 at p. 6) or from pressure from the local board of supervisors about how much petitioner's case was costing and how slowly it was moving along (*id.* at p. 5), or a combination of these factors, the fact remains that in denying counsel's motion, Judge Buffington did not hold the balance between vindicating the interests of the court and the state with those of petitioner.

In respondent's briefing, there is no mention of the fact that Judge Buffington acknowledged to Ms. Klay that he harbored actual bias against petitioner. However, respondent does mention petitioner's allegations that Judge Buffington made inappropriate gender-based sexist comments to Anna Klay. Respondent claims that petitioner has not shown that Judge Buffington's comments negatively affected Ms. Klay's performance, and downplays the decision in *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, the first published case in California in which a reversal was ordered due to the gender bias of the trial judge, John Buffington. (*Inf. Resp. at* 47). Respondent argues that in a case like petitioner's which was vigorously litigated for a period of years, "it was inevitable that tempers should rise." (*Id.*) How respondent's counsel can argue with a straight face that Judge Buffington's remark to Ms. Klay that "You used to be a pretty, fun loving girl, and now you're a goddamn basket case" (Pet., Exh. 8 at p. 7) is the product of rising tempers is anyone's guess. However, the fact remains that Ms. Klay states that she was hurt by the court's sexist remark, and that it did have a negative impact on her ability to perform effectively in the case. (*Ibid.*)

Judge Buffington's partial conduct in this case hurt not only petitioner's counsel but also petitioner. Petitioner was on trial for his life. He was entitled to trial before an impartial judge. Judge Buffington, who aligned himself with the state against petitioner's lead defense attorney, who made sexist and hurtful remarks to petitioner's other defense attorney, and who acknowledged that he (the judge) harbored actual bias against Mr. Price, was not impartial nor did he appear to be impartial. As a result, petitioner was denied his federal due process rights and he is entitled to a new trial. (See *Delvecchio*, *supra*, and cases cited therein.)

Petitioner notes that two of the incidents which gave rise to a federal due process claim based on Judge Buffington's apparent bias in aligning himself with the state against Mr. Depaoli appeared in the appellate record. Reasonably competent appellate counsel exercising due diligence would have raised this due process violation in the direct appeal, and the failure to do so by petitioner's former state appellate counsel, deprived petitioner of his federal constitutional rights to the effective assistance of counsel on appeal. (*Evitts v. Lucey*, 469 U.S. 387 (1985).)

B. The Prosecution's Role in the Breakdown In the Fairness of the Trial Process

In support of its response to the allegations about the prosecution's role in the breakdown of the fairness of petitioner's trial, respondent offers an unsworn statement by retired Department of Justice agent Paul J. Tulleners, the lead DOJ investigator on petitioner's case. (See *Inf. Resp., Exh. B.)* Respondent offered no explanation, justification or excuse for failing to provide a declaration from Tulleners, rather than only an interview report by respondent's investigator recounting Tulleners' hearsay statements to him. (See *Inf. Resp., Exh. B.)* Instead, respondent faults petitioner for not providing a sworn statement from Tulleners. Unlike

respondent, however, petitioner did explain why he was unable to do so. As he indicated, not only did Tulleners refuse petitioner's request that he provide a declaration on petitioner's behalf; he was not open to even discussing the proposed declaration sent to him by petitioner's counsel for his review. (See Pet., Exh. 6 at pp. 4-5)

Compounding the problem of utilizing an unsworn statement to rebut factual allegations in a verified petition, respondent improperly utilizes the Tulleners' interview report to inject through double hearsay, the unsworn assertion by Tulleners, a lay witness, concerning his personal opinion about the fairness of petitioner's trial. Such use of inadmissible hearsay opinion evidence is an obvious attempt to influence this court in its decision-making process on the ultimate legal determination in this case, and respondent's tactics in this regard constitute an abuse of the Informal Response process.

The manifest unfairness of such tactics is underscored by the fact that respondent was highly selective in the portions of the petition Mr. Tulleners was asked to review and to comment upon. Respondent's investigator, Mr. Lierly specifies that he provided Tulleners with only five pages of the petition (pages 207 through 211), with Mr. McGlasson's declaration and with the draft of the proposed declaration for Tulleners prepared by Mr. McGlasson. (See *Inf. Resp. Exh. B at* 1.) Respondent did not provide Mr. Tulleners with any portion of Claim I or of Claim III -- claims which allege numerous instances of misconduct by the prosecution, and particularly by Mr. Bass, and which raise substantial and serious doubts about the fundamental fairness of petitioner's trial. Respondent's selective omission in this regard is noteworthy since as part of his investigation for petitioner's case, Tulleners had a number of contacts with Michael Thompson, Clifford Smith, and Janet Myers, the three prosecution witnesses at the center of Claim I, and that claim includes a number of

references to Tulleners. In addition, petitioner filed numerous exhibits in support of his petition, including 44 pages of Tulleners's handwritten logs, but respondent did not submit those pages or any exhibits to Tulleners for his comments other than Mr. McGlasson's declaration and the attachment to that declaration.

For the above and foregoing reasons, petitioner therefore requests that this Court not consider Mr. Tulleners' inadmissible personal opinions on ultimate legal questions in determining whether or not to issue a show cause order on the claims set forth in the exhaustion petition. Petitioner offers the following responses to the most significant contents of the Tulleners' interview report and to respondent's contentions on the prosecution-related aspects of Claim VII.

Before doing so, petitioner will first briefly summarize his allegations in this Claim concerning the prosecution's discovery-related misconduct. The gist of his allegations is that the prosecution, and also various state and local agencies, engaged in tactics that were calculated to frustrate and impede the ability of the defense team to obtain the disclosure of discoverable evidence. Petitioner discussed the different tactics that were utilized, and pointed to specific instances in the trial record demonstrating the prosecution's use of such tactics. Those tactics included, *inter alia*, delaying the production of court-ordered discovery without good cause, and claiming that the prosecution had no duty to obtain discoverable documents that were in the possession of other state or local agencies. The prosecution's tactics also included teaming up with those other agencies in their efforts to quash defense subpoenas for documents on technical grounds. In addition, the prosecution claimed a number of times that evidence which had been ordered disclosed was either lost or did not exist, only to have the evidence surface later. (See Pet, at pp. 203-206.)

As part of his showing on the prosecution's role in the overall breakdown in the fairness of his trial, petitioner also relied on extra-record statements made to his habeas counsel by Mr. Tulleners. Those statements revealed that the discovery-related tactics utilized by Bass and others were deliberate and not done in good faith.

As indicated above, to counter petitioner's allegations in this claim, respondent also relies on statements by Tulleners. Tulleners made those statements during an extended interview with respondent's investigator, Jeff Lierly. The statements by Tulleners on which respondent relies must be considered in light of two factors. First, Tulleners has demonstrated by his comments and his conduct toward petitioner's habeas counsel that he does not view petitioner's efforts to obtain habeas review of his convictions and death sentence favorably and he is hostile to petitioner's habeas counsel. Tulleners' statements to Lierly must therefore be considered in light of that bias.

Second, Tulleners indicates that he has no personal knowledge of many of the facts petitioner has alleged. That is because, as Tulleners admitted to Mr. Lierly, he was intentionally kept out of the loop of information and even removed from the case at one point due to his practice of memorializing all information in his reports, including information that was potentially favorable to the defense. (*Inf. Resp., Exh. B at 2-3.*) Although Tulleners states that he did not know about all of the prosecution's actions relating to discovery, he did have personal knowledge about certain conduct by Ron Bass and others in law enforcement that raises serious doubts about their fairness in handling petitioner's case.

Among the facts that Tulleners confirms are the following. Ron Bass told Tulleners to lie to the defense team about discovery issues, and to tell defense counsel that he did not know the answers to specific questions. (*Id.* at 3.) Although Tulleners cannot now (some 13 years after petitioner's

trial) recall any specific instances in which that occurred, he confirms the fact that Bass was willing to "hide the ball from the defense" on discovery. (*Id.*) For example, although the trial court had suggested that DePaoli and Tulleners should confer to try to work out the discovery problems, Tulleners indicates that Bass told him to tell defense counsel that he (Tulleners) did not want to be interviewed and to tell Depaoli to "go fuck himself." (*Inf. Resp. at,* Exh. B at pp. 3, 6.) Other facts that Tulleners confirms are even more troubling. Those facts are relevant not only to this claim but also to Claims I and III of this petition, on the question of whether, as petitioner has alleged, Bass engaged in deliberate concealment of false testimony and other willful misconduct in this case.

For example, in his interview statement, Tulleners refers to misconduct by Bass relating to an interview of Larry Turtle Jones by SSU agent James Hahn. Hahn testified at a pretrial hearing in petitioner's case that he had not conducted any interview with Jones about the charges against petitioner, and had no tapes of any such interview. (RT 1173, 1176, 1184.) That testimony was in fact untrue. (See RT 1101-1109.) The interview in question occurred early in 1984, but information about the interview was suppressed for more than a year. Moreover, Tulleners confirms that Bass disclosed to him that he (Bass) knew that Hahn and another SSU agent, Oscar Pena, had committed perjury concerning the interview. (*Inf. Resp*, Exh. B at 4-5). There is nothing in the appellate record to indicate that Bass made a similar disclosure about this perjury either to the trial court or to defense counsel. Even more importantly, Tulleners confirms that Bass told Tulleners of the way in which they would get around the perjury -- in other words conceal it. (*Id.*) Bass told Tulleners that they would say Jones was "debriefed" rather than interviewed. (*Id.*)

Tulleners states that he has no personal knowledge about whether Bass actually coached witnesses to lie in this manner. (*Id.*) According to Mr. McGlasson, however, Tulleners told him that Bass had also asked Tulleners to testify in accordance with the debriefing/interview deception, but that Tulleners refused to do so. (Supp. Exh. 66.) In any case, Tulleners confirms that Bass was aware that Hahn and Pena "persisted in this 'deliberate deception' concerning the debriefing/interviewing of a witness" (*Inf. Resp., Exh. B* at 5.)

Tulleners states initially that, from his perspective, he did not view this conduct by Bass as "abominable prosecutorial misconduct," since Tulleners believed that Bass' co-prosecutor, Worth Dikeman, was "totally ethical" and "aboveboard." (*Id.* at 5.) Even assuming arguendo that Bass was the only member of the prosecution team who engaged in misconduct, the law is well settled that misconduct by one member of the team which rises to the level of a constitutional violation requires a new trial, even though other team members did not engage in any misconduct themselves and did not have actual knowledge of the misconduct committed.[15] (See e.g. *Giglio v. United, States*, *supra*, and its progeny.) In such a case, the knowledge of the one offending team member is imputed to the prosecution as a whole. Petitioner notes that later on in his interview with Mr. Lierly, Tulleners does acknowledge that he perceived Bass' willingness to participate in conduct exemplified by the Jones interview as "outrageous" and "prosecutorial misconduct." (See *Inf. Resp.*, Exh. B at 8.)

In addition to Bass's unethical conduct with respect to plan for handling the problem of perjury by Hahn and Pena, Tulleners mentions another incident involving Bass' concealment of evidence, which came to light after petitioner was sentenced to death. Tulleners indicates that he and

[15] Petitioner wants to make clear here that he does not concur with Tulleners' view that Dikeman conducted himself in an "above-board" manner in his handling of petitioner's case..

other members of the prosecution team were sitting around in their office in the courtroom, and Bass pulled out a reel of tape from his briefcase. According to Tulleners, Bass said laughingly, something to the effect of "[l]ook what we just found." (*Id.* at 6.) Tulleners' recollection is that the concealed tape was a recording of Duane Frederickson's interview with Berlie Petry. (*Id.*) Petry was the live-in boyfriend of murder victim Hickey and the person the defense argued committed her murder. Tulleners indicated that prosecutor Dikeman was present during this incident as were Detective Frederickson and district attorney investigator, Barry Brown, and that they were all "pissed" at Bass. (*Id.*) There is nothing in the record, however, to indicate that Dikeman reported the matter to the trial judge or disclosed it to defense counsel, and Tulleners admits he did not do so. (See *Inf. Resp., Exh. B at 8)*.

Respondent argues that there is no actual substance to this allegation against Bass by Tulleners, because Tulleners' recollections appears to be wholly incorrect as the defense had the Petry-Fredrickson interview tape all along. (*Inf. Resp. at 44-45.)* Petitioner agrees with respondent that the defense did have a copy of the Petry-Fredrickson interview tape that was introduced at trial, and that Dikeman indicated during closing argument that he had the original of the tape. (RT 13489-13490.) However, petitioner disagrees with respondent's conclusion that the incident described and personally observed by Tulleners never actually occurred. Tulleners' recollection is simply too clear to be the product of a complete mistake on his part. Without subpoena power or the opportunity to formally question Tulleners and Bass, among others, petitioner is not in a position at this stage in the case to ascertain any more about the tape Bass concealed. For instance, he cannot determine at this stage whether the tape may have been of an interview with Petry about which the defense was not informed, or perhaps of an interview with another prosecution witness. Petitioner would

note in this regard the trial court's statement it suspected that there were more tapes of prosecution witness CS's interviews with law enforcement, than the three tapes that had been provided to the court for its in camera review.[16] (RT 14891, 15046.)

Respondent attempts to diminish the impact of Tulleners' highly adverse information about Bass and others in the Attorney General's Special Prosecutions Unit by casting aspersions on Tulleners. Respondent attempts to sugarcoat Tulleners' information by claiming that Tulleners' allegations "do nothing to cast any doubt on the good faith and legal propriety of the prosecutors in carrying out of their discovery duties in this case." (*Inf. Resp. at* 46.) Respondent's claim is singularly unpersuasive.

Petitioner has several brief additional comments to make about Tulleners' interview report. First, the caveat Tulleners includes at the end of his statement that the defense eventually received all of the relevant information within the CDC files <u>of which he became aware</u> is an important one. As Tulleners has acknowledged, he was purposely kept out of the loop on discovery, and he admitted he was not aware of what the prosecution did or did not do when he was not present. ((*Inf. Resp*, Exh. B at 4.) Moreover, as Tulleners admits, he did not inform the trial court about the incident after trial involving Bass's concealment of evidence. Petitioner's counsel was likewise not informed of the incident in a timely manner. In addition, Tulleners told respondent's investigation that he had information concerning another incident about which he learned after petitioner's trial but which he did not disclose to the trial court. He declined to speak about this other incident even with Lierly. (*Id. at* 8.) In view of this, respondent's reliance on his statements in arguing that the

[16] Smith testified he thought 4 of 5 tapes had been made of his interviews with LASO Sgts. Barnett and Harryman. (RT 14811.) His testimony leaves open the possibility that there was at least one more tape that was not disclosed.

prosecution did in fact disclose all exculpatory information is clearly misplaced.

Second, Tulleners characterizes the allegations set forth in paragraph 55 of Claim VII as mere "argument by McGlasson," and as not based on fact. (Exh. B at 6-7.) For instance, Tulleners states that the remark that Judge Buffington confided in the prosecution was "100 percent false." (*Id.* at 7.) As petitioner has discussed *supra*, the court record in this case establishes otherwise, and Tulleners is simply wrong. However, his readiness to accuse Mr. McGlasson of making up that information is unfortunate and clearly indicative of his bias. In another personalized swipe at Mr. McGlasson, Tulleners states that the proposed declaration Mr. McGlasson drafted based on their interview was "full of crap" and had "tons of mistakes." (*Id.* at 7.) Mr. Tulleners was given an opportunity to correct anything he thought was inaccurate in the declaration but chose not to do so. Moreover, in his interview with Mr. Lierly, Tulleners confirms much of what was set forth in the proposed declaration.

Third, Tulleners is plainly irritated by the fact that Mr. McGlasson did not contact him again after their interview for a substantial period of time. Petitioner's counsel's actions in this regard were completely reasonable. However, as Mr. McGlasson's supplemental declaration indicates, his decision to not contact Tulleners again until he did was a reasonable one. (Supp. Exh. 66 at p.4.)

In conclusion, contrary to respondent's efforts to assert that the prosecutors acted properly and in good faith in carrying out their discovery duties in petitioner's case, the exhaustion petition and the documentation filed in support of the petition establishes otherwise. The prosecution most definitely had a role in the breakdown of the fairness of the trial process in petitioner's case.

C. Defense Counsel's Role in the Breakdown in the Fairness of Petitioner's Trial

Respondent's arguments concerning petitioner's allegations about his trial counsel's role in the breakdown of the fairness of his trial boil down to an assertion that petitioner was effectively represented by his court appointed attorneys throughout the prolonged proceedings in Humboldt County. Respondent notes that petitioner's attorneys cross-examined each of the prosecution's witnesses and called numerous witnesses on petitioner's behalf. Respondent's argues, citing language from *Walberg v. Israel*, (7th Cir. 1985) 766 F.2d 1071, 1077, that, from petitioner's vantage point, what he saw were two tremendously committed lawyers who vigorously defended him. Respondent points to bulky size of the record as evidence that there was no breakdown in normal trial procedures in petitioner's case. (*Inf. Resp. at* 40.) Petitioner has already demonstrated otherwise *supra*.

He would also point out that the size of the record does not mean that he actually received a fair trial, and vigorous advocacy by his attorneys does not mean that he necessarily received effective representation. In fact, petitioner has already extensively briefed and documented numerous instances in which his court appointed counsel did not provide constitutionally effective representation.

In mentioning what petitioner saw from his vantage point, respondent ignores the following facts. First, petitioner expressed his dissatisfaction with the performance of his attorney more than once during his trial. Second, unlike the defendant in *Walberg*, petitioner was not even present in court for his entire guilt phase trial. Had he been, he would have observed the two prosecutors running circles around his attorneys, and by their conduct, making it necessary that his attorneys spend countless hours both in and out of court trying to obtain information that the prosecution

had been ordered to disclose in discovery. Indeed, a substantial portion of the massive record in this case is taken up by the numerous discovery motions and hearings on discovery that were necessitated by the prosecution's purposeful tactics that prevented petitioner's counsel from having access to impeachment and other exculpatory information. Had he been present at his own trial, petitioner would also have observed that his lead defense counsel came into court almost every day smelling of alcohol. (See Pet., Exh. 8 at pp. 2-5.) He also would have known that his lead counsel, even though committed, exercised extremely unsound judgment in the course of representing petitioner. Petitioner sensed, but did not actually know until long after his trial, that the trial judge himself was well aware of that fact, but did not take appropriate steps to safeguard petitioner's interests and his constitutionally guaranteed rights.

In sum, petitioner's was a trial in which fairness was not of a paramount concern. As set forth in this and other claims in his exhaustion petition, and as discussed in this Reply, rather than being a "testament to the amazing solicitude afforded defendants by the courts in this state" (*Inf. Resp. at* 40), petitioner's trial was a testament to a trial process gone awry. His convictions and death sentence were obtained in violation of federal due process, and cannot stand.

Claim VIII

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, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

Claim VIII of the exhaustion petition alleges facts showing petitioner's factual innocence of the Hickey murder. Respondent claims that the evidence of petitioner's guilt was overwhelming and the case for guilt was "open and shut." This is another example of an exaggerated assertion by respondent. The factual allegations in the petition as set for in pages 218-226 of the Petition demonstrate with particularity why this was not an overwhelming case on the question of guilt. Respondent makes only a general reference to the statement of facts in his brief in the direct appeal to contend otherwise.

Respondent finds petitioner's allegations puzzling on the issue of the bloody fingerprints that were found on the victim's body. (*Inf. Resp. at* 48-49.) In particular, respondent points to Exhibit 57 to the petition to show that contrary to petitioner's allegations, he did in fact receive discovery of the FBI report concerning those fingerprints. (*Id.*) Exhibit 57 is only a summary of the FBI's conclusions. It does not contain any data or information about the procedures utilized by the FBI in examining the fingerprints or what the examination revealed that led to the determination that the prints had no value. Petitioner notes that a report from Eureka authorities that accompanied the transmittal of the fingerprint evidence to the FBI requested that the bloody prints be compared with petitioner's prints for purposes of making an identification. (See Exh. 57.) As petitioner has alleged, even if the fingerprints had no value for

identification purposes, that does not mean they had no value for any purpose, such as for elimination. It is not possible to tell from the summary report whether the prints had no value for any purpose.

Respondent faults petitioner for not presenting an expert declaration on the question of the number of characteristics that are necessary for identification purposes. That is a preliminary question only. Without access to the negatives of the prints, which are in the possession of the state and are not available to petitioner without a subpoena, petitioner is unable to have the evidence analyzed by a defense expert and provide a declaration from that expert.

Respondent makes the additional point that it would not be remarkable for the bloody prints to be those of Berlie Petry, Hickey's boyfriend, because he admitted that he handled her body when he returned from work. (*Inf. Resp. at* at 49.) Berlie Petry testified he touched Ms. Hickey on her left arm and stomach. (RT 13542.) The bloody prints were located a little below her left breast. (See RT 12838 [P. Exh. 94].) Petry also testified further that he had no blood on his hands when he touched Ms. Hickey's stomach and she was not bloody in that area. (RT 13602.)

Respondent's contentions that petitioner's claim of "actual innocence" is easily rejected is unconvincing.

CLAIM IX

THE CALIFORNIA STATUTORY SCHEME UNDER WHICH PETITIONER WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL

Respondent points out that this Court has recently rejected this claim in another case, *People v. Ochoa* (1998) 19 Cal.4th 353,479. Petitioner has raised this federal constitutional issue in his petition to exhaust it and preserve it for federal court review.

X

THE CLAIMS IN THE PETITION WERE FILED WITHOUT SUBSTANTIAL DELAY, BUT EVEN IF COURT FINDS THERE WAS SUBSTANTIAL DELAY, GOOD CAUSE APPEARS FOR ANY SUCH DELAY, AND EVEN THE COURT FINDS THAT GOOD CAUSE IS NOT ESTABLISHED, THE CLAIMS STILL FALL WITHIN ONE OF THE EXCEPTIONS SET FORTH IN CLARK

A. Introduction

Petitioner filed his exhaustion petition on April 22, 1998, months before this Court handed down its decision in In re *Robbins* (1998) 18 Cal.4th 770. In that decision, this Court imposed stringent new pleading requirements on habeas corpus petitioners for establishing that claims raised in a second habeas petition were filed a) without substantial delay or b) that there was good cause for any substantial delay or 3) that in the absence of good cause for any substantial delay, the claims came within one of the four exceptions set forth in *In re Clark* (1993) 5 Cal.4th 750. *Robbins* held that in order to satisfy this pleading burden, a petitioner must allege specific facts showing when he obtained the information offered in support of his claims and specific facts showing that the information was not known nor reasonably should have been known at any earlier time. In addition, a petitioner must establish through these specific allegations, which may be supported by any relevant exhibits, the absence of any substantial delay.

Petitioner makes the following factual showing to comply with those stringent new pleading requirements. In his showing, petitioner will first set forth with specificity facts showing when he obtained the information

offered in support of his claims and facts showing that the information was not known, nor reasonably should have been known, at any earlier time. Petitioner will make this showing on a claim by claim basis. Then, petitioner will allege with specificity facts showing that he presented his claims either without substantial delay or that good cause existed for any substantial delay. Petitioner's lead counsel has provided a supplemental declaration to support petitioner's *Robbins* showing, (see Supp. Exh. 65) and he incorporates that declaration fully here by this reference.

B. Petitioner Did Not Substantially Delay Presenting The Claims In his Exhaustion Petition to this Court.

1. <u>Claim I of the Petition</u>

Claim I sets forth two separate although related federal constitutional violations – a *Napue-Giglio* violation and a *Brady-Bagley* violation. Those claims are divided up into separate sub-claims, involving three critical prosecution witnesses, Michael Thompson, Clifford Smith and Janet Myers. Petitioner's prima facie showing on the issue of constitutional materiality is based on the cumulative impact of all of the undisclosed information, as is required in the *Bagley* context under U.S. Supreme Court precedent. Because the information offered by petitioner in support of this claim and its various sub-claims is so extensive, petitioner will make the requisite specific factual showing now required by *Robbins* on a witness by witness basis.

a. Information Relating to Michael Thompson (Pet., Claim I, subsections C & F & related Exhibits).

None of the information about Michael Thompson's special benefits at the Los Angeles County jail or about the identity of Patricia Porter as one of Thompson's visitors was known by petitioner or to his prior counsel nor

reasonably should have been known at any earlier stage. The prosecution suppressed information about the benefits, Thompson testified falsely and concealed the information, and the prosecution refused to disclose the names of any of Thompson's visitors or his whereabouts alleging security reasons.

The information first became known to petitioner only after his case had moved on to federal court and new counsel had been appointed to investigate and prepare a federal habeas corpus petition on his behalf. Federal counsel found out about Thompson's benefits and about Ms. Porter only by chance. As part of their preliminary factual investigation for the federal petition, they followed up on an article that appeared in a local newspaper indicating that Thompson was a prosecution witness in the *McClure* case in Oregon. They contacted *McClure* counsel by phone at the end of December of 1994, and learned that *McClure* counsel had obtained numerous documents about petitioner's case either through discovery in their case or through their independent investigation on *McClure*'s behalf, and that the information showed that Michael Thompson had been treated like royalty while he was housed in a secret module at the Los Angeles County jail for 3 years including during the pretrial and trial proceedings in petitioner's case. They learned at that time that Clifford Smith was a prosecution witness in *McClure* and that *McClure* counsel had obtained disclosure of part of Smith's CDC file, and also learned that Paul Tulleners was a defense witness in *McClure*, and that *McClure* counsel had obtained a copy of his entire and unexpurgated daily logs prepared during his involvement in petitioner's case. Mr. McGlasson traveled to Oregon to meet with *McClure* counsel in February, 1995, to review the above-described documents. At counsel's request, *McClure* counsel subsequently provided copies of the records they had obtained during their case. (Supp. Exh. 65.)

The records obtained from *McClure* counsel in March or April of 1985 included the entire notebook of Tulleners' daily logs. The information in the portions of the notebook that were not disclosed to petitioner through trial discovery was not known, nor reasonably should it have been known at any earlier time. Petitioner tried to obtain disclosure of the entire notebook at his trial and later during his appeal, but his requests were denied. The undisclosed information provided triggering facts that prosecutor Ron Bass and others involved in the investigation and prosecution of this case engaged in unethical conduct and in discovery-related misconduct. Those facts included inter alia references by Tulleners that Bass knew that two SSU agents had committed perjury at a pretrial hearing in petitioner's case, and a reference by Tulleners that Bass told him to tell defense counsel DePaoli to "go get fucked" when DePaoli attempted to meet with Tulleners, at the trial court's suggestion, to try to work on the ongoing discovery problems in the case. (See Supp. Exh. 65, and Pet., Exh. 43 at 11.)

The records obtained from *McClure* counsel also included copies of transcripts of Thompson's parole hearings in 1989 and 1991 and documents submitted to the parole board on Thompson's behalf. The relevant information contained in these records, including the fact that Thompson's housing status at the Los Angeles County jail, was minimum security in every sense other than that he was kept isolated from other inmates, was not known, nor reasonably should it have been known at any earlier time. Petitioner had no available access to the records or to the information. Because Thompson was a highly protected state witness, his parole records were confidential and not available to the public. Petitioner attempts to obtain Thompson's most recent parole hearing record thus met with failure. (See Pet., Exh. 58.) *McClure* counsel obtained the 1989 and 1991 hearing records through discovery in connection with an ongoing criminal case. At

the time of petitioner's trial, the records were not in existence. Similarly, the transcripts of testimony furnished in 1994 or 1995 by Thompson and other witnesses in *McClure,* which petitioner obtained from *McClure* counsel, were not in existence until after petitioner's case was in federal court. (Supp. Exh. 65.)

Petitioner offered other information in support of his claims concerning Michael Thompson that was not obtained from *McClure* counsel. Federal counsel obtained this information through either their preliminary investigation for the investigative funds request or during their subsequent ongoing factual investigation for the federal petition. They learned for the first time in November of 1994 about the Office of the Jailhouse Informant Litigation Unit (JILT) which had been set up by the Los Angeles County District Attorney's Office in the aftermath of the jailhouse informant scandal and the Los Angeles County Grand Jury's Report on that scandal. They obtained a list of the names of informants on who there were JILT files, and found that Michael Thompson was on the list. Upon learning this, federal counsel sought and obtained federal court approval to retain the assistance of an expert assistance to help them preserve those records. Federal counsel were informed by this expert in either November or early December 1994, about the cash payments to Thompson from witness protection funds in connection with his activities against petitioner, and about the fact that those cash payments had been funneled to Thompson using a case in which petitioner had no involvement or association. This expert also provided federal counsel around the same time with a copy of the 1989-1990 Grand Jury Report. The information about the cash payments and the bogus use of another case to funnel the payment to Thompson was neither known, nor reasonably should it have been known at any earlier time. The prosecution suppressed this

information. The Grand Jury report did not become available until after petitioner's case had gone into federal court. (Supp. Exh. 65.)

Later, after federal counsel had obtained federal investigative funds to conduct a through investigation of Thompson and potential *Napue* and *Bagley* claims involving him, Mr. McGlasson traveled to Los Angeles and personally inspected the files on Thompson in the JILT office. This occurred in April of 1996. It was then when counsel found out for the first time, from records located in Thompson's file in that office, the information that Thompson had demanded "proper housing" and a transfer from state prison to Los Angeles County in return for his agreement to continue his cooperation in this case. After filing the federal petition, federal counsel continued to investigate to obtain more specific evidence that Thompson received his special treatment at the jail **in return for** his cooperation against Price. Because petitioner did not have access to the government's files, counsel conducted their investigation by attempting to locate individuals with personal knowledge that Thompson had in fact admitted such connection between benefits received and his testimony against petitioner. Counsel finally found such a person in Mr. Gaxiola, and only learned that he had such information just before filing the state exhaustion petition. Petitioner did not even have time to obtain Mr. Gaxiola's declaration, so he presented the information through his gang expert Anthony Casas, as hearsay, but arguably admissible evidence as a prior inconsistent statement by Thompson. None of the above information was either known nor reasonably should it have been known at any earlier time. The prosecution suppressed the information at petitioner's trial, and it did not become available to petitioner until his case was in federal court. (Supp. Exh. 65.)

Federal counsel obtained triggering facts concerning Thompson's outside business ventures during the time he was being housed at the Los Angeles County jail from the 1989 and 1991 parole transcripts and supporting records obtained from *McClure* counsel. Once counsel obtained federally authorized investigative funds, they conducted an investigation concerning those businesses and obtained the records filed by Thompson and Ms. Pavlik with the Secretary of State, and Ms. Pavlik's Orange County divorce records. All such records were obtained in 1995-1996 as part of the ongoing investigation of Michael Thompson. Neither the information that Thompson was engaged in any such businesses during petitioner's trial, nor the assumed name under which Thompson conducted those businesses nor the identity of Patricia Pavlik were known nor reasonably should have been known at any earlier time. The prosecution did not disclose the fact that Thompson was being housed in a secret module at the Los Angeles County jail or that he was running outside businesses there using his new identity, of what new name he was given. As noted earlier, the prosecution refused to disclose the names of any of Thompson's visitors, and therefore petitioner had no way of finding out about Ms. Pavlik's identity. (Supp. Exh. 65.)

Federal counsel also obtained transcripts and records from another Oregon case (*Garrett*) that was held after *McClure*. Although counsel made several requests to Garrett's attorneys for those documents, they did not actually provide them until May of 1997, after the federal petition was filed. Garrett's trial counsel, however, did send petitioner's counsel a copy of Thompson's 1170 D motion before the federal petition was filed. Like the *McClure* records, that motion and the records in *Garrett* were not in existence until after petitioner's case was in federal court and therefore

were neither known nor reasonably should have been known at any earlier time. (Supp. Exh. 65.)

b. Information Relating to Clifford Smith – (Pet., Claim I, subsections D & F, & related Exhibits). Petitioner's federal counsel obtained various records relating to Clifford Smith, including the suppressed 1983 visiting records from *McClure* counsel in March of 1995. However, the *McClure* files did not contain information that Clifford Smith was given benefits for his cooperation beyond the ones that he disclosed at petitioner's trial. There were no court records pertaining to Jimmy Smith among the *McClure* materials.

However, in reviewing the Tulleners' notebook obtained from *McClure* counsel, federal counsel did find several references to a "JDS" in his daily logs. Such references did not have apparent meaning to counsel until she became more familiar with the record and conducted a review of defense counsel's trial files; only then did it become apparent that "JDS" was a reference by Tulleners to Clifford Smith's brother, Jimmy. Moreover, the references themselves did not indicate that Clifford was given a favorable deal for his brother. However, there were some triggering facts in the Tulleners logs and in the Los Angeles Grand Jury Report that caused federal counsel to reasonably believe that an investigation should be commenced into a potential *Napue* and *Bagley* claim involving Clifford Smith and his brother Jimmy. (Supp. Exh. 65.)

Those triggering facts were not known, nor reasonably should they have been known at any earlier time. Petitioner's trial counsel did receive an investigative report through discovery concerning Jimmy Smith, indicating that he had several new cases pending against him at the time Clifford Smith agreed to cooperate against petitioner. However, the report contained no information about any plea bargain for Jimmy in return for

Clifford's cooperation in this case. The prosecution suppressed evidence of the charging and sentencing leniency Clifford Smith was given for Jimmy Smith, and Clifford concealed this information during his testimony. (Indeed, this Court resolved a claim in the direct appeal related to the trial court's refusal to allow defense counsel to explore benefits received by Smith's family in exchange for testimony; it denied relief on the basis, which we have now shown to be false, that the error was harmless because no substantial benefits were in fact hidden by the prosecution in this case). The references in the Tulleners' notebook that triggered undersigned counsel's investigation of Jimmy Smith were not disclosed to petitioner's defense counsel or to Mr. Cutler either. Neither were the back-page entries by Tulleners on his daily logs that reflected unethical conduct by Bass and by others involved with the prosecution, including their willingness to hide discovery from the defense. Mr. Cutler therefore did not have the triggering facts, which would have warranted an investigation of Jimmy Smith; moreover, the respondent arguably committed a fraud upon this Court on direct appeal by presenting arguments which they knew or should have known were factually erroneous and upon which this Court relied in denying relief. (Supp. Exh. 65.)

After petitioner's federal counsel obtained those triggering facts and had reviewed enough of the Price case materials to recognize this as a potential issue in the case, they sent an investigator to Kern County to locate all records pertaining to Jimmy and Clifford Smith. This was done in June of 1996. As a result of that investigation, they found out for the first time that Jimmy Smith had received a favorable deal in his pending Kern County case, that this deal was promised to and negotiated by Clifford Smith, and that LASD Sgt. Haywood Barnett played a role in implementing that promise. (Barnett was a critical investigative officer in the Price case

and in the handling of informants Thompson and Smith). That latter information appeared in a transcript which was sealed in 1986 and remained sealed until 1991 or 1992. (Supp. Exh. 65.)

As indicated above, the prosecution also suppressed Clifford Smith's 1983 visiting records. Those records were disclosed to *McClure* counsel but only years after petitioner's trial, the affirmance of his direct appeal and the denial of his initial state habeas petition. These visiting records were included in the documents undersigned counsel obtained in March of 1995 from *McClure* counsel. Because the prosecution in petitioner's case suppressed these records, the impeachment evidence in these records was not known, nor reasonably should it have been known at any earlier time. That impeachment evidence was relevant to both Clifford Smith and Janet Myers, since they both testified about an alleged visit by Janet Myers to Smith on the date of the Barnes murder. (Supp. Exh. 65.)

c. Information Relating to Janet Myers – (Pet., Claim I, subsections E & F & related Exhibits). The investigation into possible undisclosed benefits for Janet Myers was part of the ongoing investigation conducted by petitioner's federal counsel into potential claims of prosecutorial misconduct in this case. The information that Janet Myers had three pending cases in which she had not entered a guilty plea when she testified at petitioner's trial, and perjured herself at trial about the status of her pending cases, was neither known nor reasonably should it have been known at any earlier time. The prosecution suppressed the information that Janet Myers had three pending cases against her in San Bernardino County in which she had not entered a guilty plea, and failed to correct her perjury in this regard. Neither petitioner's trial counsel nor Mr. Cutler had access to a rap sheet that containing this information. The unavailability of a rap sheet on Myers containing that information and the routine destruction of

court records made federal counsel's investigation of the potential *Napue* error difficult and time-consuming. Their ongoing investigation of this claim did not turn up facts sufficient to make out a prima facie case of *Napue* error until January 1997. At that time, petitioner learned from the San Bernardino County Public Defender's Office, which had represented Myers, that <u>after</u> she completed her testimony at petitioner's trial, she was given a favorable plea bargain which included the dismissal of two pending cases in which she had not yet entered a guilty plea.

Finally, in order to make out a prima facie case of either *Napue* or *Bagley* error, counsel had to establish constitutional materiality. That in turn required counsel to be thoroughly familiar with both the record of the trial proceedings and also with trial counsel's files in order to show that the three witnesses in question were critical to the prosecution's case, to show that the defense had not been provided with any of the exculpatory evidence in question, and to establish the cumulative impact of the undisclosed evidence on the issue of whether petitioner received a fair trial. This made it necessary for counsel to review the entire appellate record as well as trial counsel's files, while simultaneously conducting an independent factual investigation for the claim. Even when the process of reviewing those records and files was completed, which was not until late in the Fall of 1996, it still took a substantial amount of time to "perfect" this claim because it was so substantial and complicated. (Supp. Exh. 65)

2. Claim II. The information petitioner offered in support of this claim alleging his factual innocence of the murder of Richard Barnes consisted of a declaration from Salvador Buenrostro in which he related a confession to the murder by Danny DeAvila, a member of the Mexican Mafia. Petitioner offered the following other information to show the bona fides of the DeAvila confession and of the involvement of the Mexican Mafia in the

Barnes murder: (1) police reports of the Barnes murder investigation provided in discovery; (2) the report of a defense investigator about Arthur Blajos; and, (3) a declaration of prison gang expert Anthony L. Casas.

Petitioner's federal counsel found out from petitioner during one of their initial interviews with him in 1994 that Salvador Buenrostro had some information indicating that a third party killed Richard Barnes. Petitioner informed federal counsel that Buenrostro had revealed this to him during the time petitioner's direct appeal proceedings were still pending. Petitioner did not know anything more specific about what information Buenrostro was told or who told him the information, except for the fact that the person was Hispanic. Direct appeal counsel Cutler did not attempt to contact Buenrostro, who was still an active member of the Mexican Mafia at that time. (See Pet. Exh. 5, Cutler declaration). Federal counsel located Buenrostro within the prison system, and first interviewed him in December, 1996. Counsel conducted a followup interview of Buenrostro in early February 1997, at which time his declaration was obtained. He was in protective custody when counsel interviewed him in late 1996 and again in February of 1997. He had been in protective custody since the time in 1994 or 1995 when he was almost stabbed to death at the Los Angeles County jail by a fellow member of the Mexican Mafia. Prison gang expert Anthony L. Casas indicates in his supplemental declaration, that before Buenrostro went into protective custody, it would have not have been safe for him to have revealed to anyone outside his gang the identity of Danny DeAvila, his fellow gang member, as the individual who was responsible for murdering Steve Barnes' father, Richard Barnes. (See Supp. Exh. 67.) Therefore, even if Cutler had attempted to interview Buenrostro before filing the initial habeas petition in this matter, it is not reasonably probable that Buenrostro would have risked revealing DeAvila's identity or

DeAvila's confession to the Barnes murder to Cutler at that time. Assuming that Cutler had sufficient triggering facts to require him to conduct a further investigation, his failure to do so amounted to an effective abandonment of his habeas corpus duties. (See, *In re Sanders* (1999) ___ Cal.4th ___.)[17]

3. Claim III. This claim alleges misconduct by one of the trial prosecutors, Ron Bass, and a sitting juror, Zetta Southworth. The information petitioner offered in support of this claim was obtained from an eyewitness to the misconduct incident. This information did not come to light until petitioner was already in federal court.

Petitioner's federal counsel learned about the information by chance. Attorney Sorensen received a phone call from a Humboldt County attorney who relayed information which that attorney had recently learned from an acquaintance, Robert McConkey. The information concerned an incident during the trial proceedings in the Price case involving the trial prosecutor Ron Bass and one of the jurors in the case. McConkey identified this juror as Zetta Southworth, who records confirmed worked with him at the Waterfront bar during the trial. Ms. Sorensen received this phone call in 1995, while counsel were still in the process of conducting the preliminary investigation for their application for federal investigative funds to investigate potential claims for the federal petition that we deemed need additional factual investigation. Counsel identified this as one of those potential claims in that funds application. The funds application was granted but not until July 18, 1995. Although federal counsel did conduct a preliminary investigation for purposes of preparing an adequate funds request, they were not in a position (nor could they reasonably be expected to be) to self-fund a thorough investigation of potential claims, including

[17] Petitioner is not conceding however that those duties were sufficiently clear at the time

this juror misconduct claim. (See *In re Gallego* (1998) 18 Cal.4th 825.) (Supp. Exh. 65.)

Petitioner's federal counsel decided to gather as much information as possible about Southworth, McConkey and Bass, before attempting to interview McConkey, since Ms. Sorensen had been informed by the Humboldt County attorney that McConkey was outspoken in his hostility to petitioner. Federal counsel had already obtained some court records concerning Ms. Southworth's alcohol-related legal problems during petitioner's trial. (See Pet. Exh. 62.) After receiving federal funding and completing the initial investigation of the claim, Mr. McGlasson met with McConkey for the first time. This occurred during a trip Mr. McGlasson made to Humboldt County in December, 1995. After this initial interview, counsel conducted a further investigation to follow up on certain information learned from McConkey. After completing that investigation, Mr. McGlasson talked again with Mr. McConkey in April of 1996. On that occasion, Mr. McGlasson was accompanied by attorney Sandra Michaels. Ms. Michaels interviewed McConkey about the Bass-Southworth incident, and she provided a declaration for the exhaustion petition recounting what McConkey told her. (See Pet. Exh. 11). (Supp. Exh. 65.)

The information about the Bass-Southworth incident was neither known, nor reasonably should have been known at any earlier point. Mr. Bass never disclosed the incident to the court, as he was ethically and legally required to do, and neither did juror Southworth, as she as a juror was also required to do. There were no triggering facts available at that time which would have caused or required Mr. Cutler to investigate the claim. Mr. Cutler did attempt to interview some of the trial jurors,

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Mr. Cutler was handling the direct appeal.

including Ms. Southworth, over the telephone, but she was already deceased by that time.

4. Claim IV. This is a companion claim to Claim III. This claim includes the factual allegations concerning the Bass-Southworth misconduct incident. The showing set forth above about petitioner's allegations concerning the Bass-Southworth incident and when petitioner obtained the information he provided in support of those allegations and his showing that there was no substantial delay in presenting this claim are equally applicable to this claim and are incorporated here fully by this reference.

Claim IV also includes allegations that Ms. Southworth was dishonest during voir dire when she denied that she had a drinking problem, and implied she did not smoke or drink. Her neighbor, one of the court reporter's in this case, testified otherwise, and Ms. Southworth was arrested for two driving under the influence ("DUI") offenses **during petitioner's ongoing trial, while she sat as a juror in the case.** The information provided in support of his allegations consisted of portions of the court record, and also court records of Ms. Southworth's DUI offenses. Petitioner's federal counsel obtained these records during their preliminary investigation for the federal petition. Mr. Cutler did raise as an issue in the direct appeal that Ms. Southworth's alcohol problems should have resulted in her excusal from the jury. (See AOB 222-225). The court records of her DUI cases would have furnished further support for that contention, and arguably Mr. Cutler should have made an effort to obtain them. However, lacking any knowledge that Ms. Southworth engaged in misconduct with Mr. Bass and that she accepted drinks from the latter, Mr. Cutler did not have triggering facts that would have warranted a further investigation of Ms. Southworth. As indicated, Ms. Southworth died of alcohol-related

health problems in 1989, and Mr. Cutler's efforts to contact her by phone were therefore unsuccessful. (Supp. Exh. 65.)

5-6 Claims V & VI – These are factually related claims; in Claim V, petitioner alleges that juror Debra Kramer committed prejudicial misconduct during voir dire in concealing material information about her prior relationship with petitioner's lead trial attorney, Bernard DePaoli while he was prosecuting the rape case in which she was the victim; in Claim VI, petitioner alleges that DePaoli, who also concealed information about the nature of his prior relationship with Ms. Kramer, did so because of an actual conflict of interest on his part.

Petitioner's federal counsel learned about the nature and extent of the prior DePaoli-Kramer relationship from interviews with defense counsel Klay and Mr. DePaoli as part of their investigation of potential claims for the federal petition. Ms. Klay informed federal counsel during their initial interview with her, in the Fall of 1994, that she learned from DePaoli only after petitioner's trial that DePaoli and Kramer had a prior personal relationship that had sexual overtones and involved physical intimacy. DePaoli did not reveal that information to Ms. Klay or to petitioner during petitioner's trial. (Pet., Exh. 9 at 11.) During that initial interview, Ms. Klay also informed counsel that she had told Mr. Cutler that DePaoli may have had a prior sexual relationship with juror Kramer. When Cutler asked DePaoli about this, however, he denied having any intimate encounter or relationship with Ms. Kramer. (Pet., Exh. 5.) Mr. DePaoli eventually revealed to federal counsel that he had not told Cutler the truth. He did so during an interview in 1995 or 1996. (Supp. Exh. 65.)

DePaoli also concealed from Mr. Cutler and from Ms. Klay and petitioner the fact that he (DePaoli) had provided financial assistance to Ms. Kramer and that after the Kramer rape trial, a paralegal working for a local

attorney had accused DePaoli of unethical conduct as a prosecutor for having sex with a rape victim. (Pet., Exh. 9 at 11). In the face of DePaoli's denial that he had any improper relationship with Ms. Kramer, and in view of his concealment of these additional relevant facts, Cutler lacked the information necessary to make out a claim of conflict of interest on DePaoli's part. Without DePaoli's admission of any wrongdoing on his part involving Ms. Kramer, Mr. Cutler did not have sufficient proof that DePaoli or Kramer had concealed anything relevant about their prior relationship or that he acted out of divided loyalties in keeping the information to himself during petitioner's trial.

DePaoli eventually admitted to petitioner's federal counsel sometime in 1996 that he did have a close and physically intimate personal relationship with Ms. Kramer and had co-signed a loan for her. He did not admit, however, until much later that he had been accused of unethical conduct as a prosecutor, an accusation which he understood as referring to his association with Ms. Kramer. (See Pet., Exh. 9 at 11.) He did not disclose that information until late January of 1998, shortly before the state exhaustion petition was filed, and did so only after he was confronted with information obtained by undersigned counsel as part of the ongoing investigation of this conflict of interest claim. That investigation was conducted because counsel had a reasonable belief that DePaoli likely concealed information about the relationship because it was professionally and personally embarrassing to him. If true, that would furnish the necessary factual proof for a prima facie case that DePaoli's loyalties were divided and his failure to reveal the information about the true nature of his prior involvement with Ms. Kramer stemmed from an actual conflict of interest on his part. Petitioner obtained a declaration from DePaoli revealing that he had been accused of unethical behavior involving a rape

victim, Ms. Kramer, and also revealing the nature of his prior involvement with her. Counsel attempted, with an investigator, but without success, also to obtain a declaration from Ms. Kramer. Petitioner presented the conflict of interest claim to this court within a few months of the time his ongoing investigation bore fruit and he obtained a declaration from DePaoli admitting the facts necessary to establish a prima facie case of conflict of interest. The claim (VI) and the related claim (V) were thus presented without substantial delay and could not have been presented any earlier given DePaoli's concealment of the truth. (Supp. Exh. 65.)

7. Claim VII – This claim contains a number of sub-claims and/or sub-parts. Some of those are based entirely on the appellate record and were previously briefed by Mr. Cutler. Petitioner will discuss below when the new information presented in support of the claim was obtained, and will explain the reasons why that new information was either not known or available to Cutler or if it was, the reasons why Cutler should or should not have investigated further to develop and present a potential claim for relief.

Part of the information showing a lack of impartiality on the trial judge's part was a matter of record. That information included the judge's personal investigation of lead defense counsel in connection with the subpoena alteration issue, and the judge's later use of the district attorney's investigation, who was a member of the prosecution team handling petitioner's case, to investigate representations made by lead counsel concerning the unavailability of a defense expert. These facts were sufficient to establish a prima facie case of judicial bias and Cutler's unreasonable failure to recognize and present that as claim in the direct appeal deprived petitioner of the effective assistance of counsel on appeal.

Other information showing a lack of impartiality on the trial judge's part was known or should have been known to Cutler at the time he

prepared the direct appeal and the initial habeas corpus petition. This included Anna Klay's information that (1) the judge had expressly admitted his bias against petitioner; (2) the trial judge had been informed by Ms. Klay on a number of occasions that DePaoli was abusing alcohol and this was having a negative impact on his ability to prepare petitioner's defense; (3) the trial judge told Ms. Klay that she would risk not being appointed to handle further cases if she made any further efforts to be relieved as petitioner's counsel; (4) the trial judge made remarks to Ms. Klay that were sexist and gender-biased; and, (5) the trial judge's gender-based remarks and conduct were hurtful to Ms. Klay and affected her self-confidence and her handling of petitioner's case. Cutler apparently failed to appreciate the significance of the court's conduct toward Ms. Klay and its impact on petitioner's case. Cutler should have presented, but unreasonably failed to present, a potentially meritorious claim for habeas relief based on this and the other foregoing extra-record facts, and on the record facts which showed the appearance of judicial bias. His failure to present the claim amounted to an effective abandonment of his habeas corpus duties. (*In re Sanders, supra.*)

Petitioner's federal counsel learned about the information supporting the claim of judicial bias during their review of the state court record, their interviews with Ms. Klay and the other investigation they conducted for the federal habeas petition, and they included the claim in the federal and state petitions. They also obtained confirmation that Judge Buffington harbored gender-related bias from a court decision that was not handed down until 1995, which was after petitioner was represented by new counsel.

Most, although not all, of the information about defense counsel's contribution to breakdown of the fairness of the trial process was also either known by or should have been known to Mr. Cutler. Information about

DePaoli's alcohol-related problems was contained in the appellate record. The information about his steep personal decline following petitioner's trial, including his convictions and incarceration first in Nevada and later in California was not reasonably available to Mr. Cutler since some of those events did not occur until after petitioner's case had moved to federal court. Petitioner's federal counsel obtained the information as part of their ongoing investigation for the federal petition of potential claims of ineffective assistance of counsel during the 1995-1996 time frame. Other information that was not known by, or reasonably available to Mr. Cutler, was DePaoli's admission that his alcohol abuse impaired his judgment and his handling of petitioner's case. DePaoli did not appreciate the fact that he was an alcoholic and that his daily abuse of alcohol during petitioner's case adversely affected his judgment and performance in the case until he obtained treatment for the problem in the Nevada prison where he was incarcerated after petitioner's case was decided by this Court. Petitioner's federal counsel learned that information from him during our 1995-1996 investigation for the federal petition.

Some, although not all, of the information about the prosecution's unfair discovery tactics appeared in the record and were thus known to Cutler. He raised as much of the discovery-related issues as he could in his briefing in the direct appeal. (See Pre-Argument Brief, XXXVI.) He was unable to present more than he did, however, through no fault of his own, because his request to obtain the entire Tulleners' notebook, which was sealed by the trial court, was denied by this Court. Without access to the triggering facts contained in the undisclosed portions of the notebook, Cutler could not conduct, and was not required to conduct, an independent investigation into the prosecution's discovery related misconduct that did not appear in the record. (See *Robbins, supra.*) Petitioner's federal

counsel obtained the undisclosed portions of the Tulleners' notebook during their preliminary investigation for the federal petition, as noted above. References in the notebook triggered counsel's further investigation and led to the information obtained from Tulleners as set forth in paragraphs 42- 54 of this Claim. The *McClure* prosecution and the *Garrett* prosecution did not commence until petitioner's case had already moved on to federal court.

8. Claim VIII – In Claim VIII petitioner alleges that he is factually innocent of the murder of Elizabeth Hickey. His former counsel raised related claims in the direct appeal. (See AOB, Claims XII). The new information presented in this Claim concerns the bloody fingerprints found on Ms. Hickey's body. Although the evidence that such prints existed was brought out at the trial, neither petitioner nor his prior counsel knew or had reason to know about new technology which could possibly eliminate petitioner as the killer who left these prints on Hickey's nude body. That new technology was not available at the time of petitioner's trial or during the direct appeal and initial habeas corpus proceedings in this case. Although the technology now exists to potentially eliminate petitioner as the killer, petitioner is unable to utilize the technology because he does not have access to the negatives of the photographs of the bloody prints. Those are in the possession of the state, and petitioner will need discovery and/or a subpoena to obtain them.

9. Claim IX – This claim presents a purely legal issue. As respondent points out, this court recently rejected the same claim in a 1998 case. Petitioner presented the claim in his exhaustion petition to preserve it for later federal review.

C. Even If the Court Finds that There Was Delay in Filing One or More of the Claims in the Petition, Good Cause Exists to Justify Any Such Substantial Delay

In *Robbins,* this Court reiterated what it stated previously in its decision in *In re Clark, supra*, that the piecemeal presentation of claims for habeas corpus relief is not condoned in California. In that regard, this Court stated that known claims, that is claims for the facts sufficient to state a prima facie case for relief are known and the claim has been "perfected", in other words, the written presentation of the facts and law has been completed, that the piecemeal presentation of claims for habeas corpus relief, should be promptly presented **unless** counsel has triggering facts suggesting the existence of other meritorious claims which cannot be stated without additional investigation. The court stated further that a petitioner may establish good cause for delaying the presentation of perfected claims if he shows that he was continuing a bona fide "ongoing investigation" into another potential claims, and presented the delayed claims in a joint petition. (*Id.*, at pp. 767-770, 777;) see also *Gallego, supra,* at p. 16 & fn. 13.)

Applying those principles here, good cause exists for any delay in presenting the claims raised in the joint petition to exhaust state remedies. First, a bona fide investigation for certain of the claims and/or subclaims raised in the petition was still going until shortly before the petition was filed. Specifically, petitioner was conducting an ongoing investigation to obtain facts showing that the benefits Michael Thompson was receiving as the Los Angeles County jail during the proceedings in petitioner's case were a quid pro quo for Thompson's cooperation against Mr. Price. With that evidence, petitioner would be able to make out a prima facie case that the prosecution suppressed exculpatory evidence in this case, and that Thompson committed perjury when he denied receiving any benefits for his cooperation that were not made known to petitioner's jury. Although petitioner had triggering facts that Thompson was receiving substantial

benefits at the jail, we also were aware that he was continuing to deny that these benefits were given to him for his cooperation on any case, including this one. Given the nature of the benefits, counsel believed this was highly dubious, but counsel had no factual proof to establish otherwise, without conducting a further factual investigation. There were only limited sources from which counsel could potentially obtain the necessary information. The state was one potential source, but it had suppressed the evidence, including even the fact of Thompson was getting anything special in the way of housing or living conditions. Thompson was another potential source but counsel reasonably believed he would continue to grandstand about how altruistic his motives were. Therefore, counsel reasonably believed that the most likely source of the evidence might be another informant who knew Thompson and to whom Thompson may have revealed the truth. Counsel began the investigation to identity such a witness and obtain the evidence even before filing the federal petition. Counsel was still conducting that investigation during the time period between April 23, 1997 and March of 1998, when the investigation finally bore fruit. In March of 1998, counsel first found out that Michael Gaxiola, an ex-gang government informant witness, had personally overhead Thompson make an admission that he had gotten many benefits while he was housed at the Los Angeles County jail as a reward for his cooperation against Mr. Price. Counsel learned about that information too late to obtain a declaration from Mr. Gaxiola, and therefore presented the information in the only means reasonably available – namely through the declaration of prison gang expert Anthony L Casas, who has known Mr. Gaxiola for years, and to whom Mr. Gaxiola relayed the information about Thompson's admission. (Supp. Exh. 65.)

In addition, as indicated above, counsel were still in the process of conducting an ongoing investigation to obtain the facts needed to state prima facie case of conflict of interest on the part of lead defense counsel, DePaoli. That investigation was necessary because counsel reasonably believed that DePaoli was not being candid about why he had concealed information during petitioner's trial about DePaoli's prior relationship with juror Kramer. As alleged in Claim VI, DePaoli hid that information from his co-counsel and his client, and concealed the information from Mr. Cutler by falsely claiming that his relationship with Ms. Kramer, when DePaoli was the prosecutor handling a rape case in which Ms. Kramer was the victim, went beyond a professional one. Counsel reasonably suspected from the triggering facts they had, namely the nature of DePaoli's prior relationship with Ms. Kramer, and the fact that DePaoli was lied to Mr. Cutler about the non-professional nature of the relationship, that DePaoli may have concealed the information to avoid personal and professional embarrassment to himself. Counsel believed that, if their suspicions proved to be correct, this would give them the facts necessary to make out a prima facie case that DePaoli was protecting his own interests, not petitioner's in keeping the true nature of his prior relationship with this prospective juror to himself, and because he was acted out of divided loyalties, he had an actual conflict of interest. As a result of counsel's bona fide ongoing investigation to obtain the necessary facts, counsel located a witness who knew about DePaoli's prior relationship with Ms. Kramer and portrayed in a light very unfavorable to DePaoli. Counsel first learned about and interviewed this witness in December of 1997, while counsel was still in federal court litigating the scope of the exhaustion petition. Counsel then confronted DePaoli with the information obtained from the witness in January of 1998, and in the face of that information, he revealed that he had been accused by a paralegal in Eureka of having engaged in unethical

conduct as a prosecutor by having sex with a rape victim – an accusation DePaoli indicates he understood as referring to Ms. Kramer. He agreed to provide a declaration to that effect, and did. That declaration was obtained from him on February 17, 1998. The joint petition raising this and nine other claims, was filed a little over two months from that date. (Supp. Exh. 65.)

Although respondent faults petitioner for presenting his claims to the federal court before presenting them to this court, good cause exists to justify petitioner's filing of his claims in federal court first. Counsel were appointed and paid by the federal court to investigate claims for a federal habeas petition, not a state petition. Counsel were under a federal court order to file a federal petition containing all potentially meritorious claims, whether exhausted or not. Counsel were also facing a federal statute of limitations deadline, imposed by the 1996 Antiterrorism and Death Penalty Act (AEDPA) to file the federal petition within one year of the date of the Act. Because petitioner had already previously filed a state habeas petition, if the AEDPA and the provisions of Chapter 154 of the Act were held to apply to petitioner's case, the federal statute of limitations could not be tolled by first filing an exhaustion petition in this court. Counsel could not reasonably ignore that as possibility since the issue of AEDPA's applicability to cases such as petitioner's had not yet been decided by the courts. Counsel therefore had to proceed first in federal court to safeguard petitioner's interests in obtaining federal court review of his federal constitutional claims. Also, because the investigation for the federal petition was so extensive and widespread, and because the sheer task of "perfecting" all the claims in the federal petition was some 700 pages in length, counsel did not have time both to file a complete federal petition and to simultaneously perfect claims for a state petition, including

gathering all reasonably available documentation as required under state law. Petitioner would also note that one of the primary reasons why such an extensive investigation was necessary in the first place was because the prosecution and other California law enforcement officials suppressed material evidence and allowed their witnesses to lie at petitioner's trial.

D. Even if Good Cause is Not Found For Any SubstantialDelay, Petitioner's Claims Come Within Clark's Miscarriage of Justice Exception

Wholly apart from petitioner's good faith attempts to investigate, develop and raise each of the claims in this second habeas corpus petition in a timely manner, this Court's failure to address these claims on the merits due to any perceived procedural failings would result in a fundamental miscarriage of justice. The evidence which the prosecution hid and/or failed to disclose, and the false evidence which the prosecution did present to the jury in this case involved the central theory of the case and implicated the primary prosecution witnesses whose testimony provided the backbone to that theory.

Had the jury been informed, not only of the facts which the prosecution failed to reveal regarding benefits received in exchange for testimony, but in addition the fact of state's witness perjury in a number of material respects, the entire case against petitioner would have fallen like a house of cards. Michael Thompson, the state's primary witness, gave testimony which spanned several days and several appearances, providing the primary conspiracy facts regarding petitioner's alleged motivation for purportedly committing both homicides. He lied to the jury about why he was even testifying against his alleged former gang brother. Had the jury known that he was being paid well for his storytelling, both in the form of in-kind benefits as well as in monetary form, and that he lied about these

very issues with the prosecution fully aware of his mendacity, his credibility and that of the prosecution would have been destroyed.

The same can be said regarding Clifford Smith. Once again, had the jury known that he too was cooperating with the state in order to assist his brother in obtaining favorable treatment in the criminal justice system, and that he lied about this fact, no rational judge of truth would have believed any of the stories he told regarding petitioner.

Finally, Janet Myers, the third and final evidentiary piece in the state's conspiracy puzzle against petitioner, also lied about her motivations, as well as her most damning testimony against petitioner. She too would have been thoroughly discredited, had the jury been made aware that she lied about what prompted her to testify for the government. When coupled with the lies she told regarding an alleged visit she had with Smith and others shortly after the Barnes homicide, all of these falsehoods, had they been made known to the jury, would have destroyed her credibility and that of the story she told at trial.

In short, the state's primary case against Curtis Price involved the testimony of three witnesses who lied to the jury with the complicity, indeed the encouragement and involvement, of the prosecution. Had the jury been informed of <u>these</u> facts, the state would not have had an ounce of credibility with the jury. No rational finder of fact would have believed, beyond a reasonable doubt, that Curtis Price was guilty of the elaborate conspiracy, which these three discredited witnesses alleged him to have committed nor or any of the overt acts alleged against petitioner as part of the conspiracy, including the Barnes and Hickey murders, and no rational finder of fact would have sentenced petitioner to death..

It is important to note here that this undermining of these witnesses' credibility taints the prosecution case not only with regard to the Barnes homicide, but also the Hickey homicide as well. As noted elsewhere,

Thompson provided the only testimony, speculative though it was, as to why Mr. Price allegedly might have even taken Ms. Hickey's life. Thompson's story, tying the Hickey homicide to the Barnes conspiracy and the need to eliminate a possible witness to petitioner's involvement in that homicide, would have also been completely discredited had the jury known he lied about so many other critical and important facts in the case. This is especially true in the context of this case, there having been an obvious suspect in the Hickey murder other than Curtis Price, who failed two government-initiated polygraph examinations about the murder, and who clearly had the ability, willingness and motivation to take her life.

For this additional reason, this Court should review petitioner's claims on their merits notwithstanding any sense that the Court's timeliness rules (newly erected though they are)[18] have not been followed in this case.

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[18] Indeed, by making the above timeliness arguments herein, petitioner does not mean to concede that these rules should even apply in his case. These rules were, in petitioners view, created after his initial state habeas corpus case was denied, and thus cannot be fairly applied to him retroactively in a manner that bars this Court's merits review of all of his claims.

CONCLUSION

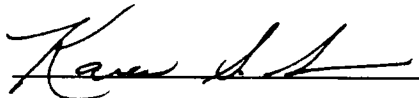
For the reasons stated herein and in the petition, and in the exhibits and supplemental exhibits which are hereby incorporated fully by this reference, petitioner's judgment must be set aside.

DATED: December 20, 1999

Respectfully submitted,

KAREN S. SORENSEN
ROBERT L. MCGLASSON

Attorneys for Petitioner Curtis F. Price

BY: 
Karen S. Sorensen

VERIFICATION

I, KAREN S. SORENSEN, declare as follows:

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

I am authorized to file this Informal Reply To Brief In Opposition To Petition For Writ of Habeas Corpus on petitioner's behalf. I make this verification for the following reasons. Petitioner still continues to suffer from impaired vision following his cataract surgery and he is therefore unable to read this Informal Reply and the accompanying volume of Supplemental Exhibits in sufficient time before the Informal Reply must must be filed to be able to verify it. In addition, I am far more familiar with the facts, claims and law set forth in this Informal Reply than is petitioner. I have read the Informal Reply and know its contents of the petition to be true.

Executed this 20th day of December 1999, at Kentfield, California

Karen S. Sorensen

Declaration of Service by Mail

RE: IN RE CURTIS F. PRICE ON HABEAS CORPUS, NO S069685

I, Karen S. Sorensen, declare that I am over 18 years of age and not a party to the within cause; my address is PMB 334, 336 Bon Air Center, Greenbrae, 94904-3017. I served a true copy of the within:

PETITIONER'S INFORMAL REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

on each of the following by placing same in a mailing container addressed (respectively) as follows:

David H. Rose
Deputy California Attorney General
455 Golden Gate Ave., #1100
San Francisco, CA 94102-3664

Enclosed said mailing container was then, on December 20, 1999, sealed and deposited in the United States Mail in Marin County, California, the county in which I am employed with postage thereon fully prepaid

I declare under penalty of perjury that the foregoing is true and correct. Executed on this on December 20, 1999, at Kentfield, California.

KAREN S. SORENSEN