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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SIRHAN BISHARA SIRHAN	)
	) **NO. CV-00-5686-CAS (AJW)**
Petitioner,	)
	) **REPLY BRIEF ON THE**
vs.	) **THE ISSUE OF ACTUAL INNOCENCE**
	)
GEORGE GALAZA, WARDEN, et. al.,	) **(28 U.S.C. section 2254)**
	)
Respondents	) **Hon. Andrew J. Wistrich**
	) **United States Magistrate Judge**

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INTRODUCTION

Pursuant to the decision by the Ninth Circuit in Lee v. Lampert this court has ordered additional briefing as to petitioner's claim of actual innocence, which was disregarded in Respondent's prior supplemental brief. Though, as a result of the Circuit Court ruling this Court has ordered us to focus on the issue of petitioner's actual innocence, petitioner in no way concedes his entitlement to statutory tolling based, amongst other issues, upon his having reasonably, diligently pursued his rights but been frustrated by some extraordinary circumstances which stood in his way, along with the issues of adequacy and defects in the California Timeliness Rule. [Petitioner's Supplemental Brief ("PSB") pages 1 to 14]

It has now become explicitly clear that actual innocence is, as it should be, of paramount importance compelling the Court's review of the substantive evidence of petitioner's actual innocence after spending 43 years in prison.

To this point the *en banc* Court in *Lee v. Lampert* (Ninth Circuit) concluded:

> In sum, we hold that a petitioner is not barred by the AEDPA Statute of Limitations from filing an otherwise untimely habeas corpus petition if the Petitioner makes a credible showing of "actual innocence" under *Schlup v. Delo.* This construction continues the traditional equitable rule that Congress did not disturb in passing AEDPA, is consistent with AEDPA's underlying philosophy, and avoids serious constitutional problems inherent in a contrary statutory interpretation." [2011 WL 3275947 (9th Circuit en banc OR.)]

Thus, for the first time in the long history of this case, Petitioner has been given an opportunity to correct a miscarriage of justice and demonstrate, through evidence, previously ignored, or only recently available, that he did not assassinate Senator Robert F. Kennedy.

ARGUMENT

1. PETITIONER'S EVIDENCE OF ACTUAL INNOCENCE IS SUFFICIENT UNDER THE PREVAILING STANDARD TO COMPEL CONSIDERATION OF HIS CLAIM FOR RELIEF

As set out below, contrary to the Respondent's argument, petitioner has clearly established in line with the existing evidentiary standards the existence of non-harmless constitutional error and a material showing of actual innocence, so that this honorable Court should grant the requested *habeas* relief.

Respondent seeks to deny the sufficiency of the evidence of Petitioner's actual innocence. Thus, to focus on the points of contention, Petitioner will address each point in turn.

A. The Standard for Actual Innocence

Respondent concedes that the recent ruling in the *Lee v. Lampert* case established that "... A credible claim of actual innocence constitutes an equitable exception to the AEDPA's limitations, and a petitioner who makes such a showing may pass through the *Schlup* Gateway and have his otherwise time-barred claims heard on the merits." In *Schlup v. Delo,* [513 US 298, 115 S. Ct. 851, 130 L.Ed. 2d 808 (1995)] the Supreme Court ruled that claims otherwise based on procedural grounds could be heard if the denial would result in a miscarriage of justice. As Respondent concedes, this exception also requires the *habeas* petitioner to show that a non-harmless constitutional violation has resulted in the conviction of one who was actually innocent. (*id.* at 327).

Respondent acknowledges that the standard of actual innocence does not simply require Petitioner to demonstrate the existence of reasonable doubt as to guilt but that he must show, in light of all of the evidence from the time of trial, to the present, that the evidence is such that it is more likely than not no juror would have voted to convict him. In other words, under the prevailing standard in *Murray v. Carrier*, [477 US 478, 496, 106 S. Ct. 2439, 91 L. Ed. 2d 397 (1998)], applied by the Supreme Court in *Schlup,* he is, in fact, innocent of the charge. The stated knowledge is that in meeting the standard the petitioner must support his claim of actual innocence with support for his allegations of non-harmless

constitutional error by submitting new reliable evidence, which surely must be viewed, in context, with the previously available evidence not presented or developed at trial or before a Judge in an evidentiary hearing.

In *Schlup,* the majority of the Court rejected what the minority saw as the more stringent requirement of a "clear and convincing" standard as set out in *Sawyer v. Whitley,*(505 US 333), and concluded that the evidence in *Schlup*, which was based upon the sworn statements of eyewitnesses that Schlup was not involved in the crime, must prevail.

Thus, the Court held that "… under a proper application of either *Sawyer* or *Carrier* , petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." (*id* at 331)

The Court, in applying the *Carrier* standard as the requirement for an evidentiary hearing, made it clear that the Court must "… the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." (*id* at 332) It emphasized that the trial court is not required to test the new evidence (as Respondent here proposes) by a standard appropriate for deciding a motion for summary judgment, but to the contrary, explicitly stated that the District Court Judge's function "… **is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial…**"(*id* at 332, emp. added)

In *Schlup*, the court said that there are three requirements that a *habeas* petitioner must meet in order to qualify for the "fundamental miscarriage of justice" status, namely: (1) new evidence of innocence;(2) nonharmless constitutional error ; and (3) that the new evidence and nonharmless constitutional error, when viewed together, undermine the court's confidence in the verdict at trial so that "… a constitutional violation has probably resulted in the conviction of one who is actually innocent."(*id* at 327)[quoting *Murray v. Carrier*, 477 US at 496]. The Supreme Court, in elaborating upon the interaction between the new evidence of actual innocence and the nonharmless constitutional error aspect, necessary to establish actual innocence stated:

> A court's assumptions about the validity of the proceedings that resulted in conviction are fundamentally different…[where[conviction had been error free. In such a case, when a petitioner has been tired before a jury of his peers, with the full panoply of protections that

> our Constitution affords criminal defendants, it is appropriate to apply an extraordinarily high standard of review.
>
> [But where a habeas petitioner] accompanies his claim of innocence with an assertion of constitutional error at trial…[petitioner's] conviction may not be entitled to the same degree of respect as one that is the product of an error free trial. Schlup, 513 US at 315-16 (internal citations omitted).

Thus, where a federal *habeas* court is confronted, as here, with both a claim of "new evidence of innocence" and allegations of "nonharmless constitutional error" its desire to respect the finality of a state court criminal judgment should be at its lowest. *Calderon v. Thompson* 523 US538, 557 (1986).

In the instant case, Petitioner presents both new evidence of innocence as well as allegations of nonharmless constitutional error sufficient to undermine this Court's confidence in the initial judgment of conviction and sentence. Though never able to present before a Judge or jury, Petitioner has consistently focused on the State's failure to disclose exculpatory ballistics and firearm evidence, a violation of Petitioner's due process rights under *Brady v. Maryland,*373 U.S. 83 (1963) (see the extensive discussion *infra*} and the violation of Petitioner's Sixth Amendment right to effective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984). (see discussion *infra.*}

In comparison with the facts in *Schlup,* Petitioner respectfully submits that the evidence herein, of actual innocence, in contrast to the evidence put forward by conflicted defense counsel at trial, is explicitly stronger and more credible than that of the petitioner in *Schlup* which convinced the Supreme Court to order such relief in that case.

In the instant case, Petitioner, not only has stronger eyewitness evidence, establishing actual innocence,(see *infra*) than there was available in *Schlup*, but he also submits scientific, forensic evidence which cannot be credibly refuted, along with the results of a three year examination, by one of the world's foremost expert psychologists, which, in the latter instance, establishes the involuntary nature of Petitioner's actions related to this crime.(see discussion *infra*) With respect to the latter psychological evidence and the Respondent's allegations of it being a " fantastic hypnotic automaton theory" (Respondent's Supplemental Brief ((RSB)) P.11) Petitioner submits supporting evidence concerning the

historical record of such programed instances by one of the leading experts in this field. (see discussion *infra*)

This new evidence, related to facts to be properly determined at a new trial or an evidentiary hearing, Petitioner respectfully submits, consists of both exculpatory scientific evidence – not available at the time of trial – trustworthy eyewitness evidence, ignored by defense counsel at trial, and other physical and psychological evidence not presented at trial, and therefore, as discussed below, satisfies the requirements under *Schlup*. (513 US at 324)

Respondent, in cursory fashion, denying its applicability, refers to the case of *Lisker v. Knowles*, [463 F. Sup. 2d 1008 CCD Cal (2006)](RSB at 3) in which the District Court found that new evidence, including forensic evidence, effectively met the *Schlup* standard establishing a miscarriage of justice and actual innocence, thus dismantling the case presented by the prosecutor at trial (*id* at 1018) and the Respondent then blithely asserts without a detailed analysis or discussion, that Petitioner, in contrast, has failed to meet that burden and demonstrate that he is actually innocent.

A closer examination of *Lisker* reveals why Respondent elected to only summarily refer to it, before attempting to use a broad brush to contrast it with Petitioner's case. As a matter of fact, Petitioner's evidence of his actual innocence is significantly stronger than that presented by the petitioner in the *Lisker* case.

In both cases there was an admission of guilt, but in Petitioner's case, he was told by defense counsel – who himself was conflicted with a pending federal indictment hanging over him – that he was guilty and that the challenge for the defense was not to assert his innocence but to focus on saving his life. In *Lisker*, the petitioner pled guilty in order to obtain favored treatment in the penal system – certainly a lesser reason than that imposed on Petitioner in the instant case who was convinced by his counsel that this was the only way to avoid the death penalty.

In *Lisker*, the primary issues were that the defense did not develop initial evidence with respect to weather conditions on the day of the crime, proof of a relevant phone call, or discrepancy regarding shoe prints at the scene. Petitioner respectfully suggests that there is no comparison in terms of material significance, with the evidence of actual

innocence of Petitioner, in the instant case (set out *infra)* ,In both cases defense counsel were deficient in fulfilling their Sixth Amendment obligations, by not using available evidence at the time to obtain the fullest benefit for the defendant, by failing to investigate factual indications of innocence and by not challenging questionable evidence put forward by the State. An examination of the *Lisker* case, however, in contrast with the instant case, in terms of these aspects, clearly indicates that Petitioner's conflicted counsel (there is no indication in the record that defense counsel in *Lisker* had any conflict) performed far worse in violation of Petitioner's Sixth Amendment rights.

1. The *Schlup* Definition of "New Evidence" In The Ninth Circuit

For the avoidance of doubt, and in the face of differing interpretations by Circuit Courts of Appeal as to what is considered "new evidence" of actual innocence for gateway purposes, under the *Schlup* ruling, Petitioner wants to ensure that the Ninth Circuit definition is clear.

The issue is whether the new evidence of actual innocence is "newly discovered" evidence or "newly presented" evidence. In the former instance, the evidence is required to have been discovered after trial, whilst in the latter, "new" means all evidence that was not presented to the fact finder even if available at the time. That would mean evidence that was not " presented" (the word actually used by Justice Stevens in *Schlup* instead of "discovered" [*Schlup* at 324] even if available, at trial or a subsequent evidentiary hearing. Building on *Schlup,* Justice Kennedy, writing for the majority in *House v Bell,* 547 U.S. 518; 126 S. Ct (2006) stressed that in evaluating gateway claims a *habeas* court's inquiry is not limited *solely* to "new reliable evidence…that was not presented at trial (*id* 126 S.ct. at 2077). He did not, however expound upon what should be the limits.

The law in the Ninth Circuit is clear and beyond any doubt. *Griffin v Johnson,*350 F3d 956,961 (9th Cir. 2003) The definition of new evidence for the purposes of actual innocence in *habeas* proceedings such as Petitioner's before this Honorable Court requires only that the evidence not have been presented to a fact finder at trial or subsequent evidentiary hearing. This includes those instances where a witness would have testified but

not been asked by counsel, of either side, to provide a particular piece of evidence which would then be viewed as not having been "presented" at trial.

The newly presented evidence rule in effect in the Ninth Circuit involves evidence that was not presented before a fact finder because of the conduct of petitioner's trial counsel, decisions made by the petitioner, or evidence excluded by a judge. In the instant case, the overwhelming reason for the exculpatory evidence not having been presented was due to the conduct of Petitioner's conflicted counsel. (see the extensive discussion *infra*)

In the instant case, the exculpatory evidence being put forward by Petitioner actually involves evidence that is both newly discovered (therefore satisfying the more restrictive standard) and newly presented, never having been put to a trier of fact. In the latter case it should be clear beyond any question that the test is that the evidence being proffered was not tested at trial or at an evidentiary hearing. Since there has never been an evidentiary hearing, in the instant case, we are referring only to evidence not adduced at trial. No other airing will suffice. In other words evidence put forward to a Grand Jury, other investigative bodies, in prior petitions, or magazine or newspaper articles do not count for the purposes of exclusion under the law of the Ninth Circuit. The reason for this requirement of presentation before a finder of fact is well founded. Only in those circumstances is a Judge, and or jury, able to assess a witness's demeanor and manner.

In this case Petitioner presents two types of newly discovered exculpatory evidence. First, is the scientific/forensic analysis of the Pruszynski tape recording made at the time of the shooting but only capable of being scientifically analyzed with the advances of technology some 35 years later. The second, are the results of interviews and testing of Petitioner, (utilizing tests and measurement devices, many of which were not previously available) conducted over a period of three years by one of the world's foremost experts in hypno programming, Harvard psychologist, Dr. Daniel Brown.

The newly presented exculpatory evidence of actual innocence, also admissible under the law in the Ninth Circuit involves: (1) the testimony of witnesses, who either were not called to testify at the trial or whose testimony did not include, or excluded the

exculpatory evidence; and (2) introduction of exculpatory documentary evidence not put forward at trial.

B. Petitioner's Evidence Of Innocence Is Sufficient To Establish The Probability That No Reasonable Juror Would Vote to Convict

In the instant case, contrary to Respondent's assertion, conflicted defense counsel virtually ignored the most significant conclusions of the late arriving autopsy report which showed that the victim was shot four times from the back at close, powder burn range with the fatal bullet fired at 1-2 inches behind his right ear, and that the bullet taken from the victim's neck was never matched to the Petitioner's gun, or that the slug entered into evidence was shown conclusively to have the marking ("TN 31") placed on it by the Medical Examiner, Dr. Thomas Noguchi, who removed it.

Despite Respondent's assertions (RSB at 8-9) defense counsel also ignored the relevant facts in the statements of 12 witnesses, most of whom were not heard by the Judge and jury at the trial. Independently of each other, they unanimously placed Petitioner in front of the Senator, and at varying distances away, and at all time, during the five seconds when the shots were fired. (See Exhibit A and discussion *infra*) In addition, neither jury nor Petitioner were informed that there were five witnesses who, also independent of each other, not only stated that they saw Petitioner's hand pinned to the steam table, but that this control over petitioner's gun hand was effected **after he fired his second shot**, (See Exhibit B.) thus confirming the fact that he had no control over his shooting hand after discharging that shot. (see discussion *infra*) For ease of reference, Exhibits A and B, contain all available sources of the relevant witness accounts, not developed by either prosecution or the defense for the Judge and jury, which Petitioner has been able to locate.

Finally, as noted above, Petitioner, eventually learned that his trial counsel ignored, and the jury never learned, the fact that there was actually no match of the bullet, recovered from the neck of the victim, or the different bullet introduced into evidence as People's Exhibit 47, (see discussion *infra*) with his gun and that consequently, defense counsel did not pursue the issue of a possible substitution of another bullet not bearing the

marking "TN 31" which is the marking placed on the slug by medical examiner Dr. Thomas Noguchi. (see discussion of the neck bullet, Ex. 47 *infra*)

Contrary to Respondent's allegation, only the most speculative motive is asserted with respect to motive, Petitioner's "displeasure" over the Senator's support for Israel. "Displeasure" is clearly not a motive for assassination, and no sworn statements are provided for the substantiation of this motive or any other alleged remarks by petitioner while under stress.

The Respondent's allegations concerning Petitioner's alleged attendance at various public appearances by the Senator as "stalking" is an uncorroborated conclusion, particularly when Petitioner has stated that, despite any differences in policy, he would have voted for the Senator; hardly the position of an assassin.

Petitioner has never denied being at the Ambassador Hotel on the evening of the assassination, and he has also not denied being at the shooting range earlier that day. He was a regular practitioner of target shooting. This activity is also discussed in detail below in the Declaration, hereto, by Harvard psychologist Dr. Daniel Brown. (Exhibit H)

Respondent attributes a great deal of significance to Petitioner's admission of guilt, as though, false confessions were unknown in the criminal justice system and Petitioner's statements are analyzed in detail in the Brown report.(*infra*) In fact, it is ludicrous that Respondent relies upon a statement in which Petitioner, script like, stated that he had killed the Senator "… with 20 years of malice aforethought." (RSB at 5) What utter nonsense. To accept that statement, or rely upon its accuracy, as Respondent appears to do, means to accept as fact that Petitioner conceived this plan, at age 4, to kill Robert Kennedy, who then was being graduated from college.

This reeks of desperation on the part of the Respondent.

As for Dr. Seymour Pollack's cursory opinion for the prosecution, Petitioner submits it is more than explicitly dismantled by Dr. Brown's exhaustive examination. (*infra)*

As noted earlier, at the time, Petitioner was convinced by his defense counsel that he should be concerned about saving his life, not considering his innocence. In concluding that Petitioner did, in fact, fire eight shots from his weapon while standing in

front of the Senator and that five people other (RSB at 6) than the Senator were wounded, Respondent, fails to acknowledge that after the second shot, Petitioner's shooting hand was pinned to the steam table, and he had no control over where the remaining shots went, and that during that five second period, the Senator was hit by three of the four shots fired at powder burn range from behind. Respondent fails to explain how Petitioner could have possibly fired four bullets at the Senator when his hand was pinned to the steam table during the discharge of his last six bullets. The reason for this failure , this omission in Respondent's argument is obvious. There is no reasonable explanation. Petitioner, simply, could not have fired four shots at the Senator. To suggest otherwise goes beyond speculation. It is pure fantasy.

Petitioner suggests that it is Respondent's position which is based on speculation, and, as noted above, fantastic misrepresentations and the omission of evidence which clearly indicate his innocence. In this context it is essential to examine the available evidence, of innocence, with a degree of detail not present in the Respondent's Supplemental Brief.

1. **The Pruszynski Recording**

Subsequently, and currently before the court, is evidence developed by the high standard, scientific, forensic analysis technique not available in 1968 of the Pruszynski tape recording by audio engineer and computer technologist Philip Van Praag. Discussed in detail in his Declaration hereto (Exhibit C). Mr.Van Praag first became aware of the recording in June, 2005 and began to conduct an analysis of the sounds it contained at that time, using laboratory grade playback and recording equipment. He engaged a 10 step process of examination and analysis, the first two of which acquainted him with the overall recording content.

The third process step involved a comparison of the Pruszynski recording with several commercial broadcast and private audio/video recordings from that night at the Embassy Room of the Ambassador hotel, in order to validate the sounds on the Pruszynski recording and to gain a general understanding of the positioning of Pruszynski, Kennedy and others heard on the recording during and immediately after the Senator's victory statement.

The fourth process step focused on re-establishing correct timing for the entire gunshot interval on the Pruszynski recording which involved the synchronization of that recording with broadcast recordings from just before the shooting. This provided a basis for comparing Pruszynski's movements to the sounds of his recording, and the precise tracking of his movements as he left the stage area and proceeded toward the kitchen pantry.(Process step five)

Process step six involved detailed study of the video footage in the Embassy Room which provided information about the recording equipment used by Pruszynski, footage of him retrieving his equipment from the podium after the victory statement and footage showing him leaving the pantry 24 minutes after the shooting.

Only then, having gathered all of this information and the dimensional data, as well as the location of Petitioner and the Senator at the time of the shooting, did Van Praag begin, in process step seven, a detailed examination of the shot sounds. This examination, and the equipment used are set out in detail in Van Praag's Declaration (Exhibit C).

This examination and analysis revealed to him that 13 shots were fired (his "first discovery") but he states that it is possible that the total number exceeded13 because loud screams from the people closest to the shooting could have possibly obscured the reliable capture of additional shots. Since he knew that the number of shots exceeded the capacity of Petitioner's gun (with no possibility for him to reload) it became evident that more than one gun must have been fired. With multiple guns firing during a period of just over 5 seconds, he realized that the spacing of some of those shots had to be close together. With this analytical focus he found that within the 13 shots there were, in fact, two "double shot" groups-his "second discovery". In other words there were two instances identified wherein the two shots within each of those double shots were fired extremely close together, specifically about 149ms apart for shots 3-4 and 122ms apart for shots 7-8.

Since Petitioner's gun was an inexpensive revolver (Iver Johnson Cadet 55SA) it was highly unlikely that it could have been fired that rapidly.

At that point, he began an even more detailed analysis. (Process step eight) Realizing that there was, at least, the possibility that the two guns might have been of

different makes and models he began to examine what is known as the shot waveform envelopes more closely. He explained that a distinguishing characteristic of gunshots is the presence of a trailing edge waveform "envelope" which follows the extremely short initial impulse of the actual shot. This distinguishes gunshot sounds from other sounds like balloons or firecrackers which the human ear might easily mistake for gunshots. As he examined the frequency content of those trailing waveform envelopes he discovered an anomaly occurring in 5 of the gunshot waveforms. The anomaly presented as a single frequency component, at 1600Hz, of a level not found in the other shot sound waveforms and it was present in one, and only one, of each double shot pair. Van Praag refers to this as his "third discovery". Since it occurred in only five of the shots he discounted coloration from the pantry furnishings or construction materials, or echoes, for the same reason. He noted that Petitioner's hand had been pinned to the steam table after his second shot and that, subsequently, he was pulling the trigger from only that position.

Process steps 9 and 10 involved field testing (on two occasions) the Iver Johnson, duplicating the distance between Pruszynski's microphone and the guns (the tests also involved the use of another 22 caliber revolver, the H&R 922 which had identical rifling characteristics with the Iver Johnson Cadet 55SA) and utilizing the Steinberg Wavelab computer software (the same software used to initially identify the frequency anomaly on the Pruszynski recording). The results revealed that no frequency anomaly was found within the Iver Johnson test firing, whether recorded from the front or the rear of that gun.

As a result of this exhaustive process Van Praag concluded as follows:

1. At least 13 shots were recorded as being fired during the period of just over 5 seconds.
2. These shots came from multiple guns being fired during that period of time.
3. In two instances (shots 3-4 and 7-8) overlapping or "double" shots were fired, indicating a second gun being discharged.
4. The gunshot trailing waveforms revealed a frequency anomaly with respect to 5 of the shots, indicating that a second gun was fired, of a make and model different from that which Petitioner fired. Test firings of an Iver Johnson Cadet

55SA (the make and model of Petitioner's gun) revealed no frequency anomaly within the tested frequency.

5. In the pantry, Petitioner was firing from east to west, whilst another gun was firing five of the shots from west to east.

It is important for this Court to understand that the capability to perform a number of the technological processes described above, together with ability to perform other of the described processes in the depth and with the degree of accuracy necessary to result in definitive findings, such as those discovered by Philip Van Praag were not available in 1968.

Petitioner also respectfully submits that the use of techniques and methodologies developed by Van Praag specifically for the task constituting advanced computerized analysis of the sounds of the Pruszinski recording are light years ahead of listening to the tape with the human ear, or, in the case of the Respondent's "experts" using earlier, relatively primitive electronic filtering or other sound devices. The unsworn opinions relied upon by Respondent (which include references to anti conspiracy book writers) simply cannot be compared with Van Praag's processes. One such examination, conducted by Phillip Harrison, a United Kingdom forensic audio examiner, hired by writer Mel Ayton, was conducted without the examiner even knowing where Mr. Pruszynski was standing and most significantly, what was the location of his microphone and how it was moving toward the pantry, where the shootings took place. Harrison does not appear to be aware of the layout of the pantry, its dimensions, or contents, or even that Petitioner's shooting hand was pinned to the table after the second shot. In addition, he appears to be working from a dubbed copy of one of Van Praag's masters.

Harrison gives no indication of the scientific processes he utilized to categorically rule out the possibility that there were more than 8 shots fired.

These deficiencies, contrasted with the mandatory standards set out, and followed, by Van Praag, inevitably bring Harrison's credibility into question.

Another, unsworn opinion, (also commissioned by Mel Ayton) put forward by the Respondent is that of one Steve Barber, whose credentials are withheld from us. It appears that Mr. Barber, largely relied upon listening to one of Van Praag's masters for his

conclusions. When he did employ a computer to examine the sounds, he is compelled to admit the possible presence of an "echo" or a double shot which, of course, is what Van Praag concluded in two instances. There is, however, no indication that Mr. Barber is any more aware of the essential shooting scene details than was Mr. Harrison.

Here, as well, Barber gives no indication of the scientific processes he utilized to categorically rule out the possibility that there were more than 8 shots fired.

In terms of good faith, and the interests of justice, the reliance of Respondent also upon the unsworn opinion of a bookwriter like Mr. Ayton, who has consistently supported the official opinion in such a case and the attempt to place articles into evidence rather than introducing formal Declarations is worrying.

Petitioner respectfully submits that there is no indication that the analysis methods relied upon by the Respondent contained the degree of sophistication sufficient to adequately characterize the nature of the gunshots present in the Pruszynski recording. Without that level of sophistication, particularly given the relatively poor quality of the recording, any conclusion that only one gun was fired has no credibility.

If it were not for the fact that Petitioner who has spent 43 years in prison for a crime of which he is innocent, and who now presents scientific evidence of his innocence, the total inadequacy of the Respondent's effort (RSB at 7) to deny the inescapable conclusions resulting from the methodical 10 step technological process, would be laughable. In these circumstances it is lamentable. Surely, Petitioner is entitled to an opportunity to have all of this, never before available, evidence tested for the first time in an evidentiary hearing.

CONCLUSION

Thirteen shots were fired in the pantry during the five second period of the shooting. Multiple guns were fired with overlapping shots (3-4), and (7-8) being detected, indicating that a second gun was being fired. The gunshot trailing waveforms revealed a frequency anomaly with respect to 5 of the shots, indicating that a second gun was fired, of a make and model different from that which Petitioner fired.

2. The Eyewitness Evidence

a. Petitioner's Location Was In Front Of the Senator At All Times

Petitioner respectfully submits that there are at least 12 eyewitnesses, most of whose evidence was not been heard by the Judge or jury, who independently have given statements which have clearly placed Petitioner in front of Senator Kennedy at the time of the shooting, although, understandably, the estimates of how close he was to the Senator vary. (Exhibit A). Respondent contends that this is not "new" evidence. (RSB at 8). Since only 6 of the witnesses, referenced by Petitioner were called to testify at the trial Petitioner suggests that the evidence of the other uncalled eyewitnesses is indeed new evidence in light of the fact that their observations were not presented to the Judge and jury at the trial. In addition, as discussed below, evidence adduced at trial on this issue as exemplified by an examination of the trial testimony contained in Exhibit A, often did not deal in detail with the location of the Petitioner so that the Judge and jury would not have been exposed to the specific details about Petitioner's position.

Having said that it is significant that we examine the testimony of the few eyewitnesses to which the Respondent refers. Their observations are surely more relevant to the issues before this court than the Respondent's submissons of the unsworn flip flopped opinion of another book writer –Dan Moldea- who for most of his history with this case adamantly supported Petitioner's innocence, only to suddenly, and mysteriously, in light of his extensive published research, change his mind. Petitioner suggests that it is telling that Respondent leads off with this unsworn writer's opinion rather than focusing on eyewitnesses who were there and actually saw what was happening.

Respondent states that Edward Minasian "… saw Petitioner moving toward Senator Kennedy before firing two shots…" *id* at 9). In fact he saw no such thing. As he reflected, Minasian realized, and so testified, that he saw no one coming toward the Senator. He, himself, was between the Senator and Karl Uecker, and Petitioner was somewhere behind Mr. Ueucker, well in front of the Senator, Minasian explicitly said: "…If I said he was running, I was mistaken. I could not see anyone".

(maryferrell.org/mffweb/archive/viewer/showDocdo?mode=search

Result&absPageId=104896 (hereafter "maryferrell.org." TR 3176-3177). From an evidentiary standpoint, in terms of what the Judge and the jury heard defense counsel did not follow up and allow the witness to make it clear that the witness was placing Petitioner in front of the Senator (so this fact may have been missed by the Judge and jury). Respondent ignores the failure of both the prosecutor and, especially, the defense counsel, to make the vital fact of Petitioner's position clear to the jury.

Linda Urso, who does not appear to have been called to testify at the trial. has stated that she saw Petitioner in front of the Senator, and thought he was going to try and shake hands with the Senator until she saw a gun and the flash of the first shot. (Exhibit A) However, even Respondent's account concedes that this witness was describing Petitioner's position as being in front of the Senator. (RSB at 9)

Karl Uecker, according to the Respondent "… saw Petitioner rushing toward the Senator." (*id* at 9) It is not at all clear from where Respondent obtained this statement. Uecker said nothing of the sort in his trial testimony. At that time he actually stated that: " The first thing I saw before I started grabbing Sirhan, I saw his {Kennedy} right hand up and turning." (*id* at TR 3107-3108) He appears to be referring to the reflexive move of the Senator, noted by others, when he raised his right hand in front of his face as though to protect himself from being shot in the front, presumably by Petitioner, instead of from behind by the second gunman, taking advantage of the distraction in front and ahead of the Senator. In no other statement that Petitioner has found and attached hereto is there any indication that Mr. Uecker saw Petitioner "rushing" toward the Senator. (see Exhibit A)

Defense counsel, once again in his cross examination of Uecker made no effort to clarify for the jury the fact that Petitioner was always in front of the Senator with absolutely no opportunity to fire 4 bullets at powder burn range from the rear of the Senator at his back.

Respondent neglects to mention that Boris Yaro was looking through the confined dimensions and potential distortions of a camera view finder in the act of being focused, and not freely observing anything with his unhindered vision.

An examination of Martin Patrusky's testimony at the trial (maryferrell.org at TR 3381-3390) reveals no such statement under oath as referenced by the Respondent, although Patrusky in an FBI interview on June 7, 1968, confirmed that Karl Uecker was between Petitioner and the Senator. (*id*) At the trial, defense counsel, once again, ignored the vital evidence of Petitioner's location. He had no questions for this witness.

If it is curious that the State did not call a number of other eyewitnesses, the comments of who Petitioner has included in Exhibit A, hereto, it is appalling that defense counsel saw fit to ignore this entire line of evidence which in light of this reality must now be regarded as new evidence of innocence to be tested at a trial or an evidentiary hearing.

Respondent chastises Petitioner for not identifying the second shooter as though it was his job to solve the crime. Respondent also cites non existent, confirmed evidence that allegedly matched Petitioner's gun to the bullets recovered from victims; presumably including the neck bullet retrieved from the Senator, marked "TN31" which, in fact, Petitioner believes, was never tested against or matched with a test fire from Petitioner's gun. (see the discussion *infra*) Defense counsel never attempted to conduct its own firearms testing and neither did counsel appear to have requested the right to be present when the State conducted its tests or, amazingly, even ask to review the test results. It serves the Respondent's interests and purpose to refer to the multiple eyewitness statements as "…inconclusive eyewitness testimony…" (RSB at 10) but it surely did not serve the cause of justice for prosecution and defense to work together and deny the trial Judge and jury the opportunity to weigh this evidence for themselves, which contrary to Respondent's bold assertion (*id* at 8) did not happen. Petitioner urgently prays that this omission may be corrected in the course of an evidentiary hearing to be ordered by this honorable Court.

Respondent also complains that Petitioner does not take into account the movements of Petitioner and the Senator during the confrontation. (*id*) Of course they moved their bodies. They were not stick figures, but none of the reported movements materially change their basic positions –Petitioner in front of the Senator.

As for Petitioner's statements and belief, about his own culpability, held for a considerable period of time, initially nurtured and reinforced by his conflicted defense

counsel, this issue will be extensively discussed below with the discussion supported by a Declaration from Dr. Daniel Brown, who examined Petitioner during three year period.

CONCLUSION

Petitioner was at all times in front of the Senator and in no position to fire four shots at him at powder burn range evidenced by the powder burns on his jacket and the skin around his right ear.

b. Petitioner's Hand Was Pinned To The Steam Table After The Second Shot

Respondent ignores the fact that immediately after the second shot (Witnessed by Edward Minasian who leaped by Karl Uecker to grab Petitioner) [Exhibit B] Petitioner was physically apprehended and his shooting hand was pinned to the steam table, where he, in automonic fashion continued to pull the trigger. Uecker seems uncertain if that apprehension took place after the second or third shot was fired but there is no doubt that it was well before Petitioner was able to completely discharge his weapon with the result that the random firing of what Uecker rcalls were five or six additional shots caused bullets to fly all over the pantry. (*id*)

In this frantic sequence of events Minasian grabbed Petitioner around the waist and Uecker put him in a headlock (*id*).

The reason that Respondent ignores this factual evidence and the reason that it was not developed at trial by either the prosecution or conflicted defense counsel, who was only interested in conceding the guilt of his client at every turn, should be obvious.

It destroys the State's case.

Four bullets were fired at the back of the Senator, obviously from behind and below him, (since all were discharged in an upward angle). No eyewitness ever indicated that Petitioner's shooting arm and gun were other than in an horizontal position. (Exhibits A and B) They were all fired at very close range –the fatal shot was 1-2 inches from his right ear- with shots 2 and3 fired in contact with the Senator's jacket or very (1/2 inch) close leaving powder burns on his jacket near the right armpit and a fourth shot going through the shoulder

pad of his jacket, not touching his body. Aside from the host of witnesses who independently contend that Petitioner was always in front of the Senator, when his hand was pinned to the steam table after he fired his second, or, at most, third shot, when the first shot was likely the one which grazed the forehead of Paul Schrade (also in front of Petitioner near the Senator) there is no way he could have been in a position to fire four shots at close range, from behind and below the target.

Petitioner respectfully submits that if this evidence had been presented at the trial in conjunction with the findings of the Medical Examiner in his report (PSB Exhibit 1) there is no way that a conviction would have resulted. It was never developed by either the prosecution or the defense and, consequently, must be regarded as new evidence of innocence available to be tested at a new trial or an evidentiary hearing.

CONCLUSION

Petitioner's gun hand was pinned to the steam table after the second shot. In addition, intervening individuals were all over him rendering it impossible for him to have fired the number of shots fired at the Senator from the position he was in.

3. The Undeveloped Evidence in the Autopsy Report and Related Ballistics

Respondent contends that any evidence pertaining to the substance of the Autopsy Report is not new since it also was presented at trial. (RSB at 8) Once again, this contention ignores what testimony was elicited and what evidence the Judge and jury actually heard at trial. In this instance, as in others (*supra*) Respondent asks us to assume that an area of evidence is covered completely simply because it is touched upon by either the prosecution or the defense, or both, in peripheral fashion.

As a matter of fact, during his testimony at the trial, Dr. Thomas Noguchi was never shown or, asked about, the neck bullet he removed and marked on the base as "TN31". (maryferrell.org TR 4503-4535) The alleged bullet was entered into evidence by the prosecution as Exhibit 47 through the testimony of the LAPD'S Chief Criminalist De Wayne A. Wolfer ("Wolfer") (maryferrell.org TR 4128). So, it is extraordinary that the Medical

Examiner who removed it and turned it over to an LAPD Detective (Bill Jordan) was not shown the bullet for him to identify, before the jury, which was certainly necessary for chain of custody purposes.

When he testified before the Grand Jury and the Board of Supervisors (maryferrell.org RFK LAPD Microfilm Vol 122 p.300) he clearly identified the bullet he was shown based upon the mark he put on the base upon removal. It is material that whenever Dr. Noguchi was asked to identify the neck bullet he always did so based upon the presence of his marking. He was not interviewed by the Wenke Commission and so, did not have an opportunity to view the bullet they examined as being the neck bullet. At the trial, the primary proceeding in the case, the prosecutor in direct examination and the defense counsel in cross examination, uniformly, neglected to show him, or raise with him, the question of this evidence bullet (Exhibit 47) which was lodged in, and recovered from, the Senator's sixth vertebrae, even though he was asked to provide great detail about the range/proximity and angles of the three bullets which were fired at the Senator.

He said that each of the three shots, which hit the body of the Senator (a fourth went through the shoulder pad of his jacket without making contact with his body) were fired at very close range, from right to left, in an upward angle. The fatal shot was fired at a distance of 1-2 inches behind the right ear, from an upward angle of about 15 degrees, whilst the other two were discharged in contact or at most a1/2 inch distance back of the right armpit. Travelling upward, initially, in almost parallel paths, one- at a 30 degree angle- exited the body and the other –at a 35 degree angle- lodged in the sixth vertebrae, or neck. The two non fatal body shots showed gun powder deposits embedded deeply in subcutaneous tissue of both entry wounds and minute metallic fragments (maryferrell.org TR 4527-4532)

The evidentiary significance of this neglect has not been considered previously and will be set out below in Petitioner's discussion of the *Brady* and *Strickland* violations surrounding the conduct of the prosecution and his own conflicted defense counsel.

In his testimony before the Grand Jury, on June 7, 1968 Wolfer stated that he test fired the Petitioner's revolver -Exhibit 7- after receiving it on June 5. He said that he compared the neck bullet with a test fired bullet, from Petitioner's gun, and there was a

match. (maryferrell.org RFK LAPD vol. 97 p.75) He was not shown, or asked to identify, the neck bullet with the marking TN31 placed on it by the Medical Examiner.

At the trial Wolfer , testified at 9:20 AM on February 24, 1969, (maryferrell.org TR 4120-4428) and was used to enter into evidence all of the bullets and bullet fragments recovered from the Senator and the other victims. Amongst the bullets he identified was the State's Exhibit 47-the neck bullet which he did identify without referring, or being asked to refer, to any marking at the base. Hence, since Dr. Noguchi was never asked to identify, or anything else about Exhibit 47, even though he was the one who removed the bullet, there was, previously, no way of it being confirmed that the bullet, entered into evidence, as Exhibit 47, was in fact the one removed from the Senator's sixth vertebrae, by Noguchi, and then marked TN 31. We would subsequently learn that it was not.(see discussion *infra*)

Petitioner respectfully suggests that this omission is a material evidentiary deficiency and its presence is compounded by the failure of defense counsel not only to not pursue the issue and require authentication of the bullet –a key element of the State's case- but to stipulate the acceptance by the defense of the authentic identity of that bullet, and the other bullets and fragments, when the State's ADA Fitts, admitted in Chambers to the court that they were unable to provide a foundation for the bullets (*id* TR3967); hence the voluntary offer of stipulation by conflicted defense counsel Cooper. Three days later, all bullets are introduced, through Wolfer's testimony, by stipulation. (*id* TR 4129-4130). Thus,Wolfer is never asked to describe the bullets he examined or to confirm that the alleged Kennedy neck bullet he "matched" to Petitioner's test fired bullet bore the TN31 marking.

Petitioner's counsel not only stipulated to the admission into evidence of the forensic ballistic evidence which was the basis of the State's case, and which evidence the State knew might not be authentic, but did so without hiring his own firearms expert, conducting his own testing, or even (so far as the record indicates) requesting an opportunity to view the reports of the testing carried out by the prosecution.

Needless to say the stipulation also allowed for the admission into evidence of the bullets removed from Ira Goldstein (Exhibit 52) and William Weisel (Exhibit 54) which Wolfer stated also matched the neck bullet and Petitioner's gun. In other words, his

unchallenged conclusion was that bullets from Petitioner's gun, (People's Exhibit 6) and no other in the world, had struck the Senator a point blank range, with one ending up in his neck, and also hit two other persons several feet away from Petitioner. With respect to the concept of magic bullets, considering the fact that Petitioner's hand was pinned to the steam table after he fired his second shot (for both of which he had to reach around Karl Uecker, who was in front of him, to get off . (see Exhibits A and B) This renders Petitioner a shooting magician in his own right.

With the Court's indulgence (and without repeating the citations set out above) the significance of the TN31 bullet requires a brief recapitulation of its history. It was removed from the Senator's neck, marked TN31 but is booked into LAPD custody as item #53 through the Property Report with no described identifying markings even though there is a space on the LAPD Property Report for identification marks. This space is left blank for the Kennedy neck bullet, though filled in for the Weisel bullet, noting its identifying initials ("LMO"). Wolfer examines a bullet but does not note any markings, so there is no way of determining if the bullet he was examining was theTN31 bullet. TN31 next appears at the Grand Jury Hearing and is shown to Dr. Noguchi, who identifies it as the bullet he removed from the Senator's neck. Exhibit 47 is introduced at trial as the neck bullet but there is no confirming evidence that it is the TN31, bullet, either from testimony from Noguchi or Wolfer. Prior to its admission into evidence ADA Fitts concedes that the prosecution lacked foundation for the bullets and defense counsel willingly helps out by agreeing to stipulate to the authenticity of all ballistic evidence including, Exhibit 47- the alleged neck bullet.

Wolfer's testimony, on September 16-18, 1975 before the Commission of Judge Robert A.Wenke, which empanelled seven ballistics experts to re-investigate the firearms evidence, was revealing. Aside from being evasive and not recalling a number of actions he took,Wolfer is not asked to specifically identify the neck bullet (Exhibit 47) on the basis of the markings contained and as noted above Dr. Noguchi is not interviewed. Though Wolfer contends that he did fire the test bullets from Petitioner's revolver his contemporaneous daily log covering his activities from June 5 through June 19 reveals no such test firing having been conducted. (Exhibit D)

What does emerge is that the test shot envelope, containing three test fired bullets, dated June 6, with Petitioner's name, which Wolfer entered into evidence at the trial as Exhibit 55, contained the serial number of another gun he had obtained from the property room, H-18602, ostensibly for sound and muzzle distance testing since Petitioner's revolver, H-53725 was with the Grand Jury. This explanation is clearly not credible since a court order could have been obtained (and previously had been issued) to allow the tests and so, Petitioner submits, Wolfer must have had another purpose in bringing another, similar weapon into the frame, quite possibly (if the label on the Exhibit 55 test shot envelope is to be believed (and is not a bizarre clerical error) for producing test fired bullets.

As noted earlier, Wolfer testified, at trial, that he had matched Petitioner's gun with the neck bullet, Exhibit 47. He also maintained that he found similar matches of test fires from Petitioner's gun with the Goldstein (Exhibit 52) and Weisel (Exhibit 54) bullets. Petitioner submits that this forensic evidence, the acceptance of which was accomplished in collaboration with his own defense counsel after the prosecution candidly admitted they lacked the necessary foundation for the bullet evidence, was largely responsible for the jury decision to convict.

The Wenke Panel of Experts did not rule the possibility of a second shooter but did not find evidence, in their work, to confirm it. The Panel explicitly contradicted Wolfer's findings, unanimously rejecting them and concluding that they could not match test fired bullets from Petitioner's gun-H-53725- with the Kennedy neck bullet, or the Goldstein and Weisel bullets. He was wrong on all counts, but this evidence has never been heard by a Judge or jury. Once again, Petitioner submits that if this evidence was put before a jury, no reasonable juror would vote to convict.

The Panel did, however, curiously, conclude that the bullets from all three victims were fired from the same gun – though not that of Petitioner.(Exhibit E)

How can this be? What does this mean? The picture becomes clearer and more pieces fall into place when it becomes incontrovertibly evident that a substitution of bullets must have taken place.

In producing the inventory for the Wenke Panel report, Panel member and Administrator, Patrick Garland, described the Kennedy neck bullet provided to him by the court clerk (Peoples Exhibit 47 in evidence at the trial) as follows:

"Contents:

1 copper colored coated bullet, hollow point ID mark "DW"(base) "TN" (base) (Exhibit F)

Petitioner submits that this extraordinary contradiction means that the bullet in evidence at the trial which was removed from the body of Senator Kennedy, which was testified to as being matched with Petitioner's gun, resulting in his conviction, was not, in fact, the Kennedy neck bullet which Dr. Noguchi testified that he had removed before the Grand Jury and the Board of Supervisors. "DW" "TN" was not the mark he placed on the base. Thus, it is irrefutable that the prosecution's case against Petitioner is completely undermined and must fall away.

Additionally, if this were not enough, the Panel's report lists the Goldstein bullet it received from the court clerk (Exhibit 52) bearing the mark on the base of "6" when an "x" was placed on the base by Dr. Max Finkel after removal in the hospital. (*id*)

Petitioner submits that pursuant to this Honorable Court's Order that there be a full briefing on all of the evidence related to factual innocence. For the first time in the long history of this case it has been possible to provide new evidence. With respect to the facts set out above it appears to be undeniable that a fraud has been committed upon the court, in the absence of which it is more probable than not that no reasonable juror would have voted to convict and no jury would have convicted.

It is clear that the prosecution's Chief Criminalist lied to the jury when he identified Exhibit 47, which was before them, as the bullet that the Medical Examiner removed from the neck of Senator Kennedy. He also lied when he said there was a match between that bullet, as well as bullets in Exhibits 52 and 54, when such a match was impossible as the Wenke Panel of Experts confirmed. The prosecution had to know that there had been a substitution of bullets in evidence but it is not Petitioner's responsibility to explain how this was arranged. Petitioner only knows that a second gun –since destroyed so

it could not be test fired- was brought into use by the LAPD 's Wolfer and it appears that three bullets from the same gun may have been substituted for bullets removed from three of the victims.

Petitioner has spent 43 years in prison as a result of this fraud. The seriousness of the fraud upon the court requires in the interests of justice that this verdict should be set aside and Petitioner should be set free, or minimally, given the opportunity through a mew trial or an evidentiary hearing, to test all of the new evidence set out herein.

CONCLUSION

No match was ever made between Petitioner's gun and the neck bullet removed from Senator Kennedy. Similarly, no match was between Petitioner's gun and the Goldstein and Weisel bullets in evidence (Exhibits 52 and 54 respectively). The Kennedy neck bullet ("TN 31") was never introduced into evidence having been substituted for by another bullet ("DW" "TN") which became People's Exhibit 47. Similar substitutions for the original bullets were effected with People's Exhibits 52 and 54. These substitutions amounted to a fraud upon the Court.

4. Petitioner Was Subjected to Extensive and Sophisticated Hypno Programming and Mind Control Rendering Him An Involuntary In The Crimes With Which He Is Charged

In the instant case Respondent refers to the in depth, scientifically based opinion of Dr Daniel Brown, regarding Petitioner's state of mind the night of the assassination of Senator Robert Kennedy as "Petitioner's fantastic hypnotic automation theory" (RSB at p.11) and continues to ridicule the concept of hypno-programming and mind control throughout their brief, while offering no solid scientific evidence to back up their claims.

Respondent would like this Court to believe that hypno programming/mind control is a concept that has no credence in the scientific field and that Dr Brown's opinion

"has no support among most of his peers." (*id.* at p13.). Nothing could be further from the truth.

Respondent has failed to properly address, and tries to dismiss hypno programming/ mind control as "these fantastic, scientifically-dubious, and self-serving theories" (*id.* at p 11.), when in fact, they are practices which date back over a century and contrary to Respondent's claims, are widely accepted in the scientific field.

Respondent refuses to acknowledge that hypno programming /mind control is not fiction but reality and has been used for years by the U.S. Military, Central Intelligence Agency and other covert organizations. According to Alan Scheflin, a world renowned expert in the field of mind control/ hypno programming, research has been conducted to create multiple personalities for mind control purposes since the early 1940s and "by the early 1950s, research was underway throughout the government to find any means possible to influence a person's thought and conducts.") (Exhibit G, Declaration of Alan Scheflin at p 3-4.). Though the practices of hypno programming/ mind control is hardly new, the public has been shielded from the darker side of the practice. The average person is unaware that hypnosis can and is used to induce antisocial conduct in humans. According to Scheflin, "People who disbelieve, as I once did, the possibility, under certain special circumstances, of enhanced control of the mind do so because (a) they sensibly fear, and thus do not want to accept, the idea that it is possible to control the mind of another person, and (2) they are unfamiliar with the extensive overt and covert scientific literature on this controversial topic. However, those of us who for several decades have studied the scientific research on mind control, and studied the literature on brainwashing, have become reluctant believers." (*id* at p.5) Respondent states that a "…broad consensus" exists in the scientific community that "hypnotized persons retain ultimate control over their actions." (*RSB* at p 12.) yet fails to offer any scientific evidence to support that claim. According to Dr. Brown, "In this *post-Daubert* era to establish "broad consensus" would necessitate that the respondent base opinions about "broad consensus" on appropriate statistical procedures, namely a random sampling of the relevant scientific community about their opinions about hypnotic undue influence with a known methodology, and appropriate statistical procedures

to minimize the error rate." (Exhibit H at p. 7 referring to the case of *Daubert v Merrell Dow Pharamceuticals, Inc.* 509 U.S. 579, [1993]) Respondent's cited "experts" consist of a British author, an APA media release and the sole opinion of a British researcher, Wagstaff, who represents one school of thought on hypnotic effects. (*RSB* at P 12-13.)

None of Respondent's cited "experts" offer a declaration to back up their opinions and when Respondent cites an APA media release " Hypnosis makes it easier for people to experience suggestions, but it does not force them to have these experiences." (*id.* at p 12-13.) Respondent conveniently omitted the next line of the same media release "**unless amnesia has been suggested people remain aware**...". (emp. added) Respondent gives the court a different impression by failing to cite the entire passage. The entire meaning of the media release conveys that certain individuals, through certain hypnotic suggestions, will engage in acts outside of their perceived control and or awareness. Respondent's convoluted use of their experts' opinions is discussed in detail below in the Declaration, hereto, by Harvard psychologist, Dr. Daniel Brown. (Exhibit H).

Multiple studies, as far back as the 1890s, have illustrated that hypnosis can and is used to induce antisocial conduct in unknowing individuals. Professor G. Stanley Hall of Clark University conducted extensive hypnosis experiments at John Hopkins and stated his results " leaves no shadow of doubt that a hypnotic subject can be made an unconscious and innocent agent of crime." (EXHIBIT G at 9, quoting Bell, "Hypnotism in the Criminal Courts," 13 Medico-Legal Journal, 351, 353 (1895)). In the 1920s, Dr. George H. Estabrooks, who is considered to have conceived the concept of the "Manchurian Candidate", while working at Harvard University, began conducting experiments using hypnosis to create multiple personalities. In the 1930s Estabrooks worked with the U.S. military. In a bibliography found in the Colgate University Archive Files, he states "I became involved in the military applications of hypnotism and spent my efforts in the field where publication was frowned upon." (*id* at p 13.). In 1968 in an interview with the Providence, Rhode Island *Evening Bulletin* (May 13, 1968) **Estabrooks, not only admitted to being a consultant for the FBI, the army and the CIA but stated that the possibility of hypnotic-**

spies "is not science fiction.... This has and is being done. I have done it". (*id* at 14 emp.added)

Further studies showing that mind control/hypno programming and "coercive persuasion" **can be and are used to induce anti-social acts and amnesia** are discussed in detail in both the Brown Declaration (Exhibit H) and the Scheflin Declaration (Exhibit G). Both Declarations strongly refute the Respondent's premise that "hypnotized persons retain control over their actions and, thus, cannot be programmed through hypnotism to commit antisocial acts against their will." (RSB at p 12.)

Respondent states that "Brown's Declaration is hardly reliable" (RSB at p13.) and "not based on an exact science." (*id* at 12) yet since the *Daubert* case, contemporary forensic psychological assessment strives to meet an acceptable standard of scientific reliability and Brown's detailed description of all the standardized tests he used while interviewing Petitioner, certainly meets that requirement of reliability. (PSB AT 2-7)

Respondent states that Dr. Pollock, the prosecution expert at the time of the trial, found "no evidence of a dissociative state at the time of the shooting," (RSB at p13.) but fails to elaborate upon the reason for such a mis-diagnosis. Today, there are a "...combination of generally accepted, empirically-derived standardized structured interviews, normative self-report and actuarial tests, independently compared to accumulative evidence from medical records as the best approach to achieve incremental validity (reliability in the legal sense). (Exhibit H, at1)

These tests are new and therefore were not available at the time of trial. If they had been available, any impartial assessment by the prosecution and the defense would most likely have drawn the same conclusions as did Brown; the Petitioner had/has both a dissociative coping style and a dissociative disorder making him highly susceptible to hypno programming/mind control and/or coercive persuasion.

Respondent's claim that Brown "purports to be able to render opinions with surprising certainty about Petitioner's state of mind in 1968 based on interviews and examinations between 2008 and 2010" (RSB at p13.) once again, shows Respondents one sided view of the evidence presented. Respondent conveniently overlooks all the data Brown

relied upon -the lists of documents, (the complete LAPD and FBI documents including the Corona Police Report), (maryferrell.org at 605-607) all eyewitness statements of those witnesses in the pantry at the time of the shootings and a recent interview with Juan Romero, the person closest to the Senator at the time of the shooting, as well as reading all the prior psychological tests performed on Petitioner from the date of his arrest through the recent psychological exam performed at by a psychologist at Pleasant Valley State Prison. Respondent's claim is simply false and mis-leading.

Robert Kaiser, the journalist closest to the defense team believed that the Petitioner was hypno-programmed and so did Dr. Simson –Kallas a psychologist at San Quentin prison when the Petitioner arrived there. Dr.Simson–Kallas, was asked to interview the Petitioner by the supervising psychiatrist because the supervising psychiatrist did not find any evidence to support both defense and prosecution experts' opinions of paranoid schizophrenia in the Petitioner. Based on what the supervising psychiatrist saw as a mis-diagnosis by both defense and prosecution experts, he specifically asked Dr.Simson–Kallas to conduct a careful and extensive evaluation of the Petitioner. After many hours interviewing the Petitioner, Dr. Simson–Kallas not only concluded that there was no evidence whatsoever for schizophrenia, he also concluded that the Petitioner might have been programmed. (Exhibit H)

Petitioner's other expert, Alan Scheflin, actually spoke with Dr. Simson–Kallas on the topic of Petitioner being a "perfect choice for being a programmed hypnotic patsy." (Exhibit G at p 28.) When asked to elaborate, Scheflin notes that Dr. Simson–Kallas commented, that he became curious because Sirhan was unable to remember details of the crime, unlike most killers he interviewed. He said that Sirhan's description of the events appeared artificial, as if he was "…reciting from a book." His description was more that of a person who dreamed an event than that of a participant. Dr. Simson–Kallas told Scheflin, Petitioner "…was put up to draw attention while experts did the work. Being an Arab, he would be easily blamed. He was programmed to be there. He said to me that he actually liked Kennedy, that he held no animosity towards him." (*id.* at p29.)

Dr. Simson–Kallas was the only psychologist that had no affiliation to either the defense or the prosecution,who interviewed/examined the Petitioner around the time of the crime and his findings support those of Dr. Brown. (See Exhibits H and G.)

Respondent cites the *Griffin* case, saying "…it is clear that the mere presentation of new psychological evaluations… does not constitute a colorable showing of actual innocence" (RSB at p 12.) but the difference between *Griffin*) and the present case is, that in *Griffin,* no psychological evidence was offered or relied upon by the defense team, whereas in the instant case Petitioner's conflicted defense team centered their whole case on Petitioner's mental state and then, lead Counsel, Grant Cooper chose not to introduce said evidence. Both the defense and prosecution believed that the Petitioner was highly hypnotizable and both Dr. Pollack and Dr. Diamond hypnotized the Petitioner numerous times while the Petitioner was held at the Los Angeles County Jail awaiting trial. Dr. Diamond went as far as having Petitioner perform whilst under hypnosis ie climbing the bars of his cell (February 8, 1969) or sticking a pin in his hand.

Respondent states: "Dr. Bernard Diamond, who had hypnotized Petitioner on numerous occasions prior to trial, advised defense counsel that 'the jury would not believe that Sirhan had been hypnotically programmed to kill.' " (*id* at p13.). This statement strongly suggests that the defense team, having witnessed Petitioner under the effect of hypnosis, on numerous occasions, believed that he might, in fact, have been hypno programmed, but due to his conflict of interest, the extremely compromised lead defense counsel Grant Cooper, as discussed *infra*, chose not to pursue this line of defense.

Respondent claims that "no reasonable juror would have believed these fantastic, scientifically-dubious, and self serving theories" (*id.* at 11.) yet if a "reasonable juror" had been properly educated/informed by defense counsel, with respect to the available literature concerning crimes committed under hypnosis, as of that date, and, further, had been instructed that The American Law Institute's *Model Penal Code,* section 2.01 **(1962**

emp.added), states that there can be no criminal liability if there is no voluntary act. Acts which are not considered voluntary include **"conduct during hypnosis or resulting from hypnotic suggestion."** (ALI, *Model Penal Code,* section 2.01(2)(c) **(1962** emp. added)

Thus, an hypnotic subject, acting under the control of a malevolent hypnotist, engages in involuntary conduct which cannot be considered criminal because there is no voluntary act, no *actus reus.* Petitioner believes, if properly instructed, a "reasonable juror" would have had to consider the absence of his voluntariness with respect to the crimes committed on that evening and therefore, no reasonable juror would have voted to convict him.

Petitioner further believes that under the *Schlup* ruling, as discussed *infra,* the new exculpatory evidence regarding the involvement of the CIA, U.S. Military and U.S. Government in overt and covert experiments with hypno programming/mind control and coercive persuasion, released under the Freedom of Information Act and obtained by Professor Scheflin, and others, would be evidence that a 'reasonable juror' would both understand and consider at a new trial or an evidentiary hearing.

CONCLUSION

Petitioner was an involuntary participant in the crimes being committed because he was subjected to sophisticated hypno programming and memory implantation techniques which rendered him unable to consciously control his thoughts and actions at the time the crimes were being committed.

2. PETITIONER HAS SUFFERED NONHARMLESS CONSTITUIONAL VIOLATIONS OF HIS RIGHTS UNDER *BRADY V MARYLAND* 373 U.S. 85 (1963) AND *STRICKLAND V.WASHINGTON* 466 U.S. 668 (1984)

A. The Brady Violations

Petitioner agrees that the *Schlup* gateway requires any new evidence to be accompanied by nonharmless constitutional violations. Where a federal habeas court is confronted *both* with a claim of new evidence of innocence *and* allegations of nonharmless constitutional error, its desire to respect the finality of state court criminal judgments should be at its lowest. Cf. e.g., *Calderon v. Thompson, 523 U.S. 538,557 (1998))* "In the absence of a strong showing of actual innocence, the State's interests in actual finality outweigh the prisoner's interest in obtaining yet another opportunity for review". (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). At least one other circuit has held that "actual innocence" does in fact toll the statute of limitations. *Malone v. Oklahoma*, 100 Fed.Appx. 795, 797 (10th Cir. 2004)

Petitioner here presents both "new evidence of innocence" as well as allegations of "nonharmless constitutional error" sufficient to undermine this Court's confidence in the initial judgment of conviction and sentence. Petitioner also respectfully submits that since, here, the new evidence of innocence combines with his allegations of nonharmless constitutional error sufficiently to undermine the confidence in the original verdict and sentence, then his claim of "actual innocence" should serve as an exception to AEDPA's statute of limitations because the state's interest in finality is at a minimum in this case.

Throughout these *habeas* proceedings, Petitioner has consistently alleged several *nonharmless constitutional violations. Petitioner focused at length on two specifically in his Traverse before this Court: (1) the State's failure to disclose exculpatory ballistics and* autopsy evidence, a violation of Petitioner's due process rights under *Brady v Maryland*, 373 U.S. 83 (1963); and, (2) violation of petitioner's Sixth Amendment right to effective assistance of counsel under *Strickland v Wahington,* 466 U.S. 668 (1984). Rather than rebutting Petitioner's *Brady* and *Strickland* allegations, Respondent instead seems to

have argued that Petitioner suffered no prejudice because Petitioner confessed at trial and that Petitioner has not been able to definitively prove the presence of a second shooter. Instead of merely repeating previous allegations of *Brady* and *Strickland* violations, Petitioner recounts them here to demonstrate how the *Brady* and *Strickland* violations combined with hypnotic programming and Petitioner's high level of suggestibility to produce a false confession.

1. Petitioner Was Denied His Right To Due Process Under *Brady* Because The State Knowingly Introduced Into Evidence a Bullet It claimed Had Been Removed From the Neck Of Senator Kennedy And Withheld The Actual Neck Bullet From The Petitioner and The Judge And Jury

The first *Brady* violation derives from the state's failure to disclose a bullet recovered from Senator Kennedy's neck. According to the autopsy report, Dr. Noguchi extracted a bullet from Senator Kennedy's neck, marked the base of the bullet "TN 31" "for future identification," and gave the bullet to Sergeant Jordan of the LAPD.(see PSB Exhibit1 Medicoolegal Investigation on the Death of Senator Robert F. Kennedy, Thomas T. Noguchi, M.D., 24.) In his testimony before the Grand Jury, Dr. Noguchi is shown a bullet for identification, states that it is the bullet he recovered from Senator Kennedy's neck, and specifically mentions that it bears the "TN 31" mark he placed on it. (See discussion *supra* and Ex. 15, p. 22, to Petition for Writ of Habeas Corpus, May 25, 2000, Grand Jury Transcript.) At Petitioner's trial, People's Exhibit 47 was offered and received into evidence as the bullet recovered from Senator Kennedy's neck. At that time Wolfer, testified that he had achieved a ballistics "match" between a bullet Wolfer test-fired from Petitioner's revolver and People's 47, the bullet recovered from Senator Kennedy's neck. (TR 4129-30.)

As noted earlier, Dr. Noguchi was never shown or asked to identify People's 47 at trial. In 1974, Dr. Noguchi appeared before the County Board of Supervisors and is shown a bullet. He identified it as the one that he removed from Senator Kennedy's neck and again states that it bears the "TN 31" mark on the base of the bullet. (See earlier discussion *supra*) In 1975, Superior Court Judge Robert A. Wenke (as noted earlier) appointed a panel of seven experts to review Wolfer's conclusions. As a condition of the panel investigation, the court required Wolfer to certify that the bullets to be placed before him in court were the ones he examined in 1968. One of the experts, Patrick Garland, examines the bullet Wolfer certified as the Kennedy neck bullet, and observes that the base of the bullet is mark "DW" "TN" on the base, not "TN 31." (See *supra*, Inventory Incorporated in Court Order # 2.) Petitioner has confirmed, for the first time, that Garland received the "DW" "TN" neck bullet, certified by Wolfer, from the clerk of the trial court. (Exhibit F)

Thus on at least three separate occasions-the autopsy report, his Grand Jury testimony, and his appearance before the County Board of Supervisors in 1974-Dr. Noguchi identified the bullet he extracted from Senator Kennedy's neck by reference to the "TN 31" mark he put on the base of the bullet. Conversely, Wolfer was never asked to describe the bullet he examined at trial, and when he was asked to identify the bullet as the one he "matched" to Petitioner's gun in 1975, the bullet bore the markings "DW" "TN." The only reasonable inference is that the bullet thus disclosed to the defense as the Kennedy neck bullet and introduced at trial as People's 47 was marked "DW" "TN," yet the Dr. Noguchi's autopsy report, testimony before the grand jury, and appearance before the county board of supervisors demonstrates that the Kennedy neck bullet was marked "TN 31." Consequently, it is apparent that the real "TN 31" bullet that Dr. Noguchi Removed from Senator Kennedy during the autopsy was never disclosed to the defense in violation of *Brady*, but even more

serious, Petitioner respectfully submits that a fraud was perpetrated upon the court since the real Peoples Exhibit 47 was also withheld from the Judge and Jury.

Is this fraud, leading to a miscarriage of justice the responsibility of the LAPD? Is the District Attorney's office blameless? In such a situation the law is clear. The prosecution is a single entity for Due Process purposes. *Gilio v. United States,* 405 U.S. 150,154, 92 S. Ct. 763, 766 [1972] As the Supreme Court noted in *Gilio, supra*: "As long ago as *Mooney v. Holohan*, 264 U.S. 103, 55 S.Ct. 340, 342, 79 L Ed.791 (1935), this court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas,* 317 U.S. 213, 63 s. Ct. 177, 87 L.Ed 214 (1942). In *Napue v Illinois,* 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed 2d 1227 (1959), we said, '[t]he same result obtains when the State, although not soliciting false evidence, allowed it to go uncorrected when it appears. *Id*, at 269, 79 S.Ct. 1177. Thereafter, *Brady* at 1197, held that suppression of material evidence justifies a new trial, 'irrespective of the good faith or bad faith of the prosecution. See also, *Gilio v. United States, supra,* 405 U.S.153.

Respondent lamely attempts to characterize this seriously illegal effort as amounting to a " potential discrepancy" in the markings (RSB at 17) which is absurd in light of the following: the initial booking of the evidence bullet into the LAPD Property Room with the identifying characteristics space left blank; the failure of Dr. Noguchi being asked to identify the Peoples 47 at trial and, subsequently, by the Wenke Panel; and also the fact, as Respondent acknowledges, that Wolfer was also not asked to publicly identify the markings in any forum where he testified, including the trial. No, it is clear that the real Exhibit 47 was knowingly suppressed and never introduced into evidence and the underlying reason for the

suppression, in violation of Brady, as the Wenke Report, makes clear, (Exhibit E) was that the bullet removed from the Senator's neck could not be matched to Petitioner's revolver.

2. The State Withheld And Destroyed Evidence That More Than Eight Bullets Had been Found At the Scene

The bullet removed from Senator Kennedy's neck is not the only piece of ballistics evidence that the state suppressed in violation of Petitioner's due process rights under *Brady*. Specifically, the state also suppressed evidence that more than eight bullets were recovered at the scene, which evidence, it must be noted would support Phil Van Praag's examination and analysis of the Pruszynski tape recording which concluded that 13 bullets were fired at the time of the assassination.(*supra*). Though it is not necessary to enumerate them here (they are set out in Exhibit I) there is a long list of independent eyewitnesses, some like FBI agent William Bailey, and LAPD Officers Charles Wright and Robert Rozzi, who had investigative training, and who observed the existence what appeared to be additional bullets in the pantry door jambs and the ceiling tiles. Both of these repositories of physical evidence were destroyed by the LAPD on June 28, 1969 before Petitioner's appeal had run its course. Bailey, the first FBI agent to arrive on the scene, gave a written statement dated November 14, 1976, in which he wrote: "I...noted at least two (2) small caliber bullet holes in the center post of the two doors leading from the preparation room. There was no question...that they were bullet holes and not caused by food carts or other equipment in the preparation room."(*id*) LAPD's Officer David Butler's recantation of his earlier politically incorrect admission to writer Moldea about seeing Wolfer extraxt bullets in the pantry (the original statement was given to Dan Moldea) is not surprising given the position of his Chief, Darryl Gates who in late August, 1975 admitted that the

LAPD destroyed ceiling panels, containing three bullet holes and xrays and records of the xrays, as well as the door jambs, because he believed that they "…proved absolutely nothing." (maryferrell.org Wenke at 50).

On August 21, 1968, also before Petitioner's appeal had run its course, the LAPD destroyed 2,410 photographs, some of which may well have shown the existence of exculpatory bullets, without turning over copies to the defense as another clear violation of *Brady*. Presumably, these also' proved nothing' but under *Brady* copies should unquestionably been provided to Petitioner for his examination. (*id,* Exhibits to Request to the Los Angeles County Grand Jury at 429.)

Suffice it to say that none of the bullets, photos, ceiling tiles, or wood panels recovered at the scene were ever disclosed to defense counsel; a clear violation of Petitioner's Due Process rights under *Brady*.

3. The State Withheld From the Defense and Then Destroyed The Second Gun H 18602 As Well As Well AS Test Fired Bullets From Said Pistol Which Were Available At the Time of Trial

It is accepted fact that Wolfer placed some test fired bullets in an envelope which he labeled "H18602". This test firing allegedly took place on June 6. (see discussion *supra*)Wolfer contended –although his log does not support this contention- that he test fired Petitioner's gun on June 5. The reason behind this second test firing has never been explained.

Wolfer's statement that this was a clerical error is incredible. In addition, there were test bullets obtained from an earlier test firing of H18602 by Officer Druly on March 22, 1967, (Board of Inquiry Transcript at 9) [a Board of Inquiry was convened by the LAPD

to investigate charges of misconduct by Wolfer]. Thus, there were in existence test fired bullets from that revolver at the time of trial. It does not appear that the Wenke Panel of Experts were ever provided with these bullets or even advised of their existence.

There has never been a satisfactory reason given for the bringing of this weapon into the proceedings.Wolfer's claim that Petitioner's gun was with the Grand Jury and unavailable is not credible. The prosecution had already obtained an Order on January 14, 1969 allowing them to have access for another reason (TR 701-702). Wolfer could easily have obtained an Order for his purported purpose. His contention that he did not get the gun until June 10 is also belied by the fact that he put the test fired bullets in the envelope marked 'H18602', dated June 6.

As to its continued availability for defense inspection Wolfer testified on February 24, 1969, at the trial, that the gun was still available even though he knew it had been destroyed in July, 1968 as reflected in the official records. (LAPD Property card for H18602.) The LAPD later contended that it had not been destroyed until July, 1969. What is relevant, for *Brady* purposes is the fact that this gun, and bullets from this gun which became involved in the prosecutors' case were withheld from the defense and ultimately were thus not available for the defense to conduct its own firearms tests.

It is not for Petitioner to be able to explain all of the inconsistencies associated with this weapon, but it was Petitioner's right to have been able to examine this weapon and the bullets it produced. The deprivation of this right, particularly in light of the irrefutable substitution of bullets by the prosecution (discussed *supra*) renders this *Brady* violation especially heinous.

4. The State Prejudicially Delayed Turning The Autopsy Report Over To The Defense

In addition to the ballistics evidence that the state never disclosed, the State also failed to disclose the autopsy report in a timely fashion. Petitioner's trial commenced on January 7, 1969, and the jury was sworn February 5, 1969. As recently as December 23, 1968, the record affirmatively discloses that defense counsel had yet to receive a copy of the autopsy report. (TR 154, 159.) There is no evidence in the record that the autopsy report was ever disclosed to the defense. Defense investigator Robert Kaiser, however, did write a memo to lead defense counsel Grant Cooper on February 22, 1969 (two days prior to the testimony of the report's author, Dr. Noguchi), pointing out that the autopsy defined the muzzle distance as being between one and two inches. (Ex. E, PSB Declaration of Robert Kaiser, 1 ¶ 2.) According to Kaiser's declaration, it was his routine practice to do things right away and that he would have written this memorandum either on the day he received the autopsy report or at the latest two days after receiving it. (*id.* at ¶3.) The only reasonable inference is that the autopsy report was disclosed to defense counsel no earlier than February 20th, 1969, fifteen days into a trial where the defense had already committed to a strategy of conceding guilt and arguing diminished mental capacity to the jury in the hopes of securing a lesser sentence.

There is every reason to believe that if Petitioner had received the Autopsy Report when it became available to the prosecution , which Petitioner believes was in September of the previous year, instead of some five months later, that its revelations about the four shots being fired at close range in upward angles, behind the Senator, with the death the fatal shot being fired 1-2 inches behind his right ear, he might not have agreed to the plea being pushed upon him by his conflicted defense counsel. In such circumstances, timing becomes a substantive consideration with delayed evidence becoming the equivalent of

evidence denied, since it was not made available to Petitioner when he required a0nd when, under *Brady* he was entitled to have it; prior to making a decision to plead guilty.

5. The State Suppressed Destroyed and Thus Denied To Petitioner The Results Of The Blood Test Taken On The Night Of The Crime

It is an accepted fact that Petitioner had four alcoholic drinks on the night of the crime, shortly before their commission. After being arrested he was subjected to blood test designed to ascertain the level of alcohol in his blood. This, of course, along with the degree of hypno programming and the use of any chemicals therefore (discussed by Dr. Daniel Brown *supra*) is relevant in terms of his state of mind.

Due Process, under *Brady* requires that such test results be preserved and made available to Petitioner. Good faith with respect to the destruction of such exculpatory evidence, should require that law enforcement policies ensure that no potential harm is being done by the elimination of the report, and certainly, that the defendant receives a copy in advance of the destruction. *People v. Hitch,* 12 Cal. 3d 642 (1974). Here, we have administration of bad faith. It is clearly not acceptable for the Respondent to claim inadvertence or routine practice. Such interference is particularly offensive in this case.

Petitioner is entitled to know which tests were performed on his blood and urine and the results of those tests, the dates on which the result reports were destroyed and the reason for such destruction. The materiality of blood test results in this case is beyond doubt. for *Brady* purposes and also had a significant impact on his situation and state of mind. The results could well have provided physiological support for a claim of unconsciousness .

A motion for the dismissal of charges was in order but not made. Minimally, Petitioner is entitled to an evidentiary hearing in order to have answered his questions with respect to these tests.

CONCLUSION

The litany of *Brady* violations, suffered by Petitioner in this case is overwhelming. It constitutes a massive breakdown in the provision of Due Process which was precisely what the *Brady* court sought to prevent. Any one Of the five violations (*supra*) in and of itself would be sufficient to require an evidentiary hearing if not a re-trial. Taken together, Petitioner respectfully submits they constitute such a gross miscarriage of justice, well beyond what was anticipated or required by *Schlup* .

The severity of Due Process denial in this case requires that the verdict and sentence be set aside.

B. Petitioner Was Denied His Right To Effective Assistance Of Counsel Pursuant to The Sixth And Fourteenth Amendment And Under *Strickland*, As A Result of Defense Counsel's Conflict of Interest and Or Incompetence, Which Resulted In Multiple Harmful Acts And Omissions By Defense Counsel, Resulting In A Miscarriage Of Justice Being Suffered By Petitioner

1. Lead Counsel's Conflict of Interest

Grant Cooper, one of the nation's most prominent criminal defense attorneys agreed to take on the defense of Petitioner on a *pro bono* basis after being solicited by Robert Blair Kaiser, a writer, who had been a client of Cooper. Kaiser would become a member of the defense team. Cooper had been president of the LA Bar Association, and the American College of Trial Lawyers as well as a prosecutor for six years at the LA County district attorney's office. He went on to build a very successful criminal defense practice.

His one condition, for taking the case, was that Petitioner's case be postponed until after a case he had taken on involving card cheating at the Friars Club in Beverly Hills. He estimated that would be sometime in September. In that case Cooper was defending Maurice Friedman, a Las Vegas hotel and casino developer who, with four others, had been charged in federal court with a five year long conspiracy to cheat wealthy members of the exclusive They had fixed gin rummy games by sending electronic signals to certain players from peepholes in the ceiling. The victims included a number of Hollywood celebraties. One of the defendants was Johnny Roselli, a notorious mobster, who, when he learned about the scam, insisted on being cut in. It has been well established that Roselli had also been a CIA operative involved in the Agency's efforts to kill Fidel Castro.

Cooper's proximity to Roselli is troubling.

Cooper agreed to take Petitioner's case subject to another attorney coming on to handle the motion work in the early phases. On June 11 Petitioner signed a retainer for Cooper who would bring on Russell Parsons as associate counsel.

Parsons' investigator was one Michael McGowan a former LAPD officer who resigned from the force in 1965 after being arrested for theft and tampering with the U.S mail. He received a five year sentence which was appealed by Parsons and on January 29, 1968 he was given three years probation, so, he was on probation when he became a member of the Petitioner's defense team.Writer Shane O'Sullivan indicates that whilst on probation, and in violation of the terms, he may have been still hiding a cache of stolen weapons. This was likely known by the LAPD (whose detectives confiscated a number of the weapons) who would then, obviously, be in a position to hold it over him. (*Who Killed Bobby,* Shane O'Sullivan, Union Square Press, NY/London p.194, 2008).

Petitioner's experience with McGowan has been unpleasant as he attempted to sell at auction confidential notes and drawings Petitioner thought he was writing for the use of defense counsel but which McGowan kept for his own personal use. Petitioner's current counsel had to obtain a court order blocking the sale. (*Sirhan Bishara Sirhan v. Michael McGowan, cv 00-5686-CAS,* 2011).

Then, Grant Cooper's conflict arose as he found himself in difficulty for the first time in his career. He was charged with illegally obtaining a transcript of the Grand Jury testimony which was spotted lying on his counsel table in the courtroom on July 23, 1968. It emerged that he was given the stolen transcripts by another lawyer in the case. Soon, he had an indictment hanging over him as he proceeded to represent a mob front man and, behind the scenes begin to prepare to represent Petitioner with the pending indictment, and his future, in the hands of the prosecuting Task Force chief, U.S. Attorney, Matt Byrne. So, Petitioner's defense team with lead counsel under indictment , with a decision on his fate to be made at a future date, and its chief investigator on probation, was not off to a very auspicious .

Initially, on August 2, Petitioner pleaded not guilty to murder and intent to commit murder. On October 14, in order to accommodate Cooper's involvement in the Friars Club case Judge Herbert V. Walker put the trial date back to December. From outset it is clear that Cooper accepted the LAPD' s fix on the case and did not challenge them or become adversarial in any way (*id* at 205). Cooper, influenced by investigator McGowan's reports never questioned his client's guilt even though there were obvious issues raised by the Grand Jury testimony, a copy of which had been with them for months. He visited Petitioner for the first time on December 3 and stated that they were looking into pleading guilty in order to avoid the death penalty. Petitioner acquiesced having been convinced that

he was guilty as charged. On December 10, Cooper met with the prosecutors in what appears to have been a collegial discussion about the best way to implement the acceptance of guilt.Thus, only one week into the case Petitioner's lead counsel was already colluding with the prosecution, more interested in striking a deal than conducting an investigation of the facts surrounding the crime.

In setting out the specific acts and omissions of his lead defense counsel, *infra,* which Petitioner contends amounts to ineffective assistance of counsel under *Strickland,* thus violating his Sixth and Fourteenth Amendment rights, Petitioner will not repeat the internal citations set out *supra* which relate to the individual claims .

2. The First *Strickland* Violation: The Delayed Delivery Of The Autopsy Report

It is generally agreed that the Prosecution received the Autopsy Report from the Medical Examiner in September, but retained it, turning it over to the defense near the eve of trial. Considering the information it contained. in particular, the fact that the Senator had been fired at four times, at close powder burn range and from the rear, with all shots fired in an upward angle and three hitting his body, the report was explosively useful to the defense; if, that is, defense counsel was willing to use it.

Cooper was not. A motion for a mistrial based upon the surprise created by the prosecution's failure to turn over the autopsy report at a meaningful time was not made or even considered. Neither was a motion made for a continuance so that the results of the Medical Examiner's findings could be considered and discussed. Instead the defense stayed on track with its decision to accept guilt. It was a though the Autopsy Report, a primary piece of evidence was insignificant.

Petitioner was denied effective assistance of counsel because his

counsel disregarded the potentially favorable evidence in the report for the defense and deliberately refused to protect Petitioner's rights by seeking the assistance of the court in the face of the prosecution's inexcusable delay in making the findings available in timely fashion to his defense counsel. In effect, defense counsel collaborated with the prejudicial action of the prosecution to the detriment of Petitioner's defense.

3. The Second *Strickland* Violation: The Failure Of The State To Turn Over Prior To Destroying The Results Of Petitioner's Blood And UrineTests

Petitioner was undeniably entitled to receive the results of the blood and urine tests conducted with samples taken from him after he was arrested. They were not made available and in fact were destroyed by a process described as routine. In Petitioner's case this is a particularly harmful action because defense counsel was contemplating a diminished capacity defense to avoid the death penalty. Petitioner had four alcoholic drinks that evening and the test results could have been critically material to his mental condition and the degree of involuntariness of his actions.

In the absence of these test results the defense suffered a serious setback. Despite this reality and the arbitrariness of the decision to destroy the test results defense counsel Cooper did nothing. Here, again, he could have put a motion forward for a mistrial or a dismissal. Given Petitioner's inability to recall the shooting or the events immediately surrounding it, such test results could well have provided a physiological basis for this lack of memory. Not only did counsel not move for dismissal or a mistrial but he also neglected to put forward any other request for sanctions which could have, for example, produced an order precluding the prosecution from introducing evidence rebutting to Petitioner's claim of intoxication by alcohol or drugs. Such a motion should likely have been granted if it was made. It was not.

Petitioner was entitled to the information related to the results of such tests, the dates on which they were taken and the dates on which the samples were destroyed, as well as an explanation of the reasons for the destruction. The prejudice to Petitioner derived from this gross ineffective assistance is blatantly obvious. The prosecution's conduct amounts to one more example of the suppression of potentially exculpatory material evidence and Petitioner's counsel is once more on the sidelines allowing it to happen to the extreme detriment of Petitioner.

4. The Third *Strickland* Violation: Petitioner's Counsel Stipulated To The Admission Of the State's Ballistic Evidence Including The Substituted Neck Bullet –People's Exhibit 47- Without First Conducting Any Tests Of His Own, Or Examining The State's Test Results Record

An ineffective assistance of counsel claim has two elements: (1) that counsel' performance was constitutionally deficient; and, (2) that these deficiencies affirmatively "prejudiced" the defendant. (*Strickland*. at 687). In addressing the deficiency prong, the Supreme Court has stated that a convicted defendant "must show that counsel's representation fell below an objective standard of reasonableness." (*id.*, at 687-88). The Court declined to adopt "[m]ore specific guidelines" because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." (*id* at 688-89).

To complement the generality of the "objective standard of reasonableness" beneath which counsel's performance must fall in order to be considered constitutionally unreasonable, the Supreme Court stated in *Strickland* that "[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged

not to have been the result of reasonable professional judgment." (*id.* at 690). Petitioner has alleged a variety of specific acts or omissions of counsel that were not "the result of reasonable professional judgment," and in particular focuses here upon counsel's stipulation to the authenticity of ballistics evidence, specifically People's Exhibit 47, offered as the bullet recovered from Senator Kennedy's neck.

On February 21, 1969, in the middle of trial, defense counsel stipulated to the authenticity of bullets yet to be introduced. (TR 3967.) Specifically, defense counsel stipulated to the authenticity of what would become People's 47, which Wolfer testified was removed from Senator Kennedy's neck during the autopsy and which Wolfer claimed to have "matched" to a bullet test-fired from Petitioner's revolver. It may be that there is often little reason to question the authenticity of certain pieces of evidence, such as the state's ballistics evidence, and thus there may often be no error for counsel's failure to contest, or even counsel's acquiescence in the admission, of that evidence. But, with respect, this is not such a case where a strategic concession serves the defendant's interests because (1) the defense received no Corresponding benefit for its stipulation;(2) the stipulation was not based in fact and, (3) the decision was not made after a "thorough investigation."

No court has specifically held that corresponding benefit for the defense, the State's ability to admit the evidence even in the absence of the defense's stipulation, and a thorough investigation are requirements that defense counsel must meet so as to render effective assistance. Nevertheless, virtually every case rejecting counsel's stipulation to a piece of prosecution evidence as a basis for an ineffective assistance claim exhibits at least one of these three characteristics.

The notion that a stipulation is a "strategic choice" to the extent that defendant receives some sort of corresponding benefit is demonstrated by *Sanchez v. Hedgpeth,* 706

F.Supp.2d 963 (C.D.Ca. 2010). In *Hedgpeth*, the defendant had previously been convicted of committing a lewd act with a minor, failure to register as a sex offender, and attempted robbery. Defendant Sanchez was subsequently charged with, among other things, being a felon in possession of a weapon. At trial, in an effort to keep the jury from hearing negative facts about his prior convictions, defense counsel stipulated to the fact of the prior convictions but did not reveal underlying factual bases for them. On petition for a writ of habeas corpus, Sanchez argued this constituted ineffective assistance of counsel. The court rejected this claim, reasoning that "the stipulation greatly benefitted Petitioner by keeping facts about his prior conviction from being admitted into evidence." (*id* at 1004).

In contrast with *Hedgpeth*, Petitioner here derived no benefit from counsel's stipulation to the authenticity of the ballistics evidence, in particular People's 47. Conceding the authenticity of the ballistics evidence did not keep the jury from hearing negative facts about the petitioner, as in *Hedgpeth*. Nor did stipulating to the authenticity of the ballistics evidence allow the introduction of favorable evidence for the Petitioner, see e.g. *Little v. Murphy*, 62 F.Supp.2d 262, 276 (D.Mass. 1999) (counsel did not act unreasonably in stipulating to the admission of witness statements that both revealed prior bad acts of the defendant and impeached a prosecution witness). Lastly, this is not an instance where counsel declined to contest an obviously authentic piece of evidence in order to preserve credibility with the jury, e.g., *U.S. V. Gaskin,* 364 F.3d 438, 469 (2d Cir. 2004). Experienced defense attorneys routinely stipulate to undisputed facts in order to maintain credibility with the jury when challenging other aspects of the prosecution case. In the instant case Petitioner's declining to stipulate to the authenticity of the bullets would not have compromised counsel's credibility with the jury. Declining to stipulate to the authenticity of a piece of evidence is not comparable to actively contesting it. The latter requires affirmative

steps, through objections and/or presentation of rebuttal evidence. By contrast, withholding consent to an exhibit's authenticity requires only that counsel stand mute.(internal citations omitted)

In contrast to *Armontrout*, and *Gaskin*, where the stipulation was undisputed, in the instant case, the prosecution conceded that it could not establish a foundation for the bullets it was attempting to admit. (TR 3967.) Despite the concession from the State that the State was unable to authenticate a key piece of evidence, defense counsel saw fit to permit the State to introduce it, anyway.

Perhaps the most important point about defense counsel's stipulation is that it was not made after a reasonable investigation. When the State conceded to defense counsel that they could not authenticate the fatal Kennedy neck bullet, this should have raised an immediate red flag with defense counsel and caused him to investigate the situation. Instead, defense counsel conceded the authenticity of the State's key piece of evidence despite being on notice that it may not have been what the State claimed it to be.

Petitioner submits that a manifestation of ineffective assistance does not get much worse than this decision by his counsel, Grant Cooper, to stipulate not only to the admission of People's Exhibit 47 but to the entire array of ballistics evidence including Exhibit 52 (the Goldstein bullet, which also had a different marking than the one placed on the base by the doctor who removed it and Exhibit 55, the three bullets in the coin envelope produced by Wolfer and marked by him as coming from a second revolver (H18602) with no explanation as to the significance of that gun or the test fired bullets in the envelope.

Instead of going into detail in his cross examination about the range of discrepencies and unanswered questions concerning the ballistics evidence Cooper ignored the hard questions after he had volunteered to stipulate their admission. For example, in his

cross examination of the Medical Examiner who removed the neck bullet, during the autopsy, he deliberately did not ask the witness, who was the initial holder of the evidence in the chain of custody, to identify the bullet, which, as we know, he would not do because the bullet in evidence –marked "DW" "TN"- was not the one he had removed and marked "TN 31".

Gross ineffective assistance, on all fours with the *Strickland* criteria has been visited once again upon Petitioner.

5. The Fourth *Strickland* Violation: Petitioner's Counsel Failed To Conduct Any Investigation Of The State's Case Or Consider Any Alternative Defenses

In addition to rendering constitutionally unreasonable assistance by stipulating to the authenticity of the state's ballistics evidence, counsel also was ineffective in failing to investigate alternative defenses. Defense counsel in this case conducted zero investigation into the facts surrounding it, taking at face value everything that the State asserted. For example, after reviewing the ballistics evidence prior to Petitioner's trial, criminalist William Harper concluded that there was no ballistics match between Petitioner's weapon and the bullets recovered from Senator Kennedy and victims Weisel and Goldstein. Robert J. Joling and Philip Van Praag's book, An Open & Shut Case: How a "rush to judgment" led to failed justice in the Robert F. Kennedy Assassination viii (2008). When confronted with this evidence, lead defense counsel Grant Cooper did nothing except to continue with his trial strategy of conceding Petitioner's guilt so as to argue diminished capacity. Cooper was again confronted with evidence that the ballistics that Wolfer and the State claimed matched Petitioner's weapon to bullets recovered from Senator Kennedy and

other victims when the prosecution conceded that they could not establish the authenticity of that evidence. Not only did counsel decline to investigate this claim, but he actually made it easier on the State by stipulating to the bullets' authenticity. Yet a third example of counsel's failure to consider the alternative defense strategy that Petitioner did not fire the fatal shot is that upon belatedly receiving the autopsy report indicating that Senator Kennedy was shot from behind and that the gun that shot Senator Kennedy was no more than two inches away, defense counsel declined to move for a continuance to investigate and possibly alter his trial strategy.

In 1972, Cooper explained his decision not to investigate as follows:

> "I did not retain an independent ballistics expert to analyze the slugs... Had I any feeling that in a case of this importance, Mr. Wolfer either willfully falsified his ballistics analysis or negligently, improperly, or otherwise arrived at his conclusions, I would have hired an independent ballistics expert....Because of my firm belief that Sirhan alone fired the shots and that Mr. Wolfer was testifying correctly under oath I did not have the bullets independently analyzed." (*id.* at 64).

Putting aside for the moment the implausibility that this is probably the first time in the history of jurisprudence that a defense lawyer argued that a police officer would not negligently misrepresent evidence, the statement is entirely implausible on its face. Cooper had up to and during the trial at least three objective indicia that Wolfer had either negligently or willfully misstated his conclusions: First, there is Harper's conclusion that no match could be identified between Petitioner's weapon and bullets recovered from the victims; second, there is the State's representation that they would be unable to authenticate the bullets offered and accepted into evidence at trial; and third, there is the autopsy report, which, had Cooper read it and followed through, would have shown him not only that the bullet the State admitted as having been recovered from Senator Kennedy was not in fact so, but also that it was literally impossible for Petitioner to have shot Senator Kennedy.

Defense counsel's failure to adequately investigate the possibility of a second shooter goes well beyond his failure to hire an independent ballistics expert. As noted earlier, counsel failed to request even the most rudimentary pre- or in-trial examination of the bullet identification evidence, nor did he proffer any cross-examination of the State's presentation of the ballistics evidence. When determining if counsel's acts or omissions are constitutionally unreasonable, the Supreme Court has stated that the inquiry should be guided by reference to "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." (*Strickland*, at 690). In failing to make even the most basic investigation of the state's allegations against Petitioner, defense counsel failed to "make the adversarial process work in the particular case."

There is a relatively simple explanation for why Petitioner's trial counsel failed to "make the adversarial process work in the particular case." Discussed earlier was the problem faced by defense counsel Cooper who had a felony indictment hanging over him during Petitioner's trial. There can be no doubt that this conflict accounted for the extensive ineffective assistance he provided to Petitioner and the extraordinary assistance he gave to the State in the prosecution of their case against his client. It seems to have paid off for Mr. Cooper. After the conclusion of Petitioner's trial and death sentence, the Government withdrew the felony indictment against Cooper. The prosecutor who chose to withdraw the felony indictment against Cooper was the U.S. Attorney, in Los Angeles who also had an interest in the prosecution of Petitioner. There can be no reasonable doubt, in fact, it is an easy and obvious inference that this conflict influenced, more precisely, determined Cooper's lamentable trial performance.

6. The Fifth *Strickland* Violation: The Introduction Into Evidence Of Potentially Incriminating Evidence Against Petitioner By His Counsel

Petitioner had, in his room at home, some writings which he appeared to have made and kept in notebooks. They contained some inflammatory and potentially incriminating statements about the Senator and taken face value would appear to provide potential damage to the Petitioner's case, if they could be authenticated. Petitioner's involvement with those writings have since been dealt with substantially by Dr. Brown and there is now a greater understanding of their development and the inducement, including the implantation of thoughts than was available at the time. Suffice it to say that at the time of the trial some of this this material appeared to be pretty damning.

The prosecution, without any authentication of the notebook writings entered some selections without any defense objection, or motion for a process of authentication. Then, defense counsel Cooper went one better saying: "I intend, if your Honor please, to offer everything in these notebooks. …I am going to offer them all…". (TR 4953) He entered the entirety of the writings into evidence and put Petitioner on the stand, as a witness against himself, to authenticate them, which Petitioner very often could not do. Petitioner would frequently look at a writing and refuse to incriminate himself by saying that he did not remember writing those words, that he was not that kind of person, could not explain why he might have written the words, or if he did write whatever the phrase was, he must have been provoked. (TR 4991-5025) Incredibly, his counsel, Cooper, would argue with him and try to force him to admit that he authored the writing. For example, with respect to one exchange concerning some threats, Cooper insisted: "That is what you wrote, isn't it?" Petitioner replied: "That is what I said, but it's not me, sir. It's not Sirhan right here who wrote that". (TR 4991-4992).

In addition, Petitioner's counsel focused on violent sections of the writings, as though he was a prosecutor attempting to build a picture of the defendant as a person consumed with violence. For example, we see this exchange:

> Did you have in mind on the 2nd of June, 1967 at some time killing the President and Vice President of the United States of America?
>
> Sir, if that is what I wrote and that is how I felt at the time I must have been provoked to the point sir where I would have-I would have blasted anybody."

This treatment of Petitioner is inexplicable. Issues of guilt and innocence aside, defense counsel having admitted that Petitioner was guilty from the beginning of his involvement with the case, this approach goes against developing any jury sympathy for a diminished capacity plea. In a subsequent examination of Dr. Marcus, a court appointed psychiatrist, concerning some writings of Petitioner when he was in high school (the"Muzzy" writing) Cooper stated: "I make the avowal at this time that this happens to be [Sirhan's] handwriting." (TR6791) He went on"… for the purpose of discussion that this was done when he [Sirhan] was in high school…what would that mean to you?' *(id)* Dr. Marcus responded:"It indicates that he is already thinking—his mind is already on the topic of assassinations…so when he writes 'many more will come'…he is already thinking about assassination in high school." (TR6791-6792) Cooper even obtains testimony from defense psychiatrist, Dr. Diamond that: "I just found out from seeing some books which were in his high school texts that even at that time in high school he was obviously obsessed already with the idea of assassination."(TR 6896)

Who is the prosecutor here?

Petitioner's counsel was certainly functioning as a second prosecutor of his own client. The writings had never been authenticated and were introduced by his own counsel, without the slightest justification , stating that the writing was Petitioner's. There was even a suspicion that a member of the defense team who had access to the room of Petitioner and who had some legal difficulties hanging over him (McGowan) may have been involved in fabrication. In any event, defense counsel's actions were outrageous and well beyond the usual scope of ineffective assistance required under *Strickland.*

CONCLUSION

It is impossible to understand how any reasonable person would not be appalled by the conduct of defense counsel Grant Cooper in representing Petitioner. His legal assistance in this case was clearly provided to the State and the prosecution not to Petitioner. He failed to file appropriate motions, stipulated the introduction by the State of unathenticated ballistics evidence, introduced potentially damaging evidence, induced Petitioner to give against himself , ignored the destruction of exculpatory evidence, did no investigation of the case itself and totally failed to conduct proper cross examinations of principal State witnesses.

It is true that he had a federal indictment hanging over him and this appears to be a possible reason for this performance. As his previous, fairly distinguished, career would indicate, his ineffectiveness in the extreme cannot be explained away as incompetence. No, if any lawyer ever engaged in a *faustian* deal to the detriment of his client it was this lawyer, in that courtroom in early 1969.

3. CONCLUSION AND REQUESTED RELIEF

Petitioner respectfully submits that he has submitted substantial evidence of actual innocence combined with nonharmless constitutional violations of the Sixth and Fourteenth Amendments and the judicially established requirements of the *Carrier, Brady* and *Strickland* cases. The foregoing establishes that the *Schlup* gateway requirements have more than been and so after 43 years in prison Petitioner is clearly entitled to relief. Petitioner suggests that the discussion and analysis of the evidence in the case and the documented factual history, *supra,* where the record showed that the trial court clerk delivered the substituted bullet in evidence at the trial to the Wenke Panel Administrator. The way that evidence was handled irrefutably reveals that this key piece of evidence –the Kennedy neck bullet- never made it to the courtroom for the consideration of the judge and jury. This was due to the fact that substitute bullet with different markings than those put on the real evidence bullet upon removal by the medical examiner, was the one admitted into evidence. Petitioner has reluctantly concluded that this substitution of vital evidence constitutes a fraud upon the court and mortally taints the proceedings. In such instances, the verdict and sentence are, and must be, set aside.

Surely, it is beyond doubt that the primary public purpose and mission of the Office of the State Attorney General is the pursuit of justice. It is not to continue in effect unsafe verdicts and sentences, the perpetuation of imprisonment of demonstrably innocent people, or the cover up of past errors or injustices. Petitioner's counsel, over the course of working on this case has developed a feeling of respect for the representatives of the AG's Office whose civility and sense of fair play has been noted.

In light of all of the above, including the formidable evidence of actual innocence in combination with the horrendous violations of Petitioner's constitutional rights, and the

difficulty of re-trying a case of this vintage, Petitioner sincerely requests that the Attorney General join in a motion to this Honorable Court requesting that the verdict and sentence in this case be set aside, the *writ* be issued and the Petitioner be set free. Petitioner fully understands that he is likely to be deported to Jordan where he would hope to quietly live out the rest of his life with family and friends, but at long last he would, at least, have received long delayed justice.

Should the Attorney General not see her way clear to jointly participate in the set aside motion, Petitioner respectfully requests that this Court set aside the original 1969 verdict and sentence and grant Petitioner his freedom or order a new trial. In the alternative, Petitioner requests that an evidentiary hearing be ordered and scheduled by the Court.

Finally, if Respondent elects to submit a rebuttal to this Reply, Petitioner respectfully reques s the opportunity within the same time allotment to submit a sur-rebuttal. Petitioner is grateful to the Court for extending its period to Reply as a result of counsels' families difficulties, but prior extensions have not prejudiced the number of responses allowed.

Dated: 20 November, 2011

Respectfully submitted,

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