WILLIAM F. PEPPER
D.C. Bar No. 464502
1003K St., Suite 640
Washington, D.C., 20001
575 Madison Ave, Suite 1006
New York, NY 10022
Telephone: (212) 405-0515
Facsimile: (718) 956-9321
wpintlawus@aol.com

LAURIE D. DUSEK
NY State bar No. 2588481
63-52 Saunders St.
Rego Park, NY 11374
Telephone: (718) 897-2700
Facsimile: (718) 897-2703
ldd1126@gmail.com
Attorneys for the Petitioner
Admitted Pro Hoc Vice

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

Table of Contents

Table of Authorities

WILLIAM F. PEPPER
D.C. Bar No. 464502
1003K St., Suite 640
Washington, D.C., 20001
575 Madison Ave, Suite 1006
New York, NY 10022
Telephone: (212) 405-0515
Facsimile: (718) 956-9321
wpintlawus@aol.com

LAURIE D. DUSEK
NY State bar No. 2588481
63-52 Saunders St.
Rego Park, NY 11374
Telephone: (718) 897-2700
Facsimile: (718) 897-2703
ldd1126@gmail.com
Attorneys for the Petitioner
Admitted Pro Hoc Vice

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SIRHAN BISHARA SIRHAN	**NO. CV-00-5686-CAS (AJW)**
Petitioner,	**MEMORANDUM OF POINTS AND AUTHORITIES ON THE ISSUES OF EQUITABLE TOLLING AND ACTUAL INNOCENCE**
vs.	
GEORGE GALAZA, WARDEN, et. al,	**(28 U.S.C. § 2254)**
Respondents	**Hon. Andrew J. Wistrich United States Magistrate Judge**

MEMORANDUM OF POINTS AND AUTHORITIES

Preliminary Statement

On April 17, 1969, a jury in the Los Angeles County Superior Court convicted Petitioner of the 1968 first-degree murder (Cal. Penal Code § 187), of Senator Robert F. Kennedy and fixed the penalty at death; it also found Petitioner guilty of

assaulting Paul Schrade, Irwin Stroll, William Weisel, Elizabeth Evans and Ira Goldstein with a deadly weapon and with intent to commit murder (Cal. Penal Code § 217); prison sentences were imposed on the latter convictions. People v. Sirhan, 7 Cal. 3d 710, 716-17, 102 Cal. Rptr. 385 (1972); Clerk's Transcript ["CT" 315-23, 344-45.) On automatic appeal, the California Supreme Court affirmed all Petitioner's convictions, but modified the judgment to impose life imprisonment, based on that court's prior invalidation of the death penalty. Sirhan, 7 Cal. 3d at 717, 755.

On February 13, 1975, the California Supreme Court summarily denied Petitioner's first petition for a writ of habeas corpus, filed on January 13, 1975, in which he claimed, *inter alia*, that the prosecution suppressed evidence that an unknown "second gunman" fired the bullet that killed Senator Kennedy. That same year, the Los Angeles Superior Court, the Honorable Robert A. Wenke presiding, conducted discovery proceedings to permit a panel of seven firearms experts to re-examine ballistics evidence from the trial (L.A.S.C. Case No. A233421[hereinafter, the "1975 Reinvestigation"]). (RE A.3/) The resulting Comprehensive Joint Report of The Firearms Examiners found no evidence that a second gun had been fired. (RE B,¶ 1.)

On April 21, 1997, Petitioner filed a habeas corpus petition in the Los Angeles County Superior Court ("LASC"). On April 30, 1997, the court denied the petition on the merits. In its order, the court noted that Petitioner had offered to plead guilty to first-degree murder in exchange for a sentence of life in prison, and that at trial, Petitioner admitted shooting Senator Kennedy. (Order, A233421, April 30, 1997.) Petitioner has continually asserted that he has no memory of the events and that his admission was based on forming an opinion based solely upon what others around him told him.

On May 1, 1997, Petitioner filed a habeas corpus petition in the California Court of Appeal in case number B111657. On June 17, 1997, the Court of Appeal denied the petition. The court ruled that Petitioner did not sufficiently justify his delay in filing the petition; Petitioner was estopped from claiming someone else killed Senator Kennedy after testifying at trial that he himself did; there was no violation of Petitioner's constitutional rights; and there was no basis for doubting the correctness of the verdict. (Order, B111657, at 2-8.) On June 20, 1997, Petitioner filed a habeas corpus petition in the California Supreme Court in case number S062258. On May 24, 2000, the state high court denied the petition as untimely and alternatively denied it on the merits. Petitioner filed the instant Petition on May 25, 2000.

ARGUMENT

I. PETITIONER IS ENTITLED TO EQUITABLE TOLLING BECAUSE HE WAS DILLIGENTLY PURSUING HIS RIGHTS AND FRUSTRATED BY EXTRAORDINARY CIRCUMSTANCES BEYOND HIS CONTROL

A. THE LEGAL STANDARD

"To equitably toll AEDPA's one-year statute of limitations, '[t]he petitioner must establish two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.'" Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also, Bryant v. Arizona Attorney General, 499 F.3d 1056, 1061 (9th Cir. 2007) (citing Rasberry v. Garcia, 448 F.3d 1150, 1153 (9th Cir. 2006). To satisfy the first, diligence, prong of equitable tolling, a petitioner need not demonstrate the maximum diligence possible, but only 'due' or 'reasonable' diligence." Souliotes v. Evans, 622 F.3d 1173, 1178 (9th Cir. 2010) (collecting cases).

Petitioner respectfully submits that he is entitled to equitable tolling because he diligently pursued his rights but was unable to uncover evidence exonerating him, in particular a recording definitively showing that more than one gun was fired on the night of the shooting, until 2001, as a result of extraordinary circumstances beyond his control.

B.DISCOVERY OF THE "PRUSZYNSKI RECORDING"

The key piece of evidence that petitioner now asserts entitles him to equitable tolling is the "Pruszynski recording,"

which demonstrates that thirteen shots were fired on the night Senator Kennedy was killed. See Exhibit A, Declaration of Robert K. Joling 4:27, Oct. 25, 2010. Joling's declaration also establishes that there were several shots which simply occurred too closely together in time for them to have been fired from the same weapon. Id. at 4:28-5:2. This recording was not known to Petitioner or his then-counsel until 2001. See Exhibit B, Letter from Lawrence Teeter, Esq., to Sirhan B. Sirhan, Nov. 20, 2001. The instant petition was filed on May 25, 2000. Since the existence of the recording was not known to Petitioner or counsel until 2001, Petitioner is entitled to equitable tolling of the statute of limitations.

The existence of the Pruszynski recording was not known by Petitioner and counsel because of its suppression in violation of the Constitution by government authorities. According to Brad Johnson, the FBI had the Pruszynski recording as early as February 4, 1969, see Exhibit C, Declaration of Brad Johnson, Mar. 21, 2011, in the middle of Petitioner's trial, and the Los Angeles Police Department gained possession of the tape as early as early as July 22, 1969. Id. Not only was this exculpatory material never disclosed to the defense in violation of Petitioner's right to due process under Brady v. Maryland, 373 U.S. 83 (1963), but also Lynn Compton, lead prosecutor for

Petitioner's trial, was never even made aware of the recording. See Exhibit C, Declaration of Brad Johnson, Mar. 21, 2011.

Even though the Pruszynski Recording was not known to Petitioner and his then-counsel until 2001, it may be that it could have been discovered through due diligence prior to that date. It is irrelevant, however, that the Pruszynski recording could have been discovered earlier through the exercise of reasonable diligence because even if discovered earlier, the technology necessary to analyze the tape was not available until around the time Robert Joling became aware of it in 2004. See Ex. A, Joling Decl., *supra*, 4:14-23. The lack of the technological wherewithal to properly analyze a piece of evidence constitutes "extraordinary circumstances" that prohibited the Petitioner from asserting his rights because there is literally no amount of diligence that Petitioner could have put forth that would have allowed him to use the Pruszynski recording to assert his rights prior to the development of the proper technology in 2004.

In sum, Petitioner is entitled to equitable tolling of AEDPA's statute of limitations because a key piece of evidence exonerating Petitioner, specifically the Pruszynski recording, was not discovered until 2001, a year after the instant petition was filed. Moreover, the technology necessary to analyze the tape was not available until 2004, four years after the instant

petition was initiated. In addition, the Pruszynski recording is important in this case because it establishes that thirteen shots were fired on the evening in question, while Petitioner could only have fired eight.

II. PETITIONER IS ENTITLED TO STATUTORY TOLLING FOR THE TIME HIS PETITION WAS PENDING IN STATE COURTS BECAUSE, *AT THE TIME IT WAS APPLIED TO PETITIONER IN 1997,* CALIFORNIA'S TIMELINESS RULE WAS NEITHER AN ADEQUATE STATE GROUND SUFFICIENT TO SUSTAIN THE JUDGMENT NOR INDEPENDENT FROM FEDERAL LAW

A. THE LEGAL STANDARD

Federal courts are prohibited from disturbing a judgment of state courts when those state court judgments rest on state law grounds that are both independent from federal law and adequate to support the judgment. E.g., Michigan v. Long, 463 U.S. 1032, 1039 n.4 (1983). This principle applies in federal habeas corpus proceedings for post-conviction relief from state convictions. E.g., Coleman v. Thompson, 501 U.S. 722 (1991). Specifically, a federal habeas court reviewing a state criminal conviction is barred from considering the "habeas corpus claims of prisoners when a state-law default prevented the state court from reaching the merits of the federal claims." Thomas v. Lewis, 945 F.2d 1119 (9th Cir. 1991).

B. THE CALIFORNIA COURT OF APPEALS 1997 RULING DISMISSING THE PETITION, NOT THE CALIFORNIA SUPREME COURT'S 2000 RULING DISMISSING THE PETITION, IS THE CORRECT APPLICATION DATE OF CALIFORNIA'S UNTIMELINESS RULE TO THE STATE PETITION BECAUSE IT IS THE "LAST REASONED STATE COURT OPINION" ON THE MATTER

Respondent argues that "[i]n the instant case, there is no dispute that, in May 2000, the California Supreme Court found Petitioner's habeas claims untimely under state law." (Resp. Supp. Brief. as to the Procedural Default Defense 2:25-26 Mar. 2, 2011.) Respondent is correct to note that the California Supreme Court denied Petitioner's habeas claims as untimely under state law in May, 2000. Unfortunately for Respondent, that date and that decision are both completely irrelevant for the case at hand. Rather, the proper date and decision as a reference point for determining if California's timeliness rule is adequate and independent is the opinion of the California Court of Appeals for the Second Appellate District, Division Five, dated June 17, 1997.

This Court should look to California's timeliness rule as it operated when the Court of Appeals denied Petitioner's claims in 1997, rather than when the California Supreme Court denied those same claims in 2000, because it is the "last reasoned opinion" on the claim. The United States Supreme Court has held that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding

that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). The entirety of the dismissal order stated: "Petition for writ of habeas corpus DENIED on the merits and as untimely." (Order, S062258.) Precisely because the California Supreme Court's order was so cursory, it is an "unexplained order upholding the…judgment" and is therefore "presumed to have rested upon the same ground." Nunnemaker, 501 U.S. at 803. Based upon the United States Supreme Court's holding in Nunnemaker, then, the controlling opinion in this case is that of California Court of Appeals for the Second Appellate District, Division Five, dated June 17, 1997, because it, and not the California Supreme Court's opinion of May 24, 2000, is the "last reasoned opinion" on the claim.

Even if this Court views the California Supreme Court's opinion dismissing Petitioner's habeas claims as untimely under state law as the "last reasoned opinion" in this case, 2000 is still not the proper date to measure the adequacy and independence of California's timeliness bar because the adequacy and independence of a state procedure are determined from the time of Petitioner's alleged default, Lambright v. Stewart, 241 F.3d 1201, 1203 (9th Cir. 2001), not the time when a court actually pronounced Petitioner to be in default. The last possible date Petitioner could be deemed to have been in default

is June 20, 1997, when a petition for a writ of habeas corpus was filed in California Supreme Court.

Without consideration of the date upon which Petitioner is alleged to have been in default, Respondent relies heavily upon the Supreme Court's recent decision in Walker v. Martin, 131 S.Ct. 1120 (2011), to argue that "this Court must reject Petitioner's claim that California's untimeliness bar is not generally an adequate state ground." (Resp. Supp. Brief., *supra*, 3:20-21.) Walker v. Martin, however, is even more irrelevant for adjudicating Petitioner's claim that California's timeliness rule was neither adequate nor independent at the time it applied to Petitioner than the California Supreme Court's 2000 decision in this case is.

In Martin, the petitioner filed his last state habeas corpus petition in March, 2002, and the California State Supreme Court denied the petition in September of that same year. Id., 131 S.Ct. at 1126. As will be shown in § II(C) and § II(D), *infra*, however, California's timeliness rule did not become either adequate to support a judgment or independent of federal law until the California State Supreme Court's decision in In re Robbins, 18 Cal. 4th 770, 77 Cal. Rptr. 2d 153 (1998), a year *after* Petitioner could be deemed to have procedurally defaulted his claims and four full years before the petitioner in Walker could have been deemed to have defaulted his claims. Since the

Supreme Court's decision in Walker addresses an application of California's timeliness rule a full five years after its latest possible application to Petitioner, and since (as will be shown in § II(C) and § II(D), *infra*) both California's own Supreme Court and the Ninth Circuit have previously held that California's timeliness rule was neither adequate nor independent at that point, then Walker cannot serve as precedential authority in this case.

C. *AT THE TIME IT WAS APPLIED TO PETITIONER IN 1997,* CALIFORNIA'S TIMELINESS RULE WAS NOT ADEQUATE TO SUPPORT THE JUDGMENT

In order to be considered "adequate," state procedural default rules must be both (1) firmly established and (2) consistently applied. E.g., Poland v. Stewart, 169 F.3d 573, 577 (9th Cir. 1999). State procedural default rules may be inconsistently applied when they either "(1) have been selectively applied to bar the claims of certain litigants ... [or] (2)...are so unsettled due to ambiguous or changing state authority that applying them to bar a litigant's claim is unfair." E.g., Bennett v. Mueller, 322 F.3d 573, 583 (9th Cir. 2003) (citing Morales v. Calderon, 85 F.3d 1387, 1392 (9th Cir. 1996)).

A year prior to the time when Petitioner could last have been in default in 1997, the Ninth Circuit had already held that California's timeliness rule was inadequate to support a

judgment. Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996). The Ninth Circuit has further held that as recently as 2001, four years after Petitioner could possibly be deemed to have defaulted his claim, that California's timeliness rule was not adequate to support a judgment. See Townsend v. Knowles, 562 F.3d 1200, 1208 (9th Cir. 2009) ("Because the government offers no evidence that California operated under clear standards for determining what constituted 'substantial delay' in 2001, it failed to meet its burden of proving that California's timeliness bar was sufficiently clear and certain to be an adequate state bar.") Moreover, because the Ninth Circuit has held that California's timeliness rule at the time it applied to Petitioner in 1997 was not adequate to support the judgment, the burden is on the government to show that California's timeliness rule was adequate at that point in time. King v. Lamarque, 464 F.3d 963, 967 (9th Cir. 2006).

Not only has the government failed to discharge their burden to demonstrate that California's timeliness rule was adequate when applied to Petitioner, but the government literally cannot meet it because the Ninth Circuit has already decided, in Townsend, Lamarque, and Morales, that California's timeliness rule was not adequate to support the judgment *at the time it was applied to Petitioner in 1997*. The Supreme Court's holding in Walker that California's timeliness rule, *when*

applied in 2002, was adequate, does nothing to disturb the Ninth Circuit's conclusions to the contrary in Townsend, Lamarque, and Morales because the date of the rules application in those cases predated its application in Walker. (See generally Petitioner's Mem. of Law in Support of Traverse 12-18, Oct. 28, 2010.)

In conclusion, the inadequacy of a state's procedural rules is determined from the time when a petitioner is deemed to have been in default. For Petitioner, this date is not later than 1998. This year, the Supreme Court in Walker v. Martin held that California's timeliness rule was adequate when it was applied to the Walker petitioner in 2002, four full years after Petitioner in this case could possibly be deemed to have been in default. Nothing in Walker suggests that its holding was intended to apply to applications of California's timeliness rule prior to 2002, and given that the Ninth Circuit has already held in Townsend, Lamarque, and Morales that California's timeliness rule was not adequate during the time frame when Petitioner could possibly be deemed to have been in default, then Walker is inapplicable to this case and this Court should find that Petitioner has not procedurally defaulted his claims because California's timeliness rule was not an adequate state ground at the time it was applied to Petitioner.

D. *AT THE TIME IT WAS APPLIED TO PETITIONER IN 1997,* CALIFORNIA'S TIMELINESS RULE WAS NOT INDEPENDENT OF FEDERAL LAW

A state procedural rule is sufficiently "independent" of federal law when the former is not "interwoven" with the latter. Michigan v. Long, 463 U.S. at 1040-41. A state law judgment is "interwoven" with federal law when "the State has made application of the procedural bar depend on an antecedent ruling on federal law." Ake v. Oklahoma, 470 U.S. 68, 75 (1985). The Ninth Circuit has already explicitly held that for decisions dismissing habeas claims as untimely prior to the Robbins decision in 1998, California's timeliness rule was dependent upon the application of federal law. See Mueller, 322 F.3d at 581 (internal citations omitted) (recognizing "that, when reviewing state habeas petitions for the untimeliness…California courts [prior to Robbins]…considered the federal constitutional merits of the petitions in determining whether the petitions qualified for an exception to the rule of procedural default.") Thus when it dismissed Petitioner's claims as untimely under state law, the California appellate court nevertheless "necessarily made an antecedent ruling on federal law before [applying the timeliness bar]" Park v. California, 202 F.3d 1146, 1153 (9th 2000), because of "*Robbins*'s acknowledgment that the constitutional error exception encompassed consideration by

the court of the merits of federal constitutional questions." Id.

The direct language of the 1998 California Supreme Court's decision in Robbins confirms the Ninth Circuit's holding that, prior to Robbins in 1998, California's timeliness rule was not "independent" of federal law:

> [I]n applying [the nonharmless constitutional error exception] and finding it inapplicable we shall, in this case and *in the future, adopt* the following approach as our standard practice: We need not and will not decide whether the alleged error actually constitutes a federal constitutional violation. Instead, we shall assume, for the purpose of addressing the procedural issue, that a federal constitutional error is stated, and we shall find the exception inapposite if, based upon our application of state law, it cannot be said that the asserted error "led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner." In re Robbins, 18 Cal. 4th 770, 811-12 (1998) (emphasis added).

That the California Supreme Court decided in Robbins it would "*adopt*" the approach of relying solely upon state law to adjudicate the "nonharmless constitutional error" exception "*in the future*" suggests that prior to Robbins determination of these questions depended in part upon the application of federal law.

In sum, because both the California Supreme Court and the Ninth Circuit have held and acknowledged that application of California's timeliness requirement was dependent upon federal law prior to Robbins in 1998, the appellate court's dismissal of

Petitioner's claims for lack of timeliness in 1997 is sufficiently "interwoven" with federal law such that it is not an "independent" state law procedural basis for barring further habeas review in this court. That no state court specifically discussed the "nonharmless constitutional error" exception in dismissing petitioner's habeas claims is irrelevant because in dismissing federal constitutional claims prior to Robbins, a California State habeas court necessarily decided the federal issues underlying the "nonharmless constitutional error" exception. See Robbins, 18 Cal. 4th 815 n.34 ("[W]hen in our orders we impose the bar of untimeliness, this signifies that we...have determined that the petitioner has failed to establish the absence of substantial delay or good cause for delay, *and* that none of the four exceptions set out in *Clark* apply." (Emphasis in the original) (internal citations omitted); see also, Park, 202 F.3d at 1152 ("The California Supreme Court recently stated that prior to 1998 it necessarily addressed fundamental constitutional claims when applying the *Dixon*[1] rule. Therefore, if 'fundamental constitutional rights' include

[1] The Dixon rule is similar to the timeliness rule in that both are procedural requirements that habeas petitioners must meet before a California court reaches the merits of a claim. Specifically, Dixon requires that a claim be presented for direct appellate review beforen it can be attacked collaterally through a habeas petition. In re Dixon, 41 Cal.2d 756, 264 P.2d 513 (1953). The Dixon rule, however, is sufficiently analgous to the timeliness rule in that (1) both function as procedural requirements that habeas petitioners must satisfy before a state habeas court will collaterally review the merits of a petitioner's claims; and, (2) both are subject to the same "fundamental constitutional error" exception. See Generally, Park, 202 F.3d at 1151-52, 1152 n.3.

federal-law issues, the denial of Park's petition citing to Dixon was not independent of federal law and does not preclude federal habeas review.") (Internal citations omitted). (See generally Traverse, *supra*, 6-12.)

E. CONCLUSION

In conclusion, it is extremely important to note the date upon which California's timeliness bar was applied to Petitioner, and the last date upon which Petitioner could be deemed to have defaulted his claims in state court. The latest possible date under either is 1997. See §II(B), *supra*. Any decisions of the Ninth Circuit or United States Supreme Court postdating 1997 and which hold that California's timeliness rule is adequate, independent, or both are wholly irrelevant to the case at hand because the question is not whether California's timeliness rule is adequate and independent at this point in time, but whether the timeliness bar was adequate and independent when applied to Petitioner in 1997. Hence, in this context where California's timeliness rule was applied five years before it was in Walker v. Martin and the Ninth Circuit has already held the rule was not adequate during the time frame it was applied to Petitioner, Walker is completely irrelevant to the case at hand. As argued in § II(C) and § II(D), *supra*, it was not.

There are consequences for the conclusion that California's timeliness rule was not adequate or independent at the time is was applied to Petitioner. In the most general sense, this finding means that this Court can review and revise the ruling of the California state court. In the narrower sense, this tolls AEDPA's statute of limitations because the California courts' ruling that the petition was untimely is no longer immune from federal review. Because a federal habeas court, specifically this one, may now review the timeliness ruling, the petition was "pending" before a state court such that it tolls the statute of limitations.

III. IT IS MORE PROBABLE THAN NOT THAT NO REASONABLE JUROR COULD CONCLUDE PETITIONER IS GUILTY BEYOND A REASONABLE DOUBT BECAUSE OF NEW EVIDENCE OF ACTUAL INNOCENCE, AND ACTUAL INNOCENCE PROVIDES, OR SHOULD PROVIDE, AN EXCEPTION TO AEDPA'S STATUTE OF LIMITATIONS

A. THE LEGAL STANDARD

Even if this Court were to hold that California's timeliness bar was both adequate and independent at the time it was applied to Petitioner, AEDPA's statute of limitations does not apply because it is more probable than not that Petitioner is "actually innocent" of the crimes for which he has been convicted. The Ninth Circuit has held that "actual innocence" is not an exception to AEDPA's statute of limitations, Lee v. Lampert, 610 F.3d 1125, 1129-33 (9th Cir. 2010), but has granted re-hearing en banc to consider precisely that issue, Lee v.

Lampert, 633 F.3d 1176 (9th Cir. Feb 08, 2011) (NO. 09-35276). This section explains the standard for "actual innocence," the next argues it should apply not only to second or successive writs but also as an exception to AEDPA's one year statute of limitations, and the remainder is dedicated to applying the actual innocence exception to Petitioner's case.

In explaining the requirements for "actual innocence" in the context of successive (as opposed to untimely) writs, the Supreme Court has stated that a habeas petitioner must demonstrate "[new] evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." Schlup v. Delo, 513 U.S. 298, 316 (1995). There are thus three requirements that petitioner must meet in order to qualify for the "fundamental miscarriage of justice" exception: (1) new evidence of innocence; (2) nonharmless constitutional error; and, (3) that the new evidence and nonharmless constitutional error, when viewed together, undermine a court's confidence in the verdict at trial such that "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" Id. at 327 (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)).

B. "ACTUAL INNOCENCE" SHOULD EXEMPT PETITIONER FROM AEDPA'S ONE-YEAR STATUTE OF LIMITATIONS BECAUSE THE STATE'S INTEREST IN FINALITY THAT THE STATUTE OF LIMITATIONS WAS DESIGNED TO SERVE IS AT ITS LOWEST WHERE NON-HARMLESS CONSTITUTIONAL VIOLATIONS COMBINE WITH NEW EVIDENCE OF ACTUAL INNOCENCE UNDERMINE A COURT'S CONFIDENCE IN THE VERDICT

The one-year statute of limitations contained within AEDPA is motivated by, among other things, a desire to respect the finality of state criminal judgments. See e.g., Cullen v. Pinholster, --- S.Ct. ----, 2011 WL 1225705 at * 10 (Apr. 4 2011). The presumption of finality, however, is predicated upon the assumption that a judgment *should* be final because the defendant received all of the constitutional and procedural protections designed to provide us with confidence in the outcome. The Supreme Court noted precisely as much when explaining the interaction between the "new evidence of innocence" and "nonharmless constitutional error" prongs of the Schlup "actual innocence" standard:

> [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 "tried 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 U.S. at 315-16 (internal citations omitted).

Thus, 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 'actua[l] innocen[ce],', 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. Acknowledging that this issue remains pending before the Ninth Circuit's *en banc* panel with a grant of certiorari waiting in the wings, Petitioner respectfully submits that since the new evidence of innocence combine with his allegations of nonharmless constitutional error sufficiently undermines 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. Washington, 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.

C. PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS UNDER *BADY* BECAUSE THE STATE WITHHELD EXCULPATORY BALLISTICS AND AUTOPSY EVIDENCE

Petitioner has alleged several Brady violations, three of which were particularly emphasized in the Traverse: First, the

state falsely introduced into evidence as the fatal bullet marked "DN" "TN" removed from Senator Kennedy and withheld the fatal bullet marked "TN 31" actually removed from Senator Kennedy; second, the state withheld evidence that more than eight bullets were recovered at the scene; and third, the state inexplicably and unconstitutionally delayed disclosure of the autopsy report that would have exonerated Petitioner until after the defense had committed to a trial strategy of conceding Petitioner's guilt and arguing diminished mental capacity in front of a jury.

(1) The First Brady Violation: Introduction of the False "DN" "TN" Bullet and Withholding the Real "TN 31" Bullet

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 turned the bullet over to Sergeant Jordan of the LAPD. (Exhibit D, Mediocolegal 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 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. De Wayne Wolfer, a criminalist with the LAPD, 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. (RT 4129-30.)

Dr. Noguchi was never shown 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 Ex. 17 p. 80 to Pet., *supra*, Noguchi Board of Supervisors Transcript.) In 1975, Superior Court Judge Robert A. Wenke 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. (See Ex. 19 ¶ 6 to Pet., *supra*.) 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 "DN" "TN" on the base, not "TN 31." (See Ex. 13 to Pet., *supra*, Inventory Incorporated in Court Order # 2.)

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, De Wayne 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 "DN" "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 "DN" "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." The only reasonable inference is 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.

(2) The Second Brady Violation: Suppression of Evidence that More than Eight Bullets Were Recovered at the Scene

The fatal 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. William 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." (Ex. 80 to Pet., *supra*, Statement of William A. Bailey, Nov. 14, 1976.) FBI files containing a description of crime scene photos reveals that the bullets Agent Bailer observed were in fact removed. Four photographs are listed in the document, E-1 through E-4. E-1 is described as showing two circled bullet holes and the caption states "The portion of the panel missing also reportedly contained a bullet." (Ex. 82 to Pet., *supra*, "FBI Captions of Photographs.") Similarly, photographs E-2 and E-3 are also described as revealing two bullet holes each. In addition, LAPD Officer Butler has stated in a taped interview with journalist and author Dan Moldea that he personally observed Wolfer remove two bullets from the center divider, which required disassembling it.

Corroborating this account is witness John Shirley, who wrote in 1969 that he had observed two circled bullet holes and that: "the center divider jamb was loose, and it appeared to have been removed from the framework so that bullets might be extracted from behind. It was then replaced but not firmly affixed." No explanation has ever been offered for what

happened to the bullets that FBI photos, Agent Bailey, and Officer Butler all confirm were removed from the pantry that evening. None of the bullets, photos, or wood panels recovered at the scene were ever disclosed to defense counsel.

(3) The Third Brady Violation: Suppression of the Autopsy Report

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. (RT 154, 159.) There is no evidence in the record that the autopsy report was disclosed to the defense prior to trial. 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, 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.

D. PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANT OF COUNSEL UNDER THE SIXTH AMENDMENT AND *STRICKLAND* BECAUSE COUNSEL FAILED TO INVESTIGATE OTHER POSSIBLE DEFENSES, STIPULATED TO THE AUTHENTICITY OF THE FATAL BULLET, AND FAILED TO MOVE FOR A MISTRIAL UPON DISCLOSURE OF THE AUTOPSY REPORT

The Brady violations led to, and combined with, ineffective assistance of counsel to cause Petitioner's false confession at trial. An ineffective assistance of counsel claim has two elements: (1) that counsel's performance was constitutionally deficient; and, (2) that these deficiencies affirmatively "prejudiced" the defendant. Strickland, 466 U.S. 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., 466 U.S. 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., 466 U.S. 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 upon three here: First, counsel's stipulation to the authenticity of ballistics evidence, specifically People's Exhibit 47, offered as the bullet recovered from Senator Kennedy's neck; second, trial counsel's failure to investigate other possible defenses; and third, counsel's failure to move for a mistrial and/or continuance once the autopsy report was disclosed.

(1) The First Strickland Violation: Stipulating to the Authenticity of the Fatal Neck Bullet, People's 47

On February 21, 1969, in the middle of trial, defense counsel stipulated to the authenticity of bullets yet to be introduced. (RT 3967.) Specifically, defense counsel stipulated to the authenticity of what would become People's 47, which De Wayne 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." Hedgpeth, 706 F.Supp.2d at 1004.

In contrast to 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. Castle's trial counsel cannot be deemed constitutionally ineffective for stipulating to his client's undisputed signatures on certain exhibits simply because he failed to anticipate a change in prosecution tactics with respect to a disputed signature on another exhibit"), because 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 require only that counsel stand mute.

With respect to the second factor, that the stipulation was not based in fact, the Eighth Circuit rejected a habeas petitioner's claim that counsel rendered ineffective assistance in stipulating that a letter written to a newspaper was in the defendant's handwriting and had defendant's fingerprints on it, reasoning that the stipulation

> [W]as solidly based in fact. Everything counsel stipulated to was true-including the ultimate fact, that [defendant] wrote the letter. [Defendant] himself has admitted under oath that he wrote the letter, and that he did it "of [his] own free will." The State could in fact have introduced evidence of the fingerprints, and could in fact have called the handwriting expert, and we have no doubt that it would have done so had Mr. Putzel refused to stipulate. Smith v. Armontrout, 888 F.2d 530, 536 (8th Cir. 1990) (internal citations omitted); see also Gaskin, 364 F.3d at 469.

In contrast to Armontrout, where the stipulation "was solidly based in fact," and Gaskin, where the stipulation was "undisputed," the prosecution conceded that it could not authenticate the bullets it was attempting to admit. (RT 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.

(2) The Second and Third Strickland Violations: Failure to Investigate Alternative Defenses and Failure to Move for a Mistrial Upon Delayed Disclosure of the Autopsy Report

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, 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. See § III(E), *infra*.

Defense counsel's failure to adequately investigate the possibility of a second shooter goes well beyond his failure to hire an independent ballistics expert. Counsel did not fail 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, 466 U.S. 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." That reason is that Grant Cooper, Petitioner's lead trial counsel, had a conflict of interest. Specifically, immediately prior to Petitioner's trial, Grant Cooper was charged with violating laws enforcing grand jury secrecy in an unrelated case. After the conclusion of Petitioner's trial and sentence, the Government withdrew the felony indictment against Cooper. The prosecutor who chose to withdraw the felony indictment against Cooper was also a prosecutor for Petitioner's trial, (see Ex. 105 to Pet., *supra*), and it is an easy and obvious inference that this conflict influenced Cooper's trial performance.

E. THE PRUSZYNSKI RECORDING, AUTOPSY REPORT, AND EVIDENCE OF HYPNOTIC PROGRAMMING ALL CONSTITUTE "NEW EVIDENCE OF INNOCENCE" SUCH THAT IT IS MORE PROBABLE THAN NOT THAT NO REASONABLE JUROR COULD FIND PETITIONER GUILTY BEYOND A REASONABLE DOUBT

In addition to the Brady and Strickland violations, Petitioner must also present here new evidence of innocence that was not presented at trial. Petitioner here presents three new pieces of evidence: (1) The Pruszynski reporting demonstrates that there was more than one shooter that evening; (2) the autopsy report combined with the eyewitness testimony to prove that Petitioner could not have shot Senator Kennedy; and, (3) the evidence of hypnotic programming explains Petitioner's

conduct and subsequent confessions in a manner consistent with the second-gunman theory. Each of these pieces of new evidence of innocence is further corroborated by the ballistics evidence the state withheld that demonstrates more than eight bullets were recovered from the scene.

(1) The Pruszynski Recording

During the shooting, a Canadian reporter named Stanislaw Pruszynski had inadvertently left his tape recorder on and recorded the entire incident (Exh. A., Joling Dec., *supra*, 4:2-6). Philip Van Praag, in collaboration with Robert Joling, a fellow and past president of the American Forensic Sciences institute, utilized technology and techniques not available at the time to identify 13 distinct "shot-sounds" on the tape (Ex. A, Joling Decl., *supra*, 4:25-27). Van Praag and Joling have concluded that the sounds they heard were, in fact, gun shots rather than, for example, balloons popping. According to Van Praag, the sound from a gun-shot is caused by the vibration of the weapon interacting with its mass. Bullets, because they have a good deal of mass, "resonate" for a much longer period than objects with much lighter mass, such as balloons. Van Praag has concluded that the resonances he heard on the tape resonated for far too long to be anything other than a bullet.

Van Praag's conclusion that he heard 13 distinct "shot-sounds" conclusively demonstrates that there was in fact an

additional shooter on the night in question. Van Praag's conclusions demonstrate the existence of a second shooter because petitioner utilized a .22 caliber Iver-Johnson revolver on the night of the incident. (E.g., Ex. A., Joling Decl., *supra,* 5:18-26.) After emptying his weapon, petitioner did not reload. Indeed, petitioner could not have reloaded because Karl Uecker had pinned his arm down and, along with others, subdued petitioner before he ever had an opportunity to reload. This is not now and has never been disputed. Given that the audio evidence demonstrates that 13 shots were fired, and given that petitioner could only have fired eight rounds, Van Praag's audio analysis conclusively demonstrates the existence of a second shooter.

Van Praag's audio analysis is not limited to the number of bullets fired. Rather, Van Praag also heard on the tape two sets of "double-shots," i.e. two shots fired extremely close together in time. The first set of double-shots that Van Praag detected have a separation of 149 milliseconds, and the second set of double shots Van Praag heard are separated by 122 milliseconds (roughly a rate of 8 per second). According to firearms experts, two or three shots per second is considered fast, and the world's record is reported at 140 milliseconds between shots. Petitioner utilized an Iver Johnson Cadet 55SA eight shot revolver on the night of the shooting. The Iver

Johnson is a 1950's low-priced revolver known for its heavy trigger pull and it contains only eight shots. In 2007, Discovery Time Channel conducted a rapid-fire test of the Iver Johnson Cadet 55 model, using a noted firearms expert. The fastest two shot firing interval this expert could achieve was 366 milliseconds. Petitioner's weapon therefore simply cannot be responsible for the two sets of "double-shots" that Van Praag identified because he simply could not have pulled the trigger in such rapid succession. Moreover, at least two eyewitnesses, Attorney Evan Philip Freed and Booker Griffin, report seeing a second shooter during the incident. These eyewitness accounts corroborate what Van Praag's audio evidence already conclusively proves: that there was a second shooter on the night in question. None of this evidence was ever presented at trial.

(2) The Autopsy Report and Eyewitness Testimony

The report of the autopsy that Dr. Thomas Noguchi, then chief medical examiner for Los Angeles County, authored discloses three bullet wounds in Senator Kennedy. For each of these three bullet wounds, there is a column for "direction," and for each of the three bullet wounds the direction is described as "back to front" and "upward." (Exh. D, Mediocolegal Investigation on the Death of Senator Robert F. Kennedy. *Supra*, 2-3.) The undeniable conclusion from the autopsy report is that whoever fired the bullets into Senator

Kennedy did so from behind and at a range of about 1-2 inches. Not a single witness, however, places petitioner behind Senator Kennedy at the time of the shooting. (E.g., Exhibit F, "Twelve Witnesses".)[2] In fact, every single eyewitness testifying under oath places petitioner in front of Senator Kennedy when the shooting occurred. For example, eyewitness Martin Patrusky, a banquet waiter at the Ambassador Hotel, provided a statement in which he said "Kennedy's back was not facing Sirhan. Sirhan was slightly to the right front of Kennedy." (Ex. 77, ¶ 2, to Pet., *supra*, Statement of Martin Patrusky to Vincent Bugliosi.) Similarly, eyewitness Vincent Di Pierro, also a waiter at the Ambassador Hotel, provided the FBI with a signed statement in which he stated: "Senator Kennedy…turned to his right in the direction of the heating cabinet and at that time I saw the white male…standing…at the heating cabinet. I saw this individual….[Shoot] Senator Kennedy in the head." (Ex. 79 p. 3 to Pet., *supra*, FBI Report Quoting Di Pierro's Written Statement.) As Di Pierro has Senator Kennedy facing the heating cabinet where the shooter is standing, Di Pierro's

[2] This exhibit is a compilation of excerpts from eyewitness trial and grand jury testimony, as well as statements made to the police. We are mindful of the Court's request that all allegations be supported either by properly authenticated documents or sworn testimony. While this exhibit itself is not sworn testimony, the witness statements it cites to are either sworn grand jury and trial testimony, or witness statements that either are or can be properly authenticated. Petitioner submits and cites this exhibit as an easy compilation of the twelve eyewitness accounts, rather than citing to twelve separate documents every single time Petitioner need mention the twelve eyewitness accounts. More specific testimony of these witnesses individually is cited elsewhere in this brief.

statement places petitioner in front of the victim. These are just some of the examples of sworn and uncontradicted testimony from no fewer than twelve eyewitnesses who place Petitioner to Senator Kennedy's front at the time of the shooting.

The eyewitness testimony combines with the autopsy report conclusively proves that Petitioner could not have killed Senator Kennedy. Every single witness places petitioner in front of Senator Kennedy at the time of the shooting, and the autopsy report unequivocally demonstrates that Senator Kennedy was shot from his back. It is therefore literally impossible for petitioner to have shot Senator Kennedy. Moreover, the evidence contained within the autopsy report regarding the angle of the entry wounds was never presented at trial (Exhibit G, Decl. of Dr. Cyril M. Wecht, 2:7-8), and as such qualifies as "new evidence" of actual innocence.

Even though the new evidence of the angle of the entry wound contained within the autopsy report and the eyewitness testimony regarding petitioner's location at the time of the shooting conclusively prove that it could not have been petitioner who shot Senator Kennedy, the eyewitnesses and the autopsy report contain additional evidence exonerating petitioner. Specifically, the autopsy and eyewitness evidence conclusively prove that petitioner was never close enough to Senator Kennedy to have made the wounds that Dr. Noguchi

observed. According to the autopsy report, Dr. Noguchi and members of the LAPD conducted a test firing on June 11, 1968, in order to replicate the powder burns that Dr. Noguchi observed around Senator Kennedy's wounds. The autopsy report states, "the test pattern is most similar to the powder residue pattern noted on the Senator's [wounds]" when the gun is fired at a distance of one inch. The "[s]imilarity persists" from a range of up to two inches, according to the report. (Exh. D, Mediocolegal Investigation on the Death of Senator Robert F. Kennedy, *supra*, 39-40.)

According to Dr. Cyril Wecht, a licensed medical examiner and world-renowned expert in forensic pathology, who consulted with Dr. Noguchi for the autopsy and has reviewed the autopsy report, the only conclusion that can be drawn from this evidence is that Senator Kennedy was shot "at a maximum distance of one to one and one half inches" (Ex. G, Wecht Decl., *supra*, 1:21-27.) Petitioner could not have fired the bullet that killed Senator Kennedy because he was never close enough to the victim, nor was he behind him as the autopsy indicated the perpetrator was. There were twelve eyewitnesses to the shooting who either testified under oath or provided statements to law enforcement. The closest any of them places petitioner's weapon to Senator Kennedy is one foot, with an outside distance of five feet. Karl Uecker, who was closest to petitioner and actually grabbed

hold of his arm while petitioner was firing, has stated that petitioner's weapon was approximately 1 ½-2 feet from Senator Kennedy, and in front of him. (Exhibit H, Five Eyewitnesses Establishing Petitioner's Hand Was Pinned Down After He Fired First Two Shots.)[3] The eyewitness and autopsy evidence thus further prove that petitioner could not have killed Senator Kennedy because where the autopsy report conclusively states that the gun that shot Senator Kennedy was no farther than two inches away and fired from behind him. The eyewitness evidence unequivocally places petitioner's weapon no closer than 1 ½ foot, and never behind the Senator.

Respondent attempts to case doubt upon Petitioner's argument for actual innocence. Specifically, Respondent suggests that Petitioner's arguments are "speculative" because, "based on inconclusive eyewitness testimony, Petitioner merely assumes (1) the eyewitnesses saw the relative positions of Senator Kennedy and Petitioner at the very moment the fatal shot was fired, (2) Senator Kennedy was somehow unable to turn his head or body away from Petitioner during the attack, and (3) Petitioner's gun did not get closer to the victim before the fatal shot." (Resp. Supp. Brief., *supra*, 7:3-8.)

Despite Respondent's contentions, there is absolutely nothing "inconclusive" about the eyewitness testimony, and it is

[3] See n.2, *supra*.

the Respondent, not the Petitioner, who is speculating at this point. As previously stated, no fewer than twelve eyewitnesses have stated that Petitioner was in front of Senator Kennedy and to his right. Not a single eyewitness saw Petitioner behind Senator Kennedy at any point in time. (Ex. F, "Twelve Eyewitnesses," *supra*). Respondent suggests that Senator Kennedy "was somehow […]able to turn his head or body away from Petitioner during the attack." Although this is possible, there is no evidence to support this theory. Petitioner does bear a particularly high burden at this point in the proceedings, and though Respondent's speculative theory that Senator Kennedy may have changed position relative to the Petitioner during the attack is possible, every single bit of evidence before this Court (specifically, the twelve eyewitnesses) suggests that this is not the case. The Respondent is free to speculate about what might have happened all he likes, but in the face of the uncontradicted testimony of twelve eyewitnesses this Court should reject that speculation unless supported by evidence.

Not only is Respondent's theory that either the Petitioner or Senator Kennedy shifted their positions during the attack affirmatively disproved by the eyewitness accounts, but so too is Respondent's unsupported assertion that Petitioner's weapon moved closer to Senator Kennedy during the attack. Karl Ueker, an eyewitness, pinned Petitioner's gun hand to a table during

the shooting, and he testified that Petitioner's weapon was never closer than 1 ½ feet to Senator Kennedy. (Ex. H, *supra*.) Given that Petitioner's weapon and hand were pinned to a table during the shooting, it is unclear how Petitioner's gun could have gotten closer to Senator Kennedy during the incident.

The Respondent concludes by stating that Petitioner "fails to present or identify conclusive physical evidence or irrefutable eyewitness testimony that somebody else, and not Petitioner, actually shot the victims." (Resp. Supp. Brief., *supra*, 7:11-12.) Respondent does not even bother to contest the autopsy report's conclusion that all the bullets entered into Senator Kennedy from behind in an upward trajectory, and Respondent's only attempt to discount the eyewitness testimony is speculation that all twelve eyewitnesses somehow were wrong about Petitioner's position, Senator Kennedy's position, and the distance of the Petitioner's weapon from the Senator. Perhaps Respondent is right that this eyewitness testimony is not "irrefutable"-no piece of evidence is truly "irrefutable" in the sense that there are absolutely no set of facts that could undermine it-but the fact remains that at this time the testimony is unrefuted. That is, there is no piece of evidence before this Court that would suggest any part of the eyewitness testimony, autopsy report, Pruszynski Recording, are wrong. Given that all twelve witnesses agree on the essential facts-

specifically, that Petitioner was in front of Senator Kennedy and to his right and that Petitioner's gun was no closer than 1 ½ feet to Senator Kennedy-the Respondent is left to speculate that *maybe* all twelve of those eyewitnesses are wrong, without any evidence to support that theory. Again acknowledging Petitioner's heavy burden at this stage of the proceedings, it is simply absurd to suggest that Respondent's speculation is sufficient to show that no fewer than twelve unbiased and uncontradicted eyewitnesses are wrong.

Respondent ignores not only the combined exculpatory effect of the autopsy report and eyewitness testimony, but he also completely disregards the findings of Philip Van Praag and Robert Joling with respect to the Pruszynski recording. Specifically, as has already been stated, Van Praag and Joling have concluded that the Pruszynski recording picked up at least 13 "shot sounds" during the attack. See § III(E)(1), *supra*. Given that Petitioner's weapon only carried eight rounds (See Ex. A, Joling Dec., *supra*, 5:26-27), and that he had no opportunity to reload after Karl Ueker pinned his gun hand to a cabinet (See Ex. H, *supra*), the Pruszynski recording conclusively demonstrates that someone other than Petitioner fired a weapon that evening. When combined with the autopsy report and eyewitness testimony, which demonstrates that Petitioner could not have fired the fatal shots based upon the

angle of the entry wounds and Petitioner's position relative to Senator Kennedy, the fact that the Pruszynski recording proves a second gunman was in the pantry of the Ambassador Hotel that evening is very powerful evidence to suggest that this second gunman and not Petitioner fired the fatal rounds.

Respondent further attempts to disparage Petitioner's innocence by arguing that even if someone else killed Senator Kennedy, then Petitioner would still be vicariously liable for the homicide because no reasonable jury could conclude either that "(1) [Petitioner] was hypnotized into writing about his motive for killing the victim, practicing with his firearm in anticipation of the shooting, shooting at Senator Kennedy, and then admitting his guilt and that (2) he was unaware that another shooter just happened to shoot Senator Kennedy at the very same time as he attempted to do so." (Resp. Supp. Brief., *supra*, 7:20-24.) The simple fact is that there is simply no evidence to suggest that Petitioner had any knowledge of a second gunman. In fact, the evidence of hypno-programming, see § III(E)(3), *infra*, suggests that Petitioner could not have been aware of a second gunman's presence. Given that one is only vicariously liable for the acts of another when the defendant acts "with knowledge of the unlawful purpose of the perpetrator," People v. Prettyman, 14 Cal.4th 248, 259 (1996)(citing People v. Beeman, 35 Cal.3d 547 (1984)), the

absence of any evidence to suggest Petitioner's awareness of a second shooter should be sufficient to foreclose the question of vicarious liability.

(3) The Hypno-Programming of Petitioner

According to Dr. Daniel Brown, a professor of Clinical Psychology at Harvard Medical School, Petitioner "shows a variety of personality factors that...make[] Mr. Sirhan the type of individual extremely vulnerable to coercive social influence." (See Exhibit I, Declaration of Dr. Daniel Brown 4 ¶ 8.1.) Dr. Brown continues to state that as a result of standard tests, "Mr. Sirhan is indeed very highly hypnotizable." Id. at 5 ¶ 8.4.

Not only has Dr. Brown concluded that Petitioner is particularly vulnerable to hypno-programming, but he has also concluded that on the night of Senator Kennedy's murder Petitioner was in fact responding to a hypnotic cue. Dr. Brown states in his declaration:

> "Mr. Sirhan did not go with the intent to shoot Senator Kennedy, but did respond to a specific hypnotic cue given to him by that woman[4] to enter 'range mode,' during which Mr. Sirhan automatically and involuntarily responded with a 'flashback' that he was shooting at a firing range at circle targets. At the time Mr. Sirhan did not know that he was shooting at people nor did he know that he was shooting at Senator Kennedy." Ex. I, Brown Decl., *supra*, at 8 ¶ 10.1.

[4] Dr. Brown here refers to a woman who led Petitioner to the kitchen at the Ambassador hotel and gave the hypnotic cue that triggered Petitioner into "range mode." See generally, Ex. I, Brown Decl., *supra*.

Dr. Brown based his conclusion that Petitioner was under hypnotic programming on the night of Senator Kennedy's murder upon Petitioner's "free recall" of the events of that night. There is one particular part of Petitioner's "free recall" that Dr. Brown has concluded is "strongly suggestive of an automatic behavioral response to a specific post-hypnotic cue." Id. at 11 ¶ 10.10. Specifically, Dr. Brown states that Petitioner described to him that when the former "was tapped on the shoulder Mr. Sirhan automatically took his weapon stance and began experiencing a 'flashback' that he was firing at a target at a firing range. Mr. Sirhan specifically recalled taking his stance, and specifically recalled seeing circular targets in his field of vision." Id.

Dr. Brown's analysis fully supports the notion that Petitioner was in fact responding to a hypnotic cue on the night of Senator Kennedy's murder. Specifically, Dr. Brown concludes that "[t]ouching Mr. Sirhan on his shoulder and/or turning him around suggests an [sic] hypnotic cue to enter 'range mode,' to hypnotically hallucinate the firing range, and to fire automatically upon cue." Exhibit I, Brown Decl., *supra*, at 14 ¶ 10.18. Moreover, there is not a single shred of evidence to contradict the account that Petitioner was in fact hypno-programmed.

F. THE *BRADY* AND *STRICKLAND* VIOLATIONS COMBINED WITH THE HYPNOTIC PROGRAMMING AND PETITIONER'S HIGH SUGGESTABILITY TO PRODUCE PETITIONER'S CONFESSION

Petitioner has recounted here the Brady and Strickland violations because Respondent seems to argue that those violations did not prejudice the Petitioner given his confession at trial. What Respondent fails to grasp, however, is that Petitioner's false confession was a product of those Brady and Strickland violations. In other words, Respondent's argument that the Brady and Strickland violations did not prejudice Petitioner because of the latter's false confession inverts the proper state of affairs: Petitioner's false confession is precisely one of the ways in which the Brady and Strickland violations prejudiced him, not the cure-all for those violations that Respondent suggests. Given that Petitioner was hypno-programmed into firing a weapon at Senator Kennedy (though not killing him), it is completely plausible that Petitioner did, at the time of his trial in 1969, believe that he had killed Senator Kennedy. This plausible belief was reinforced by Petitioner's conflicted defense counsel, the Brady violations, and Petitioner's high suggestibility.

As an initial matter, it is important to note that Petitioner possesses the type of psychological makeup that particularly lends itself to false confessions under coercive circumstances. Dr. Brown writes that:

> "Mr. Sirhan's *current* score is nearly a standard deviation above the general population mean, and just within the range that identifies individuals likely to be vulnerable to making a false confession in the context of a coercive interrogation. To a reasonable degree of psychological certainty Mr. Sirhan's degree of compliance explains why he is the type of individual who would go along with a defense strategy at trial in ways that did not best represent his interests. Furthermore, such high social compliance makes Mr. Sirhan exactly the type of individual most vulnerable to suggestive influence." Ex. I, Brown Decl., *supra*, at 5 ¶ 8.5.

Due to Petitioner's "high social compliance," Dr. Brown has concluded that he is "exactly the type of individual most vulnerable to suggestive influence," and thus "likely to be vulnerable to making a false confession." Respondent's argument that the Brady and Strickland violations were not prejudicial thus inverts the actual situation: The state's Brady and Strickland violations were actually *particularly prejudicial precisely because of Petitioner's propensity for false confessions*. Were Petitioner not so susceptible to "suggestive influence" in the particular circumstances in which he found himself, then perhaps the state might be right that there was no prejudice from the constitutional violations. Unfortunately for the state now and Petitioner then, Petitioner is "exactly the type of individual most vulnerable to suggestive influence." Given the context in which Petitioner's false confession was generated-with the state withholding all of the means to assert his innocence in violation of Brady and his own conflicted

counsel acquiescing in that effort in violation of Strickland-it was all but a certainty that Petitioner would falsely confess to the charged crime.

The "suggestive influence" to which Petitioner is and was particularly vulnerable, and which produced his false confession, are the Brady and Strickland violations discussed in § III(C) and § III(D), *supra*. Consider the first two Brady violations-introduction into evidence of the false "DN" "TN" bullet as the fatal Kennedy neck bullet and suppression of the true "TN 31" Kennedy neck bullet, and suppression of ballistics evidence indicating that more than eight bullets were recovered at the scene. Suppressing the true "TN 31" Kennedy neck bullet and substituting the false "DN" "TN" bullet had the effect of making it appear as though the state had iron-clad ballistics evidence to show that the fatal bullet was fired from Petitioner's gun. Meanwhile, suppressing evidence that more than eight bullets were recovered at the scene made it appear as though there was no evidence to implicate anyone other than the Petitioner.

Having denied to the Petitioner the means not only to disprove the ballistics link between his weapon and the fatal bullet but also the evidence to implicate someone else as the assassin, the state generated a situation where any trial strategy predicated upon denying Petitioner's guilt seemed

hopeless because it appeared as though there was not only iron-clad ballistics evidence tying Petitioner's weapon to the fatal bullet but also no evidence that someone other than Petitioner fired *any*, let alone the fatal, shots that night. Had Petitioner been aware of the state's bait-and-switch with the bullets as well as the evidence that more than eight bullets were recovered, then surely he could have at least considered a trial strategy that did not include Petitioner admitting to the crime.

As egregious and damaging as the Brady violations were to Petitioner's ability to mount a proper and adequate defense at trial, they were exacerbated by Cooper's conflicted and deficient representation. Specifically, the three specific Strickland violations discussed at length here-stipulating to the authenticity of the ballistics evidence, failing to investigate other avenues of defense, and failing to move for a mistrial-discussed at length here-contributed to Petitioner's false confession because, when combined with the Brady violations, made any decision not to concede Petitioner's guilt seem all but hopeless. The suppression of the fatal "TN 31" bullet and introduction of the false "DN" "TN" bullet, combined with Cooper's stipulation to the latter's authenticity, denied Petitioner the opportunity to argue that the state had not met its burden of proof to prove Petitioner's guilt beyond a

reasonable doubt because there was no ballistics evidence linking him to the crime. Cooper's decision not to investigate alternative defenses, combined with the state's suppression of the ballistics evidence indicating that more than eight bullets were fired, similarly denied Petitioner the opportunity to argue that someone other than Petitioner fired the fatal shots. And similarly, the state's delayed disclosure of the autopsy report, combined with Cooper's failure to move for a mistrial upon its disclosure, denied Petitioner the opportunity to argue that he could not have fired the fatal shot because the angle of the entry wounds proves that the shooter was behind Senator Kennedy while the eyewitness evidence demonstrates that Petitioner was in front of him.

Respondent attempts to dismiss each of the aforementioned Brady and Strickland violations by relying heavily upon the fact of Petitioner's confession. They would like this Court to accept that it is irrelevant that the state introduced false ballistics evidence demonstrating that Petitioner's weapon fired the fatal bullet; that the state withheld evidence indicating more than eight bullets were recovered at the scene; and that the state withheld evidence in the autopsy report indicating that Petitioner could not have killed Senator Kennedy because the angle of the wounds and the distance from which the gun was fired are inconsistent with the eyewitness accounts of

Petitioner's position and distance relative to Senator Kennedy at the time of the shooting. Respondent would like this Court to ignore the fact that defense counsel stipulated to the authenticity of the key piece of ballistics evidence despite the state's representations that it could not be authenticated; that defense counsel failed to investigate other possible defenses; and that defense counsel ignored the exculpatory autopsy report and failed to move for a mistrial upon its delayed disclosure. Respondent would like this Court to ignore all of these constitutional violations because, they say, the Petitioner *confessed*. What Respondent appears to miss, or chooses to ignore, is that Petitioner's confession was a product of these violations: Each of the aforementioned Brady and Strickland violations made it seem more and more hopeless, and even more and more counter-productive, to deny Petitioner's guilt. Faced with this situation, Petitioner had no choice but to concede his guilt.

Absent the exculpatory evidence regarding the angle of the bullet wounds and distance of the gun's muzzle from Senator Kennedy, Petitioner was denied the tools he needed to see the exculpatory power of the eyewitness testimony which, combined with the autopsy, conclusively prove that Petitioner could not have fired the fatal bullet based upon the angle of the entry wound and distance from which the gun was fired. Since

Petitioner did not receive the autopsy report until fifteen days into trial at the earliest, after they had already conceded Petitioner's guilt in front of a jury, Petitioner had no choice but to concede his guilt at trial.

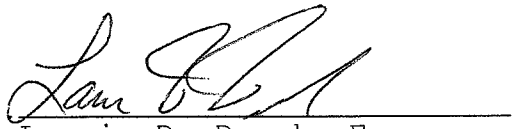
That Petitioner's hypno-programming and high suggestibility combined with the Brady and Strickland violations to produce Petitioner's false confession is confirmed by the one person who would know best-the Petitioner. According to Petitioner, "I was told by my lead trial attorney, Grant Cooper, that I shot and killed Senator F. Kennedy and *that to deny this would be completely futile.*" (Exhibit J, Declaration of Sirhan Sirhan 1:4-6, Aug. 9, 1997) (emphasis added.) Petitioner's trial counsel told Petitioner that he shot and killed Kennedy, and that it would be "futile" to deny that, even though Petitioner "had and continue to have *no memory* of the shooting of Senator Kennedy." (Id) (emphasis added). Given both that Petitioner's counsel informed him that denying shooting Senator Kennedy would be futile and that Petitioner had and has no memory of the event, then his false confession must have been caused by Petitioner's hypno-programming, his high suggestibility, and both the Brady and Strickland violations. No other explanation can account for all the evidence.

IV. CONCLUSION AND REQUESTED RELIEF

Petitioner requests that this Court set this matter down for an evidentiary hearing and issue a writ of habeas corpus. Petitioner has not procedurally defaulted his claims because the California timeliness rule was not an adequate and independent state ground *at the time it was applied to Petitioner.* Moreover, the statute of limitations should be tolled because it is more probable than not that no reasonable juror could find Petitioner guilty beyond a reasonable doubt based upon new evidence of "actual evidence," in particular the Pruszynski recording, autopsy report, and ballistics evidence that more than eight bullets were recovered at the scene.

Respectfully Submitted, April 23, 2011:

William F. Pepper, Esq.
Counsel for Petitioner



Laurie D. Dusek, Esq.
Counsel for Petitioner