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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re JOSEPH HUNT, **On Habeas Corpus.**	**Case No.: A090435** **INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS; POINTS & AUTHORITIES; EXHIBITS**

TO THE HONORABLE CHRISTOPHER DYBWAD, JUDGE, DEPARTMENT 70, WEST, AND TO TRACY LUM, COUNSEL FOR PETITIONER, AND PETITIONER JOSEPH HUNT ("PETITIONER"):

The People of the State of California, Real Party in Interest ("Respondent") in the above-entitled case, by their counsel, George Gascón, District Attorney of Los Angeles County, hereby make this informal response to the petition of Joseph Hunt, Petitioner for Writ of Habeas Corpus.

On April 26, 2022, Petitioner filed the instant petition for writ of habeas corpus ("Petition" or "Petn."), alleging: (1) a due process violation by the trial court for failing to instruct the jury on the claim of right defense; (2) ineffective assistance of counsel ("IAC") against his trial attorney for failure to request the claim of right jury instruction; and (3) requests resentencing

consideration pursuant to Penal Code,[1] section 1172.1, *formerly* 1170, subdivision (d)(1). (Petn. at pp. 17-22.)[2]

Respondent submits that Petitioner has failed to meet his burden in establishing a prima facie case for habeas corpus relief and respectfully requests that this Court deny Petitioner's request for relief on procedural and substantive grounds.

INTRODUCTION

In 1987, a jury convicted Petitioner of murder in the first degree of Ronald George Levin ("Levin") (in violation of section 187) and of robbery (in violation of section 211), and found true the special circumstance that Levin had been murdered while Petitioner engaged in the commission of robbery (section 190.2, subdivision (a)(17)).[3, 4] (6 CT 1700-1701.) He was sentenced to life in state prison without the possibility of parole. (6 CT 1624.)

The trial evidence showed that Petitioner and members of his group operated by Petitioner's "paradox philosophy": "[t]he idea that by reorienting your perspective on something, you can have a totally different result in the way you analyze it." (68 RT 10818, ll. 10-12.) "The paradox philosophy called for the group not to be bound by society's rules of law and religion. Members of the group would not blindly follow any rule but would do what was 'necessary under the circumstances.' Survival of the individual was the sole end." (Ex. 1, p. 322.)

During trial, Petitioner asserted the defense that he was innocent because victim Ronald Levin ("Levin") was not robbed or murdered, as alleged. (81 RT 12823-12939, 82 RT

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[1] All references are to the Penal Code, unless otherwise specified.

[2] In his petition, Petitioner tries to circumvent procedural bars by alleging, "Further, procedural bars are not applicable because petitioner is actually innocent of the crime of robbery and the special circumstance of murder committed in the commission of a robbery. ([Citations])." (Petn., p. 16.) On habeas corpus, claims of actual innocence are analyzed under section 1473, subdivision (b)(3)(A) and (B). Yet, Petitioner never cites to that section in furtherance of this claim. While it may be that Petitioner simply seeks to invoke "actual innocence" to avoid applicable procedural bars, such a claim must be analyzed and considered under the prevailing legal standard of section 1473, subdivision (b)(3)(A) and (B). Thus, regardless of his intentions in making this allegation, Respondent will analyze it under the applicable legal standard and will demonstrate to this Court that Petitioner's claim of actual innocence in this regard is substantively meritless. As such, he cannot properly invoke the actual innocence exception to avoid the applicable procedural bars.

[3] This procedural history is taken from the Court of Appeal ("COA") opinion in (*People v. Hunt* (Nov. 23, 1993, B029492 [nonpub. opn.] (*Hunt*)), which Respondent attaches hereto as Respondent's **Exhibit 1.** All exhibits attached to this informal response are incorporated herein by reference as if set forth in full.

[4] Respondent attaches the reporter's transcript ("RT") and the clerk's transcript ("CT") collectively on disc hereto as Respondent's **Exhibit 2**. The corresponding volume number of the RT or CT will immediately precede the designation "RT" or "CT" in any citation of those transcripts in this informal response.

12940-13014.) Petitioner's defense presented evidence to assert that on the date in question, Petitioner had met Levin, a business associate, for a dinner meeting at La Scala restaurant to sign an options contract for a predetermined amount of $1.5 million. (73 TR 11550; 74 11700.) He called his girlfriend as an alibi witness to corroborate his claims that he had said he was meeting Levin at a business dinner. (73 RT 11550-11557, 74 RT 11700, 47 RT 7106-7108, 81 RT 12904-12906.) Petitioner, via his trial counsel, argued in the closing that he had left the dinner when Levin was alive and does not know what happened to Levin, but could only speculate that Levin faked his own disappearance to avoid legal and financial problems. (81 TR 12830, 12850.) Though Levin disappeared, witnesses Carmen Canchola and Jesus Lopez later saw Levin in Arizona in September 1986. (75 TR 11897-12147; 76 TR 12169-12199; 77 TR 12253-12316; 81 TR 12850.)

In this Petition, Petitioner stays true to his "paradox philosophy," by seemingly recasting a portion of his trial defense. In the context of excepting his claims from applicable procedural bars, he reiterates he is "actually innocent of the crime of robbery and the special circumstance of murder committed in the commission of a robbery ([citations])" (Petn., p. 16.) Yet, this reiteration comes with a twist: he now propounds that the trial evidence supports that he had a claim of right to the money he got from Levin, thereby allegedly mandating his entitlement to a claim of right jury instruction. He uses this "reorientation" of his trial defense as a foundation for his current habeas corpus claims, in the apparent hope that he will get "a totally different result" in the analysis and outcome of this habeas litigation. His change in strategy appears to be Petitioner's last ditch attempt to get his conviction reversed, or at a minimum, to improperly use the writ process to get his sentence reduced.

In his Petition, he alleges: (1) a due process violation by the trial court for failing to instruct the jury on the claim of right defense; (2) ineffective assistance of counsel ("IAC") against his trial attorney for failure to request the claim of right jury instruction; and (3) requests resentencing consideration pursuant to Penal Code, section 1172.1, *formerly* 1170, subdivision (d)(1). (Petn. at pp. 17-22.) He requests the following relief: 1) issue a Writ of Habeas Corpus, 2) issue an order to show cause, 3) declare the rights of the parties, and 4) vacate the conviction for robbery and the special circumstances of murder committed in commission of robbery. (Petn. at p. 14.)

This Court has requested that Respondent file an informal response to all of Petitioner's claims.

Substantively, Petitioner has proffered nothing to make out a prima facie case on any of his current habeas claims, as is his burden.

Petitioner alleges that the trial court violated his due process rights by failing to give a claim-of-right defense jury instruction. (Petn., p. 17.) Concurrently, Petitioner claims that his trial counsel failed to request the claim of right defense jury instruction and thus was ineffective. (Petn., p. 20.) Finally, Petitioner bootstraps to this Petition a request to be resentenced pursuant to section 1172.1, for which this Petition is an improper vehicle.

Petitioner's claim of due process for instructional error by the trial court fails because Petitioner has not shown how the trial court would have had to issue the claim-of-right jury instruction *sua sponte*, as claim-of-right was never Petitioner's defense theory at trial. Even after Petitioner was tried and convicted, Petitioner continued to deny his involvement in the Levin murder and instead insisted that Levin was actually alive as evident by his 1993 direct appeal and habeas petitions, as was consistent with his trial strategies. (*Hunt,* p. 133-138, 9 EHRT[5] 1366-1367, 1498, 1998 Habeas Petition[6], p. 14-21, 27-35.) After taking many bites of the apple, Petitioner has not convinced any court that Levin is still alive and that Petitioner was not involved in the murder. In fact, multiple courts have denied Petitioner's various claims and pointed to overwhelming evidence that Petitioner was involved in the Levin murder. Further, in his 1993 habeas corpus petition in the COA, Petitioner claimed that his trial attorney had committed IAC and caused his trial attorney to testify at a lengthy evidentiary hearing, wherein trial counsel testified that Petitioner had admitted his involvement in Levin's murder to trial counsel, but later changed his story. (7 EHRT 1172-1174.)

Only now, after his 35-plus years of repeated attempts to have his conviction reversed have failed and after the damning testimony of his trial attorney regarding Petitioner's

[5] Digitized copies of the 15 volumes of Reporter's Transcripts from the 1996 LASC evidentiary hearing ("EHRT") are collectively attached to this informal response as Respondent's **Exhibit 3.**

[6] Respondent attaches hereto this order in the 1998 Habeas Petition ("1998 Habeas Petitioner") as Respondent's **Exhibit 4**.

involvement in Levin's murder has become part of the public record through Petitioner's 1996 habeas litigation, Petitioner pivots to include the claim of right theory in his defense theory as a foundation for his new habeas claims. Yet, Petitioner does not make a prima facie case that the trial court violated his due process by failing to *sua sponte* instruct the jury on the claim-of-right defense because the trial court had no duty to instruct on the claim of right defense when, as is the case here (1) Petitioner never relied on that defense at trial, (2) there is no substantial evidence supportive of the claim of right defense, and (3) the claim of right defense conflicts with Petitioner's theory of the case.[7]

Petitioner's claim of IAC fails because Petitioner has not made a prima facie showing that trial counsel's alleged failure to request instruction on the claim-of-right defense was deficient and prejudiced Petitioner. (*In re Serrano* (1995) 10 Cal.4th 447 (*Serrano*); *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*).) Petitioner utterly fails to present credible evidence in support of this claim, like declarations from his trial counsel or from *Strickland* experts as to this specific issue. Moreover, in keeping with Petitioner's sole reliance on the record, the 1996 evidentiary hearing transcript from Petitioner's prior habeas litigation illustrates the strategies that trial counsel did take and supports that trial counsel advanced the defense theory of Petitioner's choice, i.e. Levin was still alive and thus Petitioner was not involved in a murder. (7 EHRT 1172-1174, 1122-1127; 9 EHRT 1366-1367, 1498.) Thus, the instantly-alleged failure by defense counsel to have requested the "claim-of-right" instruction at trial is consistent with the defense's advancement of the principal trial defense, not with constitutionally ineffective representation. To the contrary, trial counsel's currently-alleged inaction can be explained as a matter of sound strategy. (*People v. Ledesma* (2006) 39 Cal.4th 641 (*Ledesma*).) To have requested instruction on a totally opposite defense theory would have confused the jury and would not have overcome the mountain of evidence of guilt against Petitioner and alter the result of the trial. (*In re Lawley* (2008) 42 Cal.4th 1231 (*Lawley*).) Thus, trial counsel cannot be found to have rendered deficient performance and/or that Petitioner was prejudiced, as alleged.

[7] *People v. Gordon* (1982) 136 Cal.App.3d 519, 531 (*Gordon*); *People v. Stevens* (1969) 269 Cal.App.2d 470, 474-475 (*Stevens*).

Further, Petitioner's due process and IAC claims are procedurally barred. First, his due process claim fails procedurally because it violates the *Dixon* rule,[8] which bars consideration of habeas claims that could have been raised on timely appeal, but were not. "'[T]he writ [of habeas corpus] will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.'" (*In re Reno* (2012) 55 Cal.4th 428, 490 (*Reno*); see also *In re Lindley* (1947) 29 Cal.2d 709, 723 (*Lindley*); *In re Garcia* (1977) 67 Cal.App.3d 60, 65; and *In re Gomez* (1973) 31 Cal.App.3d 728, 732.) Petitioner should have raised the instant claims of due process and IAC on appeal, as a review of the trial record is arguably all that is needed to evaluate these claims—which Petitioner had at the time he raised his other instruction-related claims on direct appeal. Because he should have raised them on appeal but did not, he is procedurally barred from bringing them now, without viable legal justification or exception.

Next, Petitioner's claims violate the *Horowitz*/*Clark* rule that a habeas petitioner may not raise claims in a subsequent habeas petition based on information that was known to the petitioner at the time of his or her first habeas petition. (*In re Horowitz* (1949) 33 Cal.2d 534, 546-547 (*Horowitz*); *In re Clark* (1993) 5 Cal.4th 750, 774-775 (*Clark*), superseded by statute on other grounds as stated in *Briggs v. Brown* (2017) 3 Cal.5th 808, 842.) Petitioner raised his first habeas petition in the appellate court at the same time he brought his direct appeal. Although he had the alleged factual bases and alleged evidentiary support to raise the instant due process and IAC claims in that habeas petition, he failed to do so. Indeed, to Respondent's knowledge, he has also failed to raise them in any of his subsequent habeas litigation until doing so in the instant petition. Thus, he is now procedurally barred from raising them in this successive petition, without valid legal justification or exception, which he does not viably present.

Third, Petitioner's due process and IAC claims fail procedurally because they are untimely. Petitioner was reasonably aware of the alleged factual and legal bases of these current claims at the time of his trial, more than 35 years ago. Petitioner provides no explanation for the substantial delay in raising them and has not stated any exception to the timeliness bar. (*Clark*, *supra*, 5 Cal.4th at pp. 797-798.) Any significant delay in seeking relief must be justified. (*In re*

[8] *In re Dixon* (1953) 41 Cal.2d 756, 759 (*Dixon*).

Robbins (1998) 18 Cal.4th 770, 780.) "Substantial delay is measured from the time petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." (*In re Gallego* (1998) 19 Cal.4th 825, 832; *In re Harris* (1993) 5 Cal.4th 813, 828, fn.7 (*Harris*).) The time may be as early as the date of his conviction. (*Clark*, *supra*, 5 Cal.4th at p. 765.) He does not viably show that he is excepted from these claims.

Because his claims are procedurally barred and substantively meritless, Petitioner is not entitled to habeas corpus relief on this Petition. Also, Petitioner's resentencing request is improperly raised in this habeas petition. As such, the Court should summarily deny the Petition without issuing an order to show cause, requiring a formal return or ordering an evidentiary hearing.

DATED: October 2, 2023

Respectfully submitted,

GEORGE GASCÓN
District Attorney

By:_____
VAN C. HA
Deputy District Attorney
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PROCEDURAL AND FACTUAL BACKGROUND

I. STATEMENT OF FACTS

Respondent adopts and asserts the following statement of facts from the Court of Appeal ("COA") opinion on Petitioner's direct appeal: [9]

> II. FACTS
>
> The plot to kill Ron Levin was testified to by Dean Karny who received immunity for his testimony. [Petitioner] first became acquainted with Dean Karny and Ben Dosti in junior high school and became reacquainted with them in 1980 while Karny was a student at UCLA. [Petitioner] impressed them as remarkably intelligent and well-established for a young man of their age. He told them how he had completed college by challenging exams at the University of Southern California, had become the youngest person to ever pass the CPA exam and about his employment with Peat, Marwick & Mitchell as a commodities trader. Eventually, over the next few months, [Petitioner], Karny, Dosti, and another friend of Karny's named Ronald Pardovich became best friends.
>
> [Petitioner] told his friends that someday he wanted to form a group of intelligent, capable, motivated people who could succeed in business, personal and social ventures without the type of constraints and intrigues usually associated with corporate structures.
>
> In November 1980, [Petitioner] moved to Chicago in order to trade commodities on the floor of the Mercantile Exchange to raise money so that he could start the group. Karny, his parents, and others provided [Petitioner] with over $400,000 to invest in Chicago. While in Chicago, [Petitioner] maintained his close friendship with Karny, Dosti and Pardovich, and a new friend, Evan Dicker, whom he met through Karny and Dosti. At first it appeared that [Petitioner] was very successful at trading. However, by 1982 [Petitioner] had lost all the money. He returned to Los Angeles with only $4 in his pocket and moved in with Karny.
>
> The idea of forming a social group of people who shared a common philosophical belief which would grow into a business venture remained alive. To get the group started, Karny, Dosti and Pardovich socialized, met people and brought their friends around to meet [Petitioner] and expose them to his ideas. By early 1983 about 10 people were involved. [Petitioner], Dosti and Karny were the leaders but [Petitioner] was the final arbiter and decision-maker. The members called themselves the 'Boys" and considered themselves a mini-mafia. They held their first formal meeting, and named themselves the Bombay Bicycle Club or "BBC."

[9] This portion of the procedural and factual background is taken primarily from the Court of Appeal's opinion in Petitioner's direct appeal, attached hereto as Respondent's **Exhibit 1**. (*People v. Hunt* (Nov. 23, 1993, B029492 [nonpub. opn.] (*Hunt*)). Much of the factual background is taken verbatim, or nearly verbatim, from that decision; however, the footnotes have been omitted, unless otherwise indicated. For continuity within this informal response, Respondent has substituted "Petitioner" for "Defendant" in the quoted material, as bracketed. Further, where incorporated, additional facts taken from the "RT" or the "CT", collectively on disc as Respondent's **Exhibit 2,** are cited. All exhibits attached to this informal response are incorporated herein by reference as if set forth in full.

The BBC's purpose was to make money through investing in commodities, cyclotron technology and arbitrage. A philosophy developed by [Petitioner] which he called the paradox philosophy bound the group together. The paradox philosophy called for the group not to be bound by society's rules of law and religion. Members of the group would not blindly follow any rule but would do what was "necessary under the circumstances."

Survival of the individual was the sole end. However, disloyalty to [Petitioner] or the BBC led to expulsion. A belief in the paradox philosophy enabled a person to lie and to commit crimes; even murder would be justified by the paradox philosophy if it was convenient.

By June 1983, money was raised, offices were rented and business appeared to be prospering through [Petitioner]'s commodity trading. Over the next year, a number of people were persuaded to invest hundreds of thousands of dollars in various BBC business enterprises and commodities accounts over which [Petitioner] had trading authority based upon [Petitioner]'s promise that they would receive high rates of return with little risk. One investor, Steve Weiss, brought in his closest friends and relatives and they, alone, invested over $1.5 million. On the surface the BBC looked highly profitable. [Petitioner] personally began spending a great deal of money and he sent out financial statements and personal checks to investors indicating that they also were making huge profits on their investments.

Ronald George Levin came to [Petitioner]'s attention early in 1983. [Petitioner] was told that Levin was a "scammer" and couldn't be trusted but [Petitioner] wanted to find out for himself. When [Petitioner] eventually met Levin that summer, he formed the opinion that Levin was wealthy and he succeeded in getting Levin to place $5 million in a commodities trading account. The account was in Levin's name and [Petitioner] was given the authority to trade the account on Levin's behalf. They would split the profits.

Shortly thereafter, [Petitioner] announced to the BBC that in one day he had lost all the investors' money in the commodities market with the exception of the Levin account. [Petitioner] told the BBC they need not worry. [Petitioner] showed them a statement indicating that he had made a $7 million profit on the Levin account. Since [Petitioner] was entitled to one-half of the Levin profits, or $3.5 million dollars, he would reimburse the other investors for their losses and the BBC was still going to have enough money to do all the other things they wanted to do.

By this time, the BBC's overhead expenses were approximately $70,000 per month, the other businesses were not making much money, and [Petitioner] was personally spending large sums of money, thus the profit from the Levin account was "a very big event." Everyone at BBC expected to get money from the Levin account.

[Petitioner] tried to get the money from Levin, but Levin told [Petitioner] he could not pay [Petitioner] his percentage immediately because he had invested the money in a shopping center. However, according to Levin, the shopping center investment had increased

[Petitioner]'s $3.5 million investment to $13 million. Later, Levin told [Petitioner] that a Japanese company had offered to buy the shopping center bringing [Petitioner]'s profit to $30 million.

Optimism over the money which would be forthcoming from the shopping center was high in October 1983. [Petitioner] called a BBC meeting and announced how the profits from the sale of the shopping center would be divided. The largest portion was to go to [Petitioner]. Karny and Dosti would get $1 million each. BBC members, Tom May and Dave May, each would receive $700,000. But the money never materialized. [Petitioner] finally learned that Levin was a conniver and a manipulator and that he had been the victim of an incredible hoax.

Levin, posing as a representative of Network News, had contacted Jack Friedman, a broker with Clayton Brokerage Company, in June 1983 and convinced Friedman that he was making a documentary movie, entitled "The Traders," in which various commodities' trading practices would be compared. Friedman's role was to set up a simulated trading account in which [Petitioner]'s results as an outside trading advisor would be compared over a four to eight week span with the results of an in-house broker, a computer, and with merely throwing darts. Levin told Friedman to make sure that [Petitioner] did not know the account was simulated, explaining that the emotional trading decisions would not be the same if the trader knew it was not real. [Petitioner] was not to be told he was trading in a simulated account until the story was done.

When [Petitioner] called the brokerage house to begin trading, he was informed by Friedman that the equity in the Levin account was over $5 million. By the time Levin closed the simulated account on August 17, 1983, [Petitioner] believed he had increased the account to $13,997,448.46, reflecting a net profit of $8,320,649 and that the account was being closed so that the money could be used for a real estate transaction. Sometime in October or November 1983, Friedman told [Petitioner] the money was not real. [Petitioner] gave Friedman the impression that he knew all along that it was just a movie, but within five hours after Friedman discussed with [Petitioner] the true nature of the account, Friedman received a phone call from Levin in which Levin screamed, yelled, and threatened Friedman for violating his confidentiality. Friedman never heard from Levin again.

At about the same time that [Petitioner] learned of Levin's scam, Jim Pittman, known to the BBC members as Jim Graham, came into the picture. At first Pittman was to provide karate lessons to BBC members. As time went on, Pittman and [Petitioner] grew very close. Pittman became a BBC member, was placed in charge of security and became [Petitioner]'s bodyguard.

[Petitioner] confronted Levin about the scam which Levin at first denied. Finally, Levin admitted to [Petitioner] that there was no shopping center and no money. However, Levin said he had used the statements from the phony trading account to con about $1.5 out of other brokerage houses and he would give [Petitioner] and the BBC $300,000 of that sum. However, Levin kept delaying in giving [Petitioner] the money which made [Petitioner] extremely angry.

[Petitioner] told Tom May he was going to get the money from Levin, "no matter what it took."

In the meantime, the real trading accounts of the other investors continued to lose huge amounts of money and the brokers were demanding additional funds from the investors to cover the accounts. By February 1984, $300,000 was no longer a large enough sum to solve the needs of the BBC and [Petitioner] no longer believed Levin was going to give him any money. However, it was apparent that [Petitioner] still believed Levin was wealthy and had really gotten $1.5 million from his scam. [Petitioner] had seen stacks of bank passbooks reflecting large deposits at Levin's house. [Petitioner] told Karny that he was going to find a way of getting that money from Levin. [Petitioner] also told Karny that Levin was going to die one day.

[Petitioner] continued to socialize with Levin. As he explained to Karny, [Petitioner] was going to maintain a relationship with Levin so that he could find a good opportunity to kill him. By the end of April or the beginning of May 1984, [Petitioner] told Karny he had developed a plan to get the money from Levin and to kill Levin.

[Petitioner]'s plan called for [Petitioner] to go to Levin's house for dinner. [Petitioner] would secretly arrange to have Pittman arrive at 9:45 p.m. Pittman was to pretend he was a mafia gunman. Upon Pittman's arrival, [Petitioner] would tell Levin that he, [Petitioner], owed a lot of money to the underworld as a result of his Chicago trading losses and that he had been putting them off by telling them he was expecting a lot of money from Levin. [Petitioner] wanted Levin to believe that he, [Petitioner], also would be in trouble if he did not get the money from Levin. [Petitioner] believed that the appearance of Pittman, an enormous black man holding a gun who was unknown to Levin, would make the scenario work.

The date of June 6th was chosen because Levin was due to leave for New York the next morning. [Petitioner] wanted to make it look like Levin had left on his trip, so that his disappearance would take longer to discover.

[Petitioner]'s plan first called for preparing the BBC in advance to believe that [Petitioner] and Levin were going to get involved in a business venture so that the BBC would not be surprised when it received money from Levin. [Petitioner] drafted letters to leave in a file he planned to create at Levin's apartment to make it look like he and Levin were involved in a business transaction. According to Karny, [Petitioner] believed such letters would deflect suspicion from [Petitioner], and in the event of a trial, that- such letters would create a "reasonable doubt." [Petitioner] also drafted an options contract between Levin and Microgenisis, one of the BBC companies, purporting to be the basis for the money [Petitioner] would receive from Levin. The amount of the option was left blank. [Petitioner] would decide the amount of the option after he got to Levin's house when he determined how much money Levin had to transfer.

[Petitioner] set forth his plan to kill Levin in a seven page outline of lists of things to do and reviewed the lists with Karny. [Petitioner] explained some of the more cryptic items on the lists to Karny, such

as one item that read, "Levin his situation." That meant [Petitioner] was going to explain to Levin his situation in such a way as to cause Levin to believe he was going to survive the ordeal on the theory that Levin would cooperate in signing the documents if Levin thought he was not going to be killed. An item reading, "kill dog (emphasis)," was in the event Levin would not cooperate.

Anyone who knew Levin knew that he really loved his dog. If Levin failed to cooperate, [Petitioner] planned to kill Levin's dog in such a grotesque way that Levin would be shaken up and more inclined to cooperate.

Another item on the list was "Jim digs pit." [Petitioner] told Karny that Pittman was up in Soledad Canyon digging a pit to take Levin to after he was killed. [Petitioner] had been helping Pittman dig the pit the day before and complained the ground was really hard.

Items such as "get alarm code," "pack a suitcase," and "keys" were to make it look like Levin had left for his New York trip. [Petitioner] was going to keep the keys in case he needed to return. Pittman was to go to New York and leave some of Levin's identification in a bar or an alley so that if anyone ever suspected that Levin had met with foul play, it would appear that it happened in New York rather than in Los Angeles.

[Petitioner]'s list reminded him to "create a file" so that people would draw the conclusion. that there had been an actual business transaction between him and Levin. Also on the list was a page entitled "at Levin's to do" with notes to "'close blinds, . . [y] [t]ape mouth, handcuff, put gloves on, . . . have Levin sign agreements and fill in blanks, Zerox everything so he has copies, initialed copies.'"

[Petitioner] arranged his alibi in advance by telling Karny to take [Petitioner]'s girlfriend, Brooke Roberts, and Jeff Raymond to the movies on the night of June 6th so that later they could say [Petitioner] was with them.

At 7 a.m. on the morning on June 7, 1984, [Petitioner] awakened Karny and told Karny he had done it, that Levin was dead. He showed him a check for $1.5 million and the contract signed by Levin. [Petitioner] was so excited about the check and contract he also woke up Jeff Raymond to show them to him. [Petitioner] told Raymond that Levin was leaving for New York that very morning to see some Arab investors who wanted to buy the option. Then he went by Tom May's and showed him the check and contract and when he arrived at the office, he made copies of the check which he distributed to the BBC members.

Three days later, [Petitioner] met with Gene Browning, the inventor of a cyclotron, which was the subject of the option agreement [Petitioner] forced Levin to sign on June 6. Browning expressed concern about the capacity of the cyclotron to perform some of the processes called for in the contract. [Petitioner] told Browning that was no particular problem because "Levin was missing and probably dead."

A few days later and in subsequent conversations, [Petitioner] described Levin's murder in detail to Karny. [Petitioner] had picked up some take-out food from a restaurant and took it to Levin's house. Pittman arrived just as planned, pulled a gun on Levin, and Levin immediately said, "will do anything you want." [Petitioner] told Karny he did not have to kill the dog because Levin cooperated so quickly. [Petitioner] told Levin his mafia story and asked Levin how much money he could be sure would clear his account. Levin said about "a million seven." [Petitioner] decided to have Levin sign a check for "a million five," just to make sure the check would clear.

[Petitioner] described how he was trying to get some other assets from Levin as well, but Pittman messed up his role of mafia enforcer. After getting the check signed, [Petitioner] turned to Pittman and said, "'Is that enough?'" Pittman was supposed to say, "'No. What else have you got?'" But instead, Pittman said, "'Yeah, that's fine.'" [Petitioner] got upset that Pittman had blown it and Levin started to whimper because he had given up the possibility that he was going to survive. When [Petitioner] tried to get Levin to tell him the alarm code Levin was so scared and nervous he could not remember the sequence and it turned out to be wrong.

They took Levin into the bedroom, put him face down on his bed and, with a silencer attached to a .25 caliber pistol, Pittman shot Levin in the back of the head. [Petitioner] described to Karny the sounds of Levin's last breath leaving his body. It was kind of like an explosive gasp. The blood started seeping out, so they quickly wrapped Levin in the bedspread. By accident they also wrapped the television remote control in the bedspread and took it with them. They carried Levin's body out to the car and put him in the trunk. Levin's body was heavy, they were exhausted and, in their haste to get the trunk closed, they closed part of the lid on his body and dented the trunk lid.

Levin's body was taken to the pit in Soledad Canyon. When they put Levin's body in the pit, [Petitioner] disfigured it by shooting the body so many times with a shotgun that it would not be recognizable even if it was found. [Petitioner] told this tale to Karny in a matter-of-fact manner without any emotion other than laughing when he told Karny how, at one point, Levin's brain jumped out of his skull and landed on [Petitioner]'s chest.

[Petitioner] thought that was "kind of neat in a weird way." Levin's distinctive watch was thrown down a storm drain because it could be traced to Levin through his special jeweler.

Levin was discovered missing early in the morning on June 7, 1984. Blanche Sturkey, Levin's housekeeper and "girl Friday" was to pick Levin up at 7 a.m. that morning to drive him to the airport. She called Levin at 6 a.m. to make sure he was up. Levin did not answer the phone. Dean Factor and Michael Broder, who were travelling to New York with Levin, arrived at Levin's house at approximately 7 a.m. and were worried because Levin was not there. Levin's blinds were closed, his alarm was not on which was very unusual, and his dog was acting peculiarly. When Sturkey arrived, she let them in with her key.

Sturkey, Factor and Broder searched the empty house and were puzzled by what they found. They thought it would have been very unusual fo[r] Levin to make plans and not show up. Levin's airline tickets and his new Luis Vuitton luggage were still in the house. A black toiletries case with which he always travelled was still in the linen closet. One of the pillows, a sheet, and the bedspread from Levin's bed were missing. His bed had been remade with a guest-room comforter Levin never used on his own bed. The television remote control was missing, the dog was acting queer and had urinated in the house, take-out food cartons with only a few bites missing were left out, the jogging suit and robe Levin had been wearing the day before was missing but none of his other clothes were missing. His wallet, house and car keys were gone, but his car was still in the carport. Perhaps most peculiar, Levin had not called his answering service for messages.

Levin's mother was called to the house and Factor and Broder went to the Beverly Hills Police Station and told a detective that they suspected Levin had been murdered. They were told that unless there was blood on the walls, there was no reason to suspect murder and there was really nothing they could do.

Nevertheless, things were no longer going according to plan. Pittman left for New York as planned and checked into the Plaza Hotel on June 7th in Levin's name. But when he tried to pay his bill with Levin's credit cards, they were rejected. Pittman tried to sneak out of the hotel without paying the bill but was caught and arrested.

[Petitioner] flew to New York and walked up to a criminal defense lawyer, Robert Ferraro, on the "stoop of the courthouse." [Petitioner] told Ferraro he had a friend named Ron Levin whom he wanted to get out of jail. [Petitioner] handed Ferraro a fee of $700, plus $2000 for "Levin" when he was released and $2000 for the Plaza Hotel, all in cash. [Petitioner] then flew on to London to stall making a payment to some investors. When he returned, [Petitioner] learned Levin's check for $1.5 million was no good and he was hysterical.

Roberts found [Petitioner] laying face down on his bed crying. [Petitioner] told her he was upset because all of the BBC boys were going to laugh at him and he did not know what to do. He told Roberts he had called Levin on the phone and driven by Levin's house and could not get a hold of him.

The pressure was increasing for money in the group. BBC members kept asking [Petitioner], Karny and Dosti why the projects they were working on were not being funded and the reason for other cutbacks. Karny thought the organization and cohesiveness of the BBC was starting to fall apart and felt uncomfortable about deceiving his friends in the BBC. Karny told [Petitioner] that if the members really understood what they were trying to accomplish and the principles of the paradox philosophy, that they also would be able to understand the killing of Levin. It was agreed that a special meeting of the BBC would be called and only those members with a sufficient orientation in the paradox philosophy would be invited to attend.

Prior to the meeting, May asked [Petitioner] what was going on. [Petitioner] replied: "Look, Tom, you are going to find out sooner or later. I killed Ron Levin." [Petitioner] told May he had committed the "perfect crime," and that he had killed Levin in New York. May thought this was just another one of [Petitioner]'s lies until he attended the secret meeting of the BBC and heard [Petitioner] tell everyone he had killed Levin.

The meeting was held on June 24. Evan Dicker, Tom May, Steve Taglianetti, Dean Karny and Brooke Roberts were present and described the meeting. [Petitioner] explained to the group, which also included Pittman, Dosti, and John Allen, that none of the BBC companies was doing well financially and there was no money left. He discussed great wealth and the need to acquire it and to protect it, and that to achieve greatness in the world, you must sometimes transgress the law. The BBC was going to take bold steps. Those who were unwilling to take the steps could remain with the BBC in some position of mediocrity, but they would never be able to achieve greatness. [Petitioner] was going to discuss some sensitive things. Anyone could leave at that point in the meeting, but if they remained, they would have to be responsible and "disciplined" about what they heard. No one left.

[Petitioner], Karny, Dosti and Pittman exited the room and were gone for a few minutes. According to Karny, during that time they discussed whether they should actually tell the others about the Levin killing. [Petitioner], Karny and Dosti were committed to sharing it with the others, but Pittman had reservations. Pittman believed that no one could be trusted with that information and that someone would always talk. Eventually, Pittman came around. Karny and Dosti returned to the meeting and were joined by [Petitioner] and Pittman a couple of minutes later.

[Petitioner] told the group, "Jim and I knocked off Ron Levin." [Petitioner] explained that all of their money had been lost and that in order for the BBC to survive, he had to do away with Levin. [Petitioner] assured the group that "it was a perfect crime" and "there is no way in which we would be caught." [Petitioner] still held out some possibility that they were going to be able to get Levin's check cashed, they still had some money and resources and a lot of good projects, and they would get back on their feet if everyone stayed together and worked hard. Before the meeting broke up, [Petitioner] threatened that if anybody talked to the police they would end up in the East River and become "fish bait."

Notwithstanding that threat, Pittman had been right when he said someone would talk. The next day, Taglianetti resigned from the BBC and called his father and told him what he had learned. Then he called David and Tom May and learned they also had told their father. Raymond moved out of the BBC apartment house. He also called David May and told him [Petitioner] had said he killed Levin and arranged a meeting with the Mays. Tom May collected copies of the Levin check and contract and other documents to turn over to the police. It was agreed that the Mays would report the matter to the police through their attorney.

[Petitioner] became suspicious that someone was talking to the police. He confirmed it by breaking into David May's apartment where he heard a message from Detective Zoeller on the answering machine. [Petitioner] confronted the Mays and Raymond with this information and demanded that they call the police and say they had lied. [Petitioner] also told them he had the pink slips to their cars and would exchange them for the documents they had given to the police. When they explained that was impossible, [Petitioner] threatened "to declare war" on them. Nevertheless, Tom May continued working with the police by removing documents from the BBC office and turning them over to the police.

Detective Zoeller of the Beverly Hills Police Department arrested [Petitioner] on September 28, 1984. [Petitioner] waived his constitutional rights and responded to a number of the detective's questions about his financial dealings with Levin. [Petitioner] appeared very confident and very sure of himself until Detective Zoeller confronted him with the seven pages of "things to do" which had been found at Levin's house. [Petitioner] immediately stopped talking and went through the lists over and over, page by page, forwards and backwards, for seven to ten minutes without speaking. Detective Zoeller then asked [Petitioner] for the second time what he knew about the lists. [Petitioner] stated, "I don't know anything about these," and the interview ended.

Defendant called Karny from the Beverly Hills jail and reminded him of the significance of the alibi they had arranged about going to the movies on June 6. After [Petitioner] was released from jail, [Petitioner] admitted to Karny how very surprised and shocked he was to see the lists, but he believed he had managed to mask his reaction. Thereafter, [Petitioner] and Karny had frequent discussions about the fake trail they had laid with regard to the crime, how brilliantly conceived and detailed their crime plan was and that if even a few of the BBC stuck to the story, a reasonable doubt would be created in the minds of the jury. [Petitioner] expressed the belief that, because he had been released from jail, even the lists did not constitute sufficient evidence to prove the case against him.

The lists contained a rough but inaccurate map of what appeared to be the Indian Canyon area of Soledad Canyon. Photographs of that area containing [Petitioner]'s picture had also been seized from Pittman's residence. On October 19, 1984, Detective Zoeller drove up to Indian Canyon with Taglianetti and Tom May to look for Levin's body. Later, Zoeller made three or four more trips to the area in an unsuccessful effort to locate Levin's remains.

[Petitioner] told Karny around the end of June that he had gone back to Soledad Canyon to see if the coyotes had dug up the body. [Petitioner] found no trace of it.

The Department of Justice Missing Persons Unit did an investigation which included comparing Levin's "unique" dental records with unidentified deceased persons. They searched his Department of Motor Vehicles record and his criminal record. They found no trace of Levin either. At the time he disappeared, Levin left thousands of dollars in various bank accounts. Levin had purchased $25,000 in

> traveler's checks before he disappeared. He had paid off debts with some of the checks and deposited $10,000 of them in a Bank of America account. Thirty of those checks totalling $3,000 were never cashed. Other than earning interest, there was no activity on any of Levin's accounts after June 6, 1984.
>
> Levin's mother never heard from him again after June 6 even though Levin loved her dearly and had never let a day go by without talking to her. Levin's body was never found and Levin was never heard from again.

(*Hunt,* pp. 4-31.)

At trial, Petitioner presented an innocence defense that advanced the theory that Levin had not been robbed or murdered, as alleged. (81 RT 12823-12939, 82 RT 12940-13014.) Rather, he and Levin had been business associates who had had a dinner meeting at La Scala restaurant to sign an options contract for a predetermined amount of $1.5 million. (73 RT 11550; 74 11700.) Through testimony and of his alibi witness/girlfriend, Brooke Roberts, Petitioner offered evidence that he last saw Levin alive at a business dinner. (73 RT 11550-11557, 74 RT 11700, 47 RT 7106-7108, 81 RT 12904-12906.) According to the testimony of Witness Roberts, Petitioner's girlfriend, she had been with Petitioner at their house sometime around 5 to 6 p.m. on June 6, 1984 when he told her he was going to meet Levin for a business dinner. (73 RT 11550.) She left for a movie, returned home, and saw him again at about 9:30 to 10:00 p.m., when he was already in his bathrobe waving the signed check around. (73 RT 11550-11557.) In closing arguments, Petitioner's trial attorney asserted that Petitioner did not know what happened to Levin after Petitioner left Levin alive at the restaurant. (82 RT 12954-12957; 81 RT 12904-12906; 81 RT 12850.) Further in closing arguments, Petitioner's trial attorney juxtaposed that by the time Petitioner had returned to his house, Levin was alive and making a call to his assistant Michael Broder at about 9:00 to 9:30 p.m. asking Broder to come over. (47 RT 7106-7108; 81 RT 12904-12906.) Michael Broder was called by the prosecution and stated that he thought there was nothing unusual about the call with Levin. (47 RT 7108.) Thus, Petitioner's trial attorney surmised that Levin had faked his own disappearance to avoid the pending legal and financial problems he had then faced. (81 RT 12830, 12850.) Petitioner also called witnesses Carmen Canchola and Jesus Lopez to testify that they had subsequently seen Levin in Arizona in September 1986. (75

RT 11897-12147; 76 RT 12169-12199; 77 RT 12253-12316; 81 RT 12850.) Per footnote 22 of the *Hunt* opinion:

> In September 1986, two people believed they saw Levin at a gas station in Tucson, Arizona. Carmen Canchola and Jesus Lopez pulled into the gas station and noticed a tall, attractive, older man pumping gas. The man was about six foot one, slender, with silver hair. His eyes were blue-gray and he had either a scar or a deep wrinkle on one side of one of his eyes. The man had a "mean" or "piercing" stare. He was wearing very nice, expensive looking clothes. He was with a man who was 15 to 20 years younger. The men appeared to be homosexuals. They drove off in a late '5O's, early '60's silverish or pinkish-beige classic automobile. On November 20, 1986, Canchola saw a sketch of Levin in an Esquire magazine article about the "Billionaire Boys Club." She thought he looked familiar and after reading a description of Levin in the article, she came to believe it was Levin she saw in the gas station and went to the police.
>
> Canchola was shown a photographic line-up and selected Levin's picture but was somewhat uncertain. When shown another line-up containing a photograph of Levin without a beard, she was 99 percent sure it was the person she had seen in the gas station. Lopez also selected a picture of Levin from the photographic lineup and was 65 percent sure it was the person he had seen in the gas station. When shown a second photograph of Levin by defense counsel he was 95 percent certain it was the man he had seen at the gas station.

(*Hunt*, p. 347, fn. 22.)

Petitioner was also connected to the murder of Heydat Eslmainia, the father of a BBC member, Reza Eslaminia. In footnote 121 of its opinion, the COA noted:

> During the penalty phase, Karny testified members of the BBC concocted a plan to kidnap Eslaminia's father to force him to turn over his fortune, estimated at $30 million, and then to kill him. Karny testified that [Petitioner] coordinated all of the details of the plan and volunteered to be the "master of torture" because he did not believe the others had the emotional constitution to handle the type of torture which would be necessary to force Eslaminia to part with his fortune. Eslaminia suffocated to death in [*sic*] trunk being used to transport him from northern to southern California.

(*Hunt,* pp. 110, fn. 121.)

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II. RELEVANT PROCEDURAL HISTORY.[10]

Although litigation on various issues has been ongoing since Petitioner's jury trial in this matter, the following procedural history is relevant to the case at hand.

In 1987, a jury convicted Petitioner of murder and found true the special circumstance of robbery. (6 CT 1700-1701.) He was sentenced to life in state prison without the possibility of parole. (6 CT 1624.)

As detailed in the COA's opinion:

> [Petitioner], Joe Hunt, was convicted by a jury of murder in the first degree of Ronald George Levin in violation of Penal Code section 187. [Petitioner] also was found guilty of robbery in violation of section 211 and that Levin was murdered while [Petitioner] was engaged in the commission of robbery within the meaning of section 190.2(a)(17). The jury fixed the penalty as life imprisonment without the possibility of parole. The court sentenced [Petitioner] to state prison for life without the possibility of parole for the murder. No sentence was imposed for the robbery.
>
> On appeal, [Petitioner] alleges his trial was unfair because: (1) the trial court imposed unconstitutional limitations on one of his attorneys; (2) his lead attorney had a conflict of interest and was ineffective; (3) a juror committed misconduct; (4) numerous evidentiary rulings were erroneous and prejudicial; (5) evidence of the corpus delicti of robbery and murder was insufficient to support the judgment; (6) the prosecutor committed misconduct during final argument; (7) the court denied the defense access to key evidence; (8) the jury was not properly instructed; (9) the court improperly limited voir dire; (10) [Petitioner] was not present during significant chambers and bench conferences; (11) his law clerk was banished from the courtroom; (12) the court violated court rules governing electronic media coverage of his trial; and (13) the trial judge was pro-prosecution and hostile to the defense.

(*Hunt,* pp. 318-319.)

In 1993, the COA denied Petitioner's direct appeal, raising 14 claims and 32 sub-claims, in the COA's 188-page, unpublished decision:

> [Petitioner] does not claim the evidence was insufficient to support the jury's verdict. He does, however, present his arguments based upon a premise that this is a weak case based solely on circumstantial evidence without body or bullets. However, we conclude that the prosecution presented overwhelming evidence that the [Petitioner]

[10] Respondent adopts some of the Procedural History from Respondent's Informal Response filed in 2017 to petitioner's prior Habeas Petition. Respondent's 2017 Informal Response ("2017 Informal Response") is attached hereto as Respondent's **Exhibit 5**. Petitioner's 2017 Petition ("2017 Petition") is attached hereto as Respondent's **Exhibit 6.**

> murdered Levin on the night of June 6, 1984, even though Levin's body was never found and notwithstanding [Petitioner]'s evidence showing that Levin was facing criminal prosecution and civil lawsuits and may have hidden away a large sum of money giving him both a motive and the financial ability to disappear.
>
> During the three-month guilt phase of the trial, in which 60 witnesses testified for the People, the prosecution proved that [Petitioner] developed a written plan to rob and murder Levin and that [Petitioner] had the motive, the opportunity, the enterprise, the philosophy, a henchman, and the weapons to carry out his plan, all of which was corroborated by [Petitioner]'s multiple admissions that he killed Levin. It is within this framework of strong and convincing evidence that we conclude that most of [Petitioner]'s claims of error are without merit and where error occurred none were of a type which necessitate a reversal of [Petitioner]'s conviction under federal or state constitutional principles.

(*Hunt,* pp. 319-320.) The COA found that "notwithstanding all of the evidence indicating that Levin merely disappeared of his own accord, we have found the jury's verdict is supported by overwhelming evidence that that was not the case." (*Hunt*, p. 185.) The appellate court simultaneously issued an Order to Show Cause on Petitioner's two state habeas petitions, filed while the direct appeal was pending, and soon thereafter an Amended Order to Show Cause, denying on the merits some newly discovered evidence and ineffective assistance of counsel claims and denying Petitioner's request for reconsideration of claims rejected on appeal. It remanded the case to the Los Angeles Superior Court ("LASC") with instructions to review the remaining 23 claims. (1996 LASC Order, pp. 1-3.)[11]

LASC Judge Stephen Czuleger was assigned to the habeas case. He reviewed the over 15,000 page trial transcript and thousands of pages comprising the habeas petition, return, traverse, and exhibits, and conducted a 13-day evidentiary hearing on seven of the 23 issues. (1996 LASC Order, p. 3.) Thirty witnesses, including Petitioner, his trial counsel, and 18 others called by him, testified at the hearing, the transcript of which exceeds 2,200 pages. The hearing focused on allegedly newly discovered evidence, including evidence of sightings of Levin and discovery of a to-do list for murder, and addressed IAC claims against trial counsel. (1996 LASC Order, p. 2-3.)

Following the hearing, the LASC denied the habeas petition in a 38-page order filed on July 12, 1996. After careful consideration, Judge Czuleger concluded that "Petitioner received a fair trial. He is not entitled to a new one. Further, this court concludes that Levin is dead and that

[11] Respondent attaches hereto this order in the LASC ("1996 LASC Order") as Respondent's **Exhibit 7**.

Petitioner and Pittman killed him. Petitioner is justly convicted of that crime." (1996 LASC Order, p. 38.) Judge Czuleger also noted in footnote 21:

> During the hearing, trial counsel testified that one of the factors he considered in making defense decisions was a confession which Petitioner had made to him at an early point in his representation. Petitioner told him that he and Pittman had, in fact, murdered Levin. Later, after coaching from counsel, Petitioner changed his story, denied involvement and related at least two other explanations for the evidence against him. Petitioner denies this confession ever took place. and at the hearing launched into a series of personal attacks on trial counsel's integrity. Regardless of the truth of the attacks on trial counsel's personal and professional habits, the Court believes that Petitioner did confess to his attorney and admit his involvement in the murder. However, the confession does not directly [*sic*] effect any of the issues needing to be resolved here. The Court has, however, taken it into consideration in judging Petitioner's credibility during his testimony at the hearing.

(1996 LASC Order, p. 38, fn. 21.)

Petitioner then filed a 472-page habeas petition in the COA, which the appellate court denied on January 15, 1998.[12] (COA denial, p. 13.) The COA, too, concluded that "[t]he prosecution case conclusively demonstrated Petitioner killed Mr. Levin and none of the collateral notions raised in the habeas corpus petition undermined that immutable reality." (*Ibid*.)[13]

In 2017, Petitioner filed a habeas petition basing allegations on two primary grounds:

> 1. New evidence within the meaning of Penal Code section 1473, subdivision (b)(3). Specifically, Petitioner argues that the declarations and/or prior testimony of 13 witnesses amount to new evidence that would "more likely than not" have resulted in a different outcome at his trial. These witnesses can be loosely categorized as either witnesses who claim to have seen victim Levin after he was murdered (sighting witnesses) or witnesses who allegedly corroborate the defense theory that Levin staged his own disappearance.
>
> 2. Material false evidence within the meaning of Penal Code section 1473, subdivision (b)(1). Petitioner alleges that the testimony of John Reeves (a representative of American Express) was material false evidence presented at his trial based on later testimony by Reeves in another case.

[12] The Court of Appeal's denial of the habeas petition filed in that court ("1998 COA denial") is attached to this informal response as Respondent's **Exhibit 8**.

[13] For a further discussion of Petitioner's subsequent habeas petitions that were denied, including one denied by the California Supreme Court, see Respondent's **Exhibit 9**, the 2013 Order Denying Petitioner's Fourth Amended Petition ("FAP").

(2017 Informal Response, p. 4; *see also* 2017 Ptn., pp. 3-4.) The LASC also denied the 2017 petition.[14]

Petitioner also sought review by the CSC and the Ninth Circuit Court of Appeals, each of which denied the various petitions.[15]

On April 26, 2022, Petitioner filed the instant Petition, for which this Court subsequently requested an informal response. Respondent now submits this informal response to the Petition.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PETITIONER BEARS THE BURDEN TO MAKE A PRIMA FACIE CASE FOR RELIEF ON EACH AND EVERY CLAIM RAISED IN THE PETITION.

> Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears … . Thus, in the eyes of the law, petitioner does not come before the Court as one who is "innocent," but on the contrary as one who has been convicted by due process of law … .

(*Herrera v. Collins* (1993) 506 U.S. 390, 399-400; *District Attorney's Office for Third Judicial Dist. v. Osborne* (2009) 557 U.S. 52, 68-69.) In a habeas proceeding, the burden of proof is on the petitioner to establish by a preponderance of substantial, credible evidence the contentions upon which he seeks habeas relief. (*In re Alvernaz* (1992) 2 Cal.4th 924, 945 (*Alvernaz)*; *In re Fields* (1990) 51 Cal.3d 1063, 1071 (*Fields*); *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1296 (*Curl*); *In re Martin* (1987) 44 Cal.3d 1, 28 (*Martin*).) "For purposes of collateral attack, all presumptions favor the truth, accuracy and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260 (*Gonzalez*), superseded by statute another ground as stated in *In re Steel* (2004) 32 Cal.4th 682, 691 and superseded by statute on other grounds as stated in *Satele v. Superior Court* (2019) 7 Cal.5th 852, 857.) "[A] judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity." (*Johnson v. Zerbst* (1937) 304 U.S. 458, 468, overruled on another ground by *Edwards v. Arizona* (1981) 451 U.S. 477, 488-489.)

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[14] Respondent attaches hereto the habeas corpus denial order in the LASC ("2018 LASC Denial") as Respondent's **Exhibit 10**.

[15] Respondent attaches hereto as Respondent's **Exhibit 10** the collective dockets from the COA, CSC and Ninth Circuit Court of Appeals.

A habeas corpus proceeding begins with the filing of a verified petition for a writ of habeas corpus. (*People v. Romero* (1994) 8 Cal.4th 728, 737 (*Romero*).) The petition "must allege unlawful restraint, name the person by whom the petitioner is so restrained, and specify the facts on which [the petitioner] bases his [or her] claim that the restraint is unlawful." (*In re Lawler* (1979) 23 Cal.3d 190, 194 (*Lawler*); see Section 1474.)

"Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them … ." (*People v. Duvall* (1995) 9 Cal.4th 464, 474 (*Duvall*), italics in original.) "A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus." (*In re Cox* (2003) 30 Cal.4th 974, 997-98, internal citations and quotation marks omitted; *In re Visciotti* (1996) 14 Cal.4th 325, 351.)

"To satisfy the initial burden of pleading adequate grounds for relief, . . . [t]he petition *should both* (i) state fully and with particularity the facts on which relief is sought [citations], as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts, and affidavits or declarations." (*Duvall*, *supra*, 9 Cal.4th at p. 474; *Clark*, *supra*, 5 Cal.4th at p. 781 fn. 16; *Harris*, *supra*, 5 Cal.4th at p. 827 fn. 5.) Vague or conclusory allegations do not warrant habeas relief: "'Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing.' [Citations.] … [A]s stated above, the burden is on Petitioner to establish grounds for his release." (*Duvall, supra*, 9 Cal.4th at p. 474, quoting *Karis*, *supra*, 46 Cal.3d at p. 656; *Gonzalez*, *supra,* 51 Cal.3d at 1260.) A petitioner's obligation to provide specific factual allegations in the petition itself is not satisfied by generally incorporating by reference the facts set forth in the exhibits to the petition. (*Gallego, supra,* 18 Cal.4th at p. 837, fn. 11, superseded by statute on other grounds as stated in *Reno, supra,* 55 Cal.4th at p. 472, which was superseded by statute on other grounds as stated in *In re Friend* (2021) 11 Cal.5th 720.) Moreover, the allegations must be presented in a "form that perjury may be assigned if they are false." (*Ex parte Walpole* (1890) 84 Cal. 584.)

California courts have specifically delineated habeas procedures. A court receiving a habeas corpus petition "evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." (*Duvall*, *supra*, 9 Cal.4th at pp. 474-475; *Clark, supra*, 5 Cal.4th at p. 769, fn. 9; *Lawler*, *supra*, 23 Cal.3d at p. 194.) In *Romero*, our High Court stated, "When presented with a petition for writ of habeas corpus, a Court must first determine whether the petition states a prima facie case for relief—that is, whether it states facts that, if true, entitle the petitioner to relief—and also whether the stated claims are for any reason procedurally barred." (*Romero, supra*, 8 Cal.4th at p. 737, citing to *Clark, supra*, 5 Cal.4th at p. 769, fn. 9.) "To assist the Court in determining the petition's sufficiency, the Court may request an informal response from the petitioner's custodian or the real party in interest." (*Romero, id.,* also citing to Cal. Rules of Ct., R. 60[16]; *In re Williams* (1994) 7 Cal. 4th 572, 586-587.) The informal response should help inform the Court's decision whether to summarily deny the petition or to issue an order to show cause.

If no prima facie case for relief is stated or if the court determines that the claims are all procedurally barred, the Court will summarily deny the petition. (*Board of Prison Terms v. Superior Court* (2005) 130 Cal. App. 4th 1212, 1234 (*Board of Prison Terms*), citing to *Romero, supra*, 8 Cal.4th at p. 737.) Summary disposition of a petition which does not state a *prima facie* case for relief is the rule. (*Clark*, *supra*, 5 Cal.4th at p. 781; *Gonzalez*, *supra*, 51 Cal.3d at pp. 1258-1259.) But if the Court finds the factual allegations, taken as true, establish a prima facie case for relief, the Court will issue an order to show cause. (*Duvall*, *supra*, 9 Cal.4th at p. 475; *Clark, supra*, 5 Cal.4th at p. 781, fn. 16; *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4 (*Hochberg*), rejected on other grounds by *Fields*, *supra*, 51 Cal.3d at p. 1070, fn. 3; Cal. Rules of Ct., R. 4.551(c)(1).) **"**When, on the other hand, a habeas corpus petition is sufficient on its face (that is, the petition states a prima facie case on a claim that is not procedurally barred), the court is obligated by statute to issue a writ of habeas corpus. In the language of the Penal Code, '[a]ny court or judge authorized to grant the writ … must,

[16] In 2007, California Rule of Court 60 was renumbered as Rule 8.380 and amended to exclude a provision for the court to order an informal response to a habeas corpus petition. Additionally, when in effect, Rule 60 only applied to appellate review, not to the Superior Courts. In *People v. Durdines* (1999) 76 Cal.App.4th 247, the appellate court addressed the issue and agreed that California Rule of Court 260, which expressly provides for habeas procedures to be followed by the Superior Court, was the appropriate vehicle; however, Rule 260 *did not* supply the Superior Court with a provision to request an informal response. Rule 260 expressly provides for habeas procedures to be followed by the Superior Court. However, the legislature solved the problem with California Rules of Court 4.551, subdivision (b), which allows the court to order an informal response in habeas corpus litigation. Respondent thus relies on this authority as well.

if it appears that the writ ought to issue, grant the same without delay … .' (Pen. Code, § 1476.)" (*Romero*, *supra*, 8 Cal.4th at pp. 737-738.) Issuance of an order to show cause signifies the court's *preliminary determination* that the petitioner has pleaded sufficient facts that, if true, would entitle him to relief. "Accordingly, the order to show cause has a limited function. As explained in *Serrano*, the order to show cause does not '*establish* a prima facie determination that petitioner is entitled to the relief requested. Rather, it signifies our '*preliminary determination* that the petitioner has made a prima facie statement of specific facts which, if established, entitle [petitioner] to habeas corpus relief under existing law.' (*Serrano*, *supra*, 10 Cal.4th at p. 455, quoting *Hochberg*, *supra*, 2 Cal.3d at p. 875, fn. 4.)" (*Board of Prison Terms*, *supra*, 130 Cal. App. 4th at p. 1234, italics in original.) "When an order to show cause does issue, it is limited to the claims raised in the petition and the factual bases for those claims alleged in the petition. It directs the respondent to address only those issues." (*Clark*, *supra*, 5 Cal.4th at p. 781, fn. 16.)

In the case at bar, this Court has ordered Respondent to file an informal response to the Petition. As will be shown *post*, Petitioner's claims are procedurally barred and he has failed to make the requisite prima facie case for habeas relief on his claims. This Court should summarily deny his Petition without the issuance of an order to show cause.

II. CLAIM-OF-RIGHT DEFENSE LAW

Petitioner founds his current habeas claims of due process violation based on trial court instructional error and IAC on his revised defense theory that he had a claim of right to the money he obtained from Levin on the evening in question. Before addressing the substantive merits of those claims, Respondent believes that a summary of applicable law on the claim of right defense, as well as preliminary discussions of whether Petitioner's revised defense theory is actually supported by the trial evidence is warranted to properly contextualize Respondent's opposition to said claims.

Preliminarily, Respondent notes that in 1984, when Petitioner committed the crimes in the underlying case, there does not appear to have been a specific CALJIC instruction for a claim-of-right defense to robbery. Indeed, based on Respondent's research to date, CALJIC instruction 9.44, entitled "ROBBERY—THEFT BY LARCENY—DEFENSE OF CLAIM OF

RIGHT" was added in 2000. (Pocket Park to CALJIC, No. 9.44 (6th ed. 2002), p. 189.)[17] Per the comment to that instruction, "This instruction is based upon *People v. Tufunga* (1999) 20 Cal.4th 935 [90 Cal.Rptr.2d 143, 987 P.2d 168] [*Tufunga*]." (*Ibid.*) However, as the *Tufunga* court stated in its 1999 opinion that addressed a court-rejected request by trial counsel for the claim of right defense: "In sum, we find that the Legislature over 100 years ago codified in the current robbery statute the common law recognition that a claim-of-right defense can negate the *animus furandi* element of robbery where the defendant is seeking to regain specific property in which he in good faith believes he has a bona fide claim of ownership or title." (*Tufunga*, *supra*, 20 Cal.4th at p. 950.) Thus, despite the seeming lack of a specifically-published CALJIC instruction on this defense at the time Petitioner committed the crimes in this case, the requesting or giving of such instruction at trials before 2000 was a recognized legal practice. (See e.g., *Tufunga*, *supra*, 20 Cal.4th 935; see also e.g., *People v. Romo* (1990) 22 Cal.App.3d 514.)

With that background in mind, Respondent now addresses the relevant legal authority regarding the claim of right defense and its pertinence to Petitioner's case.

A. *People v. Butler* and Its Limited Applicable Holding to the Time Period of the Levin Murder.

Petitioner asserts that there were substantial evidence that Petitioner had a bona belief that he was owed $3.5 million and thus was entitled to a claim-of-right defense pursuant to *People v. Butler* (1967) 65 Cal.2d 596 (*Butler*). (Petn. p. 19.)

> In *People v. Butler* (1967) 65 Cal. 2d 569 [55 Cal. Rptr. 511, 421 P.2d 703] (*Butler*), we reaffirmed that a claim-of-right defense can negate the requisite felonious intent of robbery as codified in Penal Code section 211 and extended the availability of the defense to forcible takings perpetrated to satisfy, settle or otherwise collect on a debt, liquidated or unliquidated.

(*People v. Tufunga* (1999) 21 Cal. 4th 935, 938 (*Tufunga*).) In *Butler,* defendant testified that he sought to collect money owed to him for wages he earned while working for victim Anderson's catering services. (*Butler, supra,* 65 Cal.2d at p. 513.) When the defendant went to victim

[17] Per the Fifth Edition of CALJIC, instruction 9.44 defined "Robbery—When Still in Progress." (CALJIC, no. 9.44 (5th ed.).)

Anderson's home to get the money, victim Anderson made an indecent proposal and defendant rejected the offer. (*Ibid*.) Upon being rejected, victim Anderson offered to double the money owed. (*Ibid*.) Defendant continued to reject the offer and only wished to be paid what was owed. (*Ibid*.) Victim Anderson agreed to pay and the two had drinks together. (*Ibid*.) Later, victim Anderson changed his mind and wanted to rediscuss the earlier proposition. (*Ibid*.) Defendant continued to deny the request. (*Ibid*.) Victim Anderson entered his bedroom and returned with a gun. (*Ibid*.) Defendant then saw another man in the bedroom, Victim Locklear. (*Ibid*.) Defendant had armed himself with his own gun before going to victim Anderson's house because he had heard stories of victim Anderson's brutality and upon seeing victim Anderson's gun, felt he needed his own gun to defend himself. (*Ibid*.) Victim Anderson called out to victim Locklear and threw a towel or bathrobe at defendant. (*Ibid*.) Although defendant did not intend to shoot, when the towel was thrown at him defendant nonetheless grabbed the gun and it went off. (*Ibid*.) The gunshot struck victim Anderson, killing him. (*Ibid*.) Victim Locklear jumped up and defendant shot and injured him. (*Ibid*.) Defendant looked for money in the living room and the bedroom. (*Ibid*.) When defendant did not find any, he grabbed a wallet and ran from the house. (*Ibid*.) The *Butler* court held that, "it has long been the rule in this state and generally throughout the country that a bona fide belief, even though mistakenly held, that one has a right or claim to the property negates felonious intent." (*Id.* at p. 514.) Therefore, the defendant's first-degree murder conviction, based on murder during the commission of a robbery, was reversed as the defendant did not have a premediated intent to kill and his claim-of-right negated the felonious intent element of robbery. (*Id.* at p. 513-514.)

However, *Butler's* holding was limited, and ultimately overruled "to the extent it allowed a claim-of-right defense to robbery where the alleged robbery's intent was to collect a claimed debt, rather than to recover specific property taken from him, " (*Tufunga, supra,* 21 Cal.4th at p. 956).[18] Before the *Tufunga* court overruled *Butler,* it noted that several other courts had already distinguished *Butler*:

[18] CALJIC instruction 9.44 includes such preclusive language. (CALJIC, Criminal (Jan. 2002) Pocket Part to 6th Ed., p. 189.)

> We note further that both this court and the intermediate appellate courts of this state have already placed significant policy limitations on the claim-of-right defense to robbery. The courts have indicated that the defense may not be raised when the defendant is attempting to collect on an *unliquidated* debt or damages claim. (See, e.g., [*People v. Barnett* (1998) 17 Cal. 4th at 1044,] 1146 ["claimed debt is uncertain and subject to dispute"]; *People v. Holmes* [(1970) 5 Cal. App. 3d 23,] 24 [unliquidated contract claim]; *People v. Poindexter* (1967) 255 Cal. App. 2d 566, 570 [63 Cal. Rptr. 332] [unliquidated tort claim for personal injuries].) This court has also held that the defense is not available where the claim of right to the property is founded in a "notoriously illegal" transaction. (*People v. Hendricks* (1988) 44 Cal. 3d 635, 642 [244 Cal. Rptr. 181, 749 P.2d 836] [fee collection for prostitution services]; *People v. Gates* (1987) 43 Cal. 3d 1168, 1182 [240 Cal. Rptr. 666, 743 P.2d 301] [distribution of proceeds from forgery ring]; see also *People v. Johnson* (1991) 233 Cal. App. 3d 425, 457-458 [284 Cal. Rptr. 579] [payment for a drug deal].) The rationale and holdings of these decisions do not contravene our conclusion in this case that the availability of the claim-of-right defense to robbery was envisioned by the Legislature and incorporated into the statutory definition of that offense (§ 211), for robberies in which the defendant sought to recover specific property for which he believed in good faith he had a bona fide claim of ownership or title, that is, a recognition that one cannot feloniously intend to steal one's own property.

(Tufunga, *supra,* 21 Cal. 4th at 953, fn 5.) And although the *Butler* opinion is controlling for the time period of the Levin robbery and murder in 1984,[19] the holding cites to two notable distinguishing applicable cases, *People v. Poindexter* (1967) 255 Cal.App.2d 566 (*Poindexter*) and *People v. Holmes* (1970) 5 Cal.3d 21 (*Holmes*). The *Poindexter* court noted the distinction in the ability to invoke the defense "between a bona fide intent to recover a liquidated claim, and the mere self-help in the recompense of unliquidated damages." (*People v. Poindexter, supra,* 255 Cal.App.2d at p. 570.) The *Holmes* court further extended this principle from unliquidated claims in tort to a case in contract. (*People v. Holmes supra,*5 Cal.3d at p. 24.)

B. A Claim-of-Right Defense Does Not Extent to Unliquidated Claims in Tort or Contracts.

In *Poindexter,* a bar fight erupted and defendant sustained injuries to his face when another participant stuck defendant with a beer bottle. (*Poindexter, supra,* 255 Cal.App.2d at p. 568.) Defendant struck the barmaid in charge of the place and took $40 from the cash register.

[19] *People v. Sakarias* (2000) 22 Cal.4th 596, 622 (*Sakarias*) (although *Butler* was overruled by *Tufunga*, the ruling is not retroactive to cases before *Tufunga's* finality.)

(*Ibid.*) At the court trial, defendant testified that, "—All I knew is one thing. My face was bleeding and I felt like I needed some medical care. I guess this was one of the reasons why I took the money, so, I don't know." (*Ibid.*) The appellate court stated, "Clearly it is one thing to entertain a bona fide belief that the victim of a taking owes a sum certain to the taker, and quite another to help oneself to money in satisfaction of an unliquidated, questionable tort claim." (*Ibid.*) In particular, the appellate court did not see "personal injuries resulting from a barroom brawl" to be bona fide claim for liquidated damages. (*Id.* at pp. 570-571.) The appellate court also noted in a footnote:

> Note, 46 A.L.R.2d 1227 at 1235: "In a number of cases the courts have refused to extend the rule that the taking of money or property by force for the purpose of collecting a debt does not constitute robbery (see 2 [a], *supra*), to a case where the forcible taking is for the purpose of collecting unliquidated damages." (See also Supp. Note, 4 A.L.R.2d, Later Case Service, p. 1162.)

(*Id.* at p. 570, fn 1.) The appellate court affirmed defendant's second degree robbery conviction.

Three years later, in *Holmes*, the appellate court applied the principles of *Poindexter* to claims in contracts. (*People v. Holmes supra,*5 Cal.3d at p. 24.) In *Holmes,* the defendant was charged with violating section 487, subdivision (1), grand theft, but ultimately convicted to the lesser crime of section 484, petty theft. (*Id.* at p. 23.) Defendant was hired to clean the victim's garage based on an agreement that defendant would be paid with certain items from the garage "'to be selected later.'" (*Ibid.*) A week or two later, the victim noticed about $1,300 worth of items were missing, including a Sony tape recorder, worth about $300, and Viking tape deck, worth about $450. (*Ibid.*) The victim asked the defendant to look for the various items in the garage and despite looking for several days, defendant did not find the items. (*Ibid.*) After a week, the victim complained to defendant's wife, whom victim had also employed, and complained to her. (*Ibid.*) Defendant appeared that same day, searched the garage, and found the missing Sony tape recorder. (*Ibid.*) The next day, the defendant appeared with the Viking tape deck, gave it to the victim and said, "'Well, here you are.'" (*Ibid.*) When asked where the tape deck was, defendant replied that he had given it to a friend and offered the victim $10 for it. (*Ibid.*) The victim refused the offer. (*Ibid.*) When the victim asked about the remaining missing items, defendant became

angry and left. (*Ibid.*) The defendant admitted to taking certain items from the garage. (*Ibid.*) Yet, he denied that he had stolen the items as "he felt that he had permission to take them as gifts or pay in exchange for work and errands performed for the victim." (*Ibid.*) Defendant's wife also testified and said that she thought the victim had "given defendant permission to take what he wanted from the garage" and that the victim only started to complain after she had finished her work for the victim. (*Id.* at 24.) The victim testified that he had never given defendant permission to take anything from his garage. (*Ibid.*) The court found that, "Defendant contends that the victim owed him a debt which he never intended to pay and defendant was therefore entitled to take his property to offset his debt. This contention is without merit." (*Ibid.*) The court cited to the *Poindexter* holding, and further stated, "The unliquidated claim in Poindexter was in tort, while that in the instant case is in contract. Nevertheless, the same principle applies. (*Ibid.*) The court upheld the petty theft conviction. (*Ibid.*)

C. A Claim-of-Right Defense Does Not Extend to a Taking Beyond the Specific Item or Property of Equivalent Value.

Not surprisingly, the holding in *Butler* cannot be extended to the taking of property beyond the specific item or property of equivalent value. (*Sakarias, supra,* 22 Cal.4th at 622.) In *Sakarias,* defendant killed the victim in 1988 and was convicted of murder and sentenced to death. (*Id.* at p. 609.) Defendant and codefendant had defected together from the Soviet Army and come to America. (*Ibid.*) Defendant and codefendant met the victim and her husband through the Baltic American Freedom League, in which victim and her husband helped immigrants from Estonia, Latvia, and Lithuania. (*Ibid.*) The victim and her husband invited codefendant, who was without work, to live the couple's guesthouse. (*Ibid.*) In exchange, codefendant would perform various chores and remolding work of the guesthouse. (*Ibid.*) The victim said that if codefendant completed the work, he could have the Triumph Spitfire sports car in the backyard. (*Ibid.*) Sometime later, codefendant refused to do anymore work and demanded $3,000 or $4,000 or otherwise he would report victim for having an unpermitted guesthouse on the property. (*Ibid.*) Victim and her husband asked codefendant to leave, and codefendant angrily left. (*Ibid.*)

On a later date, defendant and codefendant drove a pickup truck to the victim's house and demanded the sportscar and gas money. (*Ibid.*) The victim's husband informed codefendant that he did not have the pink slip readily available and was leaving the next day for a two-week business trip. (*Ibid.*) The victim's husband did go with defendant and codefendant to a gas station and paid for their gas. (*Ibid.*) About a week later, defendant and codefendant returned to the victim's house, waited until she left, broke in, waited for her to return by herself, and when she returned they stabbed her with a knife and hacked her to death with a hatchet. (*Id.* at pp. 611-612.) Defendant confessed that the plan was "simply 'to get some money for food.'" (*Id.* at p. 622.) Defendant and codefendant took the victim's jewelry, credit and telephone cards, and ate her food. (*Id.* at p. 613.) Defendant also confessed that he and codefendant stayed at the victim's vacation cabin for several days and took the hatchet he used to bludgeon the victim. (*Id.* at p. 612.) On the same day of the murder, defendant and codefendant pawned the jewelry, used the credit card to purchase two plane tickets and used the telephone cards to make numerous long-distance and foreign calls. (*Ibid.*)

The CSC held:

> We conclude, nonetheless, that the claim-of-right defense was unavailable on these facts. The record discloses no substantial evidence that defendant's intent, on entering the house or attacking the victim, was limited to taking the sports car, its title slip, or even property of equivalent value. Although defendant told police he and [codefendant], while at Crestline, discussed scaring [the victim] into giving them the car, on the way to the North Hollywood house, he said, they were planning simply "to get some money for food." When they got to the house, rather than carry out any plan of confronting her and obtaining the car, they waited until she left before breaking in. Defendant said their intent on entering was "to take something from the house and get away," though later they decided to wait for [the victim] to return. When she did return, they made no effort to force her into giving them the car or title slip, instead attacking her as soon as she came in, with overwhelming deadly force. The items they took, [the victim]'s jewelry and the credit and telephone cards, bore no particular relationship in nature or value to the car to which they believed [codefendant] was entitled. The evidence shows only a generalized intent to steal from the [victim and her husband], a felonious intent that is not negated by even a good faith belief [codefendant] was owed a particular automobile. (See *People v. Barnett* (1998) 17 Cal. 4th 1044, 1145 [74 Cal. Rptr. 2d 121, 954 P.2d 384] [claim-of-right defense not available where defendant simply seized whatever items of value" he could get from robbery victims]; *People v. Alvarado* (1982) 133 Cal. App. 3d 1003, 1022 [184 Cal. Rptr. 483] [no instruction on

> defense required where defendants "conducted a general ransacking of the bedroom indiscriminately taking items of value never specifically related to any claim of right"].) The trial court did not err in failing to give instructions on trespass and assault, even if those offenses were included within the charges of burglary and robbery.

(*Id.* at pp. 622-623.)

Under the lens of this legal authority, we turn to Petitioner's case.

D. Petitioner Knew His Agreement with Levin Based on a Con.

Petitioner asserts he was entitled to "far more than the $1.5 million check he took from Levin," (Petn. p. 2), and had had "told everyone that Levin owed him $3.5 to 4 million dollars from trades [Petitioner] had made on behalf of Levin. (citations.) (Petn. p. 18.) The trial evidence repudiates this claim and establishes that their entire "business association" was based on a hoax, which Petitioner became aware of well before Levin was robbed and murdered on June 6, 1984.

As stated by the COA in Petitioner's direct appeal:

> Our analysis begins with the inescapable conclusion that this case did not involve a "murder conspiracy" which ended with the death of Levin. While revenge for the commodities trading hoax perpetrated upon defendant by Levin may have been inextricably entwined with the scheme, the primary goal of the conspiracy was to obtain from Levin by force and fear the $1.5 million which defendant believed Levin had acquired as a result of that hoax. Levin's death was necessary to facilitate the acquisition of the $1.5 million but the conspiracy did not end until the conspirators received the money-or their efforts to do so were totally frustrated. (See e.g. People v. Hardy, supra, 2 Cal.4th at pp. 143-145.)

(*Hunt,* p. 74.)

The trial evidence, just as the COA saw it, established that well before Levin was robbed and murdered on June 6, 1984, Petitioner knew his business relationship with Levin was based on a con. From the onset, Petitioner was warned that Levin was a "scammer":

> Levin came to [Petitioner]'s attention early in 1983. [Petitioner] was told that Levin was a "scammer" and couldn't be trusted but [Petitioner] wanted to find out for himself. When [Petitioner] eventually met Levin that summer, he formed the opinion that Levin was wealthy and he succeeded in getting Levin to place $5 million in a commodities trading account. The account was in Levin's name and [Petitioner] was given the authority to trade the account on Levin's behalf. They would split the profits.

(68 RT at p. 10836, line 8; *Hunt*, p. 323-324; Petn. p. 3.) Nonetheless, as the trial evidence showed, the accounts were fake. When Petitioner requested his share of the money from Levin, Levin couldn't pay him: "Levin told [Petitioner] he could not pay [Petitioner] his percentage immediately because he had invested the money in a shopping center." (*Hunt,* p. 325.) Instead, they negotiated a new agreement to turn those "profits" into an investment in a shopping center that could sell for as much as $30 million. (*Ibid.*) But "[s]ometime in October or November 1983, Friedman told [Petitioner] the money was not real" and Levin was exposed as a conman: "[Petitioner] finally learned that Levin was a conniver and a manipulator and that he had been the victim of an incredible hoax." (*Id.* at 325-326.) Petitioner confronted Levin about the scam. (*Id.* at 327.) But, despite learning that he had been a victim of Levin's hoax, Petitioner thereafter entered into a brand new agreement with Levin, wherein *Levin "promised" Petitioner $300,000 of the $1.5 million* ***Levin had conned other people with the "phony trading account."*** (*Ibid.*, emphasis added.)

E. Even if Petitioner Felt He was Owed Any Amount, His Claimed Debt is Uncertain and Subject to Dispute.

In this Petition, Petitioner asserts he was entitled to $3.5 to 4 million dollars for trades he made on behalf of Levin. (Petn. p. 18.) Yet the trial evidence disputes the truth of that claim.

As noted in Section II.D., *ante*, more than six months before Levin was robbed and murdered, he learned the commodities trading accounts and the subsequent shopping center deal to turn those "profits" into an investment in a shopping center that could sell for as much as $30 million were fake and Petitioner confronted Levin about Levin having conned him. Thereafter, he and Levin struck a new agreement wherein Levin "promised" Petitioner $300,000 of the $1.5 million Levin had fraudulently obtaining through conning others.

Assuming *arguendo* the *initial* verbal agreement that Petitioner believed had existed between Levin and himself was legally binding, Petitioner would still have had to believe that he was entitled to "half the profits," of about $3.5 million, from the cooked-up commodities trading account. (68 RT at pp. 10482-10486; 10486, line 21.) But it's simply not credible that

Petitioner held that lingering belief within the six months preceding Levin's robbery and murder because, as Petitioner subsequently found out, Levin was true to his reputation as a scammer and the "profits" from the commodities trading account, which were allegedly rolled over as an investment into a shopping center that could generate $30 million dollars, as well as the account itself, were all imaginary. (68 RT 10486-10850.) Once Petitioner confronted Levin and finally confirmed that there was never any money, Petitioner allegedly still believed that Levin would give Petitioner $300,000 from other scams that Levin had worked up. (68 RT 10850-10851.) This new "promise" was similarly built on lies and proved to be a fantasy. (68 RT 10850-10851.)

While the trial evidence supports that within the months before Levin was robbed and murdered, Petitioner ultimately believed he was entitled to $300,000 of ill-gotten gains from Levin, at best for Petitioner, his claimed debt is uncertain and subject to dispute and a contract claim to be litigated in civil court. Is this claim of entitlement to money owed, based on the first, second, or third "binding" verbal contract? Is Petitioner entitled to $3.5 million dollars, "half the profits" of what he later knew to be a bogus commodities trading account? Or half the profits of what he later knew to be a fantasy sale of a shopping center, of up to $15 million dollars, that Petitioner had acquiesced the commodities trading account "profits" to? Or is he entitled to a "promise" of $300,000 from other scams that Levin had connived? Because Petitioner's claim is a claim for money of an uncertain amount subject to dispute, he did not have a claim-of-right defense as defined by *Poindexter* and *Holmes*. As discussed, *post,* the uncertain nature of his claim would remove him from a claim-of-right to collect a debt owed. (*People v. Butler* (1967) 65 Cal.2d 569; *Poindexter* (1967) 255 Cal. App. 2d 566; *People v. Holmes,* (1970) 5 Cal. App. 3d 21.)

F. Petitioner Planned to Take As Much From Levin as He Could and the Plan to Take Levin's Keys and Wallet was Not Done to Offset Any Debt.

Even assuming *arguendo*, Petitioner had a good faith belief that he was entitled to the initial $3.5 million, "half the profits" of what he knew to be a bogus commodities account, the trial evidence Petitioner's laid out plans to take whatever he could from Levin before he went to Levin's house on June 6, 1984. (71 RT 11364-11365.) Petitioner's original plan considered having Levin transfer over the option to his house and Swiss cashier's checks, one of which was for

$900,000. (70 RT 11143-11158.) The option on the house allowed the holder to purchase Levin's house for $30,000. (70 RT 11159.) Petitioner's "To Do" list[20] included a reference to "Execution of Agreements" and Petitioner and Karny had talked about different "agreements" as contingency plans.[21] (70 RT 11147-11148; Ex. 11, p. 1.) There was a discussion to have Levin "sign over his option on his house." (70 RT 11148, lines 16-17.) Petitioner did not know what Levin had and could transfer over to him, but he planned to find out. (70 RT 11148-11149.) As such, Petitioner left blanks on the fake options contract so that he could fill in the amount after he forced Levin to divulged the balance of Levin's bank account. ((70 RT 11148-11149.) *Hunt,* p. 330.) To find out what Levin had, Petitioner and Pittman planned to role play a story Petitioner had devised. (71 RT 11364-11365.) However, Pittman failed to follow the script. (71 RT 11365.)

> [PROSECUTION] Q: MR. KARNY, DID [PETITIONER] EVER TELL YOU WHY IT WAS THAT HE WAS NEVER ABLE TO GET OTHER THINGS FROM MR. LEVIN, SUCH AS THE OPTION ON HIS HOUSE, OTHER THAN JUST THE CHECK FOR ONE POINT FIVE MILLION, WHEN HE WAS THERE ON THE NIGHT OF JUNE 6TH?
>
> [KARNY]: YES, HE DID.
>
> Q: WHAT DID HE SAY?
>
> A: HE SAID THAT AFTER – THAT THE FIRST THING THAT HE AND JIM HAD FORCED RON TO DO WAS TO SIGN THE CHECK AND THAT AT THAT POINT, SINCE HE WAS ROLE-PLAYING WITH JIM, THAT JIM WAS THIS UNDERWORLD ENFORCER, HE TOLD ME THAT HE TURNED TO JIM AND ASKED HIM, "IS THAT ENOUGH?"
>
> AND JIM WAS SUPPOSED TO SAY SOMETHING LIKE, WELL, WHAT ELSE HAS HE GOT?
>
> BUT [PETITIONER] TOLD ME THAT JIM SAID, "YEAH, THAT IS ENOUGH," TO [PETITIONER'S] SURPRISE AND AT THAT POINT, TO DO ANYTHING OTHER THAN ACT LIKE THAT WAS IT WOULD HAVE, AGAIN, TIPPED RON LEVIN OFF THAT [PETITIONER] WAS RUNNING THE SHOW AND NOT JIM IN THERE, SO HE SAID THAT IS WHY THAT WAS ALL THEY GOT.
>
> IT WAS A MISTAKE OF JIM'S, ACCORDING TO HIM.

[20] Attached as **Exhibit 12** is Petitioner's "To Do" list presented as a trial exhibit.

[21] At the 1996 evidentiary hearing, Petitioner testified that the original plan was to extort from Levin and force him to sign over "his house option, cashier's checks, all the things that are listed in the seven pages." (10 EHTR 1511, lines 20-24.)

THE COURT: WHAT DIFFERENCE WOULD THAT HAVE MADE, AS LONG AS HE WAS GOING TO KILL HIM, WHAT IMPRESSION THEY MADE ON RON LEVIN?

KARNY: WELL, THE IDEA WAS THAT [PETITIONER] DIDN'T THINK RON WOULD BE AS COOPERATIVE IF HE FELT THAT THIS WAS ALL OF [PETITIONER'S] DOING.

THE COURT: I SEE, ALL RIGHT.

KARNEY: IF HE FELT HE WAS GOING TO DIE FOR SURE.

(71 RT 11364, ll. 20-28; 11365, ll. 1-19.)

As part of Petitioner's plan to murder Levin, Petitioner also took Ron Levin's wallet and car keys, as delineated on his "To Do" list. (68 RT 10922; 70 RT 11223-11225; Ex. 11, p. 3.)

[PROSECUTOR] Q: AND WHAT ABOUT THE NEXT ITEM THAT IS ON THAT LIST THAT SAYS "KEYS"? DID YOU HAVE SOME DISCUSSION ABOUT THAT?

[KARNY]: YES.

Q: WHAT WAS THAT DISCUSSION?

A: THAT WHEN THEY LEFT RON'S HOUSE, THEY SHOULD TAKE HIS KEYS SO THAT THEY COULD COME BACK IN IF THEY WANTED TO.

Q: AT SOME POINT AFTER JUNE THE 6TH OF 1984, DID YOU SEE KEYS TO RON LEVIN'S HOUSE AND HIS CAR?

A: I SAW SOME KEYS THAT WERE TOLD TO ME BY [PETITIONER] WERE RON'S KEYS.

(68 RT 10922, lines 1-10.)

[PROSECUTOR] Q: ALL RIGHT. WHAT WAS THE GENERAL REASON THAT MR. PITTMAN WAS GOING TO NEW YORK AFTER 6-6, WHAT WAS THAT ABOUT AGAIN?

[KARNY]: TO MAKE IT LOOK LIKE RON LEVIN HAD GONE THERE.

…

Q: AND WAS IT TO BE A PART OF THIS, PART OF THE PLAN THAT JIM [PITTMAN] WOULD USE RON LEVIN'S CREDIT CARDS TO RENT THE ROOM?

A: I THINK SO.

IN THE DISCUSSION THAT I HAD, IT WASN'T SPECIFIED – NOT TOO MUCH WAS SPECIFIED OTHER THAN THAT IT WAS SUPPOSED TO LOOK LIKE RON LEVIN HAD GONE THERE AND THAT ONE POSSIBILITY IS THAT HIS I.D. WAS GOING

TO BE LEFT THERE LIKE IN A BAR OR IN A BATHROOM OR SOMETHING LIKE THAT.

…

Q: DID [PETITIONER] SAY THAT JIM HAD LEVIN'S WALLET?

A: I THINK HE DID SAY THAT.

(70 RT 11223-11225.)

Per the trial evidence, if Pittman had followed the script, Petitioner would have continued forcing Levin to transfer more assets to Petitioner. (*Hunt,* p. 333-334.) As the *Sakarias* court noted, the claim-of-right defense cannot be used when the taking goes beyond the specific property or property equivalent in value. (*People v. Sakarias, supra,* 22 Cal.4th at p. 622.) According to the trial evidence, Petitioner had planned to find out all that Levin owned and would have taken as much as he could, possibly beyond the $3.5 million. (*Hunt,* p. 330.)

If, by his current habeas claim, Petitioner is trying to argue that he would have stopped taking assets from Levin when their collective value reached $3.5 million, that intention is not clearly supported by the trial evidence of the plans that Petitioner made and or from arguments in his current habeas Petition. Moreover, he does not proffer any evidence to this effect in support of his current habeas claim. Respondent will not make any assumptions that Petitioner had this intention or that Petitioner's plan was just thwarted by Pittman's poor acting skills—nor should this Court. Indeed, the trial evidence again suggests otherwise: Petitioner planned to cover up the murder by taking Levin's keys and wallet, which contained Levin's driver's license and credit card. There is no evidence these items were not taken to offset any debt and thus Petitioner would not have a claim-of-right defense to these items. Though the prosecution did not rely on the theft of these items in arguing the robbery charge, it nonetheless shows Petitioner's premediated intent to take whatever he needed, regardless of its value, to rob and revenge kill the conman who had conned him—to commit "a perfect crime" for which "there is no way in which we would be caught." (81 RT 12816-12820; *Hunt*, p. 341.)

III. PETITIONER'S CLAIM THAT THERE WAS "SUBSTANTIAL EVIDENCE THAT HUNT WAS ACTING ON A GENUINE BELIEF THAT THE VICTIM OWED HIM THE MONEY HE TOOK FROM HIM DURING THE COURSE OF THE INCIDENT," IS CONTRARY TO PETITIONER'S LONG-STANDING THEORY OF DEFENSE THAT PETITIONER IS INNOCENCE, THERE WAS NO ROBBERY OR MURDER, AND THAT LEVIN IS STILL ALIVE.

A. Petitioner's Claim Does Nothing to Refute His Long-Standing Theory of Defense and He Cannot Seek to Utilize the Claim-of-Right Defense Without Admitting He Robbed Levin, Which He has Not Admitted To.

Petitioner asserts, "There was credible, substantial evidence that Hunt was acting on a genuine belief that the victim owed him the money he took from him during the course of the incident." (Petn. p. 1, lines 8-9.) It is clear from his express language of this claim that Petitioner is carefully avoiding the most serious issue in this case: that Petitioner and Pittman robbed and murdered Levin. In making his claim-of-right-related allegations, Petitioner refers to the robbery and murder as "the incident." (*Ibid*.) While he makes general references to the robbery and murder of Levin in the Petition, he conveniently, if not advertently, opts not to include any evidence that he actually admitted or confessed to committing the murder during the course of a robbery to allegedly collect a debt. Rather Petitioner states in his Petition, in footnote 1: "Hunt maintains his innocence of the murder and robbery of Levin and disputes many of the factual findings of the jury and court of appeal." (Petn. p. 3, footnote 1.)

As discussed *post*, Petitioner cannot have eat his cake and have it, too: he cannot skirt around this very issue to preserve his trial defense that he never robbed or murdered Levin, but merely met him for a business dinner at La Scala wherein they peacefully exchanged the check, and simultaneously claim that he was entitled to instruction on a claim-of-right defense, which at its very core is intended to negate the felonious intent of a larceny or robbery—a trial defense he strategically avoided. He cannot avail himself of habeas relief founded on this gamesmanship.

It is evident Petitioner has vaguely asserted his claim to avoid admitting his guilt for the robbery and murder of Levin. This blatant sidestepping further shows that Petitioner rejected the claim-of-right defense at trial and though he asserts it now, he hasn't changed his theory of defense in a way that warrants habeas relief on the attendant claims.

1. Petitioner Always Claimed that He did No ACTS of Murder and that Levin is Still Alive, and has Not Admitted to Any ACTS of Murder in Any of His Petitions, Including this Petition.

"The issue is whether [Levin] is dead and the issue is whether Joe Hunt killed him that night. That is it. End of story." (81 TR 12850.) Such has been the consistent theme of Petitioner's defense: on the date in question, Petitioner met Levin for a business dinner about an options contract at La Scala wherein they peacefully exchanged the check and Petitioner left him alive, Levin is alive, and Petitioner is innocent. In furtherance of that defense, Petitioner's trial attorney argued in closing:

> BUT THERE IS NO CRIME TO ALIBI MR. HUNT FOR. WHAT THE DEFENSE PRESENTS, WHAT IS CALLED AN ALIBI BY THE COURT, IS EVIDENCE TO SHOW THAT WHATEVER LEVIN'S WHEREABOUTS ARE, WHATEVER HIS REASON TO LEAVE WAS, JOE HAD NOTHING TO DO WITH IT.
>
> THE DEFENSE TOLD YOU IN OPENING STATEMENT, WE DON'T KNOW WHAT HAPPENED TO RON LEVIN. I DON'T KNOW WHAT HAPPENED TO RON LEVIN. NOBODY KNOWS WHAT HAPPENED TO RON LEVIN. WE DO KNOW THE DEFENSE CONTENDS THAT JOE HUNT HAD NOTHING TO DO WITH IT.
>
> LET US NOW TURN TO THIS CASE AND ITS FACTS. …

(81 RT 12905.) Trial counsel summarized Levin's reasons for leaving town, e.g. pending multiple felony charges and likely incarceration. (81 RT 12830.) Trial counsel reasoned:

> THUS, WHAT DO WE SEE LEVIN DO? WE SEE A MULTIPLE COUNT FELONY INDICTMENT PENDING IN THE BEVERLY HILLS COURT, THE CITY HE WOULD NEVER LEAVE. THERE WAS ANOTHER CRIMINAL FRAUD CASE ABOUT TO COMMENCE, A MORBID FEAR OF RETURNING TO JAIL.
>
> AND WHAT DOES LEVIN DO? LEVIN DISAPPEARS. AS FURTHER CIRCUMSTANTIAL EVIDENCE OF LEVIN'S PREPARATIONS TO LEAVE, ASIDE FROM GETTING HIS FINANCIAL AFFAIRS IN ORDER, PLEASE RECALL THE AMERICAN EXPRESS RECORDS BROUGHT TO YOU BY MR. JOHN REEVES, THAT SHOWED WITHIN THE LAST 30 DAYS OF LEVIN BEING IN LOS ANGELES, HE SPENT SOME $49,000 OF THEIR MONEY.

(81 TR 12835.) Trial counsel also argued:

> NOW LET'S TALK ABOUT THE ALARM, WHICH WE WILL NOW, AND LATER AGAIN IN A DIFFERENT CONTEXT.
>
> I WILL AGREE THAT I BELIEVE THE WITNESSES SAY THAT DURING LEVIN'S DAY-TO-DAY LIVE, [*SIC*] HE SET HIS ALARM. BUT ON THE NIGHT LEVIN SKIPPED TOWN, HE NO LONGER HAD TO WORRY ABOUT ROBBERIES OF HIS HOUSE. HE NO LONG HAD TO WORRY ABOUT BEING

> BROKEN INTO OR KIDNAPPED BECAUSE HE WASN'T COMING BACK, WHY SET THE ALARM?

(81 TR 12837.) Furthermore, trial counsel emphasized that Petitioner was not at Levin's house on the night of the murder and DID NOT commit the murder, stating:

> IN ANY CASE, THE MORNING THAT LEVIN COLLECTED THOSE YOUNG MEN AT HIS HOUSE, WE HAVE THREE PEOPLE LOOKING AT AN UNARMED ALARM. THE EVIDENCE DOES NOT SHOW THAT IT IS THAT WAY BECAUSE JOE HUNT WAS THERE THE NIGHT BEFORE, KILLING HIM.
>
> IF THE ASSERTION BY THE PEOPLE IS THAT IT WAS JOE HUNT'S PLAN, THEN LET HIM STAND BY IT AND NOT SUFFER ONCE AGAIN, DEAN KARNY TO KARNY TO CREATE AN IMPROPER BRIDGE IN THIS INSTANCE, AS WE WILL SEE TIME AND TIME AGAIN, "JOE DIDN'T DO THAT, THAT IS ON THE LIST BECAUSE – JOE DIDN'T DO THAT ON THE LIST BECAUSE." THERE ARE TOO MANY OF THE "NOT DONE" ITEMS TO MAKE THAT LIST WORK, AND WE WILL LOOK AT EVERY WORD OF IT AS WE PROCEED.
>
> BUT AT THIS POINT, DEAN CONSTANTLY HAS IT WHERE JOE HUNT SUPPOSEDLY GOES THERE WITH A DIFFERENT IDEA IN MIND AND CHANGES IT ALL IN MIDSTREAM. HE WAS PLANNING ON DEBTOR AGREEMENTS, ON OPTIONS ON HOMES, FILLING IN A VARIETY OF BLANKS, PACKING SUITCASE, ALARMING CODES, GETTING LEVIN TO EXECUTE AUTHORIZATIONS ON HIS CORPORATION, TAKING SWISS BANK CHECKS WHICH ARE FOUND IN THE APARTMENT, PUTTING NOTATIONS IN THE MARGIN, CANCELING RESERVATIONS FROM HIS PHONE, KILLING HIS DOG, ALL OF THESE THINGS BEFORE HUNT ALLEGEDLY SO MUCH AS WAS TO CLEAR HIS THROAT THAT NIGHT, YET NONE ARE DONE.
>
> INSTEAD, THE ALLEGATION GOES THAT HUNT DOES SOMETHING COMPLETELY DIFFERENT THAN WHAT IS ON THE SEVEN PAGES. SUPPOSEDLY, HE PULLS AN OPTION CONTRACT, NOT REFERENCED ON THE SEVEN PAGES, OUT OF THIN AIR, KILLS LEVIN IN A WAY THAT WOULD LEAVE NO EVIDENCE BEHIND AS A RESULT OF EITHER BLESSED LUCK OR SOME SKILL NOT REFERENCED WHATSOEVER. TALK ABOUT THREADING A NEEDLE.

(81 TR 12838-12839.) More importantly, Petitioner's theory of defense is that he had NO MOTIVE TO KILL Levin. In particular, trial counsel argued:

> THE CONTRACT – NOW, THAT OFT WAVED AT YOU MICROGENESIS CONTRACT FOR A MILLION FIVE – NOW THIS IS OFFERED TO YOU BY THE PROSECUTION AS A MOTIVE FOR MURDER. AND A LOT SEEMED TO REVOLVE AROUND THAT.
>
> I BELIEVE THAT CONTRACT IS A GOOD POINT OF DEPARTURE FOR THE DEFENSE. THAT IS, THERE WAS NO MOTIVE FOR MURDER AND IF ANYTHING, HUNT DIDN'T WANT LEVIN TO LEAVE TOWN.

(81 TR 12867-12868.)

Similarly, Petitioner maintained his position of innocence in his direct appeal, prior habeas petitions and during his 1996 evidentiary hearing.

In light of his history of maintaining his actual innocence in legal proceedings on this case, it is perplexing now allegedly tries to implode his claim of innocence to seek habeas relief based on a claim of right defense, which would require him to admit, at baseline, that he robbed Levin, which would then suggest that he murdered Levin during a course of this robbery. Yet, significantly, it doesn't appear Petitioner takes that foundational position now either, as he proffers no evidence of his admission or confession to that effect in support of his claim. Rather Petitioner "maintains his innocence" and simply asks this Court to rely on the state of the trial evidence and find that the trial court perpetrated a due process violation on him and his attorney was constitutionally ineffective because he should have received a jury instruction he, through his trial counsel, presumably did not want for tactical reasons. A claim of right defense would have contradicted Petitioner's entire trial strategy, would have forced Petitioner's trial counsel to concede that Petitioner had been at Levin's house robbing Levin on the night of the murder and thereby to invite the very real probability that the jury would find, in light of all the other trial evidence, that Petitioner had murdered Levin during the course of that robbery, too.

As Petitioner has done nothing to alter his defense theory claiming innocence, these new claims alleging entitlement to a claim of right jury instruction are a hypothetical exercise that should be discounted as another attempt to get his conviction reversed.

2. <u>Petitioner Always Claimed that He did No ACTS of Robbery and has Not Admitted to Any ACTS of Robbery in Any of His Petitions, Including this One.</u>

The issue of whether Petitioner robbed Levin comes down to the $1.5 million question. Petitioner always maintained that the $1.5 million check he got from Levin was *NOT* forcibly acquired to recover a debt. (81 TR 12870-12871.) In closing, trial counsel argued:

> HOWEVER, IT IS QUITE EVIDENT THAT THE FACT THAT THE MILLION FIVE FIGURE DID NOT ARISE IN AN INTERACTION IN RON LEVIN'S BEDROOM AS BETWEEN JOE AND RON. IT DIDN'T HAPPEN THAT WAY.
>
> THE GOVERNMENT'S WITNESS TOLD YOU THAT, TOLD YOU THAT THAT IS NOT WHEN THAT FIGURE AROSE. THAT FIGURE WAS SEEN BY JERRY EISENBERG BEFORE HUNT WENT TO LEVIN'S.

> NOW, DEAN THAT UNBELIEVABLE SCOUNDREL SAT HERE AND TALKED HOW RON WHIMPERED AND WAS WILLING TO DO ANYTHING AND MADE US ALL FEEL BAD.
>
> WRAPPED INTO THIS LIE IS THE SCENARIO HE GAVE YOU FOR EXPLAINING THIS SITUATION THAT STORY OF HOW JIM MADE A MISTAKE. DO YOU REMEMBER THAT?
>
> JIM COMES IN AND MAKES A MISTAKE AND THAT IS WHY NO FURTHER ASSETS WERE GARNERED FROM LEVIN. THAT IS WHAT WE ARE TOLD.
>
> THERE IS WHOLE NETWORK OF LIES THAT PIVOTS OFF THE FACT THAT JOE WENT OVER TO RON'S, ACCORDING TO KARNY, WITH A CONTINGENCY PLAN, ALL KINDS OF CONTINGENCIES IN HIS MIND BUT NO SPECIFIC FIGURE.
>
> THAT IS WHAT WE ARE TOLD. AS YOU CAN SEE BY THE CONTRACT, JOE PROBABLY KNEW AT THE TIME, WHAT THE FIGURE WAS. HE TOLD EISENBERG THAT. THE BLANKS ON THE AGREEMENT INFERENTIALLY FORM EISENBERG'S TESTIMONY, WERE NOT THE AMOUNT OF THE CHECK BUT THE MANNER IN WHICH PAYMENT WAS TO BE MADE.
>
> THAT WAS WHAT WAS BEING DISCUSSED. AGAIN, YOU MUST REJECT THE PROSECUTION THEORY OF THE MOTIVE AND YOU MUST REJECT AND REMAIN SENSITIVE TO THE TREACHERY OF KARNEY'S TESTIMONY.

(81 RT 12870-12871.) To further this argument, trial counsel pointed out, "WHY TAKE THE PERSONAL CHECK BUT LEAVE THE ALLEGED CASHIER'S CHECKS BEHIND IN PLAIN VIEW?" (81 RT 12872, lines 21-22.) There were cashier's checks that Petitioner could have easily taken and quickly cashed, instead of trying to cash a large personal check. (81 RT 12872-12873.) Further, trial counsel argues that the $1.5 million check was of no consequence, as Levin had written Petitioner a bad check anyway. (81 TR 12874.)

More importantly, Petitioner, through his trial counsel, maintained that Petitioner had no motive to kill Levin, i.e. no necessity to recover a debt, as the "Clayton Brokerage Deal" was a "hoax." (81 TR 12884.) Trial counsel argued in closing the following:

> THE CLAYTON BROKERAGE HOUSE TELLS YOU THAT, THE BBC PEOPLE THAT WE HAVE HERE HAVE NO PIECE OF EVIDENCE TO FALL BACK ON SO THAT THEY COULD EVALUATE INDEPENDENTLY OF WHAT HUNT TOLD THEM, DO YOU REMEMBER THAT? ALL OF THESE BBC PEOPLE, PUT THAT ON ONE SIDE HERE, CAN'T RELY ON ANYTHING EXCEPT WHAT HUNT TELLS THEM TO BE TRUE. YOU REMEMBER NOBODY SHOWS YOU ANY EVIDENCE. THE ONLY EVIDENCE YOU ARE EVER SHOWN IN THIS DEAL, AND I CALL IT THE "HE SAID CASE." THIS WHOLE THING HAS BEEN THE "HE SAID CASE." EVERY GOVERNMENT

> WITNESS THAT COMES IN HERE SAYS "HE SAYS THAT. HE SAID, HE SAID, HE SAID, HE SAID," THAT IS ALL YOU HAVE GOT.
>
> WELL ON THE OTHER HAND, THE INFORMATION THAT IS GIVEN TO JOE HUNT ON THE CLAYTON BROKERAGE DEAL AND BY JACK FRIEDMAN IS A CLASSIC EXAMPLE OF WHY YOU, AS JURORS, SHOULD NOT BE ABLE TO PROVE OR BUY PROOF OF CORPUS DELICTI BASED ON STATEMENTS. CLAYTON GIVES YOU THE SEVEN PAGES, CLAYTON'S, LIKE THAT. CLAYTON GIVES THE PAGES, A THICK SHEAF OF TRADING DOCUMENTS THAT GIVES YOU ALL OF THESE ADMISSIONS AND CONFESSIONS ABOUT THE REALITY OF TRADES, BASED ON PHONE CONVERSATIONS BETWEEN JACK FRIEDMAN AND JOE HUNT ABOUT MILLION-DOLLAR TRADES THAT WERE BEING MADE. ***IT WAS A HOAX. IT WAS A HOAX. IT WAS SIMULATED MONEY, BROUGHT TO YOU BY THE SAME PERSON WHO BRINGS YOU SIMULATED MURDER, RON LEVIN.***
>
> NOW, WE HAD A WITNESS COME IN HERE – AND STAY WITH MY ANALOGY – JACK FRIEDMAN GETS UP ON THE STAND AND SAYS TO YOU "I AM A WITNESS. I KNOW NO REAL TRADES WERE MADE." SO EVERYONE IN THIS COURTROOM SAYS, "OKAY, I BELIEVE THAT A HUNDRED PERCENT, NO PROBLEM."
>
> NOW I AM SURE THAT THERE IS NO DOUBT IN ANY OF YOUR MINDS THAT DESPITE THE TRADING STATEMENT AND DESPITE ALL OF THE STATEMENTS THAT JACK FRIEDMAN HAD MADE TO JOE HUNT THAT THESE THINGS WERE REAL, THIS IS WHAT HAPPENED, AND THAT ALL OF THE TRADING CONFIRMATION AND THE BUY AND SELL PRICES, DESPITE ALL OF THAT APPEARANCE OF REALITY, IS THERE A PERSON ON THE JURY WHO BELIEVES THAT THAT TRADING WAS REAL? OR THAT RON LEVIN REALLY MADE $8 BILLION?
>
> WELL, IF YOU DO, YOU ARE THE ONLY JUROR ENTITLED TO VOTE GUILTY BECAUSE YOU ARE THE ONLY ONE WHO CAN SAY THAT YOU CAN CONSCIOUSLY ACCEPT APPEARANCE AS REALITY BEYOND A REASONABLE DOUBT.
>
> REMEMBER THIS, REMEMBER WHAT IS OPERATIVE IN HERE, APPEARANCE OR REALITY. DON'T CONVICT ON APPEARANCE OF THINGS.
>
> MY LORD, WE HAVE THIS CLAYTON STUFF, IT LOOKS BETTER THAN GOLD. NOT TRUE. A HOAX.

(81 TR 12884-12885.) Regardless of whether it was a "hoax" or that Petitioner believed be was entitled to go "collect a debt" from Levin, the trial defense theory is that Petitioner is innocent of the crimes against Levin. Petitioner was not there to commit a robbery and thereby he did not commit a murder because Levin was alive and the $1.5 million check was for a separate predated contract. Thus, even in the face of the overwhelming evidence of guilt and "substantial evidence"

at trial that Petitioner might have killed Levin to "collect a debt", Petitioner maintained his innocence and never pursued a claim of right defense.

III. EVEN IF PETITIONER COULD AVAIL HIMSELF TO THE CLAIM-OF-RIGHT DEFENSE, PETITIONER HAD NEVER RELIED ON THIS DEFENSE, IT IS INCONSISTENT WITH PETITIONER'S LONG STANDING THERORY OF DEFENSE AND PETITIONER DID NOT REQUEST THE INSTRUCTION AT TRIAL, THUS THE TRIAL COURT DID NOT HAVE TO GIVE THE CLAIM-OF-RIGHT INSTRUCTION *SUA SPONTE*.

A. There is No Duty to Instruct, *Sua Sponte*, on the Defense of Claim-of-Right When Petitioner had Never Relied on It.

Petitioner inaccurately asserts that the "trial court is required to instruct on a claim-of-right defense when there is substantial evidence to support an inference that appellant acted with a subjective belief he or she had a lawful claim on the property" (Petn., pp. 17-18) when he never relied on such evidence for the theory of his defense.

Petitioner points to a portion of the Prosecution's argument to emphasize that there was "substantial evidence" to justify a claim of right defense. A larger portion of the Prosecution's argument that includes Petitioner's cited portion is as follows:

> WELL, WE DON'T KNOW FOR SURE WHICH MONEY WENT INTO THE SHEARSON AND E.F. HUTTON ACCOUNTS AND WHICH MONEY WAS SPENT ON THE OFFICES, OTHER PROJECTS AND THE LAVISH LIFE-STYLE OF THE B.B.C.
>
> BUT HE STOLE SOME OF THAT MONEY. ONE WAY OR THE OTHER, IT IS BASICALLY A CON SCHEME. AND THE WHOLE THING AS I SAID, WAS FALLING IN. THAT WAS THE PURPOSE OF BRINGING IN ALL OF THAT TESTIMONY, TO SHOW THAT HE NEEDED MONEY, THE MONEY THAT HE WAS GOING TRY TO GET FROM MR. LEVIN, TO PAY THE INVESTORS.
>
> NOT ONLY DID WE PUT ON THE WITNESSES TO SHOW THAT, BUT HE ADMITTED THIS TO THE INVESTORS. HE TOLD THE INVESTORS ON SEPTEMBER THE 21ST AT THE LARGE MEETING THAT HE HAD, THAT HE WAS GOING TO GET THIS MONEY. HE WAS EXPECTING THIS MONEY FROM LEVIN OR MAYBE HE DIDN'T USE THE NAME BUT HE WAS EXPECTING THIS MONEY TO BASICALLY PAY THE LOSS. IT NEVER CAME THROUGH.
>
> AND IN FACT, HE TOLD THE PEOPLE, THE BBC MEMBERS ON JUNE 24TH, THE SAME THING, THAT HE WAS GOING TO USE THE LEVIN MONEY TO PAY OFF THE INVESTORS.
>
> THAT IS THE NUMBER ONE MOTIVE – OR EXCUSE ME, THE NUMBER TWO MOTIVE, HERE IS THE NUMBER ONE MOTIVE. THE NUMBER ONE MOTIVE – IT DOESN'T REALLY MATTER WHICH IS ONE AND WHICH IS TWO – IS THE CLAYTON BROKERAGE COMPANY AND JACK FRIEDMAN.

JACK FRIEDMAN IS ANOTHER ONE OF THE FUNNY CHARACTERS IN THIS CASE. HE GAVE US ALL A LITTLE BIT OF COMIC RELIEF.

AND JACK FRIEDMAN TOLD THE STORY OF THE "SCAM" THAT LEVIN PULLED ON HUNT. NOW, WE KNOW THAT HUNT FROM THIS $1.5 MILLION SCAM THAT HE RAN, WAS A SCAMMER HIMSELF."

AND HERE COMES LEVIN AND PEOPLE TOLD HIM – SIMI COOPER TOLD HIM AT THE BEGINNING WHEN HE INTRODUCED LEVIN TO HUNT, HE SAYS TO HUNT, "THIS GUY IS TROUBLE. THIS GUY IS A CON MAN. HE IS A SCAMMER. STAY AWAY FROM HIM."

WE KNOW LEVIN'S BACKGROUND. TELLING PEOPLE THAT HE WAS A CON MAN WAS PART OF HIS PATTERN. THAT IS WHAT HE DID. AND IT IS NOT UNUSUAL TO THINK THAT IN THE FIRST MEETING OR TWO THAT THE TWO OF THEM HAD, LEVIN TOLD HIM THAT.

THIS WAS THE GRAND CHALLENGE. THIS WAS THE CHALLENGE FOR THE PERSON WHO FELT HIMSELF A BOY GENIUS, TO GO OFF TO CHICAGO AND TRADE ON THE EXCHANGE.

THIS WAS NO CHALLENGE THAT WAS TOO BIG FOR HIM. THIS WAS NOT SOMETHING TO STAY AWAY FROM. THIS WAS SOMETHING TO RELISH.

AND SO HE SAYS, SURE, LEVIN, I WILL GET INVOLVED WITH YOU. AND HE DEALS WITH HIM FOR A WHILE AND HE CAN'T GET HIM TO INVEST ANY MONEY.

AND HE HEARD MR. KARNY TELL YOU THAT IT WAS WITH SOME FRUSTRATION THAT HUNT HAD THAT HE COULDN'T GET LEVIN TO INVEST. HE TAKES HIM THE MICHAEL DOW CONTRACT AND HE SAYS, "SEE, I GOT MONEY FROM THIS GUY, $150,000."

LEVIN JUST KIND OF LAUGHED AT HIM. SO, YOU CAN IMAGINE HOW GREAT HUNT FELT WHEN HE GOT LEVIN FINALLY, TO DO SOME INVESTING WITH HIM. LEVIN CALLS UP AND – PUT YOUR-SELF IN HUNT'S POSITION. LEVIN CALLS UP.

HE SAYS, "HUNT, I HAVE GOT $5 MILLION. ALL YOU HAVE TO DO IS MAKE YOUR TRADES. YOU DON'T HAVE TO PUT IN A DIME. IF YOU LOSE, YOU DON'T SUFFER ANY OF THE LOSS. BUT IF YOU WIN, WE SPLIT THE PROFITS 50/50."

SOME FAMILIAR? THAT IS LIKE WHAT HUNT IS GOING WITH HIS PEOPLE. AND PUT YOURSELF IN HUNT'S POSITION, HOW YOU WOULD HAVE FELT GETTING THAT PHONE CALL.

YOU HAD BEEN TRYING TO GET THE GUY TO INVEST FOR A WHILE. NOT ONLY DO YOU DO IT, BUT HE HAS GOT $5 MILLION. THIS IS LIKE PLAYTIME. THIS IS FANTASY. THIS IS FUN.

AND AS WE KNOW, IN FACT, IT WASN'T FANTASY. BECAUSE MR. LEVIN CALLED UP MR. FRIEDMAN AND TOLD HIM ABOUT THIS STORY WITH THE REPORTERS AND THAT THERE WAS NO REAL MONEY.

AND IN FACT, I KNOW THE 5 MILLION BECOMES 13 MILLION AND AS PER THE PLAN, EVENTUALLY, LEVIN SAYS TO FRIEDMAN, "THAT IS ENOUGH." AND FRIEDMAN SAYS TO HUNT, "OKAY, WE HAVE GOT TO LIQUIDATE."

AND HUNT IS NOW HAPPY. RIGHT?

THIRTEEN MILLION DOLLARS AND HE HAS MADE EIGHT MILLION DOLLARS PROFIT.

OKAY, LEVIN, YOU WANT TO LIQUIDATE? GIVE ME MY 4 MILLION AND I AM OUT OF HERE. OF COURSE, THERE WAS NO 4 MILLION.

YOU HEARD ALL OF THE TESTIMONY ABOUT THE STALLING AND THE PUTTING OFF. IT WAS LIKE LEVIN WAS PLAYING HUNT ON A STRING WITH THE PARADOX PHILOSOPHY, THE WAY HUNT PLAYED ALL OF THE OTHER PEOPLE IN THE BBC ALONG WITH THE PARADOX PHILOSOPHY.

THE WAY HUNT COULD TELL TOM MAY, "DON'T WORRY, TOM, I LOST ALL THIS MONEY OF YOURS BUT I WILL MAKE YOU A SHADING." TOM DID HIS 180 DEGREE FLIP AND HE WAS HAPPY. IT WAS OKAY.

LEVIN SAID TO HUNT, "WELL, I DON'T HAVE THE MONEY RIGHT NOW" AND HE PUT HIM OFF. AND THEN HE SAID, "BUT, DON'T WORRY. IT IS IN A SHOPPING CENTER. INSTEAD OF 4 MILLION, IT IS GOING TO BE 30 MILLION."

NOW, HUNT IS HAPPY AGAIN. THEN, WHERE ARE THE DEEDS TO THE SHOPPING CENTER? WHERE IS THE PROOF OF THE SHOPPING CENTER? AND OF COURSE EVENTUALLY, THERE WAS NO SHOPPING CENTER.

AND EVEN AFTER FRIEDMAN HAD TOLD HUNT THAT THERE WAS NO REAL MONEY, HUNT DIDN'T BELIEVE IT BECAUSE HE DIDN'T WANT TO BELIEVE IT.

DO YOU REMEMBER THAT THE ACCOUNT FINISHED TRADING IN THE MIDDLE OF AUGUST AND IT WAS SOMETIME IN SEPTEMBER OR OCTOBER OR NOVEMBER, I THINK BEFORE THANKSGIVING IN ANY EVENT, THAT FRIEDMAN HAD TOLD HUNT IT WAS ALL PHONY. IT WAS ALL FOR A TV SHOW.

BUT OF COURSE, LEVIN WAS ABLE TO CALL UP HUNT AND CONVINCE HIM THAT THAT WAS NOT TRUE. AND ACCORDING TO KARNY, HE SAID THAT, WELL, EVEN IF IT WAS NOT TRUE, THAT HE HAD SCAMMED UP SOME MONEY FROM SOME OTHER BROKERAGE PLACE.

BUT IT WAS WAY AFTER, WAY AFTER FRIEDMAN TOLD HUNT THAT THE MONEY WAS NOT REAL THAT HE HAD THESE DISCUSSIONS ABOUT DIVYING [SIC] UP THE PORTIONS OF THE SHOPPING CENTER.

BECAUSE THAT WENT INTO THE BEGINNING PART OF THE 1984 BEFORE THEY REALIZED THERE WAS NO SHOPPING CENTER. SO THAT IS THE SECOND MOTIVE. AND IT IS ALMOST – WELL, IT IS PROBABLY MORE POWERFUL THAT THE FIRST BECAUSE HUNT WAS JUST – YOU CAN IMAGINE THE PERSONALITY.

> AND ONE OF THE INTERESTING THINGS TO LOOK AT IN THIS WHOLE CASE, IS HOW CLOSE THE TWO PERSONALITIES ARE, HUNT'S PERSONALITY AND LEVIN'S PERSONALITY. YOU CAN IMAGINE HOW MAD A SCAMMER GETS WHEN HE GETS SCAMMED. AND THAT WAS THE OTHER HALF OF THE MOTIVE IN THIS CASE.

(80 RT 12749-12753.)

This argument points to the complexity of the "agreement" between Levin and Petitioner and what amount Petitioner was legally entitled to, if any, considering Petitioner learned he had been twice scammed by Levin with a big "hoax." After realizing that Levin had scammed him more than once with the original two promises of money from the profits of an imaginary commodity trading account and an imaginary shopping center, respectively, Petitioner ultimately entered into a third agreement with Levin to receive $300,000 of $1.5 million dollars of ill-gotten gains—likely because Petitioner refused to accept the fact that he had been out-conned by an admitted con artist. As the Prosecution argued of the first scam, "**And even after Friedman had told Hunt that there was no real money, Hunt didn't believe it *because he didn't want to believe it.*"** (80 RT 12752, lines 23-25.) So, when Petitioner robbed and murdered Levin, Petitioner probably wanted to reclaim an unliquidated "debt" he felt he was entitled to while seeking revenge against Levin, the con who kept conning him, by carrying out his plan for Levin's murder regardless of any of sum of money he could take from Levin. (Indeed, the trial evidence shows that Petitioner brutally and ruthlessly murdered Levin *even though he had already received the coveted check for $1.5 million dollars* from Levin. (71 RT 11364-11365; *Hunt,* p. 328, 330.)

However, the argument by the Prosecution did not alter the trial defense that Petitioner was innocent of Levin's robbery and the murder. At trial, Petitioner never deviated from his defense theory that Levin was still alive. "THE CON THAT [RON LEVIN] IS DEAD," (43 RT 6383, line 11), was the battle cry the defense introduced in opening statement and was the theme all throughout the trial. Trial counsel further elaborated in opening statements, that:

> Well, no witness is going to come forward and tell you that they saw anybody kill Ron Levin. No witness is going to come forward and tell you that they ever saw Ron Levin's dead body or ever saw Ron Levin dead at all.
>
> But you know what? Levin is not going to get away with the con, because the defense is going to bring forward not one but two witnesses that are going to tell you that they saw Ron Levin alive

> since this trial began. They are going to tell you that they saw him and what are they doing? What is Ron Levin doing when they see him? Well, he is going what he always did, driving a fancy sports car in the company of a fey appearing, clean-shaven young man, well dressed. He is well mannered, acting just like he always does.
>
> …
>
> The evidence, not the arguments, the evidence will show you that there is no evidence that will amount to proof that Ron Levin is dead.

(43 RT at pp. 6383, lines 12-25; 6384, lines 5-7.)

Though the trial evidence showed that Petitioner had declared to members of the BBC in a secret meeting, in which the members were sworn to secrecy, that "'JIM AND I TOOK CARE OF RON LEVIN' OR 'KILLED HIM," (53 RT at p. 8032-8034; 8034, lines 8-9), Petitioner nonetheless maintained in his trial defense that he had no involvement in a murder or robbery that did not take place. (81 RT 12823-12939; 82 RT 12940-13015.) Even Jeffrey Raymond, a prosecution witness and former member of the BBC, initially entertained the idea that the admission could have been another con that Petitioner was running on the members of BBC. (53 RT 8109-8110.) Ultimately when pressed on cross-examination, Raymond said he was not sure if Petitioner had been truthful in declaring that he had "TAKEN CARE" of Levin. (53 RT 8067.)

Petitioner never presented any evidence that he had been at Levin's house on the date of Levin's robbery and murder. To the contrary, his defense included evidence that he and Levin had been business associates who had had a dinner meeting at La Scala restaurant to sign an options contract for a predetermined amount of $1.5 million. (73 RT 11550; 74 11700.) Through the testimony of his alibi witness/girlfriend, Brooke Roberts, Petitioner offered evidence that he last saw Levin alive at a business dinner. (73 RT 11550-11557, 74 RT 11700, 47 RT 7106-7108, 81 RT 12904-12906.) According to the testimony of Witness Roberts, Petitioner's girlfriend, she had been with Petitioner at their house sometime around 5 to 6 p.m. on the date in question when he told her he was going to meet Levin for a business dinner. (73 RT 11550.) She left for a movie, returned home, and saw him again at about 9:30 to 10:00 p.m., when he was already in his bathrobe waving the signed check around. (73 RT 11550-11557.) Petitioner's trial counsel argued in a general sense that the defense does not know what happened to Levin, presumably since Petitioner had left the restaurant

and Levin was still alive. (82 RT 12954-12957; 81 RT 12904-12906; 81 RT 12850.) The evidence would suggest that by the time Petitioner returned to his house, Levin was alive and making a call to his assistant Michael Broder at about 9:00 to 9:30 p.m. asking Broder to come over. (47 RT 7106-7108; 81 RT 12904-12906.) According to Broder, there was nothing unusual about this call. (47 RT 7108.) Petitioner's trial counsel further emphasized that the defense could only speculate that Levin had faked his own disappearance to avoid the pending legal and financial problems he had then faced. (81 RT 12830, 12850.) Petitioner also called witnesses Carmen Canchola and Jesus Lopez to testify that they had subsequently seen Levin in Arizona in September 1986. (75 RT 11897-12147; 76 RT 12169-12199; 77 RT 12253-12316; 81 RT 12850.)

It is apparent that Petitioner had devised the theory of his defense well before he murdered Levin. As was adduced at trial, when Petitioner forced Levin to sign the $1.5 million check, it was in conjunction with a pre-typed options contract for "Microgenesis of North America." (53 RT 8017- 8019.) When Raymond asked Petitioner, "'WELL, YOU HAVE A CONTRACT AND A CHECK, IT IS GOING TO BE OBVIOUS THAT YOU WERE THE LAST ONE TO SEE HIM.'" (53 RT 8043, ll. 19-21), Petitioner responded that he had "PLANTED LETTERS IN LEVIN'S OFFICE, SHOWING THE CORRESPONDENCE PRIOR TO THE ACTUAL CHECK WRITING." (53 RT 8043, ll. 22-24.) Even the elaborated scheme of the contract made it appear that Petitioner and Levin were engaged in a business dealing rather than an execution of a contract signed under duress—thereby also combatting the charge that he had robbed Levin.

As part of his plan to kill Levin and cover it up and in an apparent plan to prepare a defense strategy, Petitioner also "MADE PHONE CALLS AT RON LEVIN'S HOUSE AFTER THE ALLEGED MURDER, TO SHOW THAT THEY STILL THOUGHT HE WAS THERE. THAT WAS PART OF THEIR PLAN, TOO." (53 RT at 8044, lines 13-16.) Petitioner even planned an alibi by having Karny take Petitioner's girlfriend and two others out to the movies, to which Petitioner would later say that he was with them. (70 RT at 11146.)

Thus, Petitioner planned and implemented his defense that Levin was alive and that their business association was agreeable, and thereby Petitioner had not murdered or robbed Levin. Petitioner seems to have had considered and cultivated this defense strategy well before he was

arrested and well before he murdered Levin. Since the prosecution was never able to produce a body, that defense was well-suited for the case.

The record reflects that at no point in the trial did Petitioner ever rely on a claim-of-right defense. Naturally so, because it would have revealed that Levin did not execute the $1.5 million options contract with Microgenisis, but rather Levin was forced to sign during a horrific murder plot that Petitioner devised to collect an alleged debt. Therefore, any claim-of-right jury instruction would have undermined Petitioner's long thought out defense strategy and confused the jury.

Remarkably, despite the overwhelming evidence of guilt *and* the Prosecution's argument, Petitioner maintained his claim of innocence on these grounds throughout the trial, in multiple post-conviction filings, and in the 1996 habeas litigation—never once relying on the claim of right defense. Even in this very Petition, Petitioner continues to maintain his innocence.

Petitioner has filed numerous habeas petitions and appeals. On direct appeal, he contended that there was no proof of corpus delicti. (*Hunt*, p. 133-134.) In particular, Petitioner asserted that Levin was:

> [F]acing a prison sentence for eight years for theft, was being investigate for income tax fraud, owed substantial sums of money to a variety of people and was facing lawsuits and other claims in excess of $250,000. Just before his disappearance, Levin had engaged in scams or bank withdrawals with netted him large sums of money and had arranged for his bail to be reduced which would eliminate the need for his parents' property to serve as security for his bail. Levin's dead body was never found. There was no visible sign of a struggle or foul play at his residence the morning following his disappearance and two people believed they saw Levin two years later. Thus, defendant argues that homicide is only one of many possibilities explaining Levin's disappearance … .

(*Hunt*, pp. 133-134.)

But perhaps his most notable proceeding is the 1996 evidentiary hearing, in which Petitioner presented multiple sighting witnesses to plump up his edict that Levin was still alive. Altogether 30 witnesses, including Petitioner, his trial counsel, and 18 others called by him, testified at the hearing, the transcript of which exceeds 2,200 pages. (EHRT, passim.) When

Petitioner took the stand, he denied that a murder took place, particularly since he did not have the motive to kill . (9 EVHT 1366-1367.)

[HABEAS COUNSEL] Q: DID FINANCIAL MOTIVE HAVE ANYTHING TO DO WITH – DID YOU DISCUSS FINANCIAL MOTIVE AS PART OF THE PROSECUTION'S CASE IN ANY OF YOUR DISCUSSIONS WITH MR. BARENS?

[PROSECUTOR]: SAME OBJECTION.

[TRIAL] COURT]: OVERRULED.

[PETITIONER]: YES, I DID.

[HABEAS COUNSEL]: AND WHAT WAS SAID?

[PETITIONER]: THIS WAS DISCUSSED AS ONE OF THE TWO PRINCIPAL REASONS WHY WE HAD TO GET INTO THE KILPATRICK NEGOTIATION, THE KILPATRICK DOCUMENTS FOR AS MUCH CORROBORATIVE EVIDENCE AS POSSIBLE FOR THAT SECTION OF THE B.B.C. BUSINESS HISTORY.

I POINTED OUT THAT BY MEANS OF THE KILPATRICK DEAL THE B.B.C. WAS GOING TO BE COMING INTO A SUBSTANTIAL AMOUNT OF MONEY STARTING IN WHAT I EXPECTED TO HAVE BEEN AUGUST OF 1984. WE WERE GOING TO BEGIN TO RECEIVE AROUND $300,000 A MONTH FOR THE NEXT 18 MONTHS UNDER THE TERMS OF – FIRST, AN INFORMAL AGREEMENT, BUT ONE THAT WAS BEING REDUCED TO WRITING BETWEEN KILPATRICK AND I.

WHEN I SAY "INFORMAL," WE HAD AN AGREEMENT THAT WAS DATED NOVEMBER OF 1983. WE THEN WERE WORKING TOWARDS MORE FORMAL, MORE SPECIFIC, MORE DEFINITE AGREEMENTS THROUGHOUT THE MARCH ONWARD PERIOD OF 1984.

[PROSECUTOR]: OBJECTION. NARRATIVE.

[TRIAL] COURT: YOU MAY FINISH YOUR ANSWER.

[PETITIONER]: MR. BARENS AND – I WAS INFORMING MR. BARENS OF MANY DIFFERENT POINTS AND REMINDING HIM ABOUT THE NATURE OF THESE NEGOTIATIONS, THE STRUCTURE OF THE PROGRESS OF THE DEAL.

ONCE, AS I RECALL, DURING A MEETING WHEN THE JENSENS WERE PRESENT I BROUGHT UP THE FACT THAT WE NEEDED TO GET NEIL ADELMAN TO CORROBORATE THE SIX MILLION PAYMENT, WHICH IS $333,333 PAYMENT TIMES 18 MONTHS FOR SIX MILLION AND BY DEMONSTRATING THAT THIS MONEY WAS EXPECTED AND THAT THE B.B.C. WAS DOING

MANY THINGS ON RELIANCE WITH THAT EXPECTATION.

AND CONSISTENT WITH OUR BELIEF THAT THE MONEY WOULD COME WE COULD ESTABLISH TO THE JURY THAT I WOULD NOT HAVE A MOTIVE TO KILL MR. LEVIN, THAT I WASN'T IN SUCH DIRE NEED OF CASH, SO DESPERATE THAT MYSELF OR ANY NORMAL REASONABLE HUMAN BEING WOULD EVER CONSIDER SOMETHING AS OUTRAGEOUS AND PERILOUS AS THAT.

(9 EVHT 1366-1367, *emphasis added*.)

[Habeas counsel] Q: Have you always maintained to [trial counsel] that you – that you did not kill either directly or indirectly Ron Levin?

[Petitioner]: Yes. Neither I by my word to another individual or personally did I kill Ron Levin.

(9 EHTR 1498, lines 12-16.)

Even years after his conviction, Petitioner continued to maintain that he did not kill Levin and that he had no motive to do so. At the 1996 habeas evidentiary hearing Petitioner denied having ever told his trial counsel that he had killed Levin. (9 EHTR 1498.) Thus, this theory of defense, which in no part relied on the claim of right theory, was acceptable to Petitioner when it suited him at trial, on appeal, and in prior habeas petitions that included him accusing his trial counsel of committing IAC.

Petitioner has consistently denied murdering Levin, proclaimed that Levin was still alive, and never relied on a claim-of-right defense. Indeed, Petitioner still maintains he is innocent and he has not made any declaration to the contrary to his trial defense in this Petition. Yet 35-plus years later, when all of his previous attempts to get his convictions reversed have failed, Petitioner suddenly elects to do in this Petition what he seemingly believes is "necessary under the circumstances": he invokes and relies on the claim of right theory for the first time—without also admitting he actually robbed and murdered Levin. This exceedingly belated move, while fatal to the foundation of his instant habeas claims, signals his unfailing adherence to his paradox philosophy, wherein "[s]urvival of the individual [is] the sole end." (Ex. 1, p. 322.)

It is also noteworthy that in support of this Petition, Petitioner superficially cites to *People v. Barnett* (1988) 17 Cal.4th 1044 (*Barnett*) and *People Flannel* (1979) 25 Cal.3d 668

(*Flannel*) as the authority requiring the trial court to instruct on the claim of right defense. (Petn. p. 18.) Yet, Petitioner failed to elaborate on the specifics of each case and ignored notable aspects of their holdings that respectively undermine his position. (Petn. p. 18.) In *Barnett,* the CSC concluded that the claim of right "defense is not available where the claimed debt is uncertain and subject to dispute." (*Barnett, supra,* 17 Cal.4th p. at 1146.) As discussed in Section IV.E., *ante*, the amount Petitioner claimed right to was uncertain and subject to dispute, if at all enforceable, even if Petitioner believed it was real at one point. *In Flannel,* the CSC stated that the trial court is not "required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly." (*Flannel, supra,* 25 Cal.3d p. at 683.)

Petitioner also does not address *People v. Gordon* (1982) 136 Cal.App.3d 519 (*Gordon*). In *Gordon*, the COA addressed the trial court's *sua sponte* duty to instruct on particular defenses:

> The duty to give instructions, *sua sponte*, on particular defenses and their relevance to the charged offense arises only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People* v. *Sedeno* (1974) 10 Cal.3d 703, 716.)

(*Id.* at p. 531.)

In *Gordon,* defendant was convicted of two robberies after he, and another codefendant, entered the home of the victims, displayed a pistol, ordered the victims to lay down and stated, "Lady, that's on account of your fucking son that we are here. Your son owes us a lot of fucking money." (*Id.* at pp. 523-524.) Defendant and codefendant then entered the victims' son's room and left with a shoulder bag. (*Id.* at p. 524.) The victims' son later testified that he lost $1,000, two pounds of marijuana and a shoulder bag. (*Ibid.*) The victims identified the defendant and the prosecution presented evidence of the defendant's fingerprint found on an atlas in the son's room, a shoe print found outside the house, and the firearm found in the defendant's possession at the time of arrest. (*Id.* at p. 527.) Defendant testified and denied going to the victims' home on the date in question. (*Id.* at p. 530.) Rather, defendant testified that he was at the victims' home on an earlier date to buy drugs, entered the son's room and looked through an atlas, thereby explaining

the false ID and reason for the fingerprint. (*Ibid.*) As the defendant maintained that he was not there on the date in question, he was not relying on a "claim of right" defense and did not request the specific jury instruction. (*Ibid.*) Thus, the court did not have a *sua sponte* obligation to give this particular jury instruction. (*Id.* at p. 531.)

Nor does Petitioner address *People v. Stevens* (1969) 269 Cal.App.2d 470 (*Stevens*). In *Stevens*, the appellate court held:

> Although there is considerable doubt in our mind whether a vague unliquidated claim for services rendered falls within the ambit of the *Butler* doctrine (cf. *People* v. *Poindexter*, 255 Cal.App.2d 566, 570 [63 Cal.Rptr. 332]), we will assume for the sake of argument only that it does. Still, we see no error in failing to instruct the jury *sua sponte* on the claim of right "defense."
>
> We are not dealing with the failure of the court to instruct on an essential element of the crime, as was the case in *People* v. *Ford, supra*, 60 Cal.2d 772, 792-793. This case comes well within the doctrine that while *sua sponte* instructions must be given on general principles of law governing the case, they need not be given on specific points developed at the trial. (*People* v. *Bevins*, 54 Cal.2d 71, 77 [4 Cal.Rptr. 504, 351 P.2d 776]; *People* v. *Wade*, 53 Cal.2d 322, 334-335 [1 Cal.Rptr. 683, 348 P.2d 116].) As in *Wade*, the "claim of right" theory was "under the surface of the facts and theories apparently involved." (53 Cal.2d at p. 335.) As the evidence concerning the alleged claim of right developed at the trial, it was more or less of a disaster for the defense. In the absence of a specific request for an instruction thereon, it should not be turned into an appellate triumph.
>
> Perhaps anticipating failure on his first point, defendant then argues that he was denied the effective assistance of counsel when no instruction on the claim of right theory was requested. The argument has no merit. Defendant had a fairly straightforward, if somewhat incredible defense, when he claimed that he had been given permission to use the powers to effect the transfers. Counsel may well have been afraid to muddy the waters with another antagonistic theory which, realistically, could not help his client unless the jury disbelieved him. The question was one of tactics. (*People* v. *Reeves*, 64 Cal.2d 766, 773 [51 Cal.Rptr. 691, 415 P.2d 35].)

(*Stevens*, *supra*, 269 Cal.App.2d at pp. 474-475.)

In *Stevens*, defendant was convicted of grand theft and burglary using the two powers of attorney from the victim when he helped her sell an apartment complex while she was hospitalized. (*Stevens*, *supra*, 269 Cal.App.2d at p. 471.) Defendant held onto the powers of attorney and went to her bank and attempted to close her savings account, worth $7,500. (*Ibid.*)

The bank associate refused to honor the power of attorney and gave defendant a form for the victim to sign. (*Ibid.*) Defendant did not return. (*Ibid.*) Defendant then used to the powers of attorney to transfer the victim's Cadillac into his name, and thereafter he physically took hold of the Cadillac. (*Id* at pp. 471-472.) The victim was the owner of a $38,433.65 purchase money note, whereby she received monthly payments of $500 through the Continental Bank, paid by the maker of the note. (*Id.* at p. 472.) Defendant showed the powers of attorney to the Continental Bank and persuaded an employee to release the purchase money note to defendant. (*Ibid.*) Then, defendant called the maker of the note and directed all further payments be made to defendant through his attorney's office. (*Ibid.*) Defendant asserted that all the transactions were done with the permission of the victim and that the victim had promised him half of the proceeds of the sale of the apartment complex, plus compensation for his other services. (*Ibid.*) Instead, the victim assumed defendant had volunteered his services as he was in love with her. (*Ibid.*) She never gave him permission to acquire the savings account, Cadillac, or purchase money note. (*Ibid.*) Defendant argued that the court should have instructed, *sua sponte*, on a claim-of-right defense, as he did so in good faith. (*Ibid.*) However, the court noted that, "any defense based on a non-consensual taking under a claim of right would have been incompatible with the defense as actually put forth, that is to say a taking with the express permission of [victim]. The only evidence which might permit an inference that defendant took [victim]'s properties under a claim of right is contained in a letter which he wrote to her on September 24, 1965, and which was offered by the People." (*Id.* at p. 473.) Thus, despite the evidence possibly suggesting some claim of right contained in a letter proffered by the prosecution, defendant had not relied on this theory at trial. Thus, the trial court was not obligated to instruct on the claim of right defense.

Petitioner never pursued the claim of right theory of defense before now. Instead, he consistently denied his involvement outright, did and still claims innocence, and continued to assert Levin is alive. Despite some trial evidence that Petitioner now points to to say he was entitled to a claim-of-right jury instruction, Petitioner did not, before now, rely on such defense and did not request the specific instruction at trial—understandably, as invoking the claim of right defense would have required him to admit he had robbed Levin and invited the jury to find that he carried

out his vengeful plan to murder Levin in the course of that robbery, which would have antagonized his otherwise chosen trial defense. The trial court was not required to anticipate Petitioner's revised theory of defense some 35 years later and was not obligated to instruct on the claim of right defense *sua sponte.* In keeping with *Gordon* and *Stevens, supra*, the trial court had no duty to instruct on the claim of right defense because (1) Petitioner never relied on that defense at trial, (2) while some, there is no substantial evidence supportive of the claim of right defense, and (3) the claim of right defense conflicts with Petitioner's theory of the case. (*Gordon*, *supra*, 136 Cal.App.3d at p. 531, citing *People* v. *Sedeno* (1974) 10 Cal.3d 703, 716; *Stevens*, *supra*, 269 Cal.App.2d at pp. 474-475.)

Because Petitioner fails to make a prima facie case that the trial court had a *sua sponte* duty to instruct on the claim of right defense at trial, this Court should summarily deny the due process claim.

IV. PETITIONER INADEQUATELY PLED HIS IAC CLAIMS AND HAS FAILED TO MAKE A PRIMA FACIE SHOWING THAT TRIAL COUNSEL RENDERED PREJUDICIALLY DEFICIENT PERFORMANCE IN FAILING TO REQUEST THE CLAIM OF RIGHT JURY INSTRUCTION.

When a convicted defendant claims that his attorney's assistance at trial was so defective that his conviction should be set aside, it is incumbent upon him to show deficient performance by counsel and that actual prejudice resulted from counsel's inadequate representation. (*Strickland, supra,* 466 U.S. 668; *People v. Marquez* (1992) 1 Cal.4th 553.) Our Supreme Court summed up the law in this area:

> If a defendant meets the burden of establishing that counsel's performance was deficient, he or she must also show that counsel's deficiencies resulted in prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Citation.]

(*People v. Lopez* (2008) 42 Cal.4th 960, 966 [quoting *Ledesma, supra,* 39 Cal.4th at p. 754-746].) The standards for IAC claims are well established.

> 'We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions.' [Citation.] To establish a meritorious claim of ineffective assistance, defendant 'MUST ESTABLISH EITHER: (1) As a result of counsel's

> performance, the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown ([citations]) or (2) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. [Citations].'

(*People v. Prieto* (2003) 30 Cal.4th 226, 261, emphasis added.)

> "'When the basis of a challenge to the validity of a judgment is constitutionally ineffective assistance by trial counsel, the petitioner must establish . . . counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome.'" [Citation.] [¶] "'[T]he petitioner must establish "prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.] . . . The petitioner must demonstrate that counsel knew or should have known that further investigation was necessary, and must establish the nature and relevance of the evidence that counsel failed to present or discover." [Citation.] Prejudice is established if there is a reasonable probability that a more favorable outcome would have resulted had the evidence been presented, i.e., a probability sufficient to undermine confidence in the outcome. [Citations.] The incompetence must have resulted in a fundamentally unfair proceeding or an unreliable verdict. [Citation.]'" [Citation.]

(*In re Cox* (2003) 30 Cal.4th 974, 1015-1016.)

Indeed, the United States Supreme Court has issued a *per curiam* decision confirming that "counsel has wide latitude in deciding how best to represent a client…" (*Yarborough v. Gentry* (2003) 540 U.S. 1, 5.) "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than sheer neglect." (*Id.* at p. 8.) "Moreover, even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." (*Ibid.*) In other words, "[j]udicial review of a defense attorney's" performance must be "highly deferential…." (*Id.* at p. 6.)

The CSC, quoting established law, confirmed as follows:

> `Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation] and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."' [Citations.] '[W]e accord great deference to counsel's tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh

> light of hindsight.' [Citation]. 'Tactical errors are generally not deemed reversible, and counsel's decision-making must be evaluated in the context of the available facts.' [Citation.]

(*People v. Weaver, supra,* 26 Cal.4th at pp. 925-926; see *People v. Stanley* (2006) 39 Cal.4th 913, 954 (*Stanley*).) "Forgoing the presentation of testimony or evidence promised in an opening statement can be a reasonable tactical decision, depending on the circumstances of the case." (*Stanley, supra,* 39 Cal.4th at 955.)

The United States Supreme Court cautioned that:

> '[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'

(*In re Cudjo* (1999) 20 Cal.4th 673, 692 [quoting *Strickland*, *supra*, 466 U.S. at pp. 690-691].

In *United States v. Cronic* (1984) 466 U.S. 648, the retained counsel of a defendant charged with 13 counts of mail fraud withdrew shortly before the trial date. The federal district court appointed a young lawyer with a real-estate practice to represent the defendant. The young lawyer, who had never conducted a jury trial, was allowed only 25 days for pretrial preparation, even though the government's investigation and review of thousands of documents had taken four years. New counsel did not put on any defense witnesses, and the defendant was convicted of 11 of the 13 counts and was sentenced to a 25-year prison term.

The high court reversed the Tenth Circuit's finding of IAC.

> [T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." [Citation.] The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—*even if defense counsel may have made demonstrable errors*—the kind of testing envisioned by the Sixth Amendment has occurred.

(*Id*., at p. 656; *emphasis added*.)

In *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059, a unanimous CSC affirmed the judgment and sentence in a capital case in which no defense was presented, commenting: "The decisions … whether to put on witnesses are matters of trial tactics and strategy which a reviewing court generally may not second-guess." Counsel's discretion has a wide range: "Where the record shows that the omission or error resulted from an informed tactical choice within the range of reasonable competence, we have held that the conviction should be affirmed." (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1215.) Similarly, "[c]ounsel may not be deemed incompetent for failure to make meritless objections." (*People v. Lucero* (2000) 23 Cal.4th 692, 732 (*Lucero*).) "…[T]o omit making a non-meritorious objection does not amount to deficient performance." (*People v. Marlow* (2004) 34 Cal.4th 131, 144 (*Marlow*).)

Strickland imposes a "highly demanding" standard upon a petitioner to prove "gross incompetence." (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382.) It is strongly presumed that counsel's conduct was within the wide range of reasonable assistance, and that counsel exercised acceptable judgment in all significant respects. (*Strickland, supra*, 466 U.S. at p. 689.) Counsel's decisions on tactical matters are accorded great judicial deference and these decisions generally will not rise to the level of reversible error. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) A petitioner has the burden of showing by a preponderance of the evidence that counsel's actions were not a result of reasonable professional judgment. (*People v. Garrison* (1989) 47 Cal.3d 746, 788.)

A court "need not determine whether counsel's performance was deficient before examining the prejudice suffered as a result of the alleged deficiencies." (*People v. Holt* (1997) 15 Cal.4th 619, 703 [quoting *People v. Rodrigues,* (1994) 8 Cal.4th 1060, 1126].) In *Strickland*, the United States Supreme Court explicitly approved the practice of examining the prejudice prong first, where the lack of prejudice provides a ground for resolving the case. "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, *that course should be followed*." (*Strickland, supra*, 466 U.S. at p. 697, emphasis added.)

When the record sheds no light on why counsel failed to act in a manner challenged, the petitioner must show that there was "no conceivable tactical purpose" for counsel's act or

omission. (*People v. Lewis* (2001) 25 Cal.4th 610, 675; see also *People v. Hines* (1997) 15 Cal.4th 997, 1048.)

Here, Petitioner relies solely on the trial record to support his claim of IAC for failure to request the claim of right instruction. He does not proffer any additional supporting evidence in this regard, such as a sworn declaration from trial counsel or from a *Strickland* expert, addressing this claim of IAC. Because the trial record does not illuminate why trial counsel failed to request this instruction, Petitioner must show that there was "no conceivable tactical purpose" for counsel's omission. (*People v. Lewis* (2001) 25 Cal.4th 610, 675; see also *People v. Hines* (1997) 15 Cal.4th 997, 1048.) Here, he fails to make that showing, so this Court is left to presume that trial counsel's performance fell within the wide range of professional competence and that her actions and inactions can be explained as a matter of sound trial strategy. (*Ledesma, supra,* 39 Cal.4th at p. 746, quoting *People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

In fact, it was. At no time during trial did Petitioner propound the claim of right defense strategy to the jury. Such a move would have confused the jury, who had already heard that Petitioner was innocent of the crimes: he had never committed the robbery or murder against Levin, his business associate, with whom he shared a positive relationship and whom he left alive at La Scala following their dinner meeting on June 6, 1984. Had Petitioner also introduced a claim of right defense, even through a request for the instruction, he would have had to admit he had robbed Levin, and necessarily invited the jury to find that he had also committed the murder in the process of the robbery. The outcome could have been disastrous for the credibility of the defense. Moreover, to have presented that defense, even through a request for the instruction, would have exposed trial counsel to a potential claim of *McCoy v. Louisiana* (2018) 138 S.Ct. 1500 (*McCoy*) error.[1] It is Petitioner's right to decide "to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence." (*Id*. at p. 1505.) Had Petitioner's trial counsel requested the claim of right instruction, in direct contrast to Petitioner's claim of innocence, Petitioner would most probably now be arguing a *McCoy* violation instead. Thus, trial counsel was not deficient under prevailing professional norms in failing to request the claim of right instruction because it would have

thwarted the principal trial defense and run counter to Petitioner's decision to maintain his innocence. Petitioner does not make a prima facie case to the contrary.

Moreover, Petitioner does not show how he was prejudiced by his trial counsel's failure to request the claim of right instruction, in light of the damage it would have done to the principal defense and of the overwhelming evidence of guilt presented at trial against Petitioner—especially the gruesome evidence of his calculated plan to murder Levin and his ultimate execution of that plan, despite the fact that Levin had already given him the $1.5 million check he wanted. As such, Petitioner has not made a prima facie case of prejudice to a demonstrable reality.

Because Petitioner does not make a prima facie showing that trial counsel rendered prejudicially deficient representation, as alleged, this Court should summarily deny the claim.

V. PETITIONER'S CLAIM THAT HE IS "ACTUALLY INNOCENT OF THE CRIME OF ROBBERY AND THE SPECIAL CIRCUMSTANCE OF MURDER COMMITTED IN THE COMMISSION OF A ROBBERY ([CITATIONS])"[22] DOES NOT SATISFY THE PREVAILING LEGAL STANDARD FOR HABEAS RELIEF.

In the context of excepting his claims from applicable procedural bars, he reiterates he is "actually innocent of the crime of robbery and the special circumstance of murder committed in the commission of a robbery ([citations])" (Petn., p. 16.) However, Petitioner does not specify the legal basis for his claim of actual innocence, leaving this Court and Respondent to guess at his thought-process, in violation of his pleading requirements.

However, as read in the context of his entire petition, Respondent assumes *arguendo*, that Petitioner bases this allegation on Petitioner's "new" emphasis of the trial evidence that he claims entitled him to the claim of right instruction. As such, Respondent will analyze the claim under section 1473, subdivisions (b)(3)(A) and (B), the prevailing legal standard for addressing claims of new evidence of actual innocence on habeas corpus.

Section 1473, subdivision (b)(3), sets forth:

> (A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.

[22] (Petn., p. 16.)

> (B) For purposes of this section, "new evidence" means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral or impeaching.

(§1473 subds. (b)(3)(A)-(B.) Under this analysis, Petitioner's claim fails.

Preliminarily, Petitioner's claim seems to rest completely on the trial evidence that Petitioner believed had a claim of right to the spoils he took from Levin. Under the statute, that evidence is not "new." First, because it is trial evidence, it was discovered during trial—and indeed before, as it is based entirely on Petitioner's alleged beliefs on June 6, 1984. Because he knew what he believed at the time he robbed and murdered Levin, that evidence was in his sole possession before the prosecution even filed the case. Both of these facts run contrary to the statutory definition that his new evidence must meet to qualify as "new".

Secondly, Petitioner's newly-discovered *emphasis* on this evidence does not equate to a new discovery of the evidence. Arguably, since he waited more than 35 years to *emphasize* this trial evidence, his *emphasis* on that trial evidence was presented after substantial delay (even though he knew about the evidence more than 35 years ago). The statute is clear: new evidence must be presented without substantial delay. (§1473, subd. (b)(3)(A).) At trial over 30 years ago, it was presented without substantial delay. But Petitioner does not get to assert it as "new evidence" all these decades later, when its presentation ultimately only amounts to a substantially delayed, "reoriented" view of the trial evidence. This approach falls outside the spirit and the letter of the statutory requirements for "new" evidence on habeas.

Moreover, the evidence supporting the claim of right defense is not credible. It is based entirely on Petitioner's expression of his personal belief about the unliquidated debt he sought to collect from Levin. Petitioner's word alone is not credible. The trial evidence clearly demonstrates he is a con artist who manipulates words to convince others to invest in his schemes, as seen from his brainchild, the Paradox Philosophy. Therefore, what he says he believes cannot be trusted as credible.

Finally, the jury already heard the trial evidence Petitioner now resurrects and relies on to support his claim that he was entitled to the claim of right defense instruction—and they convicted him anyway. Therefore, it cannot be said that this evidence carries "such decisive force and

value that it more likely than not would have changed the outcome at trial." (§1473, subd. (b)(3)(A).) It didn't have that requisite force and value when the jury heard it in 1984 and Petitioner presents nothing to support a prima facie showing that it would have such force and value if he presented it to them again now.

Accordingly, Petitioner has failed to make a prima facie showing that he is entitled to habeas relief based on actual innocence, and this Court should deny this claim.

Critically, insofar as Petitioner has not proven his claim of new evidence of actual innocence, he cannot viably invoke the *Clark* exception of actual innocence to the procedural bars against untimely and successive petitions, discussed in Section VI(B), *post*.

VI. PETITIONER IS PROCEDURALY BARRED FROM BRINGING HIS INSTANT DUE PROCESS AND IAC CLAIMS BECAUSE THEY ARE UNTIMELY AND SUCCESSIVE AND HIS DUE PROCESS CLAIM SHOULD HAVE BEEN RAISED ON DIRECT APPEAL BUT WAS NOT.

Petitioner is procedurally barred from raising his current due process and IAC claims in this Petition. Petitioner should have raised both claims on appeal, but did not. Furthermore, the claims are successive and untimely. Because Petitioner does not provide any viable legal justification or exception to overcome any of these procedural bars, this Court should summarily deny the claims in the Petition as procedurally barred.

A. Petitioner's Due Process Claim is Procedurally Barred by the *Dixon* Rule as He Should Have Raised It on Direct Appeal, But Did Not.

With respect to claimed errors that undermine the validity of the conviction, a petition for writ of habeas corpus may be denied when a remedy by appeal was available and was not employed. (*In re Lindley* (1947) 29 Cal.2d 709, 723; *Dixon*, *supra*, 41 Cal.2d at p. 759.) "'[T]he writ [of habeas corpus] will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.'" (*Reno*, *supra*, 55 Cal.4th at p. 490; see also *Lindley*, *supra*, 29 Cal.2d at p. 723; *In re Garcia*, *supra*, 67 Cal.App.3d at p. 65; and *In re Gomez*, *supra*, 31 Cal.App.3d at p. 732.) Petitioner's due process claim is procedurally barred because it violates the *Dixon* rule: he should have raised the claim on direct appeal, but did not.

The *Dixon* requirement of exhaustion of the appellate remedy may be relaxed only if one of four "narrow" exceptions is met; namely, the claim must be one that "involves a fundamental constitutional error, or that the trial court lacked fundamental jurisdiction, or that the court acted in excess of its jurisdiction, or that there has been a postappeal change in the law." (*Reno*, *supra*, 55 Cal.4th at p. 481; see also *In re Miller* (1992) 6 Cal.App.4th 873, 881 (*Miller*).)

The *Dixon* rule is the sister rule to the *Waltreus* rule: legal claims that have previously been raised and rejected on direct appeal ordinarily cannot be reraised in a collateral attack by filing a petition for a writ of habeas corpus."[23] Because the rules are analogous, the *Harris* court's discussion regarding the narrowness of the "fundamental constitutional error" exception to the *Waltreus* bar is either directly or analogously applicable here, especially vis-à-vis his IAC claim:[24]

> "Habeas corpus has become a proper remedy in this state to collaterally attack a judgment of conviction which has been obtained in violation of fundamental constitutional rights. [Citations.] The denial of a fair and impartial trial amounts to a denial of due process of law [citation] and is a miscarriage of justice within the meaning of that phrase as used in section 4, article VI, of the Constitution of this state. [Citations.] Fundamental jurisdictional defects, like constitutional defects, do not become irremediable when a judgment of conviction becomes final, even after affirmance on appeal. [Citation.] However, the petitioner must show that the defect so fatally infected the regularity of the trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice. [Citation.]" ([*In re Winchester* (1960) 53 Cal.2d 528,] 531-532.)
> …
>
> Habeas corpus may thus provide an avenue of relief to those unjustly incarcerated when the normal method of relief-i.e., direct appeal-is inadequate. fn. 6 Unlike review on direct appeal, habeas corpus does not simply inquire into the correctness of the trial court's judgment. The scope of habeas corpus is more limited. Although the writ of habeas corpus is directed against the custodian of one who is illegally confined, it will reach out to correct errors of a fundamental jurisdictional or constitutional type only. (In re Winchester, supra, 53 Cal.2d at p. 531.) (See fn. 7.), The specialized nature of the remedy itself compels the conclusion that-absent unusual circumstances-the aggrieved party should first appeal before resorting to habeas corpus. fn. 7 In this way, habeas corpus is preserved as an avenue of relief to those for whom the standard appellate system failed to operate properly.

[23] *Reno*, *supra*, 55 Cal.4th at p. 477; *In re Waltreus* (1965) 62 Cal.2d 218, 221 (*Waltreus*); *Harris*, *supra*, 5 Cal.4th at p. 829.

[24] In footnote 3 of the *Harris* opinion, the court stated: "Much of the following discussion also applies to the so-called *"Dixon* rule," which generally prohibits raising an issue in a postappeal habeas corpus petition when that issue was not, but could have been, raised on appeal. (*In re Dixon* (1953) 41 Cal.2d 756 [264 P.2d 13][hereafter *Dixon*].)" (*Harris*, *supra*, 5 Cal.4th at p. 825, fn. 3.)

Proper appellate procedure thus demands that, absent strong justification, issues that could be raised on appeal must initially be so presented, and not on habeas corpus in the first instance. Accordingly, an unjustified failure to present an issue on appeal will generally preclude its consideration in a postconviction petition for a writ of habeas corpus. (Dixon, supra, 41 Cal.2d 756.) "[H]abeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment ...." (Id. at p. 759, italics added; In re Bower (1985) 38 Cal.3d 865, 872 [215 Cal.Rptr. 267, 700 P.2d 1269]; In re Smith (1911) 161 Cal. 208 [118 P. 710]; see also, Adoption of Alexander S. (1988) 44 Cal.3d 857, 865 [245 Cal.Rptr. 1, 750 P.2d 778] [applying same rule in adoption-related matter].)

The corollary of the rule in Dixon, supra, 41 Cal.2d 756, is, of course, the Waltreus rule, i.e., that in the absence of strong justification, any issue that was actually raised and rejected on appeal cannot be renewed in a petition for a writ of habeas corpus. Courts will thus presume that the elaborate appellate system established by the state Constitution and the Legislature was sufficient to allow a person to present adequately his or her grievances for judicial review. (See In re Sterling (1965) 63 Cal.2d 486, 488- 489 [47 Cal.Rptr. 205, 407 P.2d 5].)

Petitioner recognizes the force of the Waltreus rule and admits he unsuccessfully raised the issue of his age on appeal. Nevertheless, he contends he may renew his claim in a postconviction petition for a writ of habeas corpus because his case falls within recognized exceptions to the Waltreus rule. We thus turn to an examination of limited situations in which a petitioner may renew a claim on habeas corpus despite denial of the claim on direct appeal.

2. Exceptions to the Waltreus Rule

A number of exceptions to the Waltreus rule have developed over the years. Because some of them may apply to petitioner's case, we treat the question in some depth in order to provide needed guidance to the bench and bar.

a. Fundamental Constitutional Error

In years past, we have recognized an exception to the Waltreus rule when the habeas corpus petitioner claims a violation of his or her fundamental constitutional rights. Thus, in In re Winchester, supra, 53 Cal.2d 528, we opined that "Habeas corpus has become a proper remedy in this state to collaterally attack a judgment of conviction which has been obtained in violation of fundamental constitutional rights." (Id. at p. 531; cf. Cuyler v. Sullivan (1980) 446 U.S. 335, 343 [64 L.Ed.2d 333, 343, 100 S.Ct. 1708] [federal rule permits state prisoner to seek habeas relief in federal court if he alleges he is in custody in violation of federal Constitution]; 28 U.S.C. § 2254(a) [same].) Past cases have thus permitted a habeas corpus petitioner to renew a claim of fundamental constitutional error that has previously been rejected on appeal.

We emphasize, however, that no statutory requirement directs us to permit relitigation of certain issues in a postconviction petition for a writ of habeas corpus where the matter has been duly considered on appeal. Rather, the judicially created Waltreus rule, and the similarly created exceptions to the rule, are simply manifestations of this court's resolve to balance the state's weighty interest in the finality of judgments in criminal cases with the individual's right-also significant-to a fair trial under both the state and federal Constitutions.

How to achieve the proper balance has not, however, always been clear. Certainly not all alleged constitutional defects warrant the opportunity to relitigate the issue on habeas corpus. Thus, for example, the question whether evidence was admitted at trial in violation of the Fourth Amendment is not cognizable on habeas corpus. (In re Sterling, supra, 63 Cal.2d at p. 487; In re Lessard (1965) 62 Cal.2d 497, 503 [42 Cal.Rptr. 583, 399 P.2d 39]; see also Stone v. Powell (1976) 428 U.S. 465 [49 L.Ed.2d 1067, 96 S.Ct. 3037] [same rule in federal court].) Chief Justice Traynor supplied the rationale for the court in In re Sterling, supra: " 'If the violation of a petitioner's constitutional rights by the use of illegally seized evidence had any bearing on the issue of his guilt, there should be no doubt that habeas corpus would be available. Unlike the denial of the right to counsel, the knowing use of perjured testimony or suppression of evidence, [or] the use of an involuntary confession, ... the use of illegally seized evidence carries with it no risk of convicting an innocent person. The purpose of the exclusionary rule is not to prevent the conviction of the innocent, but to deter unconstitutional methods of law enforcement. [Citations.] That purpose is adequately served when a state provides an orderly procedure for raising the question of illegally obtained evidence at or before trial and on appeal. The risk that the deterrent effect of the rule will be compromised by an occasional erroneous decision refusing to apply it is far outweighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack.' " (In re Sterling, supra, 63 Cal.2d at pp. 487-488, italics added, quoting In re Harris (1961) 56 Cal.2d 879, 883-884 [16 Cal.Rptr. 889, 366 P.2d 305] (conc. opn. of Traynor, J.).)

Just as obviously, we would be remiss were we to "close the door" completely, ignoring the legitimate arguments of habeas corpus litigants who claim that their bedrock constitutional rights have been trampled by the state. For example, in In re Masching (1953) 41 Cal.2d 530 [261 P.2d 251], the defendant was convicted of misdemeanor drunk driving. On appeal, he argued he was unconstitutionally deprived of his right to counsel; indeed, no counsel had been appointed although the defendant never waived his right to counsel. The appellate department affirmed his conviction and Masching filed a petition for a writ of habeas corpus with this court. We held the issue was cognizable in a postappeal habeas corpus petition to permit the petitioner to vindicate "a fundamental right guaranteed by our Constitution," i.e., the right to counsel. (Id. at p. 532.)

It is between these polar extremes that a line must be drawn. We begin with the state's powerful interest in the finality of its judgments. This interest is particularly strong in criminal cases, for "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." (Teague

v. Lane (1989) 489 U.S. 288, 309 [103 L.Ed.2d 334, 355, 109 S.Ct. 1060] (plur. opn. by O'Connor, J.); see also Clark, supra, ante, at p. 766; In re McInturff (1951) 37 Cal.2d 876, 880 [236 P.2d 574]; cf. Adoption of Alexander S., supra, 44 Cal.3d at p. 868 [state's interest in finality in child-custody disputes is "unusually strong" in view of the importance of a stable child- parent relationship].)

We thus agree wholeheartedly with Justice Harlan's trenchant comment that " 'No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.' " (Mackey v. United States (1971) 401 U.S. 667, 691 [28 L.Ed.2d 404, 419, 91 S.Ct. 1160] (Harlan, J., conc. in part and dis. in part), quoted in Teague v. Lane, supra, 489 U.S. at p. 309 [103 L.Ed.2d at p. 355].) Clearly, the state and society have an interest in having the matter settled once and for all.

Balanced against this strong interest is the interest an individual has in vindicating his or her constitutional rights. In the past, we balanced the two interests by declaring that the opportunity for a third judicial review (trial, appeal, postappeal habeas corpus) of a claim was appropriate only where the litigant made a colorable showing that a "fundamental" constitutional right was violated. Thus, we explained that a constitutional issue would not be cognizable on a postappeal petition for a writ of habeas corpus unless the petition could show "the defect so fatally infected the regularity of the trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice." (In re Winchester, supra, 53 Cal.2d at p. 532.)

This formulation permitted criminal defendants to gain a degree of postconviction, postappeal review for important constitutional violations that, for one reason or another, had gone unremedied. The inability of criminal defendants to gain vindication of their constitutional claims in the appellate courts, especially those claims affecting the ultimate fairness of their trials, justified an exception to the Waltreus rule for claims of "fundamental" constitutional error. Implicitly, this court found that in balancing the need for such review with the state's need for finality of judgments, the individual's need was the greater one.

Although maintaining an avenue to permit the presentation of legitimately significant constitutional claims remains important today, the modern development of the doctrine of ineffective assistance of counsel may diminish the need to retain such a broad "fundamental constitutional error" exception to the Waltreus rule. As we explained in People v. Pope, supra, 23 Cal.3d at pages 421-426 [hereafter Pope], the right to effective counsel was initially defined in terms of the due process clause of the federal Constitution. Thus, we initially held that in order for a litigant to obtain relief for ineffective assistance of counsel, " '[i]t must appear that counsel's lack of diligence or competence reduced the trial to a "farce or a sham." ' [Citations.]" (Pope, supra, at p. 421, quoting People v. Ibarra (1963) 60 Cal.2d 460, 464 [34 Cal.Rptr. 863, 386 P.2d 487].)

The "farce or sham" standard gave way to the modern view, based on the Sixth Amendment, that in order to gain relief for ineffective assistance of counsel, a litigant "must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates [and that] counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense." (Pope, supra, 23 Cal.3d at p. 425.)

This modern standard is now well established in both this state and in the federal courts. We recently summarized the law in People v. Wharton (1991) 53 Cal.3d 522 [280 Cal.Rptr. 631, 809 P.2d 290]: "A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) 'Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to effective assistance.' (People v. Ledesma (1987) 43 Cal.3d 171, 215 [233 Cal.Rptr. 404, 729 P.2d 839], italics in original.) In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness ... under prevailing professional norms.' (Strickland v. Washington (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674, 793, 104 S.Ct. 2052]; Pope, supra, 23 Cal.3d at pp. 423-425.) Second, he must also show prejudice flowing from counsel's performance or lack thereof. (Strickland, supra, at pp. 691-692 [80 L.Ed.2d at pp. 695-696].) Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (In re Sixto[, supra,] 48 Cal.3d [at p.] 1257; Strickland, supra, at p. 694.)" (People v. Wharton, supra, at p. 575.) The United States Supreme Court recently explained that this second prong of the Strickland test is not solely one of outcome determination. Instead, the question is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." (Lockhart v. Fretwell (1993) 506 U.S. ___, ___ [122 L.Ed.2d 180, 191, 113 S.Ct. 838].)

Similar concepts have been used to measure the performance of appellate counsel. (In re Banks (1971) 4 Cal.3d 337, 343 [93 Cal.Rptr. 591, 482 P.2d 215]; In re Smith (1970) 3 Cal.3d 192, 202 [90 Cal.Rptr. 1, 474 P.2d 969] [inexcusable failure of appellate counsel to raise crucial assignments of error that arguably could have resulted in reversal deprived defendant of effective assistance of appellate counsel].)

Since its inception, this court has applied the standard in numerous cases. Recently, we reversed a judgment imposing the death penalty, where the record showed a defendant's trial counsel had not adequately investigated evidence for the penalty phase of the trial, thereby depriving the defendant of his Sixth Amendment right to counsel. (In re Marquez (1992) 1 Cal.4th 584 [3 Cal.Rptr.2d 727, 822 P.2d 435].) Similarly, we vacated the entire judgment of conviction in a case where the record showed the trial attorney had not adequately investigated the evidence of the defendant's diminished capacity. (In re Sixto, supra, 48 Cal.3d 1247.) And, most recently, we vacated both the guilt and penalty judgments for ineffective assistance of counsel

for failing to object to statements elicited from the defendant in violation of his rights as established in Massiah v. United States (1964) 377 U.S. 201 [12 L.Ed.2d 246, 84 S.Ct. 1199]. (In re Wilson (1992) 3 Cal.4th 945 [13 Cal.Rptr.2d 269, 838 P.2d 1222].)

Experience with recent cases reveals that in the vast majority of cases, claims of "fundamental" constitutional error come to this court clothed in "ineffective assistance of counsel" raiment. Indeed, approaching the issue in this manner is apparently a conscious choice among litigants, possibly because it frees the litigant from having to demonstrate that the underlying issue is one involving "fundamental aspects of fairness ... result[ing] in a miscarriage of justice." (In re Winchester, supra, 53 Cal.2d at p. 532.) So long as it can be demonstrated that one's attorney acted unreasonably in doing or omitting to do something, courts will move on to the question of prejudice.

By recounting this history, we do not intend to question the wisdom of the evolution of the doctrine of ineffective assistance of counsel. Given its existence, however, we do question the necessity of maintaining a wide-ranging "fundamental constitutional rights" exception to the Waltreus rule. Presumably most erroneous deprivations of an accused's constitutional rights that occur at trial will be corrected on appeal. Many that are not corrected on appeal are the result of the ineffective assistance of either trial or appellate counsel. As such, those claims would be cognizable in a postappeal habeas corpus petition under the ineffective counsel rubric, and there would be no need to resort to the amorphous, ill-defined "fundamental constitutional rights" exception.

Balanced against the state's considerable interest in ensuring the finality of its criminal judgments, we conclude that the "fundamental constitutional rights" exception to the Waltreus rule, discussed in In re Winchester, supra, 53 Cal.2d 528, and invoked in subsequent cases, is inappropriately broad. Instead, a narrower exception, one that accounts for the evolution of the ineffective assistance of counsel doctrine and its provision for increased postappeal cognizability of constitutional issues, more appropriately reflects the proper balance between the state's interest in finality and the individual's interest in vindicating his or her constitutional rights.

Thus, courts will presume that a litigant received sufficient review of his or her legal claims, both constitutional and otherwise, on direct appeal. Where an issue was available on direct appeal, the mere assertion that one has been denied a "fundamental" constitutional right can no longer justify a postconviction, postappeal collateral attack, especially when the possibility exists of raising the issue via the ineffective assistance of counsel doctrine. Only where the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process, is an opportunity for a third chance at judicial review (trial, appeal, postappeal habeas corpus) justified. (Cf. Arizona v. Fulminante (1991) 499 U.S. 279, 309 [113 L.Ed.2d 302, 331, 111 S.Ct. 1246] [only errors amounting to a structural defect in the trial mechanism are deserving of automatic reversal rule] (maj. opn. by Rehnquist, C. J.).) fn. 8 The state's paramount interest in the finality of its criminal judgments demands no less.

(*Harris*, *supra*, 5 Cal.4th at pp. 825-826; 828-834.)

Petitioner should have raised the instant due process claim on appeal, as a review of the trial record is all that is needed to evaluate the claim. In fact, in his direct appeal of the underlying case in 1987, Petitioner unsuccessfully sought relief by alleging that his trial counsel failed to seek or object to limiting jury instructions on the issues of 1) bad character evidence, 2) Doyle Error, and 3) Co-conspirator statements and adoptive admissions. (*Hunt,* p. 67-72.) In addition, Petition took issues with other jury instructions, including the 1) Role of the Court, 2) Time of Offense, 3) Lake of Unanimity Instruction Robbery Charge and 4) Reasonable Doubt. (*Ibid*.) Petitioner also took issue with the trial court's comments and gestures at trial. (*Ibid*.) Since Petitioner had that record when he raised his other instruction-related claims on direct appeal, he had the legal and alleged factual bases to include this due process claim on appeal, too, and could and should have done so. As he did not, the *Dixon* rule procedurally bars him from bringing it now. He presents no viable legal exception or justification for why he should otherwise be able to do so.

B. Petitioner's Due Process and IAC Claims Violate the *Horowitz/Clark* Rule

Next, Petitioner's claims violate the *Horowitz*/*Clark* rule that a habeas petitioner may not raise claims in a subsequent habeas petition based on information that was known to the petitioner at the time of his or her first habeas petition. (*Horowitz*, *supra*, 33 Cal.2d at pp. 546-547; *Clark*, *supra*, 5 Cal.4th at pp. 774-775.)

Petitioner raised his first habeas petition in the appellate court at the same time he brought his direct appeal. Although he had the alleged factual bases and alleged evidentiary support to raise the instant due process and IAC claims in that habeas petition, he failed to do so. Indeed, to Respondent's knowledge, he has also failed to raise them in any of his subsequent habeas litigation until doing so in the instant petition. Thus, he is now procedurally barred from raising them in this successive petition, without valid legal justification or exception, which he does not viably show.

C. Petitioner's Due Process and IAC Claims are Untimely.

A petition for writ of habeas corpus petition must be filed "as promptly as the circumstances allow." (*Robbins*, *supra*, 18 Cal.4th at p. 780.) "In a habeas corpus proceeding . . . the petitioner must justify any substantial delay in seeking relief." (*In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1.) The United States Supreme Court cautions courts, "When a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." (*McCleskey v. Zant* (1991) 499 U.S. 467, 491, internal quotation marks omitted.) The CSC has stated:

> [W]e insist a litigant mounting a collateral challenge to a final criminal judgment do so in a timely fashion. By requiring that such challenges be made reasonably promptly, we vindicate society's interest in the finality of its criminal judgments, as well as the public's interest 'in the orderly and reasonably prompt implementation of its laws.' [Citation.]…Requiring a prisoner to file his or her challenge promptly helps ensure that possibly vital evidence will not be lost through the passage of time or the fading of memories….Accordingly, we enforce time limits on the filing of petitions for writs of habeas corpus in noncapital cases [citation], as well as in cases in which the death penalty has been imposed. [Citations.]

(*In re Sanders* (1999) 21 Cal.4th 697, 703, overruled on other grounds by *Stogner v. California* (2003) 539 U.S. 607.) Therefore, "[a] party seeking relief by way of a petition for...an extraordinary writ is required to move expeditiously." (In re Moss (1985) 175 Cal.App.3d 913, 921.) "[A]ny significant delay in seeking collateral relief . . . must be fully justified." (*People v. Jackson* (1973) 10 Cal.3d 265, 268; see also *Robbins*, *supra*, 18 Cal.4th at p. 780.)

A petitioner bears the burden of establishing, through his or her specific allegations, which may be supported by any relevant exhibits, the absence of substantial delay. (*Reno*, *supra*, 55 Cal.4th at p. 462.) Even constitutional error may be waived, and unexplained or unjustified delay in seeking relief may amount to such a waiver. (*In re Ronald E.* (1977) 19 Cal.3d 315, 322; *Miller*, supra, 6 Cal.App.4th at p. 881.)

> It is the practice of [the California Supreme Court] to require that one who belatedly presents a collateral attack such as this explain the delay in raising the question....[¶]We are entitled to and we do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of these facts.

(*In re Swain* (1949) 34 Cal.2d 300, 302-304.) When an issue of constitutional dimension has been raised, some reasonable delay may be excused, but the excusable period necessarily has practical limits. (*In re Streeter* (1967) 66 Cal.2d 47, 52.)

"Delay in seeking habeas corpus or other collateral relief has been measured from the time the defendant becomes aware of the grounds on which he seeks relief. That time may be as early as the date of the conviction." (*Clark*, *supra*, 5 Cal.4th at p. 765, fn. 5; see also *In re Gallego* (1998) 18 Cal.4th 825, 832 (*Gallego*) ["Substantial delay is measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim"].)

Here, Petitioner's due process and IAC claims are premised on a theory that antagonizes the innocence defense he promulgated at trial, and on direct appeal. Because Petitioner had the legal and alleged factual bases to have raised these claims in his first habeas petition more than 30 years ago, his substantial delay in waiting until now to raise the claims renders them untimely. Even a five-year delay is "substantial" under California law. (*Walker v. Martin* (2011) 562 U.S. 307, 312 ["California's case law made it plain that Martin's nearly five-year delay was 'substantial'"].) Petitioner has not proffered any legally-viable justification or exception for his untimely due process and IAC claims or valid explanation for this lengthy delay in raising them. As such, they are procedurally barred for their untimeliness.

1. Exceptions to Untimely and Successive Procedural Bars

Generally, untimely and successive habeas claims should be summarily denied.

> Although we conclude here that it should not be inflexible, the general rule is still that, absent justification for the failure to present all known claims in a single, timely petition for writ of habeas corpus, successive and/or untimely petitions will be summarily denied. The only petitions not subject to this rule are those petitions which allege facts which, if proven, would establish that a fundamental miscarriage of justice occurred as a result of the proceedings leading to conviction and/or sentence.

(*Clark*, *supra*, 5 Cal.4th at p. 797.) The *Clark* court explained the narrow circumstances in which a "fundamental miscarriage of justice" occurs:

> The magnitude and gravity of the penalty of death persuades us that the important values which justify limits on untimely and successive

> petitions are outweighed by the need to leave open this avenue of relief. Thus, for purposes of the exception to the procedural bar against successive or untimely petitions, a "fundamental miscarriage of justice" will have occurred in any proceeding in which it can be demonstrated: (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; (4) that the petitioner was convicted or sentenced under an invalid statute. These claims will be considered on their merits even though presented for the first time in a successive petition or one in which the delay has not been justified.

(*Id.* at pp. 797-798.)

In particular, a successive petition will "be dismissed unless the court finds that the petitioner makes a showing of actual innocence or ineligibility for the death penalty." (*In re Friend* (2021) 11 Cal.5th 720, 725.)

Petitioner tries to circumvent these applicable procedural bars by claiming that he is "actually innocent of the crime of robbery and the special circumstance of murder committed in the commission of a robbery ([citations])" (Petn., p. 16.) But he offers nothing to support that statement. As addressed in Section V, *ante*, Petitioner does not even cite the legal authority on which he relies in making that assertion. Based on the context of the Petition, Respondent can only surmise that Petitioner asserts it pursuant to section 1473, subdivisions (b)(3)(A) and (B). If that presumption is true, then Petitioner abjectly fails to meet the standard articulated in that prevailing legal authority to make a prima facie showing of new evidence of actual innocence. Thus, Petitioner's bald assertion that he is actually innocent of the stated crimes, without more, does not except his claims from these procedural bars.

Furthermore, in categorizing his complaints with the trial instructions given 35 years ago as "a due process violation" and "ineffective assistance of counsel," Petitioner again tries to conspicuously sidestep these bars through the first exception: "error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner." But under the circumstances of this case, such hyperbole fails. In light of

the overwhelming evidence inculpating Petitioner of the crimes alleged, and the fact that the claim of right defense was under the surface of and conflicted with Petitioner's chosen trial defense, the trial court's failure to *sua sponte* instruct on the claim of right defense and trial counsel's failure to request it hardly amounts to an error of constitutional magnitude leading to a trial that was so fundamentally unfair that absent this error no reasonable judge or jury would have convicted Petitioner. The holding in *Stevens* bears repeating for its aptness, in relevant part:

> We are not dealing with the failure of the court to instruct on an essential element of the crime, as was the case in *People* v. *Ford, supra*, 60 Cal.2d 772, 792-793. This case comes well within the doctrine that while *sua sponte* instructions must be given on general principles of law governing the case, they need not be given on specific points developed at the trial. (*People* v. *Bevins*, 54 Cal.2d 71, 77 [4 Cal.Rptr. 504, 351 P.2d 776]; *People* v. *Wade*, 53 Cal.2d 322, 334-335 [1 Cal.Rptr. 683, 348 P.2d 116].) As in *Wade*, the "claim of right" theory was "under the surface of the facts and theories apparently involved." (53 Cal.2d at p. 335.) As the evidence concerning the alleged claim of right developed at the trial, it was more or less of a disaster for the defense. In the absence of a specific request for an instruction thereon, it should not be turned into an appellate triumph.

(*Stevens*, *supra*, 269 Cal.App.2d at pp. 474-475.)

In sum, these exceptions do not apply to Petitioner's claims. Thus, his due process and IAC claims are procedurally barred for untimeliness and successiveness.

VII. PETITIONER'S REQUEST FOR RESENTENCING IS IMPROPER IN A HABEAS PETITION.

A habeas petition is not the proper venue for a resentencing request from a petitioner pursuant to section 1172.1. The statue states:

> (a)(1) When a defendant, upon conviction for a felony offense, has been committed to the custody of the Secretary of the Department of Corrections and Rehabilitation or to the custody of the county correctional administrator pursuant to subdivision (h) of Section 1170, the court may, within 120 days of the date of commitment on its own motion, at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of a defendant incarcerated in state prison, the county correctional administrator in the case of a defendant incarcerated in county jail, the district attorney of the county in which the defendant was sentenced, or the Attorney General if the Department of Justice originally prosecuted the case, recall the sentence and commitment previously ordered and

> resentence the defendant in the same manner as if they had not previously been sentenced, whether or not the defendant is still in custody, and provided the new sentence, if any, is no greater than the initial sentence.

Currently, Respondent is not aware of any motion by the court or recommendation for resentencing by the "secretary or the Board of Parole Hearings in the case of a defendant incarcerated in state prison, the county correctional administrator in the case of a defendant incarcerated in county jail, the district attorney of the county in which the defendant was sentenced, or the Attorney General if the Department of Justice originally prosecuted the case." (§ 1172.1.) Petitioner does not provide evidence showing otherwise. Furthermore, under the express language of the statute, Petitioner has no standing to bring this request. Finally, Petitioner provides no authority, nor is Respondent aware of any, making a resentencing request a cognizable claim on habeas corpus. Again, Petitioner does not show otherwise. Thus, not only does Petitioner lack the standing to bring this request, it is not one he can viably bring on habeas corpus.

The Los Angeles County District Attorney's Office has a screening process that is employed to determine which inmate is a qualified candidate for a resentencing recommendation. As such, Respondent will defer any assessments to the particular handling unit on any resentencing matters under section 1172.1.

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CONCLUSION

For all the reasons stated above, Petitioner fails to make a prima facie showing for habeas corpus relief on any of his claims, and the claims are procedurally barred. Accordingly, this Court should deny the relief sought in the Petition, and should not issue an order to show cause, or order a formal return or evidentiary hearing.

DATED: October 2, 2023

Respectfully submitted,

GEORGE GASCÓN
District Attorney

By:_____

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re JOSPEH HUNT,	**Case No.: A090435**
On Habeas Corpus.	**EXHIBITS**

Exhibit 1: *People v. Joseph Hunt* (Nov. 23, 1993), Court of Appeal Case No. B029492 [nonpub.opn.] (*Hunt*).

Exhibit 2: A CD with digital copies of the Clerk's Transcript ("CT") and Reporter's Transcript ("RT") from the Trial.

Exhibit 3: A CD with digital copies of the Reporter's Transcript from the 1996 LASC evidentiary hearing ("EVRT").

Exhibit 4: 1998 Habeas Corpus Petition in the Appellate Court.

Exhibit 5: Respondent's 2017 Informal Response.

Exhibit 6: Petitioner's 2017 Petition.

Exhibit 7: 1996 LASC Order.

Exhibit 8: 1998 COA Denial.

Exhibit 9: 2013 Order Denying Petitioner's Fourth Amended Petition ("FAP").

Exhibit 10: 2018 LASC Denial.

Exhibit 11: Collective Dockets from the COA, California Supreme Court and 9th Circuit Court of Appeals.

Exhibit 12: Petitioner's "To Do" List presented as a trial exhibit.

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA }
} SS.
COUNTY OF LOS ANGELES }

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am over 18 years of age, not a party in the cause of *In re Joseph Hunt on Habeas Corpus*, Case No. A090435, and am employed in the Office of the District Attorney of Los Angeles County, with offices at 320 W. Temple St., Suite 540, Los Angeles, CA 90012. In the above-entitled matter, on October 2, 2023, I served the:

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS; POINTS & AUTHORITIES; EXHIBITS

on Petitioner's counsel by depositing a true copy thereof, with postage thereon fully prepaid, in the United States Mail in the City of Los Angeles, addressed as follows to:

Tracy Renee Lum, Esq.
Law Office of Tracy Renee Lum
1045 Sperry Avenue, Suite F, #254
Patterson, CA 95363

Also, a copy has also been emailed to Petitioner's counsel at:

Tracy Lum <trlum@hotmail.com>

Executed on October 2, 2023, at Los Angeles, California.

_____Van C. Ha /s/_____
Van C. Ha