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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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| IN RE JOSEPH LYLE MENENDEZ, Petitioner, On Habeas Corpus. | No. Superior Court Los Angeles No. BA068880 |

# PETITION FOR A WRIT OF HABEAS CORPUS

From The Judgment Of The Superior Court
Of The State Of California, County Of Los Angeles

Honorable Stanley M. Weisberg, Judge

---



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Attorneys for Joseph Lyle Menendez

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| | ) | Petition for Writ of |
| | ) | Habeas Corpus |

Petitioner Joseph Lyle Menendez alleges as follows:

1. Petitioner is unlawfully incarcerated at the California Correctional Institute at Tehachapi, California, under the custody of Warden Don Hill.

2. Petitioner is in custody in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

3. Petitioner is serving consecutive terms of life without the possibility of parole imposed in People v. Menendez, Los Angles Superior Court No. BA068880, arising out of a conviction for two counts of first degree murder with special circumstances and one count of conspiracy to commit murder. Judgment and sentence was imposed on July 2, 1996.

4. Petitioner filed a timely appeal following the

judgment. The judgement and conviction was affirmed in full on February 27, 1998, by the California Court of Appeal, Second Appellate District, Division Five, No. B104022.

5. A timely petition for review of that decision was filed in the California Supreme Court on April 6, 1998. The Court denied review on May 27, 1998.

6. Petitioner has no adequate or speedy remedy aside from this habeas petition. The issue raised here could not be raised on appeal because it depends upon facts outside the record.

First Claim For Relief
(Ineffective Assistance of Counsel)

7. At trial, the trial court judge ruled that petitioner could not present evidence pertaining to his mental state at the time of the homicide unless and until petitioner himself testified first.

8. The trial court's order violated petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution. A defendant in a criminal trial cannot be compelled to testify before he is permitted to introduce relevant, admissible evidence on a critical issue.

9. Petitioner raised this issue on appeal. However, the Court of Appeal refused to consider the merits of the issue. The Court ruled: "Lyle's claim that the trial court violated his federal constitutional rights by requiring him to testify first before the trial court would admit testimony from corroborating witnesses was waived by Lyle's failure to raise a Fifth or Sixth Amendment argument in the trial court." (Opinion at 35.)

10. Petitioner was entitled to the effective assistance of counsel at trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

11. Reasonably competent counsel would have raised the Fifth and Sixth Amendment objections to the trial court's order compelling defendant to testify before admitting relevant evidence. The failure of petitioner's trial counsel to do so in this case was **not** a tactical decision. Counsel attests that he believes the objection from the first trial on these grounds was sufficient to preserve the issue for review, and had he known it would be found insufficient, he certainly would have objected. Nevertheless, the failure object at the second trial falls below the standard of care required of reasonably competent counsel representing a man on trial for special circumstances murder.

12. Petitioner was prejudiced by counsel's failure to object. Had counsel objected, it is reasonably likely the trial court would have retracted its order. Alternatively, had counsel objected on the constitutional grounds, the Court of Appeal would not have ruled that the issue was waived for appeal.

Second Claim For Relief
(Making Defendant Testify Before Admitting Evidence)

13. At trial, the trial court judge ruled that petitioner could not present evidence pertaining to his mental state at the time of the homicide unless and until petitioner himself testified first.

14. The trial court's order violated petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution. A defendant in a criminal trial cannot be compelled to testify before he is permitted to introduce relevant, admissible evidence on a critical issue.

15. Petitioner presented other evidence, aside from his own testimony, that put his mental state in issue, thus making circumstantial evidence, both lay and expert, relevant to proving that mental state.

16. The court's erroneous ruling put petitioner in a

position where he was compelled to surrender one constitutional right in order to assert another. Either he could waive his Fifth Amendment right to remain silent and present a defense under the Sixth Amendment, or he could assert his Fifth Amendment right and forego putting on a defense.

17. The court's ruling also deprived petitioner the right to effective assistance of counsel under the Sixth Amendment by requiring him to testify before he and his attorney had heard all the evidence.

18. The error is prejudicial, for the State will be unable to prove it harmless beyond a reasonable doubt.

Third Claim For Relief
(Ineffective Assistance of Counsel)

19. At trial, the trial court judge ruled that petitioner could not present evidence pertaining to his mental state at the time of the homicide unless and until petitioner himself testified first. Thus, the gist of petitioner's case could not be presented unless petitioner testified.

20. Despite the fact that without petitioner's testimony, petitioner had no defense to the charges, defense counsel did not call petitioner as a witness. Such a decision,

given the circumstances of the case, was below the standard of care required for reasonably competent counsel. Reasonably competent counsel would have called petitioner as a witness in his own defense.

21. Petitioner was entitled to the effective assistance of counsel at trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Counsel's failure to call petitioner as a witness violated petitioner's rights to effective assistance of counsel under the United States Constitution.

Fourth Claim For Relief
(Denial of Right to Testify)

22. An accused in a criminal trial has a personal right to testify under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. This right cannot be waived by counsel, but must be personally waived by the accused.

23. Here, petitioner's right to testify was not personally waived by him, nor was he informed by the court or counsel that the right to testify is not simply a tactical choice to be made by counsel, but a personal right belonging to the accused.

24. Had his right to testify not been waived for him,

and/or, had petitioner been informed of his right, he would have elected to testify in his own defense, as had in the first trial.

WHEREFORE, petitioner prays for relief as follows:

a. To issue an order to show cause to petitioner's prison warden to inquire into the legality of petitioner's present incarceration;

b. After a full hearing, to issue the writ vacating the judgment of conviction with instructions to either release petitioner or grant him a new trial;

c. Grant petitioner such other and further relief as the court may deem just and proper under the circumstances.

Date: 9/28/98

Gardner & Derham
Robert Derham

Robert Derham

by Robert Derham

Attorney for petitioner
Joseph Lyle Menendez

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| Petitioner, | Superior Court<br>Los Angeles<br>No. BA068880 |
| On Habeas Corpus. | Verification |

I, Robert Derham, declare that:

1. I am one of the attorneys of record for petitioner Joseph Lyle Menendez. I make this verification on behalf of petitioner because he is incarcerated in Tehachapi, California, several hundred miles from the county in which I maintain my office. The facts upon which the petition are based in part on the record and in part upon extrinsic evidence which I have personally reviewed.

2. The facts alleged in the petition are true and correct

to the best of my knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 25, 1998, in San Francisco, California.

Robert Derham

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MEMORANDUM OF POINTS AND AUTHORITIES

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## Table of Authorities

Cases

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## Statement of the Case and Facts

Petitioner and his brother, co-defendant Erik Menendez, were convicted of two counts of first degree murder with special circumstances (multiple murders) and one count of conspiracy to commit murder. The court sentenced them to consecutive terms of life without parole.

On appeal, petitioner argued that the trial court erred, and violated his rights under the Fifth and Sixth Amendments, by excluding relevant evidence going to

petitioner's state of mind at the time of the homicides, unless and until petitioner himself testified first. The Court of Appeal ruled that the claim was waived for appeal because trial counsel had failed to voice an objection on the grounds of the Fifth and Sixth Amendments at the time issued the order. Petitioner never testified at trial, although he would have had he known that the right to testify can be exercised against the wishes of counsel.

## Argument

### I. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE A PROPER OBJECTION BASED ON THE FIFTH AND SIXTH AMENDMENTS IN THE TRIAL COURT AND BY FAILING TO CALL PETITIONER AS A WITNESS.

The Sixth Amendment guarantees the accused in a criminal trial the right to counsel, which includes the right to effective assistance of counsel. (McMann v. Richardson (1970) 397 U.S. 759.) A "convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components." (Strickland v. Washington (1984) 466 U.S. 668, 687.) The defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's error there is a "reasonable probability" that the result of the proceeding would have been different. (Id. at p. 693.) Counsel's

failure to make a timely objection to a trial court's ruling may be ineffective assistance of counsel. (In re Jones (1996) 13 Cal.4th 552, 587-588.)

Here, the trial court ordered that petitioner could not present relevant, admissible evidence regarding his state of mind at the time of the homicides unless and until petitioner himself testified first. This ruling violated petitioner's rights under the Fifth and Sixth Amendments. (Brooks v. Tennessee (1972) 406 U.S. 605, 609.)

According to the appellate court, counsel did not object adequately at the second trial to the trial court's ruling on Fifth or Sixth Amendment grounds. (Opinion at 35.) Nor did counsel actually secure a ruling from the trial court. (Opinion at 35.) Counsel attests he had no tactical reason not to object or secure a ruling on this ground. (Declaration of Charles Gessler, ¶ 2-8 [attached as Exhibit A].) This failure constitutes ineffective assistance of counsel under the circumstances presented here. (Strickland v. Washington, supra, 466 U.S. at p. 687.) Had counsel made a timely objection and secured a ruling, there is a reasonable probability that the trial court would have reversed its decision, as mandated by law.

Of course, once the trial court ruled that the bulk of

the evidence that supported petitioner's defense was inadmissible unless petitioner testified, it was an unreasonable decision to keep petitioner off the witness stand. No countervailing tactical decision justifies elimination of the only defense that petitioner had to the charges. Thus, petitioner was deprived o the effective assistance of counsel by counsel's unreasonable decision not to call petitioner as a witness in his own defense. (See Strickland v. Washington, supra, 466 U.S. at p. 687.)

II. THE TRIAL COURT'S REFUSAL TO ALLOW LYLE TO PRESENT RELEVANT EVIDENCE IN HIS DEFENSE UNLESS HE FIRST WAIVED HIS FIFTH AMENDMENT PRIVILEGE NOT TO TESTIFY VIOLATED HIS FIFTH AND SIXTH AMENDMENT RIGHTS AND REQUIRES REVERSAL OF HIS CONVICTIONS.

At the first trial petitioner presented a detailed evidence of the family dynamic in the Menendez household. First came a series of lay witnesses to testify about the many instances of abuse Kitty and Jose inflicted upon Lyle throughout his life. These included friends, family members, teachers and coaches -- people who had observed the family in all walks of life. Next came mental health experts to testify about the impact of this abuse. Finally, from this solid and credible foundation, came the testimony of each defendant. Of the 12 jurors which heard this well organized and presented defense, nine rejected first degree murder as an option in the case and six rejected murder entirely.

The second trial was significantly different. Petitioner again sought to present both lay and expert testimony to establish his defense. The trial court candidly expressed its concern that petitioner was "doing exactly what it is that I indicated was problematic before we started, introducing or attempting to introduce testimony from so-called source witnesses prior to introducing, in some fashion, the basis for or the connection or rationale

for that testimony being reviewed, **which would basically be his testimony**." (RT 46230, emphasis added.) Thus, unless Lyle first testified, the trial court refused to allow him to present Diane Vandermolen's testimony that, when he was eight years old, Lyle told her he was scared to sleep in his own bedroom because his father was molesting him. (RT 11797-11799, 43481, 46572-46574.) Unless Lyle first testified, he could not present Ms. Vandermolen's testimony that when she told Kitty what Lyle had said, Kitty responded by grabbing Lyle and dragging him upstairs. (RT 11797-11799, 43481, 46572-46574.)

The court issued a similar ruling with respect to Lyle's 1982 essay. The essay was inadmissible. (RT 43481.) The court made clear, however, that if Lyle were to first testify a different ruling was likely: "[o]bviously, the issues are different if and when Lyle testifies. Then the whole issue could be revisited." (RT 43481.)

The court issued an identical ruling in connection with Dr. Conte. Unless Lyle testified, he could not present Dr. Conte's expert testimony regarding BPS and its effects on Lyle's mental state. (RT 35836-35844, 35852, 46226, 46229-46230, 48811, 48822, 52289-52291.) As the trial court succinctly put it, "[t]he experts really wouldn't be testifying unless your client[] testif[ies], as I view it."

(RT 30948.)

As more fully discussed below, these rulings constituted a major intrusion on the defense and improperly required Lyle and his counsel to make a decision whether Lyle should testify without first giving them an opportunity to build an evidentiary foundation and evaluate the strength of the defense case. In effect, these rulings forced Lyle into a choice between two constitutional rights: either waive the privilege against self-incrimination or forfeit the right to present relevant defense evidence. Because these rulings violated Lyle's constitutional rights to due process and to counsel, and because the state cannot prove the error harmless beyond a reasonable doubt, reversal is required.

### A. The Trial Court Violated Lyle's Constitutional Rights By Forcing Him To Choose Between His Fifth Amendment Privilege Against Self-Incrimination And His Sixth Amendment Right To Present Relevant Evidence In His Defense.

The Fifth Amendment gives all criminal defendants a constitutional right not to testify. The Sixth Amendment gives all criminal defendants a constitutional right to present a defense. The question presented here is whether a court may hinge admission of relevant defense evidence on a defendant's agreement to testify. Put another way, can a

court force a defendant to either waive his Fifth Amendment right not to testify or forgo his Sixth Amendment right to present relevant defense evidence?

In an analogous context, the United States Supreme Court has held that the state may not require a criminal defendant to waive his Fifth Amendment rights in order to exercise his Fourth Amendment rights. (See Simmons v. United States (1968) 390 U.S. 377, 393-394.) Only four years after Simmons, the Supreme Court made clear that a state may not force a defendant to decide whether he should waive his Fifth Amendment rights before he and his lawyer have had an opportunity to hear all the defense evidence. (Brooks v. Tennessee, supra, 406 U.S. 605.) Nor may a state require a defendant to waive his Fifth Amendment right as a condition of admitting relevant evidence in his defense. (See, e.g., Childress v. State (Ga. 1996) 467 S.E. 2d 865, 873-874; Williams v. State, supra, 915 P.2d at pp. 376-377.)

These cases establish that when a state trial court forces a defendant to make a decision whether to testify before hearing all the defense evidence, at least two separate constitutional flaws emerge. First, the defendant is deprived of the guiding hand of counsel in making an informed choice about whether or not to testify. Second, the defendant is forced to waive one constitutional right in

order to exercise another.

In Brooks v. Tennessee, supra, 406 U.S. 605, the Supreme Court focused on the first of these two flaws. There, pursuant to a local statute, a state trial court required that if the defendant "desir[ed] to testify [he] shall do so before any other testimony for the defense is heard by the court trying the case." Pursuant to the court's order, defendant decided not to testify before he heard his witnesses testify. Defendant there chose not to testify. He was convicted.

The Supreme Court reversed, observing that by forcing the defendant to either waive or exercise his Fifth Amendment privilege before hearing his defense witnesses, he was deprived of the opportunity to make the most informed and reasoned decision about whether to exercise that right. A defendant's choice to take the stand, the Court observed, "carries with it serious risks of impeachment and cross-examination" and the introduction of damaging evidence that might otherwise be inadmissible. (Brooks v. Tennessee, supra, 406 U.S. at p. 609.) Before he has presented the other evidence in his defense, a defendant cannot realistically assess whether the risks inherent in his taking the stand are worth the benefit. (Id. at pp. 609-610.)

The Court recognized the critical nature of the decision to testify, noting that "[w]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." (406 U.S. at p. 612.) Given the critical nature of this decision, a ruling which forced the defendant to make the decision before he and his counsel could assess the defense evidence unconstitutionally deprived the defendant of the "guiding hand of counsel" in making the decision:

> "By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statue restricts the defense -- particularly counsel -- in the planning of its case. The accused is thereby deprived of the 'guiding hand of counsel' in the timing of this critical element of his defense." (Brooks v. Tennessee, supra, 406 U.S. at pp. 612-613.)

Here, as in Brooks, petitioner was forced to decide whether to testify without being able to present and assess the impact of otherwise relevant defense evidence. Like Brooks, petitioner was deprived of the "guiding hand of counsel" in making this critical decision. (Brooks v. Tennessee, supra, 406 U.S. at pp. 612-613.)

B. Because Respondent Cannot Prove The Error Harmless Beyond A Reasonable Doubt, Reversal of Petitioner's Convictions Is Required.

The violation of Lyle's petitioner's under Brooks v. Tennessee, supra, 406 U.S. 605 must be assessed under the Chapman standard of prejudice, requiring respondent to prove the error harmless beyond a reasonable doubt. (Brooks v. Tennessee, supra, 406 U.S. at p. 613.) Where the defendant is deprived of the "guiding hand of counsel" in making the decision to testify -- and he ultimately does not testify -- it is difficult for the beneficiary of the error to prove it harmless.

This is especially true here. At the first trial, the trial judge did not intrude on the defense strategy in presenting its case. Defense counsel was able to build a solid foundation and then present Lyle's testimony. In that trial, fully half the jurors voted to acquit of murder charges. On this record, respondent will be unable to prove the Brooks violation harmless.

In any event, the separate forced choice imposed upon Lyle ultimately resulted in a forfeiture of his Sixth Amendment right to present relevant evidence. This constitutional violation is also subject to the Chapman standard and under that standard, requires reversal.

III. PETITIONER'S RIGHT TO TESTIFY, GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WAS VIOLATED.

A criminal defendant's right to testify on his own behalf is a fundamental constitutional right. (Faretta v. California (1975) 422 U.S. 806, 819, n.15; Brooks v. Tennessee (1972) 406 U.S. 605, 612-613; Harris v. New York (1971) 401 U.S. 222, 225; Ferguson v. Georgia (1961) 365 U.S. 570, 596; accord People v. Blye (1965) 233 Cal.App.2d 143, 149; United States v. Curtis (7th Cir. 1984) 742 F.2d 1070, 1075-1076 [right to testify on one's own behalf is a personal constitutional right which cannot be waived by counsel]; United States v. DiSalvo (E.D. Pa. 1989) 726 F.Supp. 596, 598 [counsel's failure to call defendant to testify does not waive the defendant's constitutional right to testify in his own defense].)

Thus, petitioner had a personal and fundamental constitutional right to testify in his own defense which his trial lawyer could not unilaterally waive. Because the decision to testify is personal one in which a defendant is authorized to override his counsel's advice, a defendant's right to testify may be violated even where counsel's tactical decision not to call defendant was entirely appropriate.

In order to prove a criminal defendant has waived a fundamental constitutional right which is personal -- that is, cannot be waived by counsel -- the record must show a voluntary, knowing and intelligent waiver. (Johnson v. Zerbst (1938) 304 U.S. 458, 464.) Courts will "indulge every reasonable presumption against waiver" of fundamental constitutional rights. (Barker v. Wingo (1972) 407 U.S. 514, 525, emphasis added.) At a minimum, the defendant must be aware of the right he is waiving. (Johnson v. Zerbst, supra, 304 U.S. at p. 464.)

For example, a defendant will not be presumed to have waived his right to counsel from a silent record; the record must show he was aware he had such a right and intelligently chose to waive that right. (Boykin v. Alabama, supra, 395 U.S. at p. 243.) Similarly, a defendant will not be presumed to have waived his right to a jury trial from a silent record; the record must show defendant was aware he had such a right and chose to waive it. (Adams v. United States (1942) 317 U.S. 269, 275-277; People v. Holmes, supra, 54 Cal.2d at p. 443-444.) Simply put, the personal relinquishment of a fundamental constitutional right may not be presumed from a silent record. (Barker v. Wingo, supra, 407 U.S. at p. 526; Boykin v. Alabama, supra, 395 U.S. at p. 242, 244; Barber v. Page (1968) 390 U.S. 719, 725.)

Here, the record does not show that petitioner was aware of his right to testify over counsel's objection and made a voluntary, knowing and intelligent waiver of this right. Pursuant to the above authorities, this record is wholly insufficient to show that petitioner entered a "voluntary, knowing and intelligent waiver" of his absolute right to testify.

The error requires reversal without a showing or prejudice. (People v. Harris, supra, 191 Cal.App.3d at p. 825-826; State v. Rosillo (Minn. 1979) 281 N.W.2d 877, 879; United States v. Johnson, supra, 555 F.2d 115; United States v. Poe, supra, 352 F.2d 639; United States v. Butts (D.Me. 1986) 630 F.Supp. 1145, 1148-1149.)

## Conclusion

For the reason stated above, the relief prayed for should be granted.

Date: 9/25/98

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by Robert Derham

Attorneys for petitioner
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EXHIBIT A -- DECLARATION OF CHARLES GESSLER

DECLARATION OF CHARLES GESSLER

I, Charles Gessler, declare:

1) I am an attorney licensed to practice in California. I was appointed to represent Lyle Menendez in the second trial in People v. Menendez, Los Angeles Superior Court No. BA068880. Lyle Menendez's co-defendant and brother Erik Menendez was represented by Leslie Abramson.

2) During trial, the trial court stated that a number of witnesses could not testify unless Lyle and Erik Menendez first waived their Fifth Amendment privilege and testified. (See, e.g., RT 35841, 35843-35844, 35842, 43481, 46230.) During these discussions, Leslie Abramson then made the following comment:

> "[W]e're sort of being required to put our clients on first, sorta, kinda, in spite of -- the Brooks case was the case -- you know, where there is a case known as Brooks v. Tennessee . . . ." (RT 35893.)

3) In the case of Brooks v. Tennessee (1972) 406 U.S. 605 the United States Supreme Court held that a trial court could not constitutionally hinge the admission of otherwise relevant evidence on a defendant's decision to waive his Fifth Amendment privilege and testify.

4) The trial court responded to Ms. Abramson's reference to Brooks by noting that "[w]e went through this in the first

trial." (RT 35893.)

5) During the first trial, the court had issued a similar ruling with respect to several witnesses and the defense had objected. (RT 13626, 13714, 13718, 13721, 13728-13732.) The trial judge overruled the objections. (RT 13731-13732.)

6) During the second trial, this is what I thought the trial court was referring to when it said "[w]e went through this in the first trial." (RT 35893.) I believed that the reference to the Brooks case was sufficient to preserve the Brooks issue for appellate review.

7) I did not know then, nor did I then anticipate, that a court of appellate judges would later hold the specific reference to Brooks to be insufficient to preserve the issue for appellate review. I did not know then, nor did I then anticipate, that despite the trial court's clear rulings, a court of appellate judges would find that the trial court did not rule witness testimony inadmissible absent testimony from the defendants.

8) I had no tactical reason not to fully preserve the Brooks issue for review or obtain even clearer rulings from the trial court. I thought the court had ruled and the Brooks issue was preserved for review.

I declare under penalty of perjury that the foregoing is

true and correct.

Executed this 9 day of June, 1998 in Los Angeles, California.

Charles Gessler

c:\wp51\aob\menend.dec