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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In Re **ERIK MENENDEZ &** **JOSEPH LYLE MENENDEZ** **On Habeas Corpus.**	**LASC Case Nos.: BA068880-01** **BA068880-02** **INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES; EXHIBITS**

TO THE HONORABLE WILLIAM C. RYAN, JUDGE DEPARTMENT 100, CENTRAL DISTRICT, AND TO PETITIONERS ERIK AND JOSEPH LYLE MENENDEZ, THROUGH THEIR ATTORNEYS OF RECORD CLIFF GARDER AND MARK GERAGOS:

The People of the State of California, Real Party in Interest in the above-entitled case ("Respondent"), by their counsel, Nathan J. Hochman, District Attorney for Los Angeles County, submit this informal response to the Petition for Writ of Habeas Corpus ("Petition") of Petitioners Erik Menendez and Joseph Lyle Menendez[1] ("Petitioners").

[1] Respondent notes Petitioner Joseph Lyle Menendez was commonly referred to as "Lyle" in the records of the underlying case proceedings. Because he is formally referred to as Joseph Lyle Menendez in this habeas litigation, Respondent will refer to him as "Petitioner Joseph Lyle Menendez" or "Lyle

INTRODUCTION

> WE HAVE NEVER SAID THAT BECAUSE YOU'RE ABUSED, YOU'RE JUSTIFIED IN KILLING YOUR ABUSER. WE DIDN'T ARGUE THAT, AND WE NEVER WILL.

(Leslie Abrahamson – Trial Counsel for Erik Menendez, August 18, 1993.[2])

> TO RESOLVE THIS CASE, JURORS HAD TO DECIDE A SINGLE, CRITICAL QUESTION; WAS JOSE MENENDEZ MOLESTING HIS SONS?

(Mark Geragos, Habeas Counsel for Erik and Lyle Menendez, May 2023)

Contrary to Leslie Abrahamson's statement at the time of their 1990s trials that they would never argue that sexual abuse justified the killing of their parents, Erik and Lyle Menendez' current counsel in their 2023 habeas petition has argued just that, namely, that the only issue at trial was sexual abuse not self-defense. While sexual abuse is abhorrent and may be a motive for murder, Abrahamson understood correctly that it does not constitute self-defense and justify murder unless the murderer has an actual fear of imminent harm. The jury was not asked to decide if the Menendez brothers were sexually abused by their father and their mother failed to stop it, only if the Menendez brothers committed these murders willfully, deliberately and with premeditation or in self-defense. The "new evidence" submitted by Petitioners – an undated copy of a letter from Erik Menendez to his cousin Andy Cano and a declaration from Roy Rossello -- provides no additional evidence at all concerning this key issue at trial about self-defense and Petitioners' mental state the night of August 20, 1989, when they executed and shotgunned their parents over 12 times to their deaths. At most, it only supplements the voluminous evidence of alleged sexual abuse the defense presented at the second trial -- including 7 days of detailed and graphic sexual abuse testimony by Erik Menendez and testimony by Andy Cano.

Petitioners' claims in this habeas petition are not new. These claims have been repeatedly raised and rejected by every court that has heard them, including the trial judge, the California

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Menendez" in this Informal Response. But within the Statement of Facts, *post*, Respondent will refer to him in the quoted material as "Lyle" in conformity within the appellate court's opinion on direct appeal.

[2] (Ex. 5, pp. 11792:22-11793:6.) As noted in footnote 13, *post*, attached hereto as Exhibit 5 and incorporated by reference as if fully set forth herein is a true and correct copy of the trial transcripts from Petitioners' first trial in the underlying case.

court of appeals on direct appeal, the California Supreme Court on a first habeas petition, and the U.S. District Judge and Ninth Circuit Court of Appeals on a federal habeas petition. Similarly, these claims should be rejected again because neither the proffered trial evidence nor any "new evidence" they have proffered as a part of their current habeas claims alters the finding that Petitioners lacked "an actual fear of an imminent harm" when they killed their parents. In rejecting similar iterations of these claims in Petitioners' federal habeas litigation, the Ninth Circuit Court of Appeals explained, "[a]s with the other excluded evidence. . . the proffered evidence would have served only to explain *why* Lyle and Erik might have actually feared their parents." (*Menendez v. Terhune* (9th Cir. 2005) 422 F.3d 1012, 1033.)[3]

Even when viewed most favorably to Petitioners, the "new evidence" proffered in the instant Petition merely bolsters why Petitioners allegedly feared their parents, while the remaining evidence continues to demonstrate that Petitioners planned a preemptive strike, purposely killing their parents *before* they believed they were in imminent danger. (See *Menendez v. Terhune* (9th Cir. 2005) 422 F.3d 1012, 1030 ["Taking Erik's testimony as true, these killings were, in effect, preemptive strikes."].)

On March 20, 1996, a second[4] jury convicted Petitioners of the following crimes: (Count 1) first-degree murder of Jose Menendez with the special circumstance of lying in wait; (Count 2) first-degree murder of Kitty Menendez with the special circumstance of lying in wait; (Count 3) Conspiracy to Commit Murder. As to Counts 1 and 2, the jury found true the special circumstance of multiple murders.[5] On April 19, 1996, the trial court sentenced each Petitioner as follows: (Count 1)

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[3] Respondent attaches hereto as Exhibit 1 a copy of *Menendez v. Terhune* (9th Cir. 2005) 422 F.3d 1012 and incorporates it by reference as if fully set forth herein.

[4] Unless otherwise noted in the body of this informal response, all references to Petitioners' trial are to their second trial, within which they were convicted of the crimes in the case *sub judice.*

[5] Respondent attaches hereto as Exhibit 2 a copy of the March 20, 1996 minute order in Los Angeles County Superior Court case number BA068880 and incorporates it by reference as if fully set forth herein.

life in prison without the possibility of parole; (Count 2) life in prison without the possibility of parole; (Count 3) sentence stayed pursuant to Penal Code[6] section 654.[7]

On May 3, 2023, Petitioners filed the instant Petition, seeking habeas relief through new evidence claims, pursuant to then-section 1473, subdivision (b)(3)(A) and (B).[8] They proffer only two items of alleged "new evidence":

- an undated photocopy of a letter without a postmarked envelope purportedly written by Erik Menendez to Andy Cano ("Cano Letter") that Petitioners allege corroborates the now-deceased[9] Andy Cano's trial testimony and Petitioners' allegations of sexual abuse asserted at trial (Petn., p. 4; Petn. Ex. A); and
- a purported declaration of Roy Rossello ("Rossello"), asserting that Jose Menendez sexually molested him in the 1980s, which Petitioners concede they did not know about at the time of their murder of their parents in 1989, found out about over 30 years later, but allege counters the trial descriptions of Jose Menendez as having been non-abusive (Petn., p. 5; Petn. Ex. F).

On June 15, 2023, this Honorable Court requested that Respondent file an informal response to the claims alleged in the Petition.[10]

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[6] All further statutory references will be to the California Penal Code, unless otherwise noted.

[7] Respondent attaches hereto as Exhibit 3 a copy of the July 2, 1996 minute order in Los Angeles County Superior case number BA068880 and incorporates it by reference as if fully set forth herein.

[8] As discussed *post*, in 2023, the Legislature further eased the requirements on a petitioner to legally satisfy a habeas claim of newly discovered evidence when it passed Senate Bill 97, which Governor Gavin Newsom signed into law on October 7, 2023, and which became effective January 1, 2024. (2023 Cal Stats. ch. 381.) Renumbered as section 1473, subdivision (b)(1)(C), the rewritten statute requires a petitioner to establish the following for habeas relief:

> (i) New evidence exists that is presented without substantial delay, is admissible, and is sufficiently material and credible that it more likely than not would have changed the outcome of the case.
>
> (ii) For purposes of this section, "new evidence" means evidence that has not previously been presented and heard at trial and has been discovered after trial.

(§1473, subd. (b)(1)(C)(i)-(ii).)

[9] According to the instant Petition, Andy Cano passed away in 2003. (Petn. at p. 13.)

[10] Respondent attaches hereto as Exhibit 4 this Court's June 15, 2023 minute order in Los Angeles County Superior Court case number BA068880 and incorporates it by reference as if fully set forth herein. The order stated:

> The District Attorney is requested to file a response to the claims alleged in the petition, generally. The Court also specifically requests that the District Attorney address whether

Petitioners' claims misstate the law and issues in their underlying case and do not make a prima facie case for habeas relief. Additionally, their new evidence claim regarding the Cano Letter is procedurally barred for untimeliness. As such, this Court should summarily deny the Petition.

Without question, this Petition is designed to enflame public passion and mislead this Court through an underlying straw man fallacy that the sole issue in Petitioners' second trial was whether their parents had sexually abused them. This argument misstates the law and issues in the case. Factually, the defense in the second trial

> did present evidence that Jose had repeatedly abused his sons and that Kitty had acquiesced, for most of their lives. Erik testified that Jose had threatened to kill him if he revealed the sexual abuse. According to Erik, there had been several confrontations between Jose, Lyle, and Erik days before the murders. Erik testified at extraordinary length and in incredible detail about his childhood and his relationships with his parents, beginning with his allegations that his father began sexually molesting him at the age of six and following through incident by incident until he was eighteen. Erik testified that in the days leading up to the murders, he had some fear that, at some point, his parents would kill him—a fear that fluctuated in intensity during those final days.

(Ex. 1 at p. 1029.)

The three questions before their convicting jury were: (1) did Erik and Lyle conspire to murder their parents? (2) did they kill their parents? and (3) what were their respective states of mind when they collectively shot their parents over 12 times with shotguns, killing them? There was not a fourth question of whether Erik or Lyle were sexually abused.

The Petition reasserts allegations that Petitioners repeatedly and respectively asserted during their second trial, on direct appeal and in prior habeas petitions, which every court to consider them

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> the letter to Cano "could not have been discovered prior to trial by the exercise of due diligence" and whether, given the exclusion of the witnesses' testimony regarding the physical and sexual abuse, the letter to Cano and the Rossello declaration would be "admissible and not merely cumulative, corroborative, collateral, or impeaching". ([] 1473, subd. (B)(3)(B).)

(Ex. 4.)

As the 2024 amendment to the operative statutory definition of "new evidence" described in footnote 7, *ante*, eliminated the requirements that the alleged new evidence "could not have been discovered prior to trial by the exercise of due diligence" and could not be "merely cumulative, corroborative, collateral, or impeaching," Respondent will not address those now-omitted elements in this informal response.

has repeatedly and respectively rejected. (Exs. 1, 6, 7.[11]) In particular, the Petition reasserts that in the second trial: (1) witnesses were improperly excluded; (2) prosecutors made an improper closing argument; (3) Petitioners were limited in presenting sexual abuse evidence; and (4) the exclusion of imperfect self-defense and heat of passion instructions was erroneous. (See Petn.) Through recycled allegations and reassertions of their perennially unsubstantiated argument that they executed their parents to defend themselves from imminent peril, Petitioners craft a foundation for their current claims, hoping to show that their proffered "new evidence" justifies habeas relief. It does not.

The law requires Petitioners to establish the following for habeas relief on a claim of new evidence:

> 1. New evidence exists that is presented without substantial delay, is admissible, and is sufficiently material and credible that it more likely than not would have changed the outcome of the case.
>
> 2. For purposes of this section, "new evidence" means evidence that has not previously been presented and heard at trial and has been discovered after trial.

(§1473, subd. (b)(1)(C)(i)-(ii).)

Indeed, their "new evidence" does not substantiate their timeworn straw man fallacy that the central issue in their second trial was whether their parents had sexually molested them. More importantly, their "new evidence" does not establish that Petitioners believed they were in imminent peril when they murdered their parents. For instance, the Rossello information could not have influenced Petitioners in any way in August 1989 since they admit they only learned about this information over 30 years after the murders. (Petn. Ex. H, Lyle Menendez Decl., ¶ 10; Petn. Ex. B, Erik Menendez Decl., ¶ 10). As for the Cano Letter, at most it illustrates that Petitioners "feared that their parents had the capacity to and might, at some point, harm them." (Ex. 1 at p. 1029.) It does not show that Petitioners feared they were in imminent peril at the moment they shotgunned their parents to death ("...the fears leading up to the murders and the reasons why such fears might have existed simply are not the threshold issue for California's imperfect self-defense instruction." (*Ibid.*, citing *In*

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[11] See fns. 13 and 16, *post.*

re Christian S., *supra*, 7 Cal. 4th at p. 783)). This "new evidence" does nothing to show that "at the moment of the killings, they had an actual fear in the need to defend against *imminent* peril to life or great bodily injury" to warrant the giving of the imperfect self-defense instruction. (Ex. 1 at p. 1029, emphasis in original.) Therefore, Petitioners do not make a prima facie showing that their "new evidence" "would have more likely than not changed the outcome" of their case, as they are statutorily required to do. (§1473, subd. (b)(1)(C)(i).)

In addition to not addressing the central issue of self-defense at trial, the "new evidence" claims fail for many other substantive reasons. Starting with the Cano Letter, the "new evidence" of the undated, photocopied Cano Letter does not meet the legal test for "new" evidence set forth in section 1473, subdivision (b)(1)(C)(i) and (ii). At least as it pertains to Erik Menendez,[12] the Cano Letter is not "new" evidence that was "discovered after trial," as the statute requires. (§1473, subd. (b)(1)(C)(ii).) Instead, its purported author,[13] Erik Menendez, could have easily introduced the purported December 1988 Cano Letter during his 7 days of trial testimony in the second trial about the sexual, physical and mental abuse inflicted on him by his father, particularly during his extensive direct and cross-examination about when and how many times he disclosed the alleged sexual abuse to Andy Cano. He did not. Or the Cano Letter could have been introduced during the testimony of Andy Cano in the second trial to corroborate Cano's allegation that Erik Menendez had informed him about sexual abuse, not just six years before the murders but within a year of the murders. Again, like with Erik Menendez' testimony, there was no mention of the Cano Letter during Cano's trial testimony.

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[12] Currently, Respondent does not have sufficient information to know nor does Lyle Menendez clarify if Erik Menendez advised him of the existence of the Cano Letter before or during either of Lyle Menendez's trials. For the limited purposes of this informal response, Respondent presumes that only Erik Menendez was aware of the Cano Letter during the time of all the trials.

[13] Currently, Respondent does not have sufficient information to confirm or deny that Erik Menendez wrote the undated Cano Letter, of which Petitioners only proffer a photocopy and no postmarked envelope. Thus, Respondent does not stipulate or concede that Erik Menendez is its true author. For brevity, Respondent does not modify each reference to the Cano Letter's author as "purported" or "alleged" in this informal response. Such purposeful omission is not Respondent's concession or stipulation on this point.

Second, as to Lyle Menendez, the introduction of the Cano Letter—an out-of-court statement allegedly made by his brother to their cousin—for its truth would have been inadmissible hearsay, without a showing of a viable legal exception. Thus, it fails the admissibility mandate of section 1473, subdivision (b)(1)(C)(i).

Third, the undated, photocopied Cano Letter is not "new evidence" because it is not "credible," in contravention to the statutory requirement of section 1473, subdivision (b)(1)(C)(i). At trial, as noted above, neither Erik Menendez (the purported author of the Cano Letter) nor Andy Cano (its purported recipient) mentioned the Cano Letter when examined and cross-examined in detail about when and how many times Erik Menendez had disclosed the alleged sexual abuse to Andy Cano. In fact, the Cano Letter contradicts the testimonies of Erik Menendez and Andy Cano at both trials where they both said the last time they had discussed sexual abuse was at least six years prior to the murders. It is inconceivable and defies common sense to believe that if the Cano Letter were actually written by Erik Menendez and received by Andy Cano by approximately December 1988, within nine months of the August 20, 1989 murders, the defense would not have introduced the actual letter or its contents during the trials. This evidence would have corroborated Erik Menendez' and Andy Cano's testimony about the alleged sexual abuse that otherwise was only supposedly discussed by Erik Menendez and Andy Cano six years before the murders, prior to Erik Menendez moving to California. The fact the defense did not introduce the Cano Letter or its contents at either trial belies its purported existence prior to the murders and drastically denigrates its credibility. (Ex. 5, pp. 17479-17480:11; Ex. 6.)[14]

Moreover, the lack of credibility of the Cano Letter is in full alignment with Petitioners' documented history of deceit, lies, fabricating evidence, and suborning perjury in this case. That history started before the murders, occurred in the hours, days, weeks and months after the murders during the investigation, and continued on unabatedly before and during the years of the two trials.

[14] Attached hereto as Exhibit 5 and incorporated by reference as if fully set forth herein is a true and correct copy of the trial transcripts from Petitioners' first trial in the underlying case. Attached hereto as Exhibit 6 and incorporated by reference as if fully set forth herein is a true and correct copy of the Reporter's Transcripts from Petitioners' second underlying trial.

The deceit, lies, fabricating evidence, and suborning perjury evolved over the course of at least five different versions of events that Erik and Lyle told: (1) Erik and Lyle did not kill their parents; it was a mafia hit; (2) their father was a violent sexual predator who raped Lyle's girlfriend: (3) their father molested Erik and their mother molested Lyle, without any mention of Lyle being molested by his father; (4) Erik and Lyle were both molested by their father; and (5) both their father and mother were going to kill them the night of August 20, 1989 which is why they shot them first. Examples include:

- Days before killing their parents, Erik and Lyle conspired and planned to kill their parents by, among other things, driving over 120 miles to San Diego to purchase shotguns and ammunition using a false identification and address.
- Hours before they killed their parents, Erik and Lyle set up a pre-planned alibi where they would pretend to have been at the "Batman" movie and then meet their friend afterwards at the "Taste of LA" event.
- During the murder, Erik and Lyle staged the brutal killings to look like a Mafia gangland hit by shotgunning their parents over 12 times, including shooting their father in the back of his head and through his kneecaps after he was dead and shooting their mother at point-blank range in her face while she lay alive and bleeding on the ground.
- Right after the murder, Erik and Lyle intentionally hid their crimes from the police by picking up all the shotgun shells and disposing of them, the shotguns, and the bloody clothing.
- Right after the murder, Erik and Lyle tried to execute their pre-planned alibi by trying to buy a movie ticket for the "Batman" movie and calling to meet their friend.
- After the murder, Erik and Lyle called 911 and met the police outside their home, convincingly lying to them that they had come home and found their parents murdered.
- In the months following the murders, Erik and Lyle convincingly and repeatedly lied to the police, their family, friends, and the media, saying that the mafia had killed their parents.
- After being arrested and awaiting trial, Erik and Lyle developed their next lie that their father was a violent sexual predator. Lyle attempted to suborn perjury by offering to pay his

girlfriend Jamie Pisarcik to falsely testify that his father had violated raped her after throwing her onto the bed and ripping off her clothes. She refused to perjure herself.

- Awaiting trial, Lyle developed the next lie, telling people that his father had molested Erik and his mother had molested him. Lyle never said that he was molested by his father.
- Lyle suborned perjury by his girlfriend Traci Baker by sending her a script to falsely testify that Lyle's mother had tried to poison the whole family in her presence. Baker testified falsely at the first trial and did not testify at the second trial.
- Lyle attempted to suborn perjury from Erik's friend Brian Eslaminia, asking to him to falsely testify that Erik and Lyle were so fearful of their parents the week of the murders they tried to borrow a handgun from Eslaminia for protection. Eslaminia refused to perjure himself.
- During trial, Erik and Lyle lied when they said they went to a Big 5 Sporting Goods store in Santa Monica to buy handguns to defend themselves; the Big 5 Store in Santa Monica had not sold handguns for years at that point.

Fourth, contrary to the express requirement of section 1473, subdivision (b)(1)(C)(i), Petitioners "substantially delayed" presenting this "new evidence." As its purported author, Erik Menendez knew about the Cano Letter at the time of both of his 1990s trials, yet substantially delayed introducing it as "new evidence" for almost 30 years after his conviction, and long after Andy Cano passed away. Lyle Menendez also substantially delayed bringing this new evidence on habeas corpus. According to the Petition, in 2015, Petitioners' aunt discovered the Cano Letter in the late-Andy Cano's personal effects and gave it to a production assistant of Barbra Walters, after which it became a subject in a nationally broadcast 2015 "Barbara Walters Special" about the Petitioners' case.[15] (Petn. p. 16) Yet instead of bringing this "new evidence" on habeas corpus immediately after that discovery, Lyle Menendez delayed for eight years until finally raising it in 2023.

Accordingly, Petitioners' new evidence claim about the Cano Letter is procedurally barred for untimeliness. Claims that are untimely will generally not be recognized on habeas corpus, if not subject to an exception. See *In re Saunders* (1970) 2 Cal.3d 1033, 1040; *In re Wells* (1967) 67 Cal.2d 873, 875.) Erik Menendez, the purported author of the Cano Letter, waited decades after his

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[15] *Barbara Walters Presents American Scandal Season 1 Episode 4: Menendez Brothers: The Bad Sons.*

conviction to raise this "new evidence" habeas claim. At best, Lyle Menendez waited almost a decade after the letter was globally published in a 2015 television special about the Menendez murders. The United States Supreme Court has held that a mere five-year delay is "substantial" under California law. (*Walker v. Martin* (2011) 562 U.S. 307, 312 [131 S.Ct. 1120, 179 L.Ed.2d 62].) Given Petitioners' lack of legally viable explanation, justification, or exception to their respectively substantial delays in raising the "new evidence" claim vis-à-vis the Cano Letter, this claim is procedurally barred for untimeliness.

Even more ancillary than the Cano Letter is Petitioners' "new evidence" claim centered on Roy Rossello's allegation in his 2023 declaration[16] that Jose Menendez sexually abused him in the 1980s. To begin with, Petitioners fail to allege how such evidence would be admissible at trial, in accordance with section 1473, subdivision (b)(1(C)(i). They cannot reasonably argue that such evidence is relevant to their individual states of mind when they conspired to kill and killed their parents in August 1989 since they admit they only learned about this information over 30 years after the murders. (Petn. Ex. H, Lyle Menendez Decl., ¶ 10; Petn. Ex. B, Erik Menendez Decl., ¶ 10.

Furthermore, while sexual abuse under any circumstance is abhorrent, the assertion that an individual sexually abused another in the past is not a recognized defense to the crimes of conspiracy to commit murder or murder in California—especially when the killers didn't even know about the allegation of prior abuse when they killed the alleged abusers. As such, Rossello's allegations are inadmissible and not "sufficiently material and credible that it more likely than not have changed the outcome of the case," contrary to the requirements of section 1473, subdivision (b)(1)(C)(i). Therefore, Petitioners have not made a prima facie showing that Rossello's declaration meets the statutory test for new evidence on habeas corpus.

[16] At this time, Respondent does not have sufficient information to confirm or deny that Roy Rossello actually signed, and even wrote, the proffered 2023 declaration. Therefore, Respondent does not stipulate or concede that Rossello did either. For brevity, Respondent will not modify every reference to the Cano Letter's author as "purported" or "alleged" in this informal response. However, such purposeful omission is not a concession or stipulation from Respondent on this point.

Because Petitioners completely fail to make a prima facie case for habeas relief on either piece of proffered "new" evidence, this Court should summarily deny the Petition without issuing an order to show cause or ordering an evidentiary hearing on the claims in this Petition.

I.
STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. STATEMENT OF FACTS

Respondent adopts and asserts the Statement of Facts regarding the trial evidence as detailed in the Appellate Court's unpublished Opinion in Petitioners direct appeal:[17]

> **A. Prosecution's Case-in-Chief**
>
> On the morning of August 18, 1989, two days before the slayings, Mark Heffernan, Erik's tennis coach, gave Erik a two-hour lesson at the Menendez residence. Mr. Heffernan did not notice anything unusual in Erik's demeanor.
>
> On August 18, 1989, Erik and Lyle purchased two Mossberg shotguns at a Big 5 Sporting Goods store in San Diego for $200 each.
>
> Erik presented a California driver's license in the name of "Donovan Jay Goodreau."[18] Erik gave a nonexistent address in San Diego. Erik indicated that the address on the driver's license was incorrect since he had just moved. Erik signed the firearm transaction form and two entries on the federal firearm log using the name "Donovan Goodreau."
>
> Perry Berman received a telephone call from Lyle during the afternoon of August 20, 1989. They discussed getting together in the evening. Berman said he planned to go to the "Taste of L.A.," a food

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[17] Attached as Exhibit 7 is a copy of the unpublished Court of Appeal Opinion (*People v. Erik Galen Menendez et al.*, (February 27, 1998, B104022 [nonpub. opn.]).

In keeping with the language of the opinion, Petitioners will be respectively referred to as "Erik" and "Lyle" in the quoted material. Any original footnote from said Opinion will be numbered in conformity with the established footnoting in this response, with the original footnote number from the opinion bracketed after the current footnote number.

[18] [3] Donovan Jay Goodreau lived with Lyle in Princeton, New Jersey, for approximately six weeks in the Spring of 1989. On the day the two shotguns were purchased in San Diego, Goodreau was working at a restaurant in New York. After Goodreau moved out of Lyle's apartment, Lyle was in possession of Goodreau's wallet which contained credit cards and a California driver license belonging to Goodreau.

festival at the Santa Monica Civic Auditorium. Lyle indicated that he and Erik were going to see the movie "Batman" in Century City, but after the movie was over, at about 9 or 9:30 p.m., he would go to the food festival. Berman waited until about 10:20 p.m. for Lyle and Erik to show up. However, the brothers did not arrive, and Berman went home.

At about the time that Berman was leaving the food festival, Avrille Krom, a neighbor of the Menendez family, heard a series of 10 to 12 popping sounds. There was a series of popping sounds and then a lapse and then another series. Krom's son picked up the phone to call 911 but was dissuaded from doing so because Krom thought the sounds were simply firecrackers.

Berman received two calls from Lyle at about 11 p.m. In the first, Lyle explained that he had gotten lost on the way to Santa Monica and the festival had closed by the time he arrived. Lyle suggested that Berman meet him and Erik at a restaurant in Beverly Hills. Berman was reluctant, but because Erik was very insistent, Berman agreed. During the conversation, Lyle sounded "anxious" and "excited." The second call was just a few minutes later, and Lyle asked Berman to meet at the Menendez home instead of the restaurant. Berman demurred and agreed to wait to give Lyle and Erik time to go home and pick up Erik's fake identification. Neither Lyle nor Erik showed up at the restaurant. Berman, upset at the turn of events, left the restaurant and decided to drive to the residence so he could "yell at" Lyle and Erik. When he arrived, he saw numerous police cars outside and was told by the police that there was some "trouble." Berman went home.

A 911 dispatcher, received an emergency call at 11:47 p.m. concerning a possible shooting at the residence. The call made by Lyle said "someone killed my parents." Lyle indicated that he had not heard anything unusual, he had just come home and discovered his parents had been shot to death.

Beverly Hills police officers responded to the 911 call. When the officers reached the front of the Menendez residence, Lyle and Erik ran out the front door of the house, toward the officers, screaming.

Leslie H. Zoeller was the investigating officer. He recovered "wadding," "spacers" for shotgun shells, and shotgun pellets. Zoeller opined that a total of 13 to 15 shotgun blasts were fired in the den. No ammunition was found inside the residence. No weapons were found in the den. The only weapons found in the house were two unloaded .22 caliber rifles in a closet off the upstairs master bedroom.

The brothers spoke to the police after the bodies of their parents had been removed from the den and again in September 1989. In both interviews they said they were elsewhere at the time of the

killings. After the initial interview, they returned to the residence and requested entry so they could remove their tennis rackets from the den. During the initial interview, Lyle indicated the possibility that the killings were "business-related."

Jose and Kitty expired from multiple gunshot wounds. Jose suffered four gunshot blasts with buckshot ammunition. Kitty suffered seven gunshot blasts with buckshot ammunition and two gunshot blasts with birdshot ammunition. The wounds to Jose's legs occurred after death.

Randolph Wright, an attorney and friend of the family, talked to Erik and Lyle the day after the murders. Erik mentioned the possibility of a Mafia murder and discussed the possibility of probating his father's will. Lyle told Wright that he thought his father might have changed his will and that changes might be in the family computer. Lyle told Wright that there was a family safe, and Lyle said he could get the safe immediately. He did so and brought it back to Wright's residence. Erik spent two nights in the spare bedroom with the safe before it was opened. Lyle did not want anyone else present when the safe was opened except for his brother. After the safe was opened in privacy, Lyle informed the family and friends that the safe was empty. Later that day, other relatives found Jose's 1981 will, and under the terms, Lyle and Erik were the sole remaining beneficiaries.

At about the same time the 1981 will was found, family members realized there were entries on the family computer possibly relating to a new will. Three files on the computer directory were named "Will," "Erik" and "Lyle." No one was able to retrieve the contents of the files.

Howard Witkin, a computer expert, testified that he received an "emergency call" from Lyle regarding files on a home computer. Witkin found the files but no information. Lyle asked Witkin to erase the disk because he was selling the computer and wanted to make sure that information relating to family financial matters was not discovered. Lyle also told Glenn Stevens that he found a computer expert to erase whatever was on the disk.

Richard Wenskoski was hired by Lyle within a few days of the killings to provide security services. Wenskoski provided 24-hour "around the clock" protection while Lyle was on the East Coast. Lyle told Wenskoski that either the Colombian Cartel or the Mafia was responsible for the killings. Lyle also told his girlfriend, Jamie Pisarcik, that the killings must have been mob related. Lyle terminated Wenskoski's services after about a week saying a deal had been reached and his life was no longer in danger.

Both brothers continued to perpetuate the Mafia hoax. Lyle hired bodyguards to protect him during the Fall 1989 semester at Princeton University. Erik told Beinian, in late September or early

October, that the killings were "business-related" and involved a man named Noel Bloom. His father had a problem with Bloom after the purchase of a distribution company.

At the time of his death, Jose was Chairman of the Board at L.I.V.E. Entertainment with an annual salary and benefit package of approximately $1,300,000. His assets included the family home in Beverly Hills valued at between $3,500,000 and $4,000,000 with a net value of approximately $1,500,000; property in Calabasas with a value of approximately $1,350,000; and stock in L.I.V.E. Entertainment valued at $5,000,000.

Erik and Lyle each received $326,747.62 in life insurance proceeds as a result of their father's demise at age 45. Following the murders, Erik and Lyle went on shopping and spending sprees. Just four days after the murders, Lyle purchased three Rolex watches and two money clips, charging more than $15,000 on his father's American Express account. Erik and Lyle purchased automobiles, houses, businesses, clothing, and expensive tennis services. The automobiles included a Jeep Wrangler for Erik and a Porsche 911 Carrera Cabriolet for Lyle.

Erik and Lyle made videotaped statements to their therapist, Dr. Jerome Oziel, on December 11, 1989.[19] On the tape, Erik and Lyle discussed their relationship with their parents and the reasons they killed them. Basically, Erik and Lyle told Dr. Oziel that they hated their father, and the murder of their mother was a "mercy killing." The contents of the Oziel tape were corroborated by Erik's confession to his friend Craig Cignarelli. In fact, shortly after the murders, Erik walked Cignarelli through the den of the Menendez home explaining where his mother and father had been located when he and Lyle had shot them to death.

Two witnesses, Amir Eslaminia and Jamie Pisarcik, testified about efforts to fabricate evidence. Eslaminia, a high school friend of Erik's from Beverly Hills High School, started visiting the brothers in jail. Lyle asked Eslaminia to give testimony favorable to the defense, specifically to testify falsely that the day before the murders, Lyle and Erik came to him and said they needed a handgun for protection from their parents. Eslaminia's testimony was corroborated by a letter Eslaminia received from Lyle, dated July 7, 1991.

Pisarcik was the other witness who testified that Lyle had asked her to give false testimony. In December 1990, Lyle asked her to testify that his father had done to her what had been done to a character in a movie called "At Close Range." Pisarcik was familiar with this movie, having seen it with Lyle. In the movie, a man gives

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19 [4] Dr. Oziel first began seeing Erik and Lyle in September 1988, after Erik was involved in two burglaries in Calabasas in July 1988.

his son's girlfriend a sedative, then tells the girl to stop seeing his son. The girl refuses, and the father violently rapes the girl. Lyle said Pisarcik had to do it because a large sum of money was to be placed in her bank account. Pisarcik said if money appeared in her account she would tell the police.

The prosecution introduced into evidence nine pages police seized from Lyle's cell before the first trial. These pages contained references to "safe houses in foreign cities." The materials also contained references to international travel and visas for different countries.

Dr. Roger McCarthy testified in an effort to reconstruct the crime scene. McCarthy concluded that 12 shots were fired, Kitty and Jose were seated when the first shot was fired, the second shot killed Jose, the first shots were aimed at the head, and later shots were aimed at the knees.

B. Defense Case

The defendants presented evidence disputing the crime scene reconstruction, concluding that the crime scene was too complex to do an accurate reconstruction. The defendants also presented witnesses relating to various matters and incidents occurring before and after the murders, and expert testimony that Erik suffered from post-traumatic stress disorder.

Erik testified on his own behalf. He maintained that he had been physically and sexually abused by his father between the ages of six and 18. He loved his parents but killed them because they were going to kill him after he had disclosed to Lyle that his father had been sexually abusing him. Erik also feared his mother. She participated in her husband's abusive behavior by condoning it. Erik, in his testimony, placed great emphasis on the last few days of his parents' lives in an effort to show he thought his parents were going to kill him.

On Sunday, August 13, one week before the shootings, Jose discussed the courses Erik would be taking at UCLA in the fall. Jose told Erik that he would have to come home several nights a week and sleep over. Erik believed that he would be required to continue to have sex with his father, and his hope of escaping the abuse was gone.

On Tuesday, August 15, Erik told Lyle about the sexual activity between him and their father over the last 12 years. Lyle told Erik he would talk to their father and the sexual activity would cease.

On Wednesday, August 16, four days before the shootings, Lyle told his mother that he wanted to speak to his father when he returned from a business trip the following day.

On Thursday, August 17, three days before the shootings, Jose returned home from his business trip. Erik stayed away from the family home until nearly midnight because he did not want to be present when Lyle talked to their father. When Erik returned home, his father confronted him and as Erik ran from the house, he saw his mother. He had a conversation with his mother, and she informed him that she was aware of what had been going on. Lyle told Erik about his earlier conversation with his father. Lyle indicated that he had threatened to tell the police or relatives if the abuse did not stop. Erik told Lyle they would both die as a result of Lyle's threats to Jose. Erik, who feared for his life, concluded that he needed a gun because he believed his father would kill him if the information about the sexual activity were revealed. The idea of running away was dismissed as impossible even though Erik had traveled extensively in the United States and had false identification.

On Friday, August 18, two days before the shootings, the brothers drove to San Diego and purchased two shotguns. After arriving home, the shotguns were left in the car. Erik acknowledged that he intended to use a shotgun, if necessary, to shoot his parents.

On Saturday, August 19, the day before the shootings, the brothers stopped at a firing range so they could practice firing the shotguns but were told they could not use shotguns at the firing range. They also purchased buckshot ammunition after talking with a sales clerk, who told them birdshot ammunition was essentially "useless" for "stopping" a person. The brothers stayed away from home in order to avoid going on a family shark fishing expedition planned for 3 p.m. that afternoon. Erik was afraid his parents had planned to kill him and his brother during the trip. When they returned home late in the afternoon, the family went on the fishing trip. The trip lasted from 4 to 11:30 p.m. Erik and Lyle remained at the front of the boat because they were afraid of their parents.[20] After the fishing trip, the family returned home. Erik slept in the house and Lyle in the rear guest house. After Erik retired to his room, Jose pounded on the door, but Erik did not open it.

On Sunday, August 20, the day of the shootings, the brothers had agreed that Lyle was going to talk to their father to see if they could come to some resolution of the problem concerning the sexual abuse. Erik talked to Lyle about noon in the guest house, and Lyle said he had not yet gone into the main house to talk to his father because he was scared. Lyle said he would talk to his father later that afternoon. Erik left the house about 1 p.m.

Erik returned to the mansion about 9:30 p.m. and talked to Lyle in the guest house. The brothers decided to go out, but their

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[20] [5] Robert Anderson, the operator of the boat charter, corroborated Erik's testimony that there was very little interaction between the family. Erik and Lyle spent most of the trip at the front of the 31-foot boat.

parents forbade it. Jose told Erik to go upstairs to his room. Lyle told his father not to touch Erik, and his father said he would do as he wanted. Lyle asked his mother if she was going to let this happen, to which she responded, "You ruined this family." Jose and Kitty went into the den and closed the doors behind them.

Lyle ran to the top of the stairs to where Erik was standing. Erik was in a panic and told Lyle he could not let his father into his bedroom. Even though Jose never expressly threatened him that day, Erik thought they were going to come and kill him. Erik ran to his bedroom and thought about locking the door behind him, but instead got his shotgun out of the closet and ran outside to his car. He ejected the two "worthless" birdshot shells he had placed in the shotgun while returning from San Diego on Friday and loaded the shotgun with the buckshot ammunition he had purchased the previous day. Lyle arrived at the car and loaded his shotgun. They entered the house together, each with a loaded shotgun.

Lyle and Erik, who believed their parents had guns inside the den, burst through the closed doors to the den off the foyer.[21] The lights in the den were off, but the room was illuminated by the flickering television. According to Erik, his parents were both standing. He indicated on direct examination that he began firing only after his father began walking toward him and Lyle. However, on cross-examination, Erik indicated that he had no idea if Jose took a step in their direction. Erik said that as soon as he saw his parents, he immediately started firing. Erik heard the sound of Lyle's shotgun. Lyle shot his father in the back of the head. The brothers ran out of ammunition and went out to the car and reloaded. Lyle returned to the den. Erik heard one more shot and saw Lyle leave the den.

After the shootings, the brothers picked up the shells because they believed their fingerprints might be on them. When the police did not arrive, Erik and Lyle decided to leave the house. They drove to a movie theater in an effort to purchase tickets for a movie in an effort to fabricate an alibi. They purchased tickets for the 10:30 p.m. showing of "Batman" but had to throw the tickets away because they were time-stamped. On their way to meet Berman, they stopped at a car wash and dumped the incriminating evidence (i.e., shotgun shells, bloody pants, shoes with blood spatter) into the trash. Rather than meeting Berman, they returned home and "discovered" the dead bodies of their parents.

The defense offered several witnesses to buttress their argument of abuse. While staying with the Menendezes in the summer of 1977, Lyle's cousin, Brian Andersen, often heard Jose

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21 [6] Neither Lyle nor Erik saw their parents with any weapons on the day of the murders. The belief that Jose and Kitty had guns in the den was based on Erik "knowing my mother and father."

beat Erik and Lyle with belts and saw bruises on them. When the boys were young, Jose would grab them by the hair and hold them under water. Erik was often hit by his father for not doing well in sports.

A number of witnesses provided circumstantial evidence corroborating the molestation. When Jose was alone in the bedroom with either Erik or Lyle, no one was permitted to walk down the hallway toward the room. When Erik was 12 or 13, he confided a secret to his younger cousin, Andy Cano. Erik told Cano that his father had been touching him in a sexual manner. Erik made Cano promise to keep the matter a secret and never to reveal it to anyone.

Dr. Wilson, a clinical psychologist who specialized in the area of post-traumatic stress disorder, interviewed Erik for over 30 hours. Dr. Wilson concluded that he suffered from chronic post-traumatic stress disorder (PTSD) as well as from Battered Person's Syndrome and depression. Dr. Wilson opined that Erik's symptoms of post-traumatic stress disorder were as severe as they were because his father subjected him to repeated episodes of sexual molestation and repeated physical assaults or threats of assaults.

Dr. Wilson also opined Erik did not believe he could change his environment because of "learned helplessness." According to Dr. Wilson, Erik felt helpless because there was nothing he could do to change his environment. Dr. Wilson also opined that Erik was "hypervigilant." "Hypervigilance" refers to an excessive scanning of the environment for cues of threats or harm where, in fact, none exist. Dr. Wilson's conclusion was that by the night of August 20, Erik was in a panic state in which he had no time or ability for reflective thought. Dr. Wilson also diagnosed Erik as suffering from depression, with symptoms currently in remission because of medication.

Dr. Kerry English, a medical doctor with a specialization in pediatrics and a sub-specialty in the area of child abuse and sexual abuse, examined Erik in August of 1993. Dr. English found no physical evidence of sodomy. Dr. English also reviewed Erik's 1977 medical records which indicated Erik had been examined for a "hurt posterior pharynx, ulva and soft palate." Dr. English explained that although the injury could have been caused by an erect penis being shoved against the back of the throat, thereby bruising the posterior pharynx, there was no indication in the medical records as to the cause of the injury. Dr. English acknowledged that the injury was consistent with being caused by a toy which could have been placed inside the mouth or falling on a popsicle stick.

C. Rebuttal

Sometime after the killings, Cignarelli, Erik's best friend, received a tour of the den and was told by Erik what happened on the evening of August 20. Cignarelli gave a statement to the police on November 17, 1989. when he related the substance of Erik's confession although he was not entirely truthful in his comments to the police.

Some of the things Cignarelli mentioned in his interviews were not known to the public.

Dr. Park Dietz, a forensic psychiatrist, reviewed materials and interviewed Erik on three separate occasions. Dr. Dietz concluded Erik was suffering from a life-long mental disorder, at least from early childhood, known as general anxiety disorder. This disorder did not affect the critical reasoning aspects of the brain. Dr. Dietz indicated that post-traumatic stress disorder did not impair brain functioning. Dr. Dietz did not diagnose Erik with battered person's syndrome. Dr. Dietz disputed psychologist Wilson's claim that Erik was "hypervigilant" immediately prior to the crimes. Dr. Dietz also contradicted Wilson's conclusion of "learned helplessness." In sum, Dr. Dietz opined that at the time of the shootings, Erik did not suffer from any mental disorder that would preclude him from exercising reflective thought.

D. Surrebuttal

Dr. William Vicary, a forensic psychiatrist, treated Erik for approximately a year and one half. Dr. Vicary opined that general anxiety disorder can affect a person's mental state at the time of an event. A person suffering from this disorder, if in a state of panic, could suffer an impairment in his ability to engage in reflective thought. In addition, the symptoms of post-traumatic stress disorder (PTSD) overlap with those of generalized anxiety disorder, and the latter disorder makes a person more prone to developing PTSD. Child abuse, including sexual abuse, is more likely to cause PTSD than generalized anxiety disorder.

(Ex. 7, pp. 4-13.)

B. PROCEDURAL HISTORY

1. Petitioners' Convictions

On March 20, 1996, a jury convicted Petitioners of the following crimes: Count 1 First Degree Murder of Jose Menendez with the special circumstance of lying in wait; Count 2 First

Degree Murder of Mary Louise Menendez with the special circumstance of lying in wait; the special circumstance of multiple murders true; Count 3 Conspiracy to Commit Murder. (Ex. 2.) On April 19, 1996, the trial court sentenced each Petitioner to the following: Count 1 life without the possibility of parole; Count 2 life without the possibility of parole; Count 3 was stayed pursuant to 654. (Ex. 3.)

2. Petitioners' Direct Appeals

Petitioners appealed the verdict on numerous grounds. (Ex. 7.) Significant to this Petition, their claims on appeal included: exclusion of imperfect self-defense instruction; exclusion of heat of passion instruction as to Kitty Menendez; exclusion of certain "source evidence;" and improper argument by the prosecutor. (Ex. 7.) In upholding Petitioners' convictions, the appellate court made the following findings regarding the aforementioned appellate claims germane to this Petition:

a. Petitioners Were Not Entitled to Imperfect Self-Defense Instruction

The California Court of Appeal upheld the trial court's decision not to instruct the jury on imperfect self-defense:

> We find no error in the trial court refusing to instruct on imperfect self-defense. Immediately prior to the shooting, the [Petitioners] left the area near the den when their parents went into the den and closed the doors behind them. They retrieved their shotguns from their hiding places, ran out of the house and met at Erik's car (which was parked near the front of the residence). Instead of driving away from the residence, they then loaded their shotguns with buckshot ammunition, went back into the house, returned to the den and shot and killed their unarmed parents while they were in the den watching television.
>
> Erik, also candidly testified, that the danger he thought existed "was in the future[,] when they came out of [the] room," and he knew that this parents could not shoot him and his brother through the walls of their home. In other words, there was not a danger of imminent harm because Erik and Lyle's parents could not kill them until they exited the den. Erik also testified that, on the day of the murders, his father never said that he was going to kill him.

(Ex. 7, pp. 81-82.)

The California Court of Appeal found that the exclusion of the imperfect self-defense instruction was strongly supported as it pertained to Kitty Menendez, stating:

> There is also another reason why the trial court would be justified in not giving the imperfect self-defense instruction as to Kitty. The

> testimony of several prosecution witnesses and Erik tend to show that Lyle fired the fatal shotgun blast into his mother's face and head, killing her after he and Erik had already shot her, and Lyle left the house went out to Erik's car, reloaded and reentered the residence, firing the fatal shots.

(Ex. 7, p. 86.)

The appellate court noted that in finding Petitioners guilty of conspiracy to commit murder and in finding true the two special circumstances, the jury had found that the killings were deliberate, premeditated, and effectuated by means of lying in wait. (Ex. 7, p. 87.)

b. Petitioners Were Not Entitled to Heat of Passion Instruction as to Kitty Menendez

The trial court only allowed the heat of passion instruction to be given for Erik Menendez as it pertained to the killing of Jose Menendez. The trial court did not allow the heat of passion instruction to be given for killing Kitty Menendez. Erik Menendez challenged this ruling.

On direct appeal, the California Court of Appeal stated the "evidence indicates that [Petitioners], after initially shooting their parents and realizing their mother was still alive, went out to Erik's car and reloaded Lyle's shotgun and went back into the residence to complete the act of murder." (Ex. 7, p. 110.) The appellate court noted that any error in not giving the instruction was harmless in view of the jury's rejection of finding voluntary manslaughter as to the killing of Jose Menendez and its finding of first-degree over second-degree murder as to Kitty Menendez. (*Ibid.*)

c. Exclusion of "Source Evidence" was Proper

The California Court of Appeal held that the trial court's exclusion of "source witnesses"[22] was proper, stating, "[t]he limitations of testimony did not hinder [petitioners'] presentation of their defense to the jury. In most cases, the proposed testimony would have just served to corroborate other testimony presented to the jury." (Ex. 7, p. 41.) The appellate court noted:

> The trial court allowed numerous source witnesses to testify on behalf of the defendants. The source witnesses were allowed to testify, in

[22] "The trial court characterized the defense "source witnesses" as individuals who had: 'observed certain things, either observed the interaction of the [Petitioners] with their parents or gave character evidence of relating to the parents, either by describing certain acts or behavior of the parents, even reference the parents' childhood or upbringing, things of that nature.'"
(Ex. 7, p. 40, fn. 18.)

> detail, about the relationship the [Petitioners] had with their parents. This testimony included incidents of physical and mental abuse by Jose and Kitty. The source witnesses were allowed to testify about Jose disciplining the [Petitioners] by sending them to their room and no one being allowed to go down the hallway near the bedroom when Jose was punishing the [Petitioners].
>
> The trial court stated the principal issue was the state of mind of the [Petitioners] at the time of the killings and the relevance the prior incidents may have had on the [Petitioners'] mental state at the time of the killings. The source witnesses were allowed to testify extensively concerning many areas in an effort to determine the state of mind of the [Petitioners] at the time of the killing. We find no abuse of discretion in the trial court's limitation or exclusion of some source witness testimony.

(*Ibid.*)

Despite this clear ruling from the appellate court and the fact that the excluded "source evidence" did not involve purported sexual abuse evidence, Petitioners reassert this argument in the instant Petition.

d. Prosecutor's Argument Denying Evidence of Sexual Abuse was Not Improper

The California Court of Appeal held that it was not prosecutorial misconduct nor improper for the prosecution to argue in closing argument that there was no convincing evidence that sexual abuse had occurred. Specifically, the California Court of Appeal noted:

The prosecutor argued: 'A GREAT DEAL OF EVIDENCE WAS PRESENTED CONCERNING THE ALLEGATIONS OF SEXUAL ABUSE, AND AS I INDICATED, THERE IS NO EVIDENCE WHATSOEVER THAT THE SEXUAL ABUSE EVER TOOK PLACE.' The prosecutor was simply commenting on the state of the evidence before the jury. This is permissible argument. The proffered testimony of [Petitioners] would not have established sexual abuse. (Ex. 7, p. 105.)

The appellate court added, "Here, the excluded evidence would not have established what [Petitioners] wanted to show, that they had sexually abused by their parents." (Ex. 7, p. 106.)

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3. Petitioners' Prior Habeas Petitions:

a. State Court Habeas Petition:

On October 5, 1998, Lyle Menendez filed a habeas corpus petition in the California Supreme Court. In the petition, he raised the following claims: (1) ineffective assistance of trial counsel for alleged failure to raise an objection; (2) unconstitutional requirement of Petitioner's testimony before he was permitted to admit allegedly relevant evidence; (3) ineffective assistance of trial counsel regarding the trial court's requirement Petitioner testify before the introduction of evidence of his mental state at the time of the killings; and (4) denial of Petitioner's right to testify. On March 31, 1999, the California Supreme Court denied the petition.[23]

On April 30, 1999, Erik Menendez filed a state habeas petition in Los Angeles Superior Court. That petition was also denied.[24]

b. Federal Court Habeas Petition:

On September 7, 2005, the Ninth Circuit Court of Appeal denied Petitioners' consolidated federal habeas petition in *Menendez v. Terhune* (9th Cir. 2005) 422 F.3d 1012. In the consolidated petition, Petitioners raised the following issues: (1) the trial court's admission of the tape-recorded therapy session between Petitioners and Dr. Oziel, a therapist ("the Oziel tapes"); (2) the trial court's denial of imperfect self-defense instruction; (3) the trial court's exclusion of testimony and the right to due process; (4) the trial court's exclusion of testimony and the Sixth Amendment right to present a defense; and (5) improper closing argument by the prosecution. (*Id.*, pp. 1028-1036)

1. Admission of the Oziel Tapes:

After killing their parents, Petitioners met with Dr. Oziel, and one of the conversations was recorded. In that recording, Lyle Menendez stated, "There was no way I was going to make a

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[23] Attached as Exhibit 8 is a copy of the habeas petition Lyle Menendez filed in the California Supreme Court on October 5, 1998, in case number S073864 and the ensuing denial order by the California Supreme Court.

[24] Respondent obtains this information from page 7 of the instant Petition. Respondent has been unable to obtain a copy of Erik Menendez's state habeas petition or the subsequent denial order.

decision to kill my mother without Erik's consent. I didn't even want to influence him in that issue. ***I just let him sleep on it for a couple of days***." (Ex. 6, p. 50919:23-27, emphasis added.) At trial, the prosecution argued to the jury that the Oziel tapes prove Petitioners' decisions to murder their parents were willful, premeditated, and deliberate and that this statement demonstrated that the murder was willful, deliberate, and premediated. The prosecution argued, "In that conversation with Dr. Oziel, they make it very clear that this was a crime that they premeditated and deliberated. And ***no abuse is mentioned***. No fear of attack by their parents." (Ex. 6, p. 50919:25-28, emphasis added.)

On federal habeas, Petitioners claimed that the admission of the Oziel tapes violated their due process rights. (Ex. 1.) The Ninth Circuit Court of Appeal disagreed, finding that the trial court did not violate due process in admitting this statement because its purpose was therapeutic, and it was not prohibited by attorney client privilege or made as part of Petitioners' defense. (Ex. 1, p. 1028.)

2. Denial of Imperfect Self-Defense Instruction:

After the trial court and the California Court of Appeal denied the claim, Petitioners, on federal habeas, reasserted their claim that the trial court's denial of the imperfect self-defense instruction violated California and federal law. The Ninth Circuit Court of Appeal court also rejected this claim.

The Ninth Circuit Court of Appeal found Petitioners could not establish imminence of the fear they had claimed: "The fear, no matter how great, cannot be of a prospective danger or even one that is in the near future. Rather, 'an imminent peril is one that, from appearances, must be instantly dealt with.'" (Ex. 1, p. 1028, citing to *In re Christian S.*, *supra*, 7 Cal.4th at p. 771.) The Ninth Circuit court reiterated the trial court's reasoning and the California Court of Appeal's affirmance of not instructing on imperfect self-defense:

> [T]he defense presented insufficient evidence under California law of a belief in imminent peril. Because Erik and Lyle left the house after the confrontation, went to the car, retrieved their shotguns, reloaded their guns with better ammunition, reentered the house, burst through the doors and began shooting their unarmed parents, the court concluded that there was no substantial evidence of a belief in imminent peril. The court placed special emphasis on Erik's testimony that Erik knew the danger to be in the future. Furthermore, the California Court of Appeal concluded that even if the trial court erred

> in failing to give the instruction, the omission was harmless because the jury necessarily resolved the question posed by the proposed instruction adversely to Petitioners....
>
> The state court carefully applied state law principles and factually similar state cases and determined that no instruction was available to Petitioners because they failed to provide a basis upon which the instruction could be given. Quite simply, that should be the final word on the subject.

(Ex. 1, p. 1029.)

The Ninth Circuit Court of Appeal ruled that Petitioners had failed to show that they had been in imminent peril and that prior abuse at the hands of their parents did not change the lack of imminent peril. (Ex. 1 at pp. 1029-1030.)

3. Exclusion of Testimony and the Right to Due Process:

Petitioners alleged that the trial court's exclusion of the source witnesses, whose testimony was to establish why Petitioners feared their parents, was improper and violated their right to due process. The Ninth Circuit Court of Appeal again disagreed, finding that the exclusion of the "source witnesses" was proper because Petitioners had failed to lay the necessary foundation for their actual belief of imminent danger. (Ex. 1, pp. 1030-1031.)

The Ninth Circuit Court of Appeal recounted the trial court's ruling that before the "source witnesses" could testify about why Petitioners had feared their parents, Petitioners had to lay a foundation for such testimony, which could only be accomplished if Petitioners testified about their actual belief of imminent danger. (Ex. 1, p. 1030.) The Ninth Circuit Court of Appeal agreed with the trial court: "Indeed, we, too, see no other competent way in which the foundation could have been laid." (*Id.*, pp. 1030-31.) The Ninth Circuit Court of Appeal quoted the trial court's explanation of its ruling:

> The issue, as I looked at it and look at it now, is the state of mind of the defendants at the time of the killing as to whether there was an actual belief of imminent danger of death or great bodily injury and a need to act. Obviously, if that actual belief is not presented to the jury, then the experts have nothing to corroborate...
>
> Since the relevance of the expert testimony is related to the state of mind of the defendants at the time of the killing, the purpose of the

> experts' testimony that they had -- that the defendants fit a certain diagnosis; that they are, whatever the expert says, a battered person -- they fit the -- or fit the diagnosis of a post-traumatic stress disorder, that is only to corroborate the defendants' testimony as to their mental state at the time of the crime....
>
> It's really irrelevant, and it would be totally irrelevant to any trial, that the defendants had been abused or that they fit a particular diagnosis of being abused. *That's totally irrelevant, unless it corroborates their testimony as to their mental state at the time of the crime. If it doesn't do that, then the fact that they happen to be abused or happen to fit a particular diagnosis is irrelevant....*
>
> And as I look at it, the foundation of the testimony -- of the evidence-- is the defendants' own testimony of that belief [of imminent danger]....

(Ex. 1, p. 1031, emphasis in original.)

The Ninth Circuit Court of Appeal, like the California Court of Appeal, found that the trial court had properly ruled, stating, "Only the defendants could testify to whether they believed the peril was imminent." (Ex. 1, p. 1032.) "Erik took the stand, but Lyle chose not to testify." (*Id.*, p. 1031.) The Ninth Circuit Court of Appeal held that the requirement Petitioners lay the proper foundation before their source witnesses could testify did not violate their due process rights. (*Ibid.*)

4. Exclusion of Testimony and the Sixth Amendment:

On federal habeas, Petitioners alleged that the trial court's exclusion of testimonial evidence violated their due process rights under the Fifth, Fourteenth, and Sixth Amendment because the excluded evidence would have explained why Petitioners had felt they had been in immediate danger on the night of the shooting. Specifically, Petitioners challenged the trial court's "exclusion as either cumulative or lacking foundation: (1) some evidence relating to specific instances of physical, psychological, and sexual abuse; and (2) some expert testimony that Petitioners suffered from Battered Person Syndrome." (Ex. 1, p. 1032.) In rejecting this claim, the Ninth Circuit Court of Appeal noted that "Petitioners' claim here is closely related to the previous two claims we have rejected." (*Ibid.*) The Ninth Circuit Court of Appeal stated the California Court of Appeal's conclusion "that the trial court did not abuse its discretion in excluding this evidence because the court had admitted extensive evidence of the history of Petitioners' abuse at the hands of the

parents." (*Ibid.*) The Ninth Circuit Court of Appeal remarked, "The very length of the defense case – more than two full months – belies an assertion that the court arbitrarily limited defense evidence." (*Ibid.*)

In finding it was not error to exclude this evidence, the Ninth Circuit Court of Appeal wrote:

> Erik testified about the alleged abuse in great detail for roughly seven full court days. In addition, Brian Anderson, a cousin of Lyle and Erik, testified about severe physical abuse that Petitioners suffered at the hands of Jose. Diane Vandermolen testified about physical and verbal abuse by both Jose and Kitty. Andy Cano, also a cousin, testified that Erik confided to him that Jose was molesting Erik. Cano testified also that Erik always had bruises on his body. Several witnesses testified that when Jose was alone with one of his sons in the bedroom, no one was allowed to go near the bedroom. Dr. Vicary testified that Erik suffered from an anxiety disorder that could affect his mental state. In addition, Dr. Wilson testified that Erik suffered from Battered Person's Syndrome, depression, and post-traumatic stress disorder. Given all of this testimony directly suggesting various forms of abuse as to both Erik and Lyle, the trial court excluded some of the other proffered testimony as cumulative. This decision survives scrutiny under *Crane*.
>
> We need not analyze this claim in any great depth, for even were we to conclude that the state court erred in its determination that the evidence was cumulative, such error would be harmless. As with the other excluded evidence we have discussed above, the proffered evidence would have served only to explain *why* Lyle and Erik might have actually feared their parents. But without any basis for support, and with the imperfect self-defense instruction unavailable, this evidence ultimately was irrelevant. Indeed, without the availability of imperfect self-defense, the proffered evidence would likely have served only to confuse and mislead the jury.

(Ex. 1, p. 1033. Emphasis in original.)

5. Improper Closing Arguments by the Prosecution:

Identical to the argument they now assert in the Petition in support of their instant habeas claims, on federal habeas, Petitioners argued that the prosecution made an improper closing argument in commenting that Jose Menendez had been a loving father and that there was no evidence of sexual abuse. (Ex. 1, p. 1033.) Lyle Menendez claimed that his due process had been denied because the prosecution had moved to excluded purported evidence regarding abuse

allegations and mental health. (Ex. 1, p. 1034.) Lyle Menendez additionally argued that the "prosecutor improperly argued that Jose [Menendez] was a 'patient man' and 'one who would not be abusing his sons." (*Id.*) Lyle Menendez alleged that the defense had been prevented from "presenting evidence to the contrary – that in fact, Jose [Menendez] was an abusive father, one who had mistreated his sons." (*Id.*)

The Ninth Circuit Court of Appeal rejected Petitioners' claim, stating that the defense had been allowed to "present *substantial evidence relating* to the allegations of abuse. Indeed, Erik testified for seven days about the various types of physical, mental, and sexual abuse he claimed that his father inflicted." (Ex. 1, p. 1034, emphasis added.) The Ninth Circuit Court of Appeal noted Erik Menendez had admitted on cross-examination that despite the years of purported abuse, there was *not a single witness* who could testify that they had ever seen Jose [Menendez] hit his sons, and Erik Menendez could *not produce a single witness* who had ever asked him about any bruises or welts that he allegedly had received from Jose Menendez. (*Ibid.* emphasis added.) The Ninth Circuit Court of Appeal highlighted the following excerpt of the prosecution's closing argument:

> I asked Erik Menendez: 'Bearing in mind you were so frightened of your father, he was always going to punish you for everything, what was the punishment for the burglaries?
>
> And he said 'No punishment.' No punishment for the burglaries. Ladies and gentlemen, Jose Menendez was not a punitive man. Jose Menendez was a man who forgave his sons time and time again, even for the most serious transgressions. He was a very patient man and as much as he was disappointed in his sons, he forgave them....
>
> Lyle Menendez admits –and I even questioned Erik Menendez about this while he was on the stand, and Erik Menendez doesn't deny the truthfulness of this assertion – that Jose Menendez cried when he heard about the Calabasas [burglary] incident, and Jose Menendez cried when he heard about his son's failure in Princeton....
>
> He said–Lyle Menendez says: "After the Calabasas issue [burglaries] he cried, and we were together. We were close. This was the first time he cried in front of me."
>
> And he later goes on to say: "He cried after the Calabasas issue, after I said that, you know, Erik and I were very sorry, and the whole deal— and I'm sorry for all the trouble that you were caused through this whole issue, and he cried and he felt – I think he cried a lot after the Princeton issue, and I came to him and I said this and that."

> Again, they want you to see Jose Menendez as a cold monster. Easy to make those claims, ladies and gentlemen. It's very easy, especially when you say, "Well, Mr. Conn, this happened behind closed doors, you see. That's the reason why I don't have any witnesses, Mr. Conn. It, all happened behind closed doors."
>
> But ladies and gentlemen, Jose Menendez was a man who wanted the best for his sons. Time was precious to him, yet he took time out of his own schedule to attend all of the sporting events of his sons, and he was a man who cried for his sons.

(*Id.*, pp. 1034-1035.)

The Ninth Circuit Court of Appeal found the prosecutor's argument was proper and was based on the evidence the jury had heard, that Jose Menendez was not abusive, contrary to what some of the witnesses had testified. (Ex. 1, p. 1035.)

Petitioners re-allege here what they unsuccessfully alleged in federal habeas, that the prosecutor's argument of no sexual abuse was inappropriate because Petitioners had been prevented from presenting evidence of sexual abuse to the jury. The Ninth Circuit Court of Appeal rejected this claim, finding no inappropriate argument or error in the trial court. (Ex. 1, pp. 1035-36.)

C. PETITIONERS' DOCUMENTED HISTORY OF LYING AND FABRICATING EVIDENCE

In analyzing the current "new evidence" habeas claims, it is critical to consider Petitioners' established history of lying and manufacturing evidence in the underlying case. Petitioners' prevarications and evidence fabrication started before the murders and continued through the trials.

1. Before the Murders:

Days before killing their parents, Petitioners purchased shotguns from a gun store over two hours away from their house and used a false identification and address when purchasing these guns.

Prior to killing their parents, Petitioner visited a gun store in Santa Monica. (Ex. 6, p. 43505:4-7.) After visiting that gun store, they drove over two hours to San Diego to buy two shotguns. (Ex. 6, p. 43510:20-22.) While purchasing the shotguns, Erik Menendez lied by stating his name was Donovan Goodreau and by providing Goodreau's identification and a fake address. As Erik Menendez testified on direct examination in the second trial:

Q WHEN YOU FILLED OUT THE FORMS [TO PURCHASE THE SHOTGUNS], DID YOU USE ANY PARTICULAR NAME FOR THIS PURCHASE?

A DONOVAN'S NAME.

Q AND DID YOU SIGN DONOVAN GOODREAU'S NAME?

A YES.

Q DID YOU USE AN ADDRESS ON THIS FORM?

A YES.

Q WHAT ADDRESS DID YOU USE?

A I DON'T REMEMBER THE PARTICULAR - - THE ADDRESS. I KNOW IT WAS AUGUST STREET. I HAD FORGOTTEN THE ADDRESS THAT I WAS SUPPOSED TO REMEMBER AND SO I JUST, ON THE SPUR OF THE MOMENT, USED THE NAME OF THE MONTH THAT WAS IN, THAT WAS AUGUST.

(Ex. 6, pp. 43529:10-43530:4.)

2. After the Murders:

Immediately after killing their parents, Petitioners engaged in a series of actions to dispose of evidence, fabricate alibi evidence, mislead investigators and lie to their family and friends about the murder of their parents.

First, after shooting their parents, Petitioners picked up the shotgun shells in a blatant attempt to hide evidence connecting them to the murders. Erik Menendez testified on direct examination in the second trial:

Q WHAT DID YOU DO?

A WE WENT INTO THE DEN. I REMEMBER MY BROTHER WENT INTO THE DEN TO GET HIS GUN, AND I REMEMBER WE WERE WALKING OUT OF THE FOYER, AND ONE OF US SAID TO PICK UP THE SHELLS.

Q DID YOU PICK UP SHELLS?

A YES.

Q WHY?

A JUST FLASHED – I REMEMBER IT FLASHING THROUGH MY MIND. I DON'T KNOW IF IT WAS AFTER MY BROTHER HAD SAID IT OR IF BECAUSE OF THAT I SAID IT, THERE MIGHT BE FINGERPRINTS ON THE SHELLS BECAUSE WE HAD HANDLED THEM. SO WE JUST DECIDED TO PICK THEM UP, SINCE THERE WAS NO ONE COMING TO THE HOUSE.

(Ex. 6, p. 43643:1-26.)

Next, Petitioners attempted to create an alibi. Leaving their dead parents in the den, Petitioners left to buy movie tickets to create an alibi for the time of the murder. They wanted to purchase tickets for a movie time of 8 p.m.—before the murders—but arrived at the theater too late and had to buy tickets for a movie starting at 10 p.m., the next available time. Erik Menendez testified to the following in the second trial:

Q FOLLOWING THE DEATH OF YOUR PARENTS, WHEN YOU WENT TO THE MOVIES, YOU ACTUALLY PURCHASED A TICKET, DID YOU NOT, FOR - -TO GET INSIDE THAT WOULD HAVE ALLOWED YOU TO GET INSIDE THE MOVIE THEATER?

A YES.

Q AND THE TICKET THAT YOU RECEIVED WAS TIME-STAMPED FOR THE 10:00 SHOW; IS THAT CORRECT?

A YES

Q YOU WANTED ONE FOR THE 8:00 SHOW, CORRECT?

A WE TRIED TO GET ONE. WE COULDN'T GET ONE.

(Ex. 6, pp. 45689:17- 45690:4.)

After purchasing the movie tickets, Petitioners continued to deliberately hide and destroy evidence. They drove from the movie theater up Coldwater Canyon toward Mulholland Drive to hide the shotguns. (Ex. 6, pp. 43658:25-43659:11.) During his direct examination in the second trial, Erik Menendez testified about the lengths he went to conceal the murder weapons:

Q YOU GOT OUT OF THE CAR?

A YES.

Q AND YOU GOT THE SHOTGUNS FROM THE BACK?

A RIGHT.

Q DID YOU TAKE THE SHOTGUN SHELLS OUT OF THE BACK OF YOUR CAR?

A NO.

Q WHY NOT?

A THERE WERE SHELLS ALL OVER THE CAR AT THIS POINT, AND I JUST GRABBED THE GUNS. I DON'T KNOW WHY ANYMORE.

Q YOU SAID YOU HAD TO GO DOWN A STEEP BANK?

A IT WAS A STEEP BANK. I REMEMBER FALLING AT ONE POINT AND SLIDING DOWN. AT ONE POINT I'D GOTTEN SO FAR, I JUST DECIDED TO STOP AND PUT THE GUNS THERE AND RUN BACK UP.

Q IN WHAT MANNER DID YOU LEAVE THOSE SHOTGUNS?

A I HAD PUT THEM NEXT TO A BUSH AND TRIED TO BRUSH SOMETHING OVER THEM, BUT THEY WERE EXPOSED. I REMEMBER SEEING THE LIGHTS WAY UP AT THE TIME OF THE HILL AT THE TOP.

(Ex. 6, pp. 43659:15-43660:11.)

Once Petitioners had hidden the shotguns, they went to a gas station to dispose of additional evidence. Erik Menendez testified to the following in the second trial:

Q WHY DID YOU STOP AT A GAS STATION?

A TO GET RID OF EVERYTHING IN THE CAR.

Q AND DID YOU STOP AT A GAS STATION?

A YES.

Q WHAT DID YOU DO AT THE GAS STATION?

A I REMEMBER THERE WAS A CAR WASH AT THE GAS STATION. WE PARKED NEAR THE DUMPSTERS AND QUICKLY GOT OUT OF THE CAR AND TRIED TO FIND EVERYTHING THAT WAS IN THE CAR. IT WAS DARK. I REMEMBER SEEING RED SPATTERS ON MY PANTS. I TOOK THEM OFF.

Q BLOOD SPLATTERS?

A YES.

Q WHERE WERE THEY?

A ON MY PANTS.

(Ex. 6, p. 43661:10-24.)

After disposing of all the evidence they could, Petitioners continued to fabricate an alibi. Specifically, Petitioners tried to meet a friend, Perry Berman, to be able to say they had been with him at the time of the murders. Petitioners attempted to schedule a meet time with Mr. Berman before the murders—one of the overt acts alleged in the conspiracy to commit murder that the jury found true. (Ex. 6, p. 50939:13-28.) While testifying in the second trial, Erik Menendez admitted on cross examination:

Q AFTER YOU SHOT YOUR PARENTS TO DEATH YOU DECIDED TO MAKE CONTACT WITH PERRY BERMAN; ISN'T THAT CORRECT?

A YES.

Q WHAT WAS THE PURPOSE OF MAKING CONTACT WITH PERRY BERMAN?

A TO TRY TO HAVE SOMEPLACE WHERE WE COULD SAY WE WERE WHEN THE POLICE ASKED US.

Q AND YOU WERE GOING TO SPEND THE EVENING SITTING DOWN AT A RESTAURANT SOMEWHERE WITH PERRY BERMAN, IS THAT CORRECT?

A THAT WAS THE IDEA. IT SIMPLY - - WE WEREN'T IN ANY EMOTIONAL CONDITION TO DO THAT.

Q AT ONE POINT YOU FELT THAT YOU WERE IN AN EMOTIONAL CONDITION TO CARRY THAT OFF, DIDN'T YOU?

A YES.

Q AND BECAUSE YOU FELT THAT YOU WERE IN AN EMOTIONAL CONDITION TO CARRY THAT OFF, YOU AND LYLE AGREED THAT THAT'S WHAT SHOULD HAPPEN; HE SHOULD CONTACT PERRY

BERMAN AND TRY TO GET TOGETHER WITH HIM; IS THAT CORRECT?

A LYLE DIDN'T DISCUSS IT WITH ME. HE WENT IN TO SEE IF PERRY WAS STILL AT THE CIVIC CENTER. HE DIDN'T FIND HIM, SO HE CALLED PERRY ON HIS OWN, TRYING TO GET PERRY TO MEET WITH US SO WE COULD AT LEAST SAY WE MET WITH PERRY THAT NIGHT.

Q UH-HUH. AND IT WAS YOUR UNDERSTANDING WHEN YOU WENT IN TO MEET WITH PERRY BERMAN THAT YOU WERE GOING TO SIT DOWN SOMEWHERE WITH PERRY BERMAN AND HE WAS GOING TO BE YOUR ALIBI WITNESS; IS THAT CORRECT?

A I DON'T KNOW WE WERE GOING TO SIT DOWN WITH HIM OR JUST BE THERE. I THINK THEY WERE STAND-UP TABLES WHERE YOU WALKED AROUND. I DIDN'T GO IN, SO I COULD ONLY SEE THROUGH THE FENCE. CERTAINLY, WE WERE GOING TO TRY TO MEET UP WITH PERRY.

(Ex. 6, pp. 44017:2- 44018:11.)

Contrary to Erik Menendez's testimony, Mr. Berman testified that the plan to meet Petitioners was made hours before the murder, corroborating Petitioners' alibi planning preceded the murder. During the second trial, Mr. Berman testified to the following conversations that happened on the day of the murder:

Q DID YOU RECEIVE A CALL FROM THE DEFENDANT, LYLE MENENDEZ, AFTER YOU SPOKE TO HIS FATHER?

A YES.

Q AND AT ABOUT WHAT TIME DID YOU RECEIVE THIS CALL?

A I BELIEVE IT WAS AROUND FIVE, FIVE TO SIX P.M.

Q AND AT THAT TIME DID YOU A CONVERSATION WITH THE DEFENDANT?

A YES.

Q AND WHAT DID YOU DISCUSS?

A ABOUT GETTING TOGETHER THAT EVENING. AND I TOLD HIM THAT I ALREADY HAD PLANS TO GO TO THE "TASTE OF L.A.,"

WHICH IS A FOOD FESTIVAL DOWN AT THE SANTA MONICA CIVIC AUDITORIUM. AND HE SAID HE ALREADY HAD PLANS WITH HIS BROTHER TO GO TO SEE "BATMAN" IN I BELIEVE IT'S CENTURY CITY.

Q DID HE, MEANING THE DEFENDANT, LYLE MENENDEZ, WAS HE THE FIRST ONE TO SUGGEST GETTING TOGETHER?

A YES.

Q AND AFTER HE TOLD YOU THAT HE HAD PLANS TO SEE "BATMAN" AND YOU HAD PLANS TO GO TO THE "TASTE OF L.A.," WHAT DID YOU DISCUSS DOING, IF ANYTHING?

A ABOUT POSSIBLY GETTING TOGETHER LATER THAT EVENING. HE WAS GOING TO GO TO SEE THE MOVIE AND THEN WHEN IT GOT OUT, AROUND 9:00, 9:30, HE WOULD HEAD DOWN TO THE "TASTE OF L.A."

(Ex. 6, pp. 36882:24 -36883:25.)

Q SO AFTER 10:15 ROLLED AROUND AND YOU COULD NOT FIND EITHER DEFENDANT YOU WENT HOME, DID YOU HEAR FROM THEM?

A YES.

Q AND DID YOU HEAR FROM ONE OR BOTH?

A ONE.

Q WHICH ONE DID YOU HEAR FROM?

A LYLE ...

Q AND WHAT – WHAT TIMES WERE YOU CALLED BY THE DEFENDANT, LYLE MENENDEZ?

A 11:07 APPROXIMATELY AND 11:15 P.M.

(Ex. 6, p. 36886:4-6.)

Mr. Berman testified to the tone of Lyle Menendez's request to meet that night: "HE WAS VERY PERSISTENT AND HE WANTED TO SEE ME THAT EVENING." (Ex. 6, p. 36887:21-23.) In response, Mr. Berman agreed to meet Petitioners at the Cheesecake Factory in 20 minutes. (Ex. 6, p. 36889:15-

18.) After receiving this call, Mr. Berman received a second call from Lyle Menendez asking Mr. Berman to meet Petitioners at their home. (*Ibid.*) Mr. Berman stated he would not do that. (Ex. 6, p. 36890:6-26.)

Mr. Berman did not know at the time Lyle Menendez wanted him to come to the house so he could serve as a witness for Petitioners when they claimed to have discovered their parents' dead bodies. Erik Menendez testified in the second trial that this was Lyle Menendez's plan, stating on cross examination:

> Q ARE YOU SAYING THAT THE PLAN TO HAVE PERRY BERMAN COME TO YOUR HOUSE AND BE PRESENT WHEN THE BODIES WERE DISCOVERED WAS A PLAN OF LYLE MENENDEZ AND YOU HAD NOTHING TO DO WITH THAT PLAN?
>
> A I DON'T KNOW THE CONVERSATION THAT LYLE HAD WITH PERRY. I WASN'T THERE. I KNOW THAT HE ASKED PERRY TO MEET HIM AT THE HOUSE; AT LEAST I THINK THAT'S WHAT HE ASKED HIM. PERRY SAID NO. LET'S MEET AT THE CHEESECAKE FACTORY. SO LYLE SAID OKAY, WE'LL BE THERE.
>
> Q SO YOU'RE SAYING YOU HAD NOTHING TO DO WITH ANY PLAN THAT LYLE MENENDEZ HAD TO MEET PERRY BERMAN AT YOUR HOME; IS THAT CORRECT?
>
> A RIGHT.

(Ex. 6, p. 44021:1-14.)

In the few hours between murdering their parents and making their crying-and-screaming 911 call, Petitioners: 1) removed all shotgun shells from the crime scene; 2) drove to a movie theater and purchased movie tickets; 3) drove to Mulholland Drive and descended the side of a mountain to hide two shotguns they had used to kill their parents; 4) drove to a gas station and discarded their bloody clothes and other evidence; 5) drove to Santa Monica to meet Mr. Berman; and 6) called Mr. Berman twice to try and meet him to create an alibi. When cross examined about their pre-911 call actions, Erik Menendez testified:

> Q: WELL, WEREN'T YOU TRYING TO TRICK THE POLICE THAT EVENING AND CAUSE THEM TO CONCLUDE THAT YOU HAD NOTHING TO DO WITH THE KILLING?
>
> A CERTAINLY BY THAT TIME I DID NOT WANT THEM TO KNOW.

Q AND TO ACHIEVE THAT GOAL, YOU WENT THROUGH CONSIDERABLE EFFORTS PRIOR TO CALLING THE POLICE TO INSURE THAT YOU WOULD NOT BE SUSPECTS; IS THAT CORRECT?...

A YOU MEAN TRYING TO GET TICKETS AND GETTING RID OF THE GUNS AND SO ON?

Q CORRECT.

A YES.

Q AND THAT IT WAS ALL DESIGNED TO FOOL THE POLICE INTO THINKING THAT YOU HAD NOTHING TO DO WITH THE CRIME; ISN'T THAT CORRECT?

A AT THIS POINT WE WANTED THEM NOT TO THINK WE HAD ANYTHING TO DO WITH IT, YES.

(Ex. 6, pp. 44179:28- 44180:19.)

3. After the 911 Call:

After the discovery that Jose and Kitty Menendez had been murdered, Petitioners continued lying to law enforcement, family, and friends. Erik Menendez testified to the following on cross examination in the second trial:

Q DID YOU LIE ABOUT YOUR INVOLVEMENT IN THIS INCIDENT, MR. MENENDEZ?

A YES.

Q AND YOU LIED FROM AUGUST THE 20TH OF 1989 UP UNTIL THE TIME THAT YOU WERE ARRESTED, IS THAT CORRECT?

A WHENEVER ANYONE BROUGHT UP THE DEATH OF MY PARENTS I WAS NOT GOING TO TELL THEM THAT I WAS INVOLVED.

Q NOT ONLY WOULDN'T YOU TELL THEM THAT YOU WERE NOT INVOLVED, BUT - - NOT ONLY WOULDN'T YOU TELL THEM THAT YOU WEREN'T INVOLVED, YOU TOLD THEM YOU WERE NOT INVOLVED, IS THAT CORRECT?

A RIGHT.

Q AND YOU DID THAT TO AVOID PUNISHMENT AND RESPONSIBILITY, IS THAT CORRECT?

A YES.

Q BY MR. CONN: AND YOU NOT ONLY LIED ON YOUR OWN, BUT YOU ALSO CONSPIRED WITH YOUR BROTHER LYLE MENENDEZ TO LIE AND DECEIVE LAW ENFORCEMENT AUTHORITIES, IS THAT CORRECT?

A YOU MEAN TO TELL THE POLICE THAT WE HAD NOT DONE IT? YES.

Q: AND YOUR LIES CONCERNING THIS INCIDENT BEGAN BEFORE THE 911 CALL, IS THAT CORRECT?

A ON THE WAY DRIVING HOME TO CALL 911.

Q THAT'S WHEN YOU AND YOUR BROTHER BEGAN TO CONSPIRE TO DECEIVE THE POLICE; IS THAT CORRECT?

A YES.

Q AND YOU WORKED OUT A SERIES OF LIES THAT YOU WERE GOING TO TELL THE POLICE ON THE WAY HOME, CORRECT?

A YES.

Q AND YOU REACHED AN AGREEMENT TO TELL THOSE LIES SO THAT BOTH YOU AND YOUR BROTHER WOULD BE HELD RESPONSIBLE FOR THIS CRIME; IS THAT CORRECT?

A YES.

Q AND YOU PURSUED THOSE LIES WITH SERGEANT EDMONDS THAT DAY; IS THAT CORRECT?

A YES.

(Ex. 6, pp. 43999:14-44000:28.)

Q AND YOU UNDERSTOOD THAT DETECTIVE EDMONDS WAS SEEKING INFORMATION THAT WOULD HELP THEM SOLVE THIS CRIME; IS THAT CORRECT?

A YES.

Q AND YOU HAD NO INTENTION OF PROVIDING THEM WITH ANY INFORMATION THAT WOULD HELP THEM DO THAT; IS THAT CORRECT?

A THAT'S RIGHT.

Q AND HE SPECIFICALLY ASKED YOU: "CAN YOU THINK OF ANYTHING ELSE THAT'S GOING TO HELP US?" AND YOU SAID "I CAN'T HELP YOU. I DON'T KNOW."

IS THAT CORRECT.

A RIGHT.

Q AND THAT WAS A LIE WHEN YOU SAID "I DON'T KNOW," WASN'T IT?

A IT WAS.

(Ex. 6, pp. 44006:13-44007:1.)

Q AND THE LIES CONTINUED WHEN YOU SPOKE TO DETECTIVE ZOELLER IN SEPTEMBER OF 1989; IS THAT CORRECT?

A YES.

Q IN FACT, YOU LIED TO THE POLICE AT EVERY CHANCE – EVERY OPPORTUNITY YOU HAD, DIDN'T YOU?

A WHEN IT CONCERNED ME BEING RESPONSIBLE FOR THIS I DID.

(Ex. 6, p. 44008:15- 22.)

Q SO YOU TOLD DETECTIVE ZOELLER A LOT OF LIES ON SEPTEMBER 17TH, DIDN'T YOU?

A. YES.

Q YOU LIED TO OTHER PEOPLE AS WELL, DIDN'T YOU?

A MOST SPECIFICALLY MY FAMILY.

Q WHO DID YOU LIE TO IN YOUR FAMILY?

A I DIDN'T WANT TO TELL MY FAMILY THAT I HAD—I WAS RESPONSIBLE. I DON'T THINK THEY EVER ASKED ME DID YOU DO THIS.

Q WHAT YOU TOLD THEM WAS YOU CAME HOME AND YOU FOUND YOUR PARENTS IN THAT CONDITION; IS THAT CORRECT?

A RIGHT.

Q AND THAT WAS A LIE?

A YES.

Q WHO DID YOU TELL THAT LIE TO?

A I DON'T BELIEVE MANY PEOPLE IN MY FAMILY ASKED ME ABOUT IT. BUT WHOEVER DID, I WOULD HAVE TOLD THEM THAT.

Q YOU LED EVERYONE IN YOUR FAMILY TO BELIEVE THAT YOU WERE NOT RESPONSIBLE; IS THAT CORRECT?

A RIGHT.

Q: AND YOU LIED TO FRIENDS AS WELL?

A WHOEVER ASKED ME ABOUT THAT NIGHT.

Q WERE YOU INTERVIEWED BY REPORTERS?

A. JOHN JOHNSON, RON SOBLE.

Q AND YOU LIED TO THEM AS WELL, DIDN'T YOU?

A YES.

Q DID YOU LIE TO PEOPLE IN YOUR FATHER'S BUSINESS?

A WHOEVER WOULD ASK ME ABOUT THAT NIGHT I WOULD EITHER SAY I DON'T WANT TO TALK ABOUT IT OR NOT TELL THEM THAT I WAS RESPONSIBLE.

Q AND YOU CALLED MARK HEFFERNAN THAT NIGHT BECAUSE HE WAS A CLOSE FRIEND OF YOURS; IS THAT CORRECT?

A I DON'T KNOW IF HE WAS A CLOSE FRIEND, BUT HE WAS A FRIEND WHO WAS GOOD GUY.

Q AND YOU LIED TO HIM TOO, DIDN'T YOU?

A. YES.

(Ex. 6, pp. 44013:10-44014:24.)

Lyle Menendez also testified during the first trial that he had lied to the police, family, friends and the media, testifying:

Q OKAY, NOW, IN ADDITION TO LYING TO THE OFFICERS WHO CAME TO THE SCENE, YOU THEN WENT TO THE POLICE DEPARTMENT FOR AN INTERVIEW WITH SERGEANT EDMONDS. DO YOU REMEMBER THAT?

A YES.

Q AND WHEN YOU SAW SERGEANT EDMONDS YOU LIED TO HIM TOO, CORRECT?

A YES.

Q NOW, AT THE TIME THAT THE POLICE ARRIVED AT YOUR PARENTS' HOME, SHORTLY THEREAFTER, A FAMILY FRIEND OR A FRIEND OF YOURS AND YOUR BROTHER'S ARRIVED. AND THAT WAS MARK HEFFERNAN, CORRECT?

A SHORTLY AFTER - - AT THE HOUSE, YES.

Q AND HE ACCOMPANIED YOU TO THE POLICE DEPARTMENT; IS THAT CORRECT? OR HE WENT IN A SEPARATE CAR?

A RIGHT.

Q AND DID YOU LIE TO HIM TOO?

A IN THE SENSE THAT WE DIDN'T TELL HIM WHAT HAPPENED, YES.

Q SO YOU AGAIN, TO HIM, PORTRAYED YOURSELF AS HAVING BEEN A WITNESS AND NOT A SUSPECT IN THIS CRIME, CORRECT?

A RIGHT.

Q ALL RIGHT. NOW, WHO ELSE DID YOU LIE TO ABOUT THIS? DID YOU LIE TO YOUR FAMILY ABOUT IT?

A FOR A LONG TIME.

(Ex. 5, pp. 14795:6 -14796:5.)

Q IN ADDITION, THEN, TO LYING TO YOUR FAMILY, YOU ALSO LIED TO YOUR FATHER'S BUSINESS ASSOCIATES ABOUT YOUR PARTICIPATION IN HIS MURDER, CORRECT?

A RIGHT.

Q AND YOU ALSO WERE INTERVIEWED BY NEWSPAPER REPORTERS, CORRECT?

A I BELIEVE SO. YES.

(Ex. 5, p. 14799:2-5.)

Lyle Menendez also lied to the media, as he testified to on cross examination in the first trial:

Q WERE THE TWO REPORTERS TOGETHER WHEN YOU INTERVIEWED WITH THEM? ARE YOU TALKING ABOUT TWO SEPARATE OCCASIONS?

A OH. YOU'RE RIGHT. TWO SEPARATE OCCASIONS. AND THERE WAS ONE INTERVIEW, I BELIEVE, WITH TWO PEOPLE.

Q DO YOU REMEMBER TELLING ONE OF THOSE REPORTERS THE FOLLOWING:

"FINDING OUT WHO IT IS, ERIK AND I ARE PROBABLY NOT GOING TO BE ABLE TO DO ANYTHING ABOUT IT. TO FIND OUT WHO IT IS AND NOT BE ABLE TO DO ANYTHING IS PROBABLY WORSE THAN NOT KNOWING. SO IT'S A HARD THING FOR ERIK AND I GO TO DECIDE WHETHER OR NOT WE WANT IT SOLVED."

DO YOU REMEMBER SAYING SOMETHING TO THAT EFFECT TO THE REPORTERS?

A I PROBABLY DID.

(Ex. 5, p. 14810:2-20.)

In the first trial, Lyle Menendez admitted that the purpose of the interview was to say that he did not want the investigation to continue. (Ex. 5, pp. 14812:6-14813:6.)

4. Post-Arrest Fabrication of Evidence:

After Lyle Menendez was arrested, he still dated Jamie Pisarcik. During his incarceration and before he ever claimed to have been molested, he asked Jamie Pisarcik, among other things, if she would find criminal cases for him, particularly cases where defendants were exonerated for killing their parents. During the first trial, Ms. Pisarcik testified:

> Q AND DID YOU EVER GO TO SANTA MONICA, ANY COURT PROCEEDING THAT LYLE MENENDEZ ATTENDED DURING THE SUMMER OF 1990?
>
> A YES.
>
> Q AND DID YOU GO TO COURT TO SUPPORT HIM DURING THAT PERIOD OF TIME?
>
> A YES, I DID.
>
> Q WHAT WAS THE NATURE OF THE CASE – WELL, LET ME ASK YOU THIS: DID YOU EVER READ ANY OF THE CASES THAT LYLE MENENDEZ ASKED YOU TO LOOK UP?
>
> A WELL, I READ PARTS OF THEM, YES.
>
> Q AND DID YOU GET A FEEL FOR WHAT KIND OF CASES YOU WERE LOOKING AT?
>
> A YES.
>
> Q COULD YOU DESCRIBE THE NATURE OF THE CASES THAT YOU WERE ASKED TO LOOK UP AND XEROXING FOR LYLE MENENDEZ?
>
> A THE CASES WERE SITUATED WHERE CHILDREN HAD GOTTEN OFF AFTER KILLING THEIR PARENTS.
>
> Q WERE THERE ANY OTHER KIND OF CASES, ANY OTHER SUBJECT MATTER OF A CRIMINAL NATURE, THAT WAS INVOLVED IN THESE CASES YOU WERE ASKED TO LOOK UP?
>
> A NOT THAT I RECALL.

Q ANYTHING ABOUT CHILD MOLESTING?

A I BELIEVE SO – YES. I MEAN, THE CASES WERE, YOU KNOW, CHILD MOLESTATION AND, YOU KNOW, CHILDREN HAD KILLED THEIR PARENTS AND GOTTEN OFF.

(Ex. 5, pp. 22267:10-22268:8.)

As detailed *post*, Mr. Cano did not disclose to anyone that Erik Menendez had told him he had been molested until 1991. Mr. Cano's disclosure *postdated* Lyle Menendez's research of cases involving people who had been acquitted for murdering their parents after claiming the murders were the respective results of sexual abuse.

Months *after* Ms. Pisarcik provided him with the cases, Lyle Menendez disclosed the alleged molestation and confessed to the murders of his parents. During the first trial, Ms. Pisarcik testified to the following:

Q WHAT DID YOU ASK HIM?

A I, AT THE TIME, WANTED TO KNOW THE TRUTH.

Q AND WHAT HAPPENED?

A AT THAT TIME LYLE HELD UP A LETTER, BECAUSE HE DID NOT WANT TO DISCUSS THIS OVER THE PHONE SYSTEM THAT WAS THERE. SO HE HELD UP A LETTER AND IT WAS— JUST DESCRIBED THAT HE AND ERIK HAD KILLED THEIR PARENTS....

Q COULD YOU TELL ME ESSENTIALLY WHAT THE LETTER SAID THAT YOU READ THAT LYLE MENENDEZ HELD UP FOR YOUR THAT DAY?

A THE LETTER JUST SAID THAT HE WAS VERY SORRY THAT HE HAD HAD TO LIE TO ME FOR SO LONG AND—BUT THAT THE TRUTH WAS THAT HE HAD KILLED HIS PARENTS, HE AND ERIK; AND THAT THE REASON WAS THAT ERIK HAD BEEN ABUSED BY HIS FATHER AND LYLE HAD BEEN ABUSED BY HIS MOTHER.

Q AND WAS IT AT THAT POINT THAT YOU STOPPED READING, OR WAS IT AT A DIFFERENT POINT?

A THAT WAS WHEN I STOPPED READING.

Q AND WHEN YOU STOPPED READING, DID YOU SAY ANYTHING TO HIM?

A YES.

Q WHAT DID YOU SAY?

A I SAID: "I DON'T BELIEVE YOU."

(Ex. 5, pp. 22270:22 -22272:27.)

5. Attempt to Fabricate that Jose Menendez Had Raped Jamie Pisarcik

Before claiming their parents had sexually abused them, Lyle Menendez tried to fabricate evidence that Jose Menendez had raped his girlfriend, Jamie Pisarcik. This evidence was not presented to Erik Menendez's jury in the first trial. In the second trial, Ms. Pisarcik testified that she had visited Lyle Menendez in custody in 1990 and talked to him about his defense. In that conversation, Lyle Menendez told her he wanted her to testify about his father:

A IN THIS CONVERSATION LYLE HAD ASKED ME IF I WOULD SAY THAT HIS FATHER HAD DONE WHAT WAS DONE TO A CHARACTER IN THE MOVIE, AND THE MOVIE WAS CALLED "AT CLOSE RANGE." AND HE ASKED ME TO LIE AND SAY THAT HIS FATHER HAD DONE THAT TO ME.

Q NOW WERE YOU FAMILIAR WITH THE MOVIE "AT CLOSE RANGE"?

A YES. LYLE AND I HAD SEEN IT TOGETHER.

Q AND WHEN YOU SAID A SCENE, DID HE CALL YOUR ATTENTION TO THIS PARTICULAR SCENE?

A YES, HE DID.

Q AND COULD YOU DESCRIBE THIS SCENE.

A THE SCENE WAS ONE IN THAT THE FATHER OF THE MAIN CHARACTER AND THE GIRLFRIEND OF THE MAIN CHARACTER WERE IN A ROOM TOGETHER AND THE FATHER HAD GIVEN THE GIRL A PILL, A DRUG, AND SHE WAS A LITTLE GROGGY. AND THE FATHER HAD ASKED HER NOT TO SEE THE SON ANYMORE. AND SHE SAID THAT SHOULD COULD NO—SHE COULDN'T DO THAT

BECAUSE SHE LOVED THIS CHARACTER AND THEN SHE PROCEEDED TO TRY TO LEAVE....

A AND SHE HAD PROCEEDED TO TRY TO LEAVE AND THE FATHER CHARACTER WOULD NOT LET HER LEAVE THE ROOM.
AND THEN WHAT HAPPENED WAS THE FATHER KIND OF LOOKED AT HER VERY STRANGELY AND SHE SAID NO. AND THEN THE FATHER SAID, I'M NOT ASKING YOU AND THEN HE PUSHED HER DOWN ON THE BED AND PROCEEDED TO RAPE HER.

Q AND WHEN LYLE MENENDEZ ASKED YOU TO SAY THAT HIS FATHER HAD DONE WHAT THE CHARACTER IN THIS MOVIE HAD DONE IN THIS SCENE HOW DID YOU RESPOND.

A WELL, I—IT HAD BEEN ABOUT A YEAR, I GUESS, MAYBE A LITTLE BIT LONGER, SINCE I HAD SEEN THE MOVIE. BUT I KNEW EXACTLY WHAT LYLE WAS TALKING ABOUT. AND I JUST BASICALLY SAID, I CAN'T BELIEVE YOU'RE ASKING ME TO DO THIS, AND IT'S A LIE AND NOTHING LIKE THIS EVER HAPPENED; THAT YOUR FATHER WOULD NEVER DO THAT TO ME, NOR DID HE.

Q AND HOW DID THE DEFENDANT RESPOND WHEN YOU SAID THAT.

A HE SAID THAT – THAT I HAD TO DO IT BECAUSE A LARGE SUM OF MONEY WAS GOING TO BE PLACED IN MY BANK ACCOUNT, AND THAT I HAD TO DO IT. AND I SAID THE MINUTE A CENT IS PUT INTO MY BANK ACCOUNT I'M GOING RIGHT TO THE POLICE WITH THIS.

(Ex. 6, pp. 39280:14; 39282:8.)

6. Attempt to Fabricate Gun Evidence:

An astonishing piece of evidence came to light *after the first trial*: the discovery of a letter Lyle Menendez had written to Amir ("Brian") Eslaminia ("Eslaminia Letter") asking Mr. Eslaminia to *fabricate evidence* and conspire to *commit perjury* for Petitioners.[25] Mr. Eslaminia received the Eslaminia Letter prior to the first trial on July 9, 1991, but did not testify until the second trial after the prosecution discovered the letter. (Ex. 6, p. 38864:17-18.) Mr. Eslaminia had been Erik

[25] Attached as Exhibit 9 is a copy of the Eslaminia Letter. Respondent notes redactions contained therein are in the original.

Menendez's classmate and had visited Petitioners while they were in custody on the underlying case. Mr. Eslaminia also testified he had conversations with Petitioners wherein they had discussed what they thought he could do to help them with the case. (Ex. 6, p. 38866:24-28.)

In the Eslaminia Letter, Lyle Menendez concocted a story he wanted Mr. Eslaminia to testify to at trial to corroborate the telling of the same false story that Lyle Menendez would testify to when he took the stand. Lyle Menendez asked Mr. Eslaminia to testify that Mr. Eslaminia had given Erik Menendez a gun prior to the killing of Kitty and Jose Menendez. Lyle Menendez offered to provide Mr. Eslaminia with an "untraceable [sic] handgun" to corroborate the story if he didn't have a gun himself. (Ex. 9.) Additionally, Lyle Menendez told Mr. Eslaminia to falsely portray Jose Menendez by testifying to a made-up statement about a father killing a son—taken from a scene in the movie "At Close Range"—that Mr. Eslaminia would attribute to Jose Menendez. The Eslaminia Letter also instructed Mr. Eslaminia to testify about other incidents involving Petitioners' case—specifically, that Erik Menendez had told him that Jose Menendez had taken them out of the will. Finally, the Eslaminia Letter instructed Mr. Eslaminia on how to destroy the Eslaminia Letter after reading it.

(Ex. 9.)

7. Fabricating Evidence During Trial:

After the first trial, the prosecution discovered Lyle Menendez had spoken with a reporter, Norma Novelli ("Novelli"), during the first trial and that the conversations had been recorded.[26] In one conversation, Lyle Menendez discussed his plan to discredit Dr. Oziel because Petitioners had confessed to Dr. Oziel that they had murdered their parents: Lyle Mendez would fabricate evidence that Dr. Oziel was attempting to blackmail Petitioners. Lyle Menendez told Novelli:

> L. I mean, his tapes, supposedly, like he says, a week later Right. But, any case, my thinking is that to - - to tell a story, talk about him coming - -
>
> N. Uh-huh.

[26] Attached as Exhibit 10 is a transcript of one entire conversation between reporter Norma Novelli and Lyle Menendez.

L. – see, and us having a meeting of some sort on which he basically says, you know, I have this tape, maybe plays the whole tape or a portion of it – And—and it's a blackmail meeting. You know what I'm saying?

N. Yeah, right.

L. and –'cause I'm going to have to make something up to show this guy's motive because sometimes people can lie too convincingly….

(Ex. 10, p. 5.)

L. Or—or this is—or maybe blackmail, he wants money. You know, I can't figure out which it is, maybe a combination or something like that.

N. Yeah. Okay.

L. And how the meeting would take place and then this and that, and the things that would be said because I'll have to recount all that….

L. What I may then do is use a witness that'll say, yeah, Lyle said he had to go to this meeting with a psych at this restaurant.

N. Uh-huh.

L. He came back and was real frazzled and everything. Something like that might be good, you know what I mean?

N. Yeah. Okay.

L. That gives me a little more time to set that up because then I don't need to know by Monday, I don't need to know 'till I testify.

(Ex. 10, p. 10.)

In this recording, Lyle Menendez articulated his plan to perjure himself and potentially have another witness provide perjured testimony to support his false blackmail claim against Dr. Oziel.

Ultimately, Lyle Menendez tried to discredit Dr. Oziel during the first trial by claiming Dr. Oziel had a financial motive to lie and Petitioners were Dr. Oziel's hostages because of their confession tapes. Lyle Menendez testified to the following:

> Q AND WAS IT YOUR FEELING THAT IF HE CAME TO YOU WITH SOME SUGGESTIONS ABOUT HOW TO INVEST THE MONEY, THAT YOU'D GO ALONG WITH HIM?
>
> A WELL, I DIDN'T FEEL WE HAD A LOT OF CHOICE ABOUT GOING ALONG WITH HIM.
>
> Q WHY?
>
> A JUST, YOU KNOW, HE HAD SAID HE HAD TAPES IN SAFETY DEPOSIT BOXES. HE WAS VERY NERVOUS, UNCOMFORTABLE. THERE WAS NO CONFIDENTIALITY SINCE HE FELT THREATENED. HE COULD GO TO THE POLICE. THE SENSE I GOT WAS THAT HE WAS UNDER A LOT OF STRESS AND WOULD HAVE TROUBLE WORKING AND WANTED TO BE COMPENSATED BY BEING ABLE TO HELP US INVEST AND US GOING INTO BUSINESS TOGETHER, AND WE WOULD BOTH PROFIT. HE DIDN'T WANT ME TO JUST GIVE HIM MONEY. HE WANTED IT TO BE LEGITIMATE, BUT HE WANTED TO BE INVOLVED. AND HE HAD LOTS OF GOOD IDEAS.

(Ex. 5, pp. 14744:27-14745:15.)

It is against this well-established backdrop of Petitioners' deception and evidence fabrication that we analyze Petitioners' "new evidence" claims.

II.
MEMORANDUM OF POINTS AND AUTHORITIES

A. AT THE INFORMAL BRIEFING STAGE, PETITIONER HAS THE BURDEN TO MAKE A PRIMA FACIE CASE FOR HABEAS RELIEF ON EACH AND EVERY CLAIM

Habeas corpus relief is *extraordinary relief* from a judgment that is presumed valid. (*Clark*, *supra*, 5 Cal.4th at p. 759.) Society's interest in the finality of criminal proceedings justifies this presumption, which is "necessary to deter use of the writ to unjustifiably delay implementation of the law and to avoid the need to set aside final judgments of conviction when retrial would be difficult or impossible." (*Ibid.*) The law is clear:

> 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.) "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 on other grounds as stated in *Satele v. Superior Court* (2019) 7 Cal.5th 852, 857 and superseded by statute on another ground as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.)

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; *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1296; *In re Martin* (1987) 44 Cal.3d 1, 28-29 (*Martin*).) "Because a petition for a 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*).) All facts upon which Petitioner relies to overturn the judgment must be proven true. (*Martin*, *supra*, 44 Cal.3d at pp. 28-29; *In re Lawler* (1979) 23 Cal.3d 190, 194 (*Lawler*).) Thus, to satisfy his burden, Petitioner must set forth fully, and with particularity, the evidentiary basis for each claim, along with reasonably available documentary evidence, including affidavits and declarations. (*Duvall, supra,* 9 Cal.4th at p. 474; *Clark, supra,* 5 Cal.4th 750, 781, fn. 16.) Statements that are not made under penalty of perjury lend no evidentiary support to Petitioner's claim. (See generally, *Moody v. Dexter* (2009) 667 F. Supp. 2d 1167, 1177 (unsworn statements are not competent evidence), vacated on other grounds by *Moody v. Dexter* (9th Cir. 2013) 544 F. App'x. 700.)

In this case, this Court has ordered an informal response to Petitioners' instant habeas corpus petition. An informal response may assist the Court in determining if the Petition sufficiently states a prima facie case for relief and whether the claims are procedurally barred. (*People v. Romero* (1994) 8 Cal.4th 728, 737.) If the court determines that the Petition does not

establish a prima facie basis for relief or that the claims are procedurally barred, it may summarily deny the Petition without issuing an order to show cause or an evidentiary hearing. (*Clark*, *supra*, 5 Cal.4th at p. 769, fn. 9.) Respondent files this informal response to assist the Court's determination of whether the Petitioners are procedurally barred from raising any of the current claims and whether they have made a prima facie case for habeas relief.

For the reasons discussed *post*, Petitioners' new evidence claims are procedurally barred and fail to make a prima facie showing for habeas relief. This Honorable Court should deny the Petition without the issuance of an order to show cause or the necessity of an evidentiary hearing.

B. THE PETITION'S PREMISES ARE FUNDAMENTALLY FLAWED

Before delving into applicable procedural bars and the substantive failures of Petitioners' instant new evidence claims, it is critical to first address the fundamental flaws in the premises of these claims. Petitioners found their new evidence claims on this straw man fallacy: "jurors had to decide a single question: was Jose Menendez molesting his sons." (Petn., p. 6:1-2.) This argument completely misstates the law and the questions their convicting jury were required to answer. The three questions before their convicting jury were: (1) did Petitioners conspire to murder their parents?; (2) did Petitioners kill their parents?; and (3) what were Petitioners' respective states of mind when they collectively shot their parents over 12 times with shotguns, killing them?

To support their misleading argument, Petitioners rely on their similarly misleading assertion that sexual assault evidence was excluded at the second trial. (Petn. 2-4.) Through such specious argument and assertion, Petitioners endorse their faulty conclusion that they were only convicted in the second trial because of the exclusion of sexual assault evidence. In this way, Petitioners attempt to create a foundation that their two pieces of allegedly "new" evidence—the Cano Letter and Rossello declaration—are each "sufficiently material and credible that [each] more likely than not would have changed the outcome of the case." (§ 1473, subd. (b)(1)(C)(i).)

But Petitioners' faulty conclusion disintegrates in the face of crucial facts they omit in advancing it: (1) sexual assault evidence was presented in Petitioners' second trial; (2) Petitioner Joseph Lyle Menendez chose not to testify in the second trial; (3) new evidence of Petitioners' guilt was presented in the second trial; and (4) new evidence of Petitioners' attempt to fabricate evidence

was presented in the second trial.

1. Alleged Excluded Sexual Assault Evidence in the Second Trial:

To create the false impression that sexual assault evidence was not presented at the second trial, the Petition points to the 47 "source witnesses" who did not testify in the second trial. As noted by the Ninth Circuit Court of Appeal, "Lyle and Erik sought to introduce testimony that could explain why they feared their parents. These witnesses were referred to by the trial court as so-called 'source witnesses,' people who had 'observed certain things, either observed the interaction of the defendants with their parents or gave character evidence . . . relating to the parents, . . . things of that nature . . . .'" (Ex. 1, p. 1030.) Their assertion is misleading for myriad reasons.

Initially, in the second trial, the defense introduced a plethora of sexual abuse evidence. As the Ninth Circuit Court of Appeal noted, in the second trial, the defense:

> Did present evidence that Jose had repeatedly abused his sons and that Kitty had acquiesced, for most of their lives. Erik testified that Jose had threatened to kill him if he revealed the sexual abuse. According to Erik, there had been several confrontations between Jose, Lyle, and Erik days before the murders. Erik Testified at extraordinary length and in incredible detail about his childhood and his relationships with his parents, beginning with his allegations that his father began sexually molesting him at the age of six and following through incident by incident until he was eighteen. Erik testified that in the days leading up to the murders, he had some fear that, at some point, his parents would kill him—a fear that fluctuated in intensity during those final days.

(Ex. 1, p. 1029.)

The Ninth Circuit Court also noted,

> Erik testified about the alleged abuse in great detail for roughly seven full court days. In addition, Brian Anderson, a cousin of Lyle and Erik, testified about severe physical abuse that Petitioners suffered at the hands of Jose. Diane Vandermolen testified about physical and verbal abuse by both Jose and Kitty. Andy Cano, also a cousin, testified that Erik confided to him that Jose was molesting Erik. Cano testified also that Erik always had bruises on his body. Several witnesses testified that when Jose was alone with one of his sons in the bedroom, no one was allowed to go near the bedroom. Dr. Vicary testified that Erik suffered from an anxiety disorder that could affect his mental state. In addition, Dr. Wilson testified that Erik suffered from Battered Person's Syndrome, depression, and post-traumatic stress disorder.

(Ex. 1, p. 1034.)

Indeed, as the Ninth Circuit Court of Appeal remarked,

> The defense was, as discussed above, allowed to present substantial evidence relating to the allegations of abuse. Indeed, Erik testified for seven days about the various types of physical, mental, and sexual abuse he claimed that his father inflicted. But when asked on cross-examination, Erik admitted that, despite years of alleged physical abuse, there were no witnesses who could testify that they had ever seen Jose hit his sons. Erik was unable to name a single person who had ever even asked Erik about the bruises and welts he claimed his father inflicted on him for years.

(Ex. 1, p. 1034.)

Second, while the trial court did limit the presentation of abuse evidence in the second trial, it did so on multiple legal grounds. For example,

> The trial court ruled, however, that the defendants were required first to lay a foundation, which in this case, could only be accomplished if the defendants testified about their actual belief of imminent danger. Indeed, we, too, see no other competent way in which the foundation could have been laid. Erik took the stand, but Lyle chose not to testify.

(Ex. 1, pp. 1030-1031.)

Further, during the second trial,

> ... the prosecution successfully argued that some so-called "source evidence," evidence that would have explained why the brothers might have had a fear of their parents, was cumulative or lacking in foundation. These witnesses included family and friends who would have testified to specific instances of abuse by Kitty and Jose. The evidence also included experts who would have explained what effect the abuse might have had on Lyle and Erik. The trial court excluded or limited some of this testimony as either lacking foundation or because it was cumulative.

(Ex. 1, pp. 1024-1025.)

In excluding this testimony from the second trial, the trial court noted:

> . . . BASED UPON WHAT I HEARD DURING THE FIRST TRIAL AND ALL THE EVIDENCE PRESENTED DURING THE FIRST TRIAL, THIS PRIMARILY CONSTITUTES CHARACTER EVIDENCE OF THE CHARACTER OF THE DECEDENTS AND IS NOT RELEVANT OR PROBATIVE ON ANY ISSUE IN THE CASE, AND ALSO THE POTENTIAL OF PREJUDICE DOES NOT

SUBSTANTIALLY OUTWEIGH THE PROBATIVE VALUE.

(Ex. 6, pp. 31347:28-31348:7.)

In upholding the trial court's ruling, the California Court of Appeal stated:

> the trial court stated the ***principal issue was the state of mind of the defendants at the time of the killing*** and the relevance the prior incidents may have had on the defendants' mental state at the time of the killing. The source witnesses were allowed to testify extensively concerning many areas in an effort to determine the state of mind of the defendants at the time of the killing. We find no abuse of discretion in the trial court's limitation or exclusion of some source witness testimony.

(Ex. 7, p. 41, emphasis added.)

Critically, none of the "source witnesses" whose testimony was excluded in the second trial provided or had any personal knowledge about the alleged sexual abuse. In fact, in the instant Petition, Petitioners particularly allege that the *only witness* excluded who had any knowledge of alleged sexual abuse was Diane Vandermolen. (Petn. P&A p. 30: 8-14) Ms. Vandermolen did not have any firsthand knowledge of any sexual abuse occurring. Moreover, while the Petition further alleges "[a]t trial, much of defense evidence, including Diane Vandermolen's testimony, was excluded" (Petn. p. 3:27-28), the trial court did *not* exclude Ms. Vandermolen from testifying in the second trial. Ms. Vandermolen's "fresh complaint" testimony was made inadmissible by Lyle Menendez' personal decision not to testify.

Also contrary to their current arguments, the trial court did not limit Erik Menendez in presenting any sexual assault evidence in the second trial. In fact, Mr. Cano, the sole witness who corroborated Erik Menendez's sexual assault claim, testified in both trials. Moreover, even though Lyle Menendez chose not to testify in the second trial, Erik Menendez did testify and was given the option of reading in Lyle Menendez's testimony from the first trial to the jury in the second trial. But as the California Court of Appeal astutely noted, Erik Menendez "*made a tactical decision* not to request that the transcript of Lyle's previous trial testimony be read to the jury." This decision avoided extensive impeachment regarding Lyle Menendez' lies before, during, and after trial. (Ex. 7 p. 108, emphasis added.)

Lastly, Petitioners' argument that sexual assault evidence or any evidence was improperly excluded is not new, is misleading and it is unfounded. Petitioners' counsel unsuccessfully advanced this argument on appeal and in prior habeas petitions. Both the California Court of Appeal and Ninth Circuit Court of Appeal reviewed and rejected this argument in upholding the trial court's decision to exclude the 47 witnesses and noting that those witnesses would not provide evidence of sexual assault. (See Exs. 1 and 7.)

2. Lyle Menendez Chose Not to Testify in the Second Trial

In the second trial, Lyle Menendez chose not to testify—a decision that was only his to make. (See *McCoy v. Louisiana* (2018) 138 S.Ct. 1500, 1508; see also *Gannett Co. v. DePasquale* (1979) 443 U.S. 368, 382, fn. 10.)

Arguably, his decision not to testify in the second trial was based in part on law enforcement's discovery that Petitioners had tried to or fabricated evidence. After their first trial concluded and before their second trial commenced, the Beverly Hills Police Department discovered multiple incidents of both Petitioners attempting to or succeeding in manufacturing evidence.

a. Lyle Menendez's Letter to Amir "Brian" Eslaminia

One such piece of contrived evidence was a letter Lyle Menendez wrote to Brian Eslaminia. (Ex. 9.) As discussed above, Mr. Eslaminia had been Erik Menendez's classmate and had visited Petitioners while they were in custody on the underlying case. Lyle Menendez sent a letter to Mr. Eslaminia on July 9, 1991 providing him a script of perjured testimony that he wished Mr. Eslaminia to testify to in Petitioners' trial. Since the Eslaminia Letter was not discovered until after the first trial, it would have been the subject of cross-examination against Lyle Menendez in the second trial. Thus, in choosing not to testify in his second trial, Lyle Menendez dodged that inquiry in court.

Specifically, Lyle Menendez avoided having to answer questions about the Eslaminia Letter that directly contradicted his previous testimony in the first trial. In the first trial, before his Eslaminia Letter was discovered, Lyle Menendez testified about Petitioners' collective efforts to buy the suspect firearms:

Q AND WHERE DID YOU FIRST GO?

A FIRST WE WENT TO THE BIG-5 IN SANTA MONICA, AND THEN EVENTUALLY WE ENDED UP IN SAN DIEGO AT TWO STORES DOWN THERE.

Q AND WHEN YOU WENT TO THE BIG-5, THAT'S WHEN YOU DISCOVERED THAT THERE WAS A 15-DAY WAITING PERIOD BEFORE YOU COULD PURCHASE A HANDGUN, CORRECT?

A RIGHT.

(Ex. 5, pp. 14978:26-14979:5.)

Yet in the Eslaminia Letter, Lyle Menendez asked Mr. Eslaminia to testify to a false narrative about how and when Petitioners obtained a firearm that included events on August 19:

> So you stopped asking questions and said yes you had one handgun at the house.
>
> We all drove back and you ran in and got it. Lyle took it and they said they would be in touch. We then drove off. You told nobody about the incident and you were very nervous that we were in trouble. The gun you gave was loaded. You didnt [sic] give any ammunition with it....
>
> You told Erik not to let the lawyers know about actually giving us a gun because the gun is illegal and your mom would freak out.
>
> (I have an untraceable handgun I can get for you to use as the one you gave us if you don't already have one. Let me know over the phone.) Ill [sic] have Beatrice get it for you if necessary)

(Ex. 9, pp. 3-4.)

This Letter completely contradicts both Petitioners' testimonies in the first trial as to why and when they purchased the shotguns. By choosing not to testify, Lyle Menendez did not have to answer questions about his scripted Eslaminia Letter, address its contradictions with his previous testimony in the first trial, and lose credibility with his second jury.

b. Petitioner Joseph Lyle Menendez's Attempt to Fabricate a Rape Allegation Against Jose Menendez

In their first trial, Petitioners had separate juries. (See generally Exs. 5 and 6.) Erik

Menendez's first jury did not hear evidence from Jamie Pisarcik about Lyle Menendez attempting to elicit perjured testimony, that Jose Menendez had raped her, but Lyle Menendez's jury did. (Ex. 5, p. 22202:9-21.) By not testifying in the second trial when Petitioners had one jury, Lyle Menendez did not have to admit to the second jury that he had brazenly tried to bribe his girlfriend into falsely testifying that Jose Menendez had raped her in a scenario that mirrored a storyline in the movie, "At Close Range."

c. Lyle Menendez's Attempt to Fabricate a Poisoning Story

In another example of evidence manufacturing, after Petitioners' first trial, the Beverly Hills Police Department discovered a letter Lyle Menendez had written to Traci Baker, instructing her on how to testify at trial (Baker Letter).[27] Ms. Baker was one of Lyle Menendez's girlfriends and a witness in the first trial. (Ex. 5, Vol. 104.) In the Baker Letter, Lyle Menendez directed Ms. Baker as follows:

> Alright Traci this is the information we discussed on the phone about visiting Erik. I'm going to get right to the point because after you read this and feel you've absorbed it, I want you to throw it away. Do that right away so you don't forget, maybe you can take some notes in your handwriting. Ok well basically there are two incidents, they may seem strange and irrelevant to my case but I assure you they will be very helpful. You'll just have to trust me on it, later on I can explain why but for now I'll just lay them out. I have given a lot of thought to this and I really feel that you can do it, however, just let me know if you'd rather not.

(Ex. 11.)

Lyle Menendez then instructed Ms. Baker to testify that Kitty Menendez had tried to poison her family:

> [A]ll of a sudden Mr. Menendez said in a stern voice to Mrs. Menendez who was standing behind you, "what did you do the food!" and Mr. Menendez shoved his plate forward, knocking over some stuff.

(Ex. 11.)

Thereafter, at the first trial, Ms. Baker testified almost verbatim to what Lyle

[27] Attached as Exhibit 11 is a copy of the Baker Letter.

Menendez had instructed her to say:

> Q. WHEN MRS. MENENDEZ PUT THE FOOD ON THE TABLE, DID SOMETHING UNUSUAL HAPPEN?
>
> A. YES. SHE WAS STANDING BEHIND ME, SO I DON'T KNOW IF SHE DID SOMETHING TO PROVOKE HER HUSBAND. BUT BEFORE I KNEW IT, HE HAD STOOD UP AND PUSHED HIS PLATES OUT OF THE WAY VERY VIOLENTLY, KNOCKING OVER ALL SORTS OF GLASSES AND CONDIMENTS, WHATEVER WERE ON THE TABLE; AND SAID SOMETHING TO HER LIKE: "WHAT DID YOU DO THIS FOOD? WHY ARE YOU SERVING THIS FOOD?

(Ex. 5, p. 17360:12-21.)

Also in the Baker Letter, Lyle Menendez directed Ms. Baker to testify:

> [T]hen I [Lyle Menendez] got up immediately and said "come on Traci" and we both walked out int the foyer. Erik walked out too. You got your purse and jacket, we walked outside and stood in front of the big Mercedes.

(Ex. 11.)

As directed, Ms. Baker testified in the first trial:

> A. AND LYLE MOTIONED TO ME TO COME WITH HIM. I WAS ABLE TO GRAB MY PURSE AND COAT, AND WHATEVER ELSE, AND WE WENT OUT TO THE FRONT WHERE THE CARS WERE PARKED.

(Ex. 5, p. 17631:7-10.)

In the Baker Letter, Lyle Menendez further instructed Ms. Baker that she should testify:

> [E]ither Erik or I, (you can't remember which) said to him "what's the matter, Dad you think she tried something?"

(Ex. 11.)

Thereafter, Ms. Baker testified in the first trial:

> [A]ND ERIK HAD ASKED HIS FATHER SOMETHING: "DO YOU THINK SHE TRIED SOMETHING ON PURPOSE?" OR SOMETHING LIKE THIS.

(Ex. 5, p. 17362:7-9.)

Lastly, the Baker Letter included the following instruction to Ms. Baker: to testify

that they had all ended up eating at "Hamburger Hamlet." (Ex. 11.)

Ms. Baker did exactly that, subsequently testifying in the first trial: "WE WENT TO EAT AT A "HAMBURGER HAMLET." (Ex. 5, p. 17363:4-5.)

Significantly, in the first trial, Ms. Baker testified immediately after Erik Menendez testified. In the first trial, Erik Menendez also testified about the alleged poisoning incident:

> Q IN THE FALL OF 1988 DO YOU REMEMBER AN OCCASION WHEN MISS BAKER WAS AT YOUR HOME IN BEVERLY HILLS FOR DINNER?
>
> A YES, I DO.
>
> Q AND DID SOMETHING UNUSUAL HAPPEN?
>
> A YES.
>
> Q AND WOULD YOU TELL THE JURY WHAT HAPPENED. . . .
>
> A SHE WAS OVER EATING DINNER, AND MY MOM WAS SERVING. APPARENTLY THE MAID WAS OFF, OR SOMETHING LIKE THAT. AND WE WERE ALL SITTING DOWN TO THE TABLE. AND MY MOM HAD SERVED DINNER AND MY DAD PUSHED THE TRAY AWAY, HIS PLATE, TOWARD MY MOM AND SPILLED SOMETHING AND TOLD MY BROTHER AND I TO GET UP FROM THE TABLE. . . .
>
> Q NOW, DO YOU RECALL WHETHER OR NOT YOUR FATHER SAID ANYTHING TO YOUR MOTHER AS HE PUSHED THE PLATE AWAY OR AT ANY TIME DURING THIS?
>
> A YES.
>
> Q WHAT DID HE SAY? . . .
>
> A HE LOOKED AT MY MOM AND THEN HE SAID SOMETHING LIKE WHAT DID YOU DO TO THE FOOD? OR WHAT ARE YOU UP TO? OR SOMETHING LIKE THAT.
>
> Q WHAT, MR. MENENDEZ, DID YOU BELIEVE WAS GOING ON?
>
> A I BELIEVED THAT MY DAD THOUGHT MY MOM POISONED THE FOOD.

(Ex. 5, pp. 17143:3-17144:27.)

Although Ms. Baker was called as a defense witness in the first trial, after the Baker Letter was discovered, Petitioners did not call her as a witness in the second trial. (Ex. 6, pp. 27387:28-27388:9.) The People did not attempt to call her as a witness in the second trial because, as they told the trial court, they anticipated that she would invoke her Fifth Amendment Right against self-incrimination. (Ex. 6, p. 28065:15-20.)

The trial court ruled that the Baker Letter could not come in as evidence in the second trial unless Ms. Baker testified (Ex. 6, p. 28065:22-26) or if Lyle Menendez testified. (Ex. 6, p. 28067:23-28.) Therefore, by not calling Ms. Baker as a defense witness in the second trial and by choosing not to testify in the second trial, Lyle Menendez evaded the possibility of his second jury learning that he had also tampered with Ms. Baker's trial testimony.

d. Lyle Menendez's Recorded Conversations with Norma Novelli

As discussed in Section B.3.b.7, *ante*, between the first and second trials, the prosecution became aware of audio-recorded conversations with Norma Novelli, wherein Lyle Menendez openly discussed fabricating evidence and perjuring himself to try to discredit his recorded confession to Dr. Oziel for why he had killed his parents. (See Ex. 10.) In choosing not to testify in his second trial, Lyle Menendez eluded the prosecution's possible cross examination on this credibility-shattering evidence of his own making.

3. New Evidence of Petitioners' Guilt Presented in Second Trial

At Petitioners' second trial, the prosecution presented new evidence to show Petitioners' motive for conspiring to and ultimately killing their parents and to refute their previous claims and testimony of how they had murdered Kitty and Jose Menendez.

a. Testimony of Klara and Randolph Wright

The prosecution presented witnesses Klara Wright and her husband, Randolph Wright, for the first time at the second trial. The Wrights' son had played tennis with Erik Menendez. The morning after the murder, Mrs. Wright went to the Menendez house to pick up some of her son's tennis rackets. When she arrived there, she observed a lot of police cars and saw Erik Menendez. Erik Menendez said to her, "MRS. WRIGHT, I'M SO GLAD YOU'RE HERE. WE NEED TO SPEAK TO YOUR

HUSBAND. AND EITHER HE WAS – HE SAID EITHER THAT HE WAS TRYING TO GET A HOLD OF HIM OR THAT HE WANTED TO GET A HOLD OF HIM . . . ." (Ex. 6, p. 37148:21-25.) Randolph Wright is an attorney. (Ex. 6, p. 37269:9-10.) Mrs. Wright told Erik Menendez to come to her house that day at 3:30 as Randolph Wright would usually be home at that time. (Ex. 6, p. 37149:20-25.) Petitioners went to the Wright's house that day. (Ex. 6, p. 37151:25.) Erik Menendez asked Klara Wright, when he first got to her house, if she knew anyone who was good with computers because he suspected there was a will on the family computer. (Ex. 6, pp. 37153-37154.) Mrs. Wright testified about Erik Menendez:

> WELL JUST WANTED TO MAKE SURE THAT THERE WASN'T ONE [WILL] IN THERE. HE WANTED TO MAKE SURE THAT HE WAS – THAT HE ALREADY CHECKED AND HE COULDN'T FIND NOTHING, BUT HE'S NOT THAT GREAT. AND WITH THE COMPUTER, THAT MAYBE IF SOMEBODY WAS GOOD AT IT, THEY COULD GO INTO DIFFERENT COMPARTMENTS TO MAKE SURE THAT THERE IS NO WILL IN THERE.

(Ex. 6, p. 37154:17-23.)

When Mr. Wright came home, he spoke to Petitioners and, at one point, "[T]HEY ASKED MY HUSBAND IF - - IS IT LEGAL TO WRITE A WILL IN A COMPUTER? AND, AS I REMEMBER, MY HUSBAND [RANDOLPH] SAID THAT HE DIDN'T KNOW THE ANSWER TO THAT; THAT HE WOULD CHECK INTO IT." (Ex. 6, p. 37157:14-18.) Mrs. Wright testified that Petitioners had been concerned about a possibility that Jose Menendez had written a new will that was on the computer. (Ex. 6, pp. 37157:27- 37158:8.) Mrs. Wright also testified:

> Q [PROSECUTOR] WHAT DO YOU RECALL EITHER OR BOTH DEFENDANTS ACTUALLY SAYING CONCERNING A WILL IN THE COMPUTER?
>
> A [MRS. WRIGHT] JUST THAT THEY HAD - - THEY – THEY HAVE TO LOCATE THE WILLS. THERE MAY BE TWO OF 'EM.
>
> Q AND WHAT DO YOU RECALL EITHER OR BOTH DEFENDANTS SAYING ABOUT THE POSSIBILITY OF THEIR FATHER HAVING CHANGED OR WAS WORKING ON A WILL?
>
> A JUST THAT, THAT POSSIBLY, HE WAS WRITING A NEW WILL.
>
> Q AND DO YOU RECALL AS YOU SIT THERE, WHICH OF THE DEFENDANTS, OR BOTH, SAID THIS?

A THIS WAS BOTH OF 'EM TALKING AT DIFFERENT TIMES.

(Ex. 6 at 37160:7-20.)

Mrs. Wright testified that once it was mentioned that a will might be in the family safe, both Petitioners left the Wright's house to go home and locate the safe. (Ex. 6, p. 37161:1-26.) Petitioners returned to the Wright's house with the safe. (Ex. 6, pp. 37162: 22-37163:3.)

Mr. Wright testified about his interactions with Petitioners on the day after they had murdered their parents. Mr. Wright testified that he had asked Petitioners if they knew who had killed Jose and Kitty Menendez and Lyle Menendez had told Mr. Wright that he believed the mafia had killed his parents. (Ex. 6, p. 37278:17-28.)

b. Testimony of Pathologist and Accident Reconstruction Expert

The prosecution presented to the jury evidence from Pathologist Dr. Robert Lawrence and Accident Reconstruction Expert Dr. Roger McCarthy in the second trial. Combined, this evidence belied Petitioners' contention in the first trial that Jose Menendez had been standing and moving toward them when Petitioners had started shooting their parents. Instead, the new evidence clearly established Petitioners had executed Jose and Kitty Menendez while they were sitting down.

Specifically, Pathologist Robert Lawrence testified that Jose and Kitty Menendez had been killed by multiple shotgun wounds: "JOSE WAS STRUCK FOUR TIMES AND MARY WAS STRUCK WITH NINE BLASTS." (Ex. 6, p. 39866:20-22.) Of the four shotgun shells that had struck Jose Menendez, one had caused "AN EXPLOSIVE CONTACT WOUND IN THE BACK OF HIS HEAD. THIS WAS THE LETHAL WOUND." (Ex. 6, p. 39867:4-6.) Dr. Lawrence explained that an explosive contact wound meant "THE MUZZLE OF THE SHOTGUN WAS IN CONTACT WITH THE BACK OF HIS HEAD WHEN IT WAS FIRED." (Ex. 6, p. 39868:14-15.) Dr. Lawrence further explained that the shot had been fired from back to front and in a downward angle. (Ex. 6, p. 39871:23-26.)

Dr. Lawrence stated that Kitty Menendez had been shot nine times by two different types of shotgun shells: seven times with buckshot and twice with birdshot. (Ex. 6, p. 39867:8-13.) Dr. Lawrence described the wounds as follows:

> SHE WAS STRUCK IN HER LEFT BREAST AREA FROM THE SIDE. SHE WAS STRUCK FROM THE FRONT IN HER RIGHT FACE, ANOTHER THROUGH HER

> RIGHT HAND AND ON INTO HER COLLAR BONE AREA ON THE RIGHT SIDE. ANOTHER THAT WENT THROUGH HER FOREARM AND UPPER ARM SO THAT BOTH OF THOSE SHOTS WERE RECEIVED WHEN THE HAND WAS HELD AGAINST HER CHEST. AND THEN THERE WAS A PERFORATION OF HER RIGHT THING AND TWO WOUNDS OF HER - - I'M SORRY -- HER LEFT THIGH AND TWO WOUNDS OF HER LEFT KNEE AREA.
>
> FINALLY, THE BIRD SHOT WOUNDS WERE ONE THAT WENT UP THROUGH HER LEFT SHOULDER AND STRUCK HER IN THE LEFT SIDE OF THE FACE AND THE OTHER WAS A CONTACT WOUND IN THE LEFT CHECK. THE MUZZLE WAS HELD AGAINST HER CHEEK AND BIRD SHOT WAS FIRED INTO HER HEAD.

(Ex. 6, pp. 39867:17-39868:5.) Dr. Lawrence testified that Kitty Menendez's contact wound to her left cheek indicated that someone had placed the shotgun muzzle directly on her skin when firing the shot. (Ex. 6 at p. 39885:11-18.)

In addition to Dr. Lawrence, Accident Reconstructionist Dr. Roger McCarthy testified about the sequence of the shots fired. Dr. McCarthy testified that both Jose and Kitty Menendez had been seated on the sofa at the time of the first shot and that it had passed through the left arm and right arm of Jose Menendez and the breast of Kitty Menendez. (Ex. 6, pp. 40453:8-40454:8.) Dr. McCarthy testified the second shot had been a contact wound to the back of Jose Menendez's head. (Ex. 6, pp. 40456:21-40457:5.) Dr. McCarthy testified that Kitty Menendez had moved off the couch, causing the third shot to miss her. (Ex. 6, p. 40480:8-15.) Dr. McCarthy testified that the fourth shot hit Kitty Menendez in the right side of her face. (Ex. 6, p. 40484:7-19.) The fifth shot had been fired at Kitty Menendez while she was on the ground, between the sofa and coffee table, and had struck her in the right lower forearm and her upper right arm near the shoulder. (Ex. 6, p. 40596:20-28.) The sixth shot struck Kitty Menendez in her right hand, upper throat, chin and clavicle area. (Ex. 6, p. 40604:6-11.) The seventh shot hit Jose Menendez's left upper leg. (Ex. 6, p. 40610:25-26.) Dr. McCarthy testified that he could not specify if shot seven had been before or after the shots to Kitty Menendez's legs. (Ex. 6, p. 40611:2-11.) Shots eight through 10 had been fired at Kitty Menendez while she was on her back and struck her left leg. (Ex. 6, pp. 40615:24-40616:7; 40631:1-40632:9.) The eleventh shot was birdshot—a different type of ammunition from the previous 10 fired rounds—and struck Kitty Menendez in the face and on her shoulder. (Ex. 6, pp.

40632:10-40633:10; 406347-12.) Before the eleventh shot was fired into Kitty Menendez's head and shoulder, she had rolled onto her right side. (Ex. 6, p. 40637:4-13.) The twelfth and final shot left a contact wound to Kitty Menendez's left cheek. (Ex. 6, p. 40642:9-11.)

The testimony of Drs. McCarthy and Lawrence proved that Jose and Kitty Menendez had been shot while they sat on the sofa. Through this and the other trial evidence, the prosecution was able to show Petitioners had shot both of their parents in the knees to make it look like a mafia killing. (Ex. 6, p. 51188:14-21.) The mafia-style killing of their parents was the original lie Petitioners had told family, friends and law enforcement. This evidence further corroborated the prosecution's position that these were premeditated murders committed while lying in wait and pursuant to a conspiracy to commit murder—not in the heat of passion.

With all the additional incriminating evidence in the second trial pointing to Petitioners' guilt for murder and conspiracy to commit murder, Petitioners' second jury heard more evidence proving their guilt than their first juries. (See generally Exs. 5 and 6.) In response to Erik Menendez's attorney's closing argument that the second-trial jurors were the third jurors to hear the case, the prosecution rebutted:

> LADIES AND GENTLEMEN, YOU ARE THE JURY, AS YOU KNOW, WHO IS THE ONLY JURY TO HEAR FROM ROGER MCCARTHY. HE SAID HE NEVER PREVIOUSLY TESTIFIED IN REGARD TO THIS MATTER.
>
> YOU ARE THE ONLY JURY, LADIES AND GENTLEMEN, TO HEAR ABOUT A RECONSTRUCTION OF THE EVIDENCE IN THIS CASE, TO LOOK THROUGH THE EYES OF ROGER MCCARTHY AT WHAT HAPPENED IN THAT ROOM.
>
> THE FIRST JURY TO HEAR THROUGH THE EYES OF – AND SEE THROUGH THE EYES OF ROGER MCCARTHY THAT THERE ARE REASONABLE CONCLUSIONS THAT CAN BE DRAWN CONCERNING HOW BRUTALLY KITTY MENENDEZ AND JOSE MENENDEZ WERE SHOT TO DEATH ON AUGUST 20TH OF 1989, AND YOU KNOW THAT YOU ARE THE FIRST JURY TO HEAR THE TESTIMONY OF KLARA WRIGHT AND RANDY WRIGHT, WHO DID NOT COME FORWARD UNTIL AFTER THE FIRST TRIAL....
>
> KLARA WRIGHT AND RANDY WRIGHT, WHO PROVIDED EVIDENCE OF THE GREED MOTIVE OF DEFENDANTS WITHIN HOURS OF SHOOTING THEIR PARENTS TO DEATH.
>
> AND YOU KNOW THAT YOU ARE THE FIRST JURY TO HEAR EVIDENCE

> FROM BRIAN ESLAMINIA, WHO NEVER CAME FORWARD BEFORE.
>
> YOU KNOW THAT YOU ARE THE FIRST JURY TO HEAR THAT HERE WAS, IN FACT, A PLAN ON THE PART OF BOTH DEFENDANTS, ACCORDING TO THE PRIOR STATEMENTS OF BRIAN ESLAMINIA, TO FABRICATE AND TRICK A JURY IN THIS CASE.
>
> AND LADIES AND GENTLEMAN, YOU KNOW THAT YOU ARE THE FIRST JURY TO HEAR FROM PARK DIETZ. PARK DIETZ, WHO TOLD YOU IN SO MANY WORDS THAT THIS CRIME – THAT THE ACTIONS OF THE DEFENDANT, ERIK MENENDEZ, AT THE TIME OF THE COMMISSION OF THE CRIME, IS ONLY CONSISTENT WITH DELIBERATE BEHAVIOR THAT IS REFLECTIVE THOUGHT, AND IS INCONSISTENT WITH SOME NOTION OF AUTOMATIC BEHAVIOR.

(Ex. 6, pp. 52312:9-52313:19.)

As the prosecution clearly explained to the second-trial jury, substantially more evidence of Petitioners' guilt for murder and conspiracy to commit murder, attempts to fabricate evidence, conspiracy to commit perjury, motive and impeaching evidence was presented against Petitioners in the second trial.

For these reasons, Petitioners' sensationalized, yet baseless, allegations that they were only convicted in the second trial because the trial court allegedly improperly excluded evidence of sexual assault evidence fails. No evidence supports Petitioners' assertions that their two pieces of allegedly "new" evidence—the Cano Letter and Roy Rossello's declaration—are each "sufficiently material and credible that [each] more likely than not would have changed the outcome of the case." (§ 1473, subd. (b)(1)(C)(i).)

C. PETITIONERS HAVE NOT MADE A PRIMA FACIE SHOWING OF ENTITLEMENT TO RELIEF BASED ON "NEW EVIDENCE"

Recent legislation has modified the standard for analyzing claims of new evidence on habeas corpus.

In 2023—after Petitioners filed the instant Petition and after this Court requested an informal response that was partially based on specific elements of the prior definition—the Legislature again amended the language of section 1473 and redefined a petitioner's burden

when raising a claim of newly discovered evidence on habeas corpus. The new law became effective January 1, 2024. (Stats. 2023, ch. 381, §1.) Renumbered as section 1473, subdivision (b)(1)(C), the rewritten statute now requires a petitioner to establish the following for habeas relief on a claim of new evidence:

> 3. New evidence exists that is presented without substantial delay, is admissible, and is sufficiently material and credible that it more likely than not would have changed the outcome of the case.
>
> 4. For purposes of this section, "new evidence" means evidence that has not previously been presented and heard at trial and has been discovered after trial.

(§1473, subd. (b)(1)(C)(i)-(ii).)

Though the Legislature has amended the statute relating to new evidence claims on habeas corpus, Petitioners have not met their burden even under the revised statute.

1. The Cano Letter Does Not Constitute New Evidence on Habeas Corpus

Here, Petitioners claim the Cano Letter, that Erik Menendez purportedly sent to Mr. Cano, is newly discovered evidence. But the Cano Letter *does not* constitute "new evidence" under the legal definition of section 1473, subdivision (b)(1)(C). This point is clear. At best, the Cano Letter is corroborative evidence that Erik Menendez told his cousin Mr. Cano that his father was molesting him—a fact that both Mr. Cano and Erik Menendez testified to at both trials. Respondent recognizes that the current statutory definition of new evidence on habeas corpus does not exclude evidence that is "merely cumulative, corroborative, collateral or impeaching" as "new," even though the prior definition did. (Cf. §1473, subd. (b)(1)(C)(ii) & former §1473, subd. (b)(3)(B).) Yet, the fact Petitioners need no longer overcome that aspect of the prior statutory definition to make prima facie showing that the Cano Letter is "new evidence" does not mean the Cano Letter satisfies the current definition. In fact, it does not.

First, assuming *arguendo* that the letter was legitimately written by Erik Menendez in or around 1989, as alleged (Petn. p. 4.) is true—a futile exercise given his documented history of deceit—Erik Menendez presents this claim after substantial delay, in contravention of the current

statutory definition of "new evidence." (§1473, subd. (b)(1)(C)(i).) As its purported author, Erik Menendez knew about the Cano Letter when he wrote it approximately *34 years ago*—before both of his trials. Yet, he did not disclose this purported Cano Letter to his juries. Erik Menendez knew about the Cano Letter *four years* before his first trial commenced in 1993, yet the first-trial record is devoid of any mention of it by Erik Menendez. (Ex. 1.) Even when the prosecution repeatedly questioned the veracity of the alleged abuse, Erik Menendez *never mentioned or introduced* the Cano Letter. Significantly, Mr. Cano, the alleged recipient of the Cano Letter, testified during the first trial for the sole purpose of claiming Erik Menendez had told Mr. Cano that he had been molested prior to Petitioners murdering their parents. (Exs. 5 and 6.) Before testifying in that trial, Mr. Cano's credibility was also questioned based on a car he was gifted from Erik Menendez before testifying. (Ex. 6, pp. 48175: 13 – 48176: 6.) It defies logic that Erik Menendez *never* examined Mr. Cano about having received the Cano Letter or tried to introduce the Cano Letter into evidence through Mr. Cano to salvage Cano's credibility. More incredibly, in the second trial after having both testified before, neither Erik Menendez nor Mr. Cano mentioned the Cano Letter. (Ex. 6.)

In a feeble attempt to excuse this substantial delay, Erik Menendez claimed that he first heard about the Letter in 2015 during a Barbara Walters special. (Petn. Ex. B, Erik Menendez Decl., ¶ 5.) His excuse falls flat. Allegedly having been reminded of the Cano Letter—that he purportedly wrote—in 2015 does not change the fact that Erik Menendez knew of the Letter *26 years* earlier in 1989 when he purportedly wrote it. Therefore, his presentation of this claim violates section 1473 in two ways—he did not discover the Cano Letter after trial and his presentation of this claim is substantially delayed. (§1473, subd. (b)(1)(C)(i)-(ii).)

Lyle Menendez claimed to have learned of the Letter almost eight years ago in 2015. (Petn. Ex. H, Lyle Menendez Decl., ¶ 4.) Assuming *arguendo* that this declaration is true—which, given his extensive history of documented deceitfulness and evidence fabrication in the underlying case, is also a strain—he, too, allowed years to pass before raising this claim.

To justify their substantial delay in filing this habeas petition, both Petitioners continue to lie. They stated they delayed in filing this Petition because they believed an individual could only file one habeas petition. (Petn. Ex. H, Lyle Menendez Decl., ¶ 9; Petn. Ex. B, Erik Menendez Decl.,

¶ 9.) This anemic excuse is belied by the fact that both Petitioners *previously* filed multiple habeas petitions. Lyle Menendez filed a state habeas petition on October 5, 1998. (Ex. 8.) Erik Menendez filed a state habeas petition on April 30, 1999. (Petn., p. 7) Both petitions were denied. (*Ibid.*) Thereafter, both Petitioners filed federal habeas petitions challenging the underlying case, which the Ninth Circuit Court of Appeal denied. (See Petn., p. 7; Ex. 1.)

If Erik Menendez wrote the Cano Letter, he knew about its existence over 30 years before raising this claim. Lyle Menendez knew about this Cano Letter for at least eight years before raising this claim. As noted above, a five-year delay is considered "substantial" under California law. (*Walker v. Martin*, *supra*, 562 U.S. at p. 312.) Therefore, both Petitioners violate section 1473, subdivision (b)(1)(C)(i) in presenting the Cano Letter after substantial delay. As such, it is not "new evidence" on habeas corpus.

Second, the Cano Letter is not "admissible" evidence as it pertains to Lyle Menendez. (1473, subdivision (b)(1)(C)(i)). The Cano Letter does not provide any evidence as to Lyle Menendez's state of mind at the time of the murders. Lyle Menendez fails to make a prima facie showing to the contrary thus, the Cano Letter is not "new evidence" on habeas corpus as it pertains to him.

Third, the Cano Letter is not "sufficiently material and credible that it more likely than not would have changed the outcome of the case" for either Petitioner, a requirement of section 1473, subdivision (b)(1)(C)(i). At baseline, the issue of whether sexual abuse occurred is not material to whether Petitioners were entitled to an imperfect self-defense instruction. As the trial court, and every reviewing court since has found, there was no immediate danger and therefore, Petitioners could not argue imperfect self-defense. (Exs. 1, 6, 7) In this way, the Cano Letter, which purports to document a past act of alleged sexual molestation by Jose Menendez against Erik Menendez, does not evidence that Petitioners believed they were in imminent danger when they murdered their parents. Similarly, it would not change the trial court's rulings that Petitioners were not entitled to a heat of passion instruction as to Kitty Menendez and that Lyle Menendez was not entitled to a heat of passion instruction as to Jose Menendez.

Moreover, the Cano Letter is inconsistent with Erik Menendez's and Mr. Cano's testimony in both trials. In both trials, Erik Menendez and Mr. Cano testified Erik Menendez had only disclosed alleged molestation to Mr. Cano when Erik Menendez was 12 or 13 years old and Mr. Cano was 10. Both testified in detail that they only discussed the molestation approximately three times that year and neither made mention of a letter. (See Ex. 1 & Ex. 3.)

In the second trial, Erik Menendez testified that he had been 12 or 13 years old when he had told Mr. Cano about the alleged molestation:

A I DIDN'T FEEL COMFORTABLE ENOUGH TO TALK TO ANYONE ABOUT THAT EXCEPT FOR ANDY.

Q AND WHEN YOU SAY ANDY, ARE YOU TALKING ABOUT YOUR COUSIN, ANDY CANO?

A YES.

Q DID YOU TELL ANDY CANO THAT YOUR FATHER WAS MOLESTING YOU?

A IN A WAY.

Q HOW OLD WERE YOU WHEN YOU TALKED TO ANDY CANO?

A TWELVE OR THIRTEEN.

Q WHAT DID YOU TELL HIM?

A I JUST TOLD HIM – WELL, I ASKED HIM FIRST. I WAS TRYING TO FIND OUT AT THIS POINT WHETHER ANY OTHER FATHERS DID THIS WITH THEIR SONS, AND I WAS – I WAS GOING THROUGH A PERIOD WHERE I JUST WASN'T SURE. AND I ASKED HIM IF HIS FATHER HAD EVER DONE THESE THINGS –I ASKED HIM IF HIS FATHER HAD EVER TOUCHED HIM, HIS PENIS, BEFORE.

Q WHAT DID HE TELL YOU?

A HE SAID NO.

Q DID YOU GO INTO SPECIFICS WITH ANDY CANO ABOUT WHAT YOUR FATHER WAS DOING TO YOU?

A NO. I JUST TOLD HIM THAT MY FATHER WAS HURTING ME. I TOLD HIM THAT MY FATHER WAS TOUCHING ME. HIS FATHER HAD DIVORCED HIS MOTHER AND SO HE WASN'T QUITE SURE IF IT WAS NORMAL OR NOT. HE WANTED TO ASK – HE WANTED ME TO TALK TO HIS MOTHER.

(Ex. 6, pp. 43319:11-43320:11.)

Erik Menendez further testified on the subject:

Q YOU INDICATED BEFORE THAT ANDY CANO WAS THE ONLY PERSON THAT YOU TALKED ABOUT MOLESTATION TO; IS THAT CORRECT?

A YES.

Q AND YOU INDICATED THAT YOU HAD TOLD ANDY CANO SOME THINGS. DID ANDY CANO EVER SAY ANYTHING BACK TO YOU AFTER YOU TOLD HIM THE INFORMATION THAT YOU TOLD THE JURY?

A WHAT DO YOU MEAN BY BACK TO ME?

Q WELL, DID HE SAY ANYTHING IN RETURN TO YOU LIKE WHAT YOU SHOULD DO?

A HE WANTED ME TO TALK TO HIS MOTHER, MY AUNT MARTA, ABOUT THAT, AND I MADE HIM SWEAR NEVER TO TELL HER ABOUT THIS.

HE TOLD ME THAT HE WOULD TRY AND FIND OUT—I BROUGHT IT UP WITH HIM ON SEVERAL DIFFERENT OCCASIONS.

I REMEMBER ONE TIME WHEN HE WAS IN MY ROOM AND I REMEMBER WE WERE IN SLEEPING BAGS AND I WOULD TELL HIM A LITTLE BIT MORE OF THE INFORMATION AND WE WOULD TALK ABOUT IT AND—BUT—HE WAS TWO YEARS YOUNGER THAN ME. SO HE DIDN'T GIVE ME ANY EXTENSIVE ADVICE.

Q NOW, DURING THE CONVERSATIONS, VARIOUS CONVERSATIONS, YOU HAD WITH ANDY CANO, DID YOU ACTUALLY TELL HIM YOUR DAD WAS TOUCHING YOU?

A MORE THAN THAT.

Q WHAT DID YOU TELL HIM MORE SPECIFICALLY?

A I TOLD HIM THAT MY DAD WOULD TOUCH MY GENITALS AND THAT I WOULD TOUCH HIS, AND WE WOULD MASSAGE EACH OTHER.

I REMEMBER WHEN I WAS IN MY ROOM ONE TIME HE WANTED TO KNOW MORE ABOUT WHETHER IT HURT OR NOT, AND I TOLD HIM THAT IT HURT, AND HE ASKED WHERE, AND I TOLD HIM IN MY BUTT; AND WE TALKED ABOUT WHAT THAT MEANT, AND I TRIED TO AVOID WHAT THAT MEANT. AND JUST DIFFERENT THINGS LIKE THAT.

Q DID YOU ASK ANDY CANO OR MAKE HIM PROMISE ANYTHING ABOUT TELLING WHAT YOU TOLD HIM?

A WELL, I MADE HIM PROMISE NEVER TO TELL HIS MOTHER AND HIS BROTHER OR IN ANY WAY THAT COULD COME BACK TO MY MOTHER.

Q NOW, WHERE IS ANDY CANO TODAY?

A HE LIVES WITH MY—NO. I GUESS HE DOESN'T. HE'S GOING TO SCHOOL IN FLORIDA.

(Ex. 6, pp. 43351:2 – 43352: 19.)

Q DID YOU EVER FEEL THAT THERE WAS ANY PERSON THAT YOU COULD TELL THAT YOU FELT CLOSE ENOUGH TO, THAT YOU COULD TELL ABOUT THE MOLESTATION?

A BESIDES ANDY?

Q BESIDES ANDY

A NO.

(Ex. 6, pp. 43352:27--43353:5.)

In the second trial, Mr. Cano also testified that Erik Menendez had told him about the alleged abuse by Jose Menendez:

Q NOW, YOU'RE SAYING THAT WHEN YOU WERE 10 YEARS OLD ERIK MENENDEZ WAS ABOUT 13 YEARS OLD; IS THAT CORRECT?

A YES.

Q AND THAT IS WHEN THIS STATEMENT TO YOU WAS MADE; IS THAT CORRECT?

A WHICH STATEMENT?

Q THAT IS, THE STATEMENT ABOUT HIS FATHER TOUCHING HIM OR GIVING HIM MASSAGES.

A YES.

(Ex. 6, pp. 48161:18-27.)

Mr. Cano further testified about the amount of times Erik Menendez had brought up the alleged molestation:

Q DID YOU EVER TALK ABOUT EITHER THE SUBJECT MATTER OR -- THE SAME SUBJECT MATTER AGAIN AFTER THAT?

A YES.

Q AND ABOUT HOW LONG LATER WAS IT THAT YOU HAD ANOTHER CONVERSATION?

A APPROXIMATELY AROUND A MONTH. IT WAS THE NEXT TIME I SAW HIM AT THIS HOUSE.

Q IN PENNINGTON [NEW JERSEY]?

A CORRECT.

Q AND WHAT WAS IT THAT YOU TALKED ABOUT ON THAT OCCASION?

A HE REALLY WANTED TO KNOW WHETHER I HAD KEPT IT A SECRET. HE WANTED TO FIND OUT IF I HAD TOLD MY MOTHER; AND BASICALLY, AFTER THAT CONCLUDED, WE WERE TALKING ABOUT WHETHER IT WAS NORMAL OR NOT.

Q DID HE DESCRIBE, WITH ANY ADDITIONAL CLARITY OR DESCRIPTION, WHAT HIS FATHER WAS DOING TO HIM AT THAT TIME?

A NO.

Q DID HE TELL YOU OR INDICATE TO YOU THAT THE MASSAGES THAT HE DESCRIBED TO YOU WERE SOMETHING THAT WAS

HAPPENING TO HIM RIGHT THEN AND THERE IN HIS LIFE AT THAT TIME IN HIS LIFE?

A YES, YES.

(Ex. 6, pp. 48153:22-48154:19.)

Q DID YOU EVER TALK ABOUT THAT SUBJECT MATTER AGAIN?

A I CAN RECALL ONE OTHER TIME THAT IT WAS BROUGHT UP.

Q AND WHEN WAS THAT?

A PROBABLY, AGAIN, ANOTHER COUPLE OF MONTHS DOWN THE LINE.

Q WHERE WAS IT THAT YOU WERE AT WHEN YOU HAD THAT CONVERSATION.

A WE WERE IN HIS BEDROOM IN THE PENNINGTON HOUSE.

(Ex. 6, p. 48155:2-12.)

Q AND THIS IS SOMETHING THAT HE BROUGHT UP FROM TIME TO TIME?

A HE BROUGHT IT UP SEVERAL TIMES AFTER THAT.

Q AND OVER WHAT PERIOD OF TIME?

A OVER -- WITHIN THE YEAR.

Q HOW MANY TIMES?

A THREE, THAT I REMEMBER.

Q OVER APPROXIMATELY A ONE-YEAR SPAN?

A RIGHT.

(Ex. 6, p. 48163:5-14.)

Mr. Cano also testified that besides his conversations on the subject with 13-year-old Erik Menendez when he was 10, the *only other time* he had spoken of the alleged abuse disclosures was when he had first met Erik Menendez's attorney Leslie Abramson—*after* Erik Menendez had been

arrested for the murders and *after* Erik Menendez had gifted Mr. Cano a car. (Ex. 6, pp. 48173 7-25; 48176:3-6.)

Importantly, in the first trial, Mr. Cano testified that Erik Menendez had ***never*** mentioned the alleged molestation to him after Erik Menendez had moved to California – in direct contradiction to Petitioners' instant allegations regarding when Erik Menendez had allegedly written the Cano Letter to Mr. Cano. Mr. Cano testified:

> Q WHEN ERIK WAS A TEENAGER DID HE - - STRIKE THAT. AFTER ERIK MOVED TO CALIFORNIA, DID HE EVER BRING UP THE MOLESTATION BY HIS FATHER TO YOU AGAIN?
>
> A NO
>
> Q DID YOU EVER BROACH THE SUBJECT AGAIN?
>
> A NO
>
> Q WHEN HE WOULD MAKE REFERENCE TO PROBLEMS IN THE FAMILY, WAS HE VERY SPECIFIC ABOUT WHAT WAS GOING ON THAT YOU CAN RECALL?
>
> A NO. I DON'T RECALL ANY DETAILS. HE WOULD JUST SAY SOMETHING LIKE, "THINGS WITH MY PARENTS ARE GOING REALLY BADLY," SOMETHING TO THAT EFFECT."

(Ex. 5, pp. 17479-17480:11.)

As discussed, Mr. Cano and Erik Menendez never testified about the Cano Letter in either trial. In both trials, Mr. Cano's and Erik Menendez's testimony were oddly consistent on the timing of Erik Menendez's disclosure of the alleged molestation to Mr. Cano. The specificity and consistency of their testimony is unusual, given that the disclosures had allegedly occurred ***eight years*** before they both testified in the first trial and that Mr. Cano had such great recall of what Erik Menendez told him when he was 10 years old.

The Cano Letter contradicts Mr. Cano's testimony from the first trial that Erik Menendez had never broached the subject of the alleged molestation with him after Erik Menendez had moved to California. (Ex. 5, pp. 17479-17480:11.) Erik Menendez testified he had moved to California in 1986—two years before Petitioners allege the Cano Letter was written. (Ex. 6, p. 43084: 14-17.)

If the Cano Letter is genuine, it defies logic that neither he nor Erik Menendez raised the

subject during Mr. Cano's trial testimony. In the second trial, Mr. Cano was given every opportunity to mention and/or produce the Cano Letter, but did not:

A FIRST OF ALL, I WAS VERY LOYAL TO ERIK IN THAT SENSE. ALSO, IT'S NOT REALLY THE KIND OF QUESTION THAT A BOY WOULD REALLY LIKE TO ASK HIS MOTHER, SORT OF EMBARRASSING.

Q SO DID YOU ASK YOUR FATHER?

A NO

Q WHY NOT?

A IT'S NOT SOMETHING THAT WAS THAT IMPORTANT TO ME THAT IT STUCK WITH ME FOR WEEKS AND WEEKS OR MONTHS UNTIL I SAW MY FATHER. I WAS A KID AND MY MIND WAS RACING TO DIFFERENT THOUGHTS AND DIFFERENT IDEAS EVERY DAY.

Q DID YOU ASK ANY ADULT?

A NO.

(Ex. 6, pp. 48164:19-48165:4.)

Q OKAY. BUT WHETHER OR NOT YOU KEPT IT IN YOUR MIND CONTINUOUSLY, WOULD IT OCCUR TO YOU FROM TIME TO TIME, OR WOULD YOU THINK ABOUT IT FROM TIME TO TIME, THAT YOU COUSIN WAS SUPPOSEDLY BEING TOUCHED BY HIS FATHER.

A. NO. I REALLY WOULD THINK ABOUT IT.

(Ex. 6, p. 48167:2-7.)

Q WELL, DID YOU SUGGEST TO HIM THAT YOU CAN INQUIRE OF AN ADULT WITHOUT IDENTIFYING HIM AS THE PERSON INVOLVED?

A I WAS 11 YEARS OLD. I PROBABLY DIDN'T EVEN TRY AND CIRCLE AROUND IN THE WAY OF ASKING LIKE THAT.

Q THE FACT OF THE MATTER, MR. CANO, IS YOU DID NOT REPORT THIS TO ANYONE; IS THAT CORRECT?

A THAT'S CORRECT.

Q YOU DID NOT MEMORIALIZE THIS IN ANY WAY IS THAT CORRECT?

A I'M SORRY, SIR?

Q YOU DID NOT MEMORIALIZE THIS OCCURRENCE IN ANY WAY, DID YOU?

A NO.

(Ex. 6, pp. 48167:16-48168:2.)

If Mr. Cano had truly received the Cano Letter (which Petitioners allege in this Petition had been found amongst Mr. Cano's personal effects after he died) (Petn. Ex. C), he would have been a teenager, and the Cano Letter would have been a key piece of evidence in support of Erik Menendez's molestation allegation—especially given the defense in both trials. It is inconceivable that neither defense witness Mr. Cano nor Erik Menendez mentioned or introduced this Cano Letter when meeting with Erik Menendez's attorney or in testimony in two different trials.

The timing and the manner of Mr. Cano's disclosure of the alleged molestation is also questionable. In the second trial, Mr. Cano testified that Erik Menendez was in Israel when notified that he needed to surrender to authorities for killing Kitty and Jose Menendez. Erik Menendez then flew to Florida where Mr. Cano and his mother, Marta Cano, met him and flew with Erik Menendez from Florida back to California. (Ex. 6, p. 48168: 20:22.) Per Mr. Cano, not once during their time together in Florida or on the flight back to California, did Mr. Cano and Erik Menendez discuss anything about the murders or alleged molestation. (Ex. 6, pp. 48157:15-48158:1.)

Also, per Mr. Cano, he subsequently visited Erik Menendez, who was in custody awaiting his trial. (Ex. 6, p. 48170:21-23.) During that time, Erik Menendez gifted Mr. Cano a car. (Ex. 6, p. 48176: 3-14.) After receiving a car from Erik Menendez and visiting Erik Menendez numerous times in jail, Mr. Cano testified that he had visited Erik Menendez's attorney, Leslie Abramson, in January of 1991—approximately nine months after Erik Menendez's arrest—and revealed that Erik Menendez had told him of Jose Menendez's molestation. (Ex. 6, p. 48173:8:25.) Mr. Cano testified he never told anyone else, not even his mother, about the molestation. (Ex. 6, p. 48174.) Even more

suspect, Petitioners conveniently waited to raise the Cano Letter until after Mr. Cano had died, which precludes Respondent from examining Mr. Cano about the Cano Letter in any proceedings.

As soon as Petitioners murdered their parents, they began a relentless campaign to deceive, conceal, and fabricate evidence. Moments after the murder, instead of calling 911, Petitioners left to buy movie tickets and tried to shore up an alibi with Mr. Berman. Additionally, Petitioners hid evidence by picking up the shotgun shells, hiding the murder weapons and discarding their bloody clothes. The potential that they would continue to falsify evidence to secure their freedom is not only possible but probable.

The Petitioners have exhibited a clear pattern and practice of deceit which continued beyond the day of the murders. For example, in 1990 and 1991, Petitioners ardently tried to fabricate multiple pieces of evidence in their underlying case. Before December 1990, Lyle Menendez asked Jamie Pisarcik to look up several legal cases for him, which had been "WHERE CHILDREN HAD GOTTEN OFF AFTER KILLING THEIR PARENTS.... I BELIEVE SO – YES. I MEAN, THE CASES WERE, YOU KNOW, CHILD MOLESTATION AND, YOU KNOW, CHILDREN HAD KILLED THEIR PARENTS AND GOTTEN OFF." (Ex. 5, pp. 22267:10-22268:8.) After providing these cases to Lyle Menendez, Jamie Pisarcik had met with him in December 1990. (Ex. 5, p. 22270:1-7.) At this meeting, Lyle Menendez asked Jamie Pisarcik to commit perjury and testify at trial that Jose Menendez had raped her. (Ex. 5, pp. 39280:14-39282:8.) When Jamie Pisarcik refused, Lyle Menendez tried to bribe and intimidate her into submission by telling her she had to do it because a large sum of money was going to be deposited into her bank account. (*Ibid.*) Jamie Pisarcik refused to testify in the way Lyle Menendez instructed her.

After Mr. Cano's alleged disclosure of Erik Menendez' claims of molestation to Leslie Abramson, Lyle Menendez sent the six-page Eslaminia Letter to Erik Menendez's classmate, Mr. Eslaminia, instructing him to fabricate evidence and perjure himself at trial. In the Eslaminia Letter Lyle Menendez informed Mr. Eslaminia that "Leslie wants to interview you as soon as your (*sic*) in town. She may even come up to see you." (Ex. 9.) The Eslaminia Letter then instructed Mr. Eslaminia in very specific detail to lie and testify to a made-up incident wherein Petitioners had been in fear and borrowed a handgun from Mr. Eslaminia. In other parts of the Eslaminia Letter,

Lyle Menendez concocted and scripted lies for Mr. Eslaminia to tell on various subjects, including: Petitioners were afraid of their father; Petitioners believed their father had been killed because of Jose Menendez's alleged mafia connections; Erik Menendez had informed Mr. Eslaminia that Jose Menendez had taken Erik Menendez out of the will; and Jose Menendez's statement about a father killing a son mimicking a scene from the movie "At Close Range," which Mr. Eslaminia would attribute to Jose Menendez.

In the Eslaminia Letter, Lyle Menendez wrote: "Here is an outline of what we need. It is not crucial that your story match ours perfectly, so do not worry." (Ex. 9.) Lyle Menendez also wrote:

> (Erik + I have told our lawyers this story already except we said their [*sic*] was no gun. You will say their [*sic*] was and when Leslie says but the boys said their [*sic*] was no gun, you say well I told Erik to say there wasn't a gun because of my mom.)

(*Ibid.*)

Lyle Menendez instructed Mr. Eslaminia:

> (I have an untraceable handgun I can get for you to use as the one you gave us <u>if</u> you don't already have one. Let me know over the phone.)[*sic*] Ill have Beatrice get it for you, if necessary)

(*Ibid.*)

After explicitly and comprehensively detailing the false statements that Lyle Menendez asked Mr. Eslaminia to talk to their lawyers and testify to in trial. Lyle Menendez added the following direction:

> That is basically the important facts. There may be little things like Erik told you we were taken out of the will awhile back by his Dad and occasionally you used to watch videos over our house with my Mom + Dad. You once watched a movie called <u>At Close Range</u> with Sean Penn (watch it if you haven't already) My Dad said the movie was unrealistic because the Father would have killed the son as soon as the trouble started, and not waited. You of course were shocked at this statement. You always felt my Dad was a powerful scary person. You never felt welcome.
>
> Your memory on these things does not have to be that good. Leslie will help tell you what she sort of needs. However, I think that the Saturday Store and perhaps the movie incident will be enough. Too much is not good.

> I'll be calling you. Please leave a message on my service when you receive this Letter 652 7329 and mail it back to Beatrice…
>
> First write down all the facts you need to know so that you have them to remind you later.
>
> Also scribble over the writing of this Letter with magic marker so that if it falls into the wrong hands its [*sic*] not legible. I obviously trust you completely however I sleep better if Im [*sic*] sure things have been destroyed. Mistakes have been made in the Past.

(Ex. 9.)

In the second trial, Mr. Eslaminia testified that he was supposed to tailor his testimony to whatever Petitioners needed in trial:

> Q DID YOU TELL DETECTIVE ZOELLER THAT AS TIME WHEN ON THE THREE OF YOU, THAT IS, ERIK, LYLE AND YOURSELF, WOULD ADD DYNAMICS TO FIT WHAT WAS NEEDED FOR TRIAL?
>
> A THE QUESTION IS: DID I SAY THAT TO DETECTIVE ZOLLER?
>
> Q YES.
>
> A YES. I DID….
>
> Q DID YOU TELL DETECTIVE ZOELLER THAT ERIK AND LYLE MENENDEZ ASKED YOU NOT TO COME TO THE JAIL FOR VISITS, AS VISITS WOULD LOOK SUSPICIOUS WITH YOU TESTIFYING IN THEIR BEHALF?
>
> A YES, I DID TELL DETECTIVE ZOELLER THAT.

(Ex. 6, pp. 38871: 18-25, 38872: 22-26.)

Mr. Eslaminia also testified that he never watched the movie "At Close Range" and never heard Jose Menendez mention anything about "At Close Range." (Ex. 6, p. 38884:20-28.) Mr. Eslaminia testified that he knew when he had received the Eslaminia Letter from Lyle Menendez that this was a lie. (Ex. 6, p. 38884: 26-28.)

Similar to their manipulation of Mr. Berman, the Cano Letter, the bribes and intimidation of Jamie Pisarcik regarding her testimony, and the gifting of the car to Mr. Cano, the Eslaminia Letter evidences unremitting attempts by Petitioners to coordinate evidence fabrication to support their

false narrative to justify killing their parents through defense witnesses.

Given the fact that the Cano Letter contradicts Mr. Cano's and Erik Menendez's trial testimony and Petitioners' documented history of manipulating and fabricating evidence in the underlying case (including through bribes and intimidation), the Cano Letter is neither credible nor reliable. As such, the Cano Letter is not "new evidence" under the current statutory definition as it is not "sufficiently material and credible that it more likely than not would have changed the outcome of the case." (§1473, subd. (b)(1)(C)(i)-(ii).) Moreover, it does nothing to prove Petitioners actually believed they were in imminent danger when they brutally killed their parents.

Because Petitioners totally fail to make a prima facie case of new evidence with the Cano Letter under the prevailing legal standard, this Court should summarily deny habeas relief on these grounds.

2. Roy Rossello's Claim that Jose Menendez Sexually Molested Him Does Not Constitute New Evidence on Habeas Corpus

Petitioners assert a new evidence claim on the grounds of Roy Rossello's 2023 declaration alleging Jose Menendez molested him in the 1980s. (Petn. Ex. F.) Even assuming *arguendo* that the allegations in this declaration are true, such evidence does not meet the statutory requirements for relief on claims of new evidence on habeas corpus. It is inadmissible, immaterial and lacks credibility, in contravention of section 1473, subdivision (b)(1)(C)(i).

Initially, Petitioners do not establish that it would have been admissible or material at trial. The three questions before their convicting jury were: (1) did Petitioners conspire to murder their parents?; (2) did Petitioners kill their parents?; and (3) what were Petitioners' respective states of mind when they collectively shot their parents over 12 times with shotguns, killing them? The California Court of Appeal noted:

> The trial court stated the ***principal issue*** was the state of mind of the defendants at the time of the killing and the relevance the prior incidents may have had on the defendants' mental state *at the time of the killings*. The sources witnesses were allowed to testify extensively concerning many areas in an effort to determine the state of mind of the defendants at the time of the killing.

(Ex. 7, p. 41, emphasis added.)

For example, the appellate court found that the trial court correctly sustained the prosecution's objections to a witness's opinion about Kitty Menendez's child-rearing style, finding that "[t]he question was properly objected to by the prosecution because they concerned behavior of the victims which was remote in time and ***not relevant*** to Erik's state of mind on August 20, 1989." (Ex. 7, p. 44, emphasis added.)

In similar fashion, Rossello's current allegation of sexual abuse by Jose Menendez is not admissible or material to Petitioners' states of mind at the time of the crimes because both Petitioners claimed not to have learned about Roy Rossello's allegation until more than ***30 years after*** the murders. (Petn. Ex. H, Lyle Menendez Decl., ¶ 10; Petn. Ex. B, Erik Menendez Decl., ¶ 10.) Erik Menendez declared: "In November 2022, I was told that a former member of the band [Menudo] had come forward to say that my father had raped him." (Petn. Ex. B, Erik Menendez Decl., ¶ 10.) *In another example of meticulously matched statements,* Lyle Menendez declared: "In November 2022 I was told that a former member of the band [Menudo] had come forward to say that my father had raped him." (Petn. Ex. H, Lyle Menendez Decl., ¶ 10.) Petitioners' admissions decimate the admissibility of Rossello's allegation. Clearly, a sexual abuse allegation Petitioners did not learn about for more than three decades *after* they murdered their parents was irrelevant and immaterial to their states of mind in conspiring to murder their parents, days before the murders, and at the moment they murdered their parents. Petitioners do not show otherwise.

Most importantly, as has been repeatedly litigated in Petitioners direct appeal, and federal habeas petition, Petitioners did not face imminent danger before they decided to kill their parents. (Exs. 1, 7.) Rossello's allegation does not change the facts that "[Petitioners] Erik and Lyle left the house after the confrontation, went to the car, retrieved their shotguns, reloaded their guns with better ammunition, reentered the house, burst through the doors and began shooting their unarmed parents." (Ex. 1, p. 1029.) Rossello's allegation decades after the fact does not change the convicting trial evidence or the jury's finding that Petitioners conspired to kill their parents.

Simply put, Petitioners make no showing that Rossello's declaration is admissible and "sufficiently material and credible that it more likely than not would have changed the outcome of the case," as section 1473, subdivision (b)(1)(C)(i) requires them to do. As such, it is not "new

evidence" entitling them to relief on habeas corpus.

D. PETITIONER'S NEW EVIDENCE CLAIM PERTAINING TO THE CANO LETTER IS PROCEDURALLY BARRED WITHOUT EXCEPTION

Petitioners' new evidence claim regarding the Cano Letter is procedurally barred as untimely and neither Petitioner has established a legally viable excuse or justification for its untimeliness.

Generally, successive or untimely claims in habeas petitions 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.)

A petition for writ of habeas corpus petition must be filed "as promptly as the circumstances allow." (*In re Robbins* (1998) 18 Cal.4th 770, 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 that "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 California Supreme Court 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 [123 S.Ct. 2446, 156 L.Ed.2d 544].) Thus, "[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 *In re 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.)

> A petitioner does not meet his or her burden simply by alleging in general terms that the claim or subclaim recently was discovered, or by producing a declaration from present or former counsel to that general effect. He or she must allege, with specificity, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time—and he or she bears the burden of establishing, through those specific allegations (which may be supported by relevant exhibits, see *post*, fn. 16), absence of substantial delay. (Policy 3, *supra*, std. 1-1.2 ["A petition . . . may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim, and (b) became aware, or should have become aware, of the legal basis for the claim." (Italics in original.)].)

(*In re Robbins*, *supra*, 18 Cal.4th, pp. 787-788.)

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, abrogated on other grounds by *People v. Howard* (1992) 1 Cal.4th 1132, 1174-1178; *In re Miller* (1992) 6 Cal.App.4th 873, 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 *Gallego*, *supra*, 18 Cal.4th at p. 832 ["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."])

It is no excuse that Petitioner represented himself at any point during the proceedings: "The burden [of justifying delay] is one placed even on indigent petitioners appearing in propria persona . . ." (*Clark*, *supra*, 5 Cal.4th at p. 765.)

"A convicted person is not permitted to allow years to pass during which witnesses die, disappear or forget, and his own imagination grows and expands." (*People v. Martinez* (1948) 88 Cal.App.2d 767, 773.) In waiting until after Mr. Cano died to raise this claim, Erik Menendez weaponized this substantial delay. Erik Menendez declares he wrote the Cano Letter in 1988. (Petn. Ex. B, Erik Menendez Decl., ¶ 5.) If the proffered date of this undated letter is taken as true, Erik Menendez—its alleged author—knew about this letter even before he murdered his parents. By waiting until after Mr. Cano died to raise the claim, Erik Menendez conveniently foreclosed the prosecution's ability to examine Mr. Cano about the Cano Letter. Furthermore, if his declaration on this point is taken as true, Lyle Menendez knew about it at least eight years before filing this Petition. (Petn. Ex. H, Lyle Menendez Decl., ¶ 10.) Yet he provides no credible or legally viable explanation or justification for waiting until 2023 to raise this claim.

Accordingly, this Court should summarily dismiss Petitioners' claim of new evidence vis-à-vis the Cano Letter as procedurally barred for its untimeliness. In addition, Petitioners' new

evidence claim regarding the Cano Letter does not fall within any of the exceptions to a procedural bar for untimeliness.

The "only exception" to the rules barring successive or untimely petitions "are 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, italics in original.) *Clark* 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.*, pp. 797-798.)

As the California Supreme Court observed in *Reno*, *supra*:

> The words used to articulate the *Clark* exceptions to our timeliness rules—"*fundamentally* unfair," "*actually* innocent," "*grossly* misleading profile," "*invalid* statute"—indicate how high the bar is to a litigant's successfully invoking these narrow exceptions.

(*Reno*, *supra*, 55 Cal.4th at p. 472, citations omitted, italics in original.)

None of these exceptions apply to Petitioners' new evidence claim regarding the Cano Letter because this claim is not a constitutional, Petitioners are not sentenced to death and they were not convicted or sentenced pursuant to an invalid statute.

While Petitioners may try to argue that this claim falls under the second *Clark* exception for claims of actual innocence, it does not. Petitioners abjectly fail to make a prima facie showing that this "new evidence" meets the statutory requirements necessary on habeas corpus. It does nothing to alter the finding that they lacked "an actual fear of an imminent harm" when they killed their parents. (Ex. 1, pp. 1029-1030.) It is not evidence of their actual innocence.

Thus, Petitioners "new evidence" claim regarding the Cano Letter is procedurally barred for its untimeliness. As such, this Court should summarily deny the claim.

CONCLUSION

Petitioners have failed to establish a prima facie case that they are entitled to habeas corpus relief on any of their claims. Procedurally, Petitioners' new evidence claim based on the Cano Letter is barred as untimely, without exception. Substantively, Petitioners' claims fail. Both claims of their alleged "new evidence" fail the specific requirements of section 1473, subdivision (b)(1)(C). Petitioners do not make a prima facie showing otherwise.

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court summarily deny Petitioners' Petition without an order to show cause and without the necessity of an evidentiary hearing.

Dated: February 21, 2025

Respectfully submitted,

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By:

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