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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** **RETURN 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 GARDNER 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 Return to the Petition for Writ of Habeas Corpus ("Petition") of Petitioners Erik Menendez and Joseph Lyle Menendez[1] ("Petitioners").

[1] Petitioner Joseph Lyle Menendez was commonly referred to as "Lyle" in the records of the underlying case. 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 Menendez" in this Return. But within the Statement of Facts, *post*, Respondent will refer to him

INTRODUCTION

> [K]illing him [Jose Menendez] had nothing to do with us . . . [I]t was just a question of Erik and I getting together and somebody bringing it up, and us realizing the value of it.

—Lyle Menendez. Dec. 11, 1989 conversation with Erik Menendez and Dr. Jerome Oziel.[2]

> There was no way I was going to make a 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. . . . It had to be his own personal issue. If he felt the same way I did about killing mom.

—Lyle Menendez. Dec. 11, 1989 conversation with Erik Menendez and Dr. Jerome Oziel.

> IF YOU WERE TO SPEND ALL YOUR TIME TALKING ABOUT WHETHER OR NOT THE DEFENDANTS WERE ABUSED, THAT WOULD BE ONE WAY OF VEERING AWAY, OR STEERING AWAY FROM THE REAL ULTIMATE ISSUE IN THIS CASE, WHICH IS THE DEFENDANT'S STATE OF MIND AT THE TIME OF THE COMMISSION OF THE CRIME.

—David Conn, lead prosecutor.[3]

There are few murder cases in which the evidence of planning and premeditation is as stark as that presented in this case. Petitioners confessed on tape to murdering their parents, revealing the extent of their forethought and deliberation. As the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") observed, in those conversations Petitioners "spoke candidly about the murders, discussing in some detail their thoughts and plans leading up to them." (Ex. 1, p. 1022.) They consistently framed their planning of the murders as a "decision" that they had arrived at over a period of time. In those conversations, Petitioners never mentioned the alleged abuse that they now

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in the quoted material as "Lyle" in conformity within the usage of the Court of Appeal opinion on direct appeal.

[2] *Menendez v. Terhune* (9th Cir. 2005) 422 F.3d 1012, 1023. Respondent attaches a copy of this decision hereto as Exhibit 1. All exhibits are incorporated by reference as if fully set forth herein.

[3] Reporter's Transcript ("RT"), volume 299, page 50961. Attached hereto as Exhibit 5 is a true and correct copy of the RT from Petitioners' first trial in the underlying case. Attached hereto as Exhibit 6 is a true and correct copy of the RT from Petitioners' second underlying trial. The volume number of the RT will immediately precede the designation "RT" in any citation of those transcripts. Thus, for example, the citation for the above quote is 299RT 50961.

claim is central to this case. Instead, as the Ninth Circuit explained, they "talked about their relationships with their parents and about the pressures they felt growing up—the fact that they loved their parents but found their father too demanding, and that their mother, who had contemplated suicide, was unhappy." (Ex. 1, p. 1022.)

"Particularly incriminating were statements about the reasons for and plans to kill Jose and Kitty . . . ." (Ex. 1, p. 1022.) Lyle Menendez said, "we thought that we would just kill dad, and eliminate the problem." (*Id.* at p. 1023.) In the audio recording, Petitioners portrayed their decision to kill Kitty Menendez as a planned mercy killing—because, as Erik Menendez said of his mother, "there was no way, never could she live without my father." (*Ibid.*) Lyle Menendez said that "for my mother's sake . . . we had to make a decision. It was one of the harder ones, and it was a separate issue. (unintel.). He's the reason. My father should be killed. There's no question." (*Ibid.*) As set forth in the quote above, Lyle said that Petitioners realized "the value" in killing their parents (*ibid.*), but explained that he wanted to let Erik Menendez "sleep on it for a couple of days" to see "[i]f he felt the same way I did about killing mom" (*ibid.*). Petitioners were unspeakably callous in describing their decision making and their state of mind. For example, as the prosecutor noted in his opening argument, Lyle Menendez likened the prospect of Erik Menendez missing his parents after killing them to the concept of Lyle Menendez missing his dog, saying: "And I think one of the biggest pains he has is that you miss just having these people around. I miss not having my dog around, if I can make such a gross analogy." (Ex. 6, 300RT 51041.)

Petitioners' recorded confession to Dr. Oziel was only part of the abundant evidence that Petitioners premeditated and deliberated before killing their parents. Erik also confessed the murders to a friend. The prosecution presented evidence that Petitioners purchased shotguns in a different city over 100 miles away under false names two days before the murders and planned a detailed alibi ahead of time for the evening of the murders. A stream of witnesses came forward to describe various ways in which Petitioners had attempted to fabricate evidence and suborn perjury, to create carefully concocted and false stories about their parents (e.g., the fabricated stories of Jose Menendez raping Lyle's girlfriend or Kitty Menendez trying to poison the family), including scenarios based on movies.

Based on this devastating evidence of Petitioners' planning and execution of two brutal murders, on March 20, 1996, a jury[4] convicted Petitioners of the following crimes: first degree murder of Jose Menendez with the special circumstance of lying in wait (Count 1); first degree murder of Kitty Menendez with the special circumstance of lying in wait (Count 2); and conspiracy to commit murder (Count 3). As to Counts 1 and 2, the jury found true the multiple-murder special circumstance.[5] On April 19, 1996, the trial court sentenced each Petitioner as follows: on Count 1, Petitioners received a sentence of life in prison without the possibility of parole; on Count 2, Petitioners received a sentence of life in prison without the possibility of parole; and on Count 3, the sentence was stayed pursuant to Penal Code[6] section 654.[7] (On May 13, 2025, Petitioners were resentenced to 25 years to life on all three counts, with the sentence for Count 2 to run consecutive to the sentence for Count 1; as before, the term for Count 3 is stayed.)

The Court of Appeal affirmed Petitioners' convictions "based upon the overwhelming evidence presented against the defendants at trial." (Ex. 7, p. 14.)[8]

Petitioners have already unsuccessfully brought several legal claims in appeals and habeas petitions. Two of their previously raised and denied claims are especially relevant to this Petition: 1) the trial court's refusal to give an imperfect self-defense instruction (Ex. 1, pp. 1028-1030), and 2) complaints that the trial court improperly excluded "some evidence relating to specific instances of physical, psychological, and sexual abuse . . ." (Ex. 1, pp. 1032-1033). Critically, both state and federal courts upheld the trial court's refusal to give an instruction on imperfect self-defense because, as the Ninth Circuit explained: "Petitioners failed

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[4] Unless otherwise noted in the body of this Return, all references to Petitioners' trial are to their second trial, at 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.

[6] All further statutory references are 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.

[8] Attached as Exhibit 7 is a copy of the unpublished Court of Appeal opinion. (*People v. Erik Galen Menendez et al.* (Feb. 27, 1998, Court of Appeal Case No. B104022 [nonpub. opn.].)

to demonstrate that they believed they were in *imminent* peril . . ." (Ex. 1, p. 1029, italics in original.) As for the excluded evidence of specific instances of physical, psychological, and sexual abuse, as the Ninth Circuit explained: "The California Court of Appeal concluded 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 their parents." (*Id.* at p. 1033.) Not only was the excluded evidence cumulative, but the Ninth Circuit explained that even if it had been error for the trial court to exclude the evidence, any such error would be harmless. "[W]ith 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.)

Petitioners now proffer two pieces of allegedly new evidence that are little different from the evidence excluded at trial—the exclusion of which was previously held proper and harmless by every court that has considered the issue. On May 3, 2023, Petitioners filed the instant Petition, seeking habeas relief through new evidence claims, pursuant to section 1473, subdivisions (b)(3)(A) and (B).[9] The "new evidence" submitted by Petitioners—an undated copy of a letter purportedly from Erik Menendez to his cousin Andy Cano (the "Cano Letter") and a declaration from Roy Rossello—provides no additional information at all concerning the key issue at trial; namely, Petitioners' mental state on the night of August 20, 1989, when they executed their parents by fatally shooting them over 12 times with shotguns. At most, this evidence merely supplements the voluminous evidence of alleged sexual abuse the defense presented at the second trial—including testimony by Andy Cano, and seven days of detailed and graphic sexual abuse testimony by Erik Menendez.

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[9] As discussed *post*, in 2023, the Legislature amended the requirements for a habeas petitioner to prove a habeas claim based on new 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.) The subdivisions have been renumbered.

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).)

Petitioners' "new evidence" claims fail for many 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,[10] 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,[11] Erik Menendez, could have easily introduced the purported December 1988 Cano Letter during his seven days of trial testimony in the second trial. In that testimony, Erik Menendez detailed the sexual, physical, and mental abuse inflicted on him by his father for over a decade and specifically testified about his communications with his cousin Andy Cano concerning that alleged abuse. The only communications Erik Menendez testified about, however, involved conversations he had with Andy Cano approximately six years before the murders and prior to Erik Menendez moving to California. Andy Cano similarly testified about these conversations six years prior to the murders, confirming that no additional subsequent communications about sexual abuse occurred thereafter. Since Erik Menendez claims he wrote the Cano Letter and thus knew about it at his trial, the defense could have

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[10] Lyle Menendez does not allege in the Petition that Erik Menendez advised him of the existence of the Cano Letter before or during either of Lyle Menendez's trials.

[11] Respondent denies that Erik Menendez is the true author of the Cano Letter, and intends to challenge that claim if the Court sets an evidentiary hearing on that claim. For brevity, Respondent does not modify each reference to the Cano Letter's author as "purported" or "alleged" in this Return. Such purposeful omission is not Respondent's concession or stipulation on this point.

introduced the Cano Letter during the testimony of Erik Menendez and/or Andy Cano in the second trial. This would have allowed the defense to argue that Erik Menendez had mentioned sexual abuse to Andy Cano, not just six years before the murders, but within a year of the murders. Inexplicably, there was no mention of the Cano Letter during Erik Menendez's or Cano's trial testimony.

Second, 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" until 2023, nearly 27 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 hearsay statements attached 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 Barbara Walters, after which it became a subject in a nationally broadcast 2015 "Barbara Walters Special" about Petitioners' case. [12] (Petn., p. 16.) Yet instead of immediately filing a habeas petition based on this piece of "new evidence," Lyle Menendez delayed bringing it to the courts' attention for eight years, finally raising it only in 2023.

Third, as to Lyle Menendez, the introduction of the Cano Letter—an out-of-court statement allegedly made by his brother to their cousin—in order to establish the truth of its contents would have been inadmissible hearsay, without a showing of a viable legal exception. Thus, this alleged "new evidence" fails the admissibility mandate of section 1473, subdivision (b)(1)(C)(i).

Fourth and most important, the undated, photocopied Cano Letter is not "new evidence" because 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)), for many reasons.

The lack of credibility of the Cano Letter is established principally by sworn testimony already provided by both its purported author and recipient. At trial, neither Erik Menendez (the purported author of the Cano Letter) nor Andy Cano (its purported recipient)

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

mentioned the Cano Letter, despite having had the perfect opportunity to do so 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 sworn testimony of both Erik Menendez and Andy Cano at the two trials, in which they both stated under oath that 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 had actually been 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 thought to introduce the actual letter or its contents during the trials. 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, 104RT 17479-17480:11; Ex. 6.)

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 ceaselessly before and during the years of the two trials. Petitioners' deceit, lies, fabrication of evidence, and subornation of perjury evolved over the course of at least five different versions of events that Petitioners told: (1) Petitioners 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 of this pattern of deliberate deceit 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 false identification and a false 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 of 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, Petitioners developed their next lie that their father was a violent sexual predator. Lyle attempted to suborn perjury by telling his girlfriend Jamie Pisarcik to falsely testify that his father had 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 did not tell these people that he had been 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 followed Lyle's instructions and testified falsely to this story at the first trial but 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 had gone 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.

Even if the Cano Letter were considered credible, it would not have changed the outcome of the trial. It does nothing to show that Petitioners feared they were in *imminent* peril at the moment they shotgunned their parents to death. "[T]he 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." (Ex. 1, p. 1029, citing *In re Christian S.* (1994) 7 Cal.4th 768, 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, p. 1029, italics in original.) Accordingly, Petitioners have no basis to argue that the trial court would have changed its decision to refuse an imperfect self-defense instruction had the letter been admitted at trial.

Nor would the Cano Letter have caused the trial court to give a heat of passion instruction as to Kitty Menendez—as to whom a heat of passion instruction was denied because in the middle of their brutal murder, Petitioners, "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.) Nor would the Cano Letter add materially to any heat of passion defense regarding Jose Menendez—especially in light of the overwhelming evidence of premeditation and deliberation in this case.

Even more ancillary than the Cano Letter is Petitioners' "new evidence" claim centered on Roy Rossello's allegation in his 2023 declaration[13] that Jose Menendez sexually abused him in the 1980s. Like the Cano Letter, the Rossello declaration would not have changed the trial court's decision to deny an imperfect self-defense instruction due to the lack of "imminent" peril.

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[13] Respondent does not admit, stipulate, or concede that Roy Rossello actually signed, and even wrote, the proffered 2023 declaration. This is a claim that Respondent intends to challenge at an evidentiary hearing if the Court decides to set one on that claim. For brevity, Respondent will not modify every reference to the Rossello declaration's author as "purported" or "alleged" in this Return. However, such purposeful omission is not a concession or stipulation from Respondent on this point.

Petitioners 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.) Thus, it would not be relevant to the jury's evaluation of their individual states of mind in August 1989, when they conspired to kill, and did kill, their parents. Petitioners cannot reasonably argue that such evidence is relevant to a heat of passion defense, or to the question of whether they deliberated or premeditated before killing their parents.

Even when viewed in the light most favorable to Petitioners, both pieces of "new evidence" proffered in the instant Petition at best marginally provide more evidence to corroborate the evidence Petitioners already submitted at trial that Jose Menendez was an abuser. This evidence does not merit a new trial, given the overwhelming evidence demonstrating that Petitioners deliberately and with premeditation planned a fatal preemptive strike, purposely killing their parents *before* they believed they were in imminent danger. (See *Menendez v. Terhune*, *supra*, 422 F.3d at p. 1030 ["Taking Erik's testimony as true, these killings were, in effect, preemptive strikes."].)

Current counsel for Erik and Lyle Menendez try to reframe the issues by falsely claiming that the *only* issue at trial was sexual abuse, not the state of mind of Petitioners when they shotgunned their parents to death. Indeed, the entire Petition rests on this faulty premise. Counsel for Petitioners distort a line from the prosecutor's argument to suggest that even the prosecution agreed that the entire case was about sexual abuse. As shown in this Return, this is a flagrant distortion of the prosecutor's arguments, which were designed to show that the defense relied on allegations of abuse as a *distraction* from the real issue in the case: the fact that overwhelming evidence demonstrated that Petitioners coldly deliberated and premeditated the shotgun murders of their parents. The prosecutor *continually* reminded the jury not to be distracted by the abuse allegations, explaining that even if they were true, they might have given Petitioners a motive to commit premeditated murder: revenge. But, as the prosecutor noted, a premeditated and deliberate murder committed for revenge is still first degree murder.

While sexual abuse is abhorrent and may be a *motive* for murder, it does not *justify* murder and does not negate overwhelming evidence of planning, deliberation, and premeditation.

The jury was not asked to decide if the Menendez brothers were sexually abused by their father, or whether their mother failed to stop it. Rather, the jury was asked whether the Menendez brothers conspired to commit these murders and did commit these murders; whether they did so willfully, deliberately, and with premeditation; whether they lay in wait to surprise their parents . . . or whether (with respect Jose Menendez only) they acted in the "heat of passion." The evidence contained in the Petition would not have affected the jury's evaluation of these questions. Therefore, Petitioners cannot justify an evidentiary hearing through a claim that their "new evidence" "would have more likely than not changed the outcome" of their case. (§1473, subd. (b)(1)(C)(i).)

Moreover, Petitioners' new evidence claim about the Cano Letter is procedurally barred for successiveness (as to Erik Menendez) and untimeliness (as to both Petitioners).

Absent exceptions not applicable here, habeas corpus is not a vehicle for matters that could have been raised at trial,[14] that were raised on appeal,[15] that could have been raised on appeal,[16] or that were[17] or could have been[18] raised in a previous habeas corpus petition. Erik Menendez, the purported author of the Cano Letter, knew about the Cano Letter at the time of trial, and thus could have raised it at trial, on appeal, or in one of his previous habeas petitions. Accordingly, the claim is successive as to him.

Also, the claim is untimely as to both Petitioners. 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.) Instead of raising the claim in a timely fashion, Erik Menendez waited decades after his conviction to raise this "new evidence"

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[14] *In re Seaton* (2004) 34 Cal.4th 193, 196-197, 200 (*Seaton*).

[15] *In re Waltreus* (1965) 62 Cal.2d 218, 221 (*Waltreus*); *In re Harris* (1993) 5 Cal.4th 813, 829 (*Harris*).

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

[17] *In re Miller* (1941) 17 Cal.2d 734, 735 (*Miller*).

[18] *In re Horowitz* (1949) 33 Cal.2d 534, 546-547 (*Horowitz*); *In re Clark* (1993) 5 Cal.4th 750, 774-775 (*Clark*), superseded by statute on other grounds as stated in *Briggs v. Brown* (2017) 3 Cal.5th 808, 842.

habeas claim. As for Lyle Menendez, he waited about eight years 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 a legally viable explanation or justification for their substantial delays in raising the "new evidence" claim vis-à-vis the Cano Letter, this claim is also procedurally barred for untimeliness.

Petitioners fail to justify an evidentiary hearing as to either piece of proffered "new" evidence. Accordingly, this Court should discharge the order to show cause and summarily deny the Petition without ordering an evidentiary hearing on the claims in this Petition.

DATED: August 7, 2025

Respectfully submitted,

NATHAN J. HOCHMAN
District Attorney

By:

SETH CARMACK
Deputy District Attorney

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 Court of Appeal's unpublished opinion in Petitioners' direct appeal:[19]

> **A. Prosecution's Case-in-Chief**
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> 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."[20] 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 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.

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[19] 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.

[20] [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.

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.[21] 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

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21 [4] Dr. Oziel first began seeing Erik and Lyle in September 1988, after Erik was involved in two burglaries in Calabasas in July 1988.

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 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.[22] 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 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.[23] 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

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22 [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.

23 [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."

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 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, u[vul]a 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 and found true the following allegations: first degree murder of Jose Menendez (Count 1) with the special circumstance of lying in wait; first degree murder of Mary Louise Menendez (Count 2)[24] with the special circumstance of lying in wait; and conspiracy to commit murder (Count 3). The jury also found true a multiple-murder special circumstance. (Ex. 2.) On April 19, 1996, the trial court sentenced each Petitioner to the following: as to Count 1, life in prison without the possibility of parole; as to Count 2, life in prison without the possibility of parole. The sentence on Count 3 was stayed pursuant to section 654. (Ex. 3.)[25]

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[24] Mary Louise Menendez was the given name of Petitioners' mother, but she was consistently referred to as "Kitty" Menendez throughout the trial and appellate opinions and will be referred to as "Kitty" in this Return.

[25] As noted *ante*, on May 13, 2025, Petitioners were resentenced to 25 years to life on all three counts, with the sentence for Count 2 to run consecutive to the sentence for Count 1; as before, the term for Count 3 is stayed.

2. **Petitioners' Direct Appeals**

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

a. **Petitioners Were Not Entitled to an 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 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 Court of Appeal noted that in finding Petitioners guilty of conspiracy to commit murder and in finding true the special circumstances, the jury had found that the killings had been 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 allowed the heat of passion instruction to be given only 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 appeal.

On direct appeal, the 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. The Trial Court's Exclusion of "Source Witnesses" Was Proper

The Court of Appeal held that the trial court's exclusion of "source witnesses"[26] had been 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 Court of Appeal noted:

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

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[26] "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.)

> 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 Court of Appeal and the fact that the excluded "source witnesses" did not involve purported sexual abuse evidence, Petitioners continue to complain about the exclusion of these witnesses in the instant Petition. (See Petn., p. 11.)

d. <u>The Prosecutor's Argument Denying Evidence of Sexual Abuse was Not Improper</u>

The 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 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 Court of Appeal 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.)

3. <u>Petitioners' Prior Habeas Petitions</u>

a. <u>State Habeas Petitions</u>

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.[27]

On April 30, 1999, Erik Menendez filed a state habeas petition in Los Angeles Superior Court. That petition was also denied.[28]

b. Federal Habeas Petition and Appeal

On September 7, 2005, the Ninth Circuit affirmed the denial of Petitioners' federal habeas petitions in *Menendez v. Terhune*, *supra*, 422 F.3d 1012 (Ex. 1). In the consolidated appeal, 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 an imperfect self-defense instruction; (3) the trial court's exclusion of testimony and denial of the right to due process; (4) the trial court's exclusion of testimony and denial of the Sixth Amendment right to present a defense; and (5) improper closing argument by the prosecution. (*Id.*, pp. 1028-1036.)

1. The Admission of the Oziel Tapes Was Proper

After killing their parents, Petitioners met with Dr. Oziel, and one of the conversations was recorded. As noted in the introduction to this Return, in that recording, Lyle Menendez stated, "There was no way I was going to make a 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, 299RT 50919:23-27, bold and italics added.) At trial, the prosecution argued to the jury that the Oziel tapes generally, and this statement in particular, served as clear proof that Petitioners' decisions to murder their parents were willful, premeditated, and deliberate. The

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[27] 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.

[28] 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.

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, 299RT 50919:25-28, bold and italics added.)

On federal habeas, Petitioners claimed that the admission of the Oziel tapes violated their due process rights. (Ex. 1.) The Ninth Circuit 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. <u>Denial of Imperfect Self-Defense Instruction Upheld</u>

After the trial court and the 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 had violated California and federal law. The Ninth Circuit also upheld the rejection of this claim.

The Ninth Circuit held that Petitioners could not establish the 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 reiterated the trial court's reasoning and the Court of Appeal's affirmance of the trial court's refusal to instruct 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 ruled that Petitioners had failed to show that they had been in imminent peril, and further ruled that any prior abuse at the hands of their parents did not change that lack of imminent peril. (Ex. 1, pp. 1029-1030.)

3. Exclusion of Source Witnesses Did Not Violate Due Process

Petitioners alleged that the trial court's exclusion of the source witnesses, whose testimony was intended to establish why Petitioners feared their parents, was improper and violated their right to due process. The Ninth Circuit again disagreed, finding that the exclusion of the "source witnesses" had been 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 recounted the trial court's ruling that before the "source witnesses" could testify about why Petitioners had feared their parents, Petitioners were required to lay a foundation for such testimony, which could be accomplished only if Petitioners testified about their actual belief of imminent danger. (Ex. 1, p. 1030.) The Ninth Circuit 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 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, italics in original.)

The Ninth Circuit, like the 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 held that the requirement that Petitioners lay the proper foundation before their source witnesses could testify did not violate their due process rights. (*Ibid.*)

4. Exclusion of Testimony Did Not Violate the Federal Constitution

On federal habeas, Petitioners alleged that the trial court's exclusion of testimonial evidence had violated their due process rights under the Fifth, Fourteenth, and Sixth Amendments 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 upholding the rejection of this claim, the Ninth Circuit noted that "Petitioners' claim here is closely related to the previous two claims we have rejected." (*Ibid.*) The Ninth Circuit stated that 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 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 had not been error for the trial court to exclude this evidence, the Ninth Circuit 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, italics in original.)

5. <u>Prosecution Closing Arguments Not Improper</u>

On federal habeas, Petitioners advanced an argument similar to one made in the instant Petition: 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 exclude 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 upheld the rejection of 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, italics added.) The Ninth Circuit 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.*, italics added.) The Ninth Circuit 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 found that the prosecutor's argument had been proper, and had been 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 affirmed the rejection of this claim, finding no inappropriate argument or error in the trial court. (Ex. 1, pp. 1035-36.)

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ADMISSIONS, DENIALS, AND ALLEGATIONS

Respondent admits, denies, and alleges as follows:

I.

Respondent admits Petitioners are prisoners in the State of California who are in the custody of the California Department of Corrections and Rehabilitation.

Respondent denies the Petitioners' current incarceration is unlawful or unconstitutional.

Respondent affirmatively alleges that Petitioners are constitutionally restrained pursuant to the abstracts of judgment reflecting the convictions in Los Angeles Superior Court case numbers BA068880-01 and BA068880-02.

Respondent affirmatively alleges that Petitioners shot and killed Jose and Kitty Menendez.

II.

Respondent admits Petitioners were each convicted of two counts of first degree murder, with lying-in-wait and multiple-murder special circumstance allegations, and one count of conspiracy to murder. Respondent admits that the trial court imposed consecutive life without parole terms on each defendant for the murder charges. Respondent admits that the trial court stayed the 25 year-to-life term for the conspiracy charge pursuant to Penal Code section 654. Respondent affirmatively alleges that on May 13, 2025, Petitioners were resentenced to 25 years to life on all three counts, with the sentence for Count 2 to run consecutive to the sentence for Count 1; as before, the term for Count 3 is stayed.

III.

Respondent admits Petitioners pled not guilty and were tried by a jury.

IV.

Respondent admits Petitioners appealed their convictions to the Court of Appeal, Second Appellate District. Respondent affirmatively alleges that on February 27, 1998, the Court of Appeal affirmed Petitioners' convictions in an unpublished opinion.

Respondent admits that Petitioners each filed timely Petitions for Review in the California Supreme Court which were denied on May 27, 1998. (Petn., p. 7.)

V.

Respondent admits that on October 5, 1998, Lyle Menendez filed a habeas corpus petition in the California Supreme Court. Respondent admits that petition was denied without comment on March 31, 1999. Respondent admits that on April 30, 1999, Erik Menendez filed a habeas corpus petition in the California Supreme Court. Respondent admits that on July 28, 1999, that petition was denied without comment.

Respondent admits both defendants filed habeas corpus petitions in federal court which were denied. Respondent affirmatively alleges that these denials were affirmed on appeal.

Respondent denies the allegation that as to the matters raised in paragraph VI of the Petition, no other petitions for writ of habeas corpus have been filed. Respondent affirmatively alleges that Petitioners have previously filed state and federal habeas petitions alleging violations of constitutional rights. Respondent affirmatively alleges that those previous habeas petitions have been denied. Respondent admits that Petitioners have not brought any previous habeas petitions based on the letter to Andy Cano or the declaration of Roy Rossello.

VI.

Respondent denies that Petitioners' judgment of conviction has been unlawfully and unconstitutionally imposed in violation of their constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Respondent denies that newly discovered evidence directly supports the defense presented at trial and just as directly undercuts the state's case against Petitioners.

Respondent denies Petitioners' allegation that the following facts are just "now known to Petitioners" and that they support Petitioners' claims.

//

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a.

Respondent admits on August 20, 1989, Jose and Kitty Menendez were shot over 11 times and killed. Respondent affirmatively alleges that the killings were perpetrated by Petitioners Erik and Lyle Menendez.

Respondent affirmatively alleges that the fact of the killings is not a new fact "now known to Petitioners."

b.

Respondent admits in April of 1993 the state charged Petitioners with three counts: two counts of special circumstance murder and one count of conspiracy to murder.

Respondent affirmatively alleges that this is not a new fact "now known to Petitioners."

c.

Respondent admits that at trial, Petitioners did not deny the shootings with which they were charged. Respondent denies that "petitioners admitted their participation in the shooting," as Respondent affirmatively alleges that only one of the Petitioners testified at trial. Respondent admits that at trial, Petitioner Erik Menendez admitted his participation in the shootings. Respondent admits that in their opening statements in Petitioners' second trial, Petitioners' counsel conceded Petitioners' participation in the shootings. (Ex. 6, 221RT 36216-36219, 36245.)

Respondent denies that Petitioners' defense was that the shooting was in imperfect self-defense. Respondent affirmatively alleges that the trial court refused an imperfect self-defense instruction, and thus Petitioners could not legally pursue a theory of imperfect self-defense. Respondent affirmatively alleges that the trial court ruled: "And looking at the evidence here, I just don't see that there has been presented substantial evidence of imminent danger to justify giving of an instruction on imperfect self-defense." (Ex. 6, 298RT 50664: 21-24.) Respondent admits that Petitioners' defense included the contention that Petitioners did not harbor the mental state needed for first degree murder and that they were therefore guilty only of manslaughter.

Respondent affirmatively alleges that the California Court of Appeal found that the exclusion of the imperfect self-defense instruction had been proper because Petitioners had not been

in imminent harm before or at the time of the murder. (Ex. 7, pp. 80-88.) Respondent affirmatively alleges that the California Court of Appeal found that "there was not a danger of imminent harm because Erik and Lyle's parents could not kill them until they exited the den." (Ex. 7, p. 82.)

Respondent affirmatively alleges that the Ninth Circuit agreed with the trial court and the Court of Appeal in upholding the denial of Petitioners' claim challenging the exclusion of the imperfect self-defense instruction. (Ex. 1, pp. 1028-1030.) Respondent affirmatively alleges that the Ninth Circuit 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, pp. 1029-1030.)

d.

Respondent admits that Petitioners were tried twice.

e.

Respondent admits that at the first trial, Petitioners had separate juries.

f.

Respondent admits that Diane Vandermolen was the niece of Jose and Kitty Menendez. Respondent admits that Diane Vandermolen testified that she stayed with them during the summer of 1976 when Lyle was eight years old. Respondent admits that in Petitioners' first trial, Diane Vandermolen testified that one night eight-year-old Lyle came down to her bedroom and asked if he could sleep in her room because "he and his dad had been touching each other" in the genital area." (Ex. 5, 71RT 11797.) Respondent admits that in Petitioners' first trial, Diane Vandermolen testified that when Diane immediately told Kitty about this, Kitty dragged Lyle away by the arm. (Ex. 5, 71RT RT 11798-99.)

Respondent affirmatively alleges that the Court of Appeal found that the trial court's decision to exclude this particular testimony of Diane Vandermolen in Petitioners' second trial was not reversible error. (Ex. 7, pp. 32-38.)

Respondent affirmatively alleges the Ninth Circuit also held that the exclusion of Diane Vandermolen's testimony relating to this specific event was proper, and rejected this claim when raised in the appeal from the denial of the federal habeas petition. (Ex. 1, p. 1032.)

Respondent affirmatively alleges that Diane Vandermolen did testify at Petitioner's second trial about physical and verbal abuse by both Jose and Kitty. (Ex. 1, p. 1033.)

Respondent admits that Peter Cano, Marianne Cano, Jessica Goldsmith, and certain other witnesses that were deemed "source witnesses" were excluded from testifying in the second trial.

Respondent affirmatively alleges that the exclusion of the "source witnesses" was litigated on appeal. Respondent affirmatively alleges that the Court of Appeal determined that the exclusion of certain source witnesses had been proper, noting that "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." (Ex. 7, p. 41.) Respondent affirmatively alleges that the Court of Appeal held: "We find no abuse of discretion in the trial court's limitation or exclusion of some source witness testimony." (*Ibid.*)

Respondent admits that Andy Cano was a cousin and friend of Erik Menendez and testified that when Erik Menendez was 12 or 13 years old, Erik told him that Jose was giving him massages in the genital area and massaging his penis. Respondent admits that Erik Menendez testified that he asked Andy Cano if his father did the same thing and swore him to secrecy.

Respondent affirmatively alleges that Andy Cano testified that beside the conversations he had with Petitioner Erik Menendez when he was approximately ten years old, the only other time that he spoke of the alleged abuse was with Erik Menendez's counsel Leslie Abramson after Petitioner Erik Menendez was arrested for murdering Jose and Kitty Menendez. (Ex. 6, 284RT 48173-48175.)

Respondent affirmatively alleges that in Petitioners' first trial, Andy Cano testified that Petitioner Erik Menendez had never mentioned the alleged molestation to him after Petitioner Erik Menendez had moved to California. (Ex. 5, 104RT 7479-17480:11.)

g.

Respondent denies as argumentative and misleading the contention that the prosecutor "urged jurors to find that no sexual abuse had occurred" but admits that the prosecutor argued that the evidence of sexual abuse was not credible. However, Respondent affirmatively

alleges that in both his opening argument and rebuttal argument, the prosecutor repeatedly emphasized that focusing on the issue of abuse would be a distraction from the jury's proper focus: the issue of whether the murder was deliberate and premeditated. (See, e.g., Ex. 6, 299RT 50883; 50961-50962; 51479; 51481; 306RT 52213-52215; 52237-52240.)

Respondent affirmatively alleges that the jury was given no instruction in this case stating that the jury was required to decide whether Petitioners had been sexually molested. Respondent affirmatively alleges that the jury was not asked to make, and did not make, any special finding regarding whether Jose Menendez committed sexual assault.

Respondent affirmatively alleges that the principal questions for the jury were whether Petitioners conspired to murder their parents and did murder their parents; whether Petitioners deliberated and premeditated in committing the murders; and whether they committed the murders by means of lying in wait.

Respondent affirmatively alleges that the Court of Appeal stated that the evidence in Petitioners' trial was "overwhelming." (Ex. 7, p. 14.)

h.

Respondent admits Petitioners' allegations regarding the trial court's reporting of the tally of the votes from the juries at Petitioner Lyle Menendez's first trial, except that Respondent denies as argumentative the statement that these tallies were arrived at "[i]n light of the evidence presented."

i.

Respondent admits Petitioners' allegations regarding the trial court's reporting of the tally of the votes from the juries at Petitioner Erik Menendez's first trial, except that Respondent denies as argumentative the statement that these tallies were arrived at "[i]n light of the evidence presented."

j.

Respondent admits that at Petitioners' second trial, there was only one jury for the two defendants. (Petn, p. 8.)

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k.

Respondent admits that the trial court excluded certain defense evidence at the second trial. Respondent denies the allegation that "[a]t trial, much of the defense evidence, including Diane Vandermolen's testimony, was excluded." (Petn., p. 3:27-28.) Respondent affirmatively alleges that the trial court did *not* exclude Ms. Vandermolen from testifying in the second trial. Respondent affirmatively alleges that Ms. Vandermolen did testify at Petitioners' trial. (See Ex. 6, 277RT 46588-46726.) Respondent affirmatively alleges that one aspect of Ms. Vandermolen's testimony, her "fresh complaint" testimony, was made inadmissible by Lyle Menendez's personal decision not to testify.

Respondent admits that the trial court excluded certain proffered testimony from Peter Cano, Marianne Cano, and Jessica Goldsmith, as well as evidence of an essay purportedly written by Lyle Menendez in 1982. Respondent denies as argumentative the allegation that the trial court excluded "substantial amounts" of defense evidence.

Respondent affirmatively alleges that the California Court of Appeal held the trial court had allowed numerous witnesses to testify about physical and mental abuse by Jose and Kitty Menendez and that the exclusion of any witnesses had not been an abuse of discretion. (Ex. 7, pp. 40-41.) Respondent affirmatively alleges that none of the "source witnesses" whose testimony was excluded in the second trial had any personal knowledge of the alleged sexual abuse.

Respondent affirmatively alleges that Petitioners presented extensive evidence about abuse at their trial. Respondent affirmatively alleges that Erik Menendez testified about the alleged abuse in great detail for roughly seven full court days. Respondent affirmatively alleges that Brian Anderson, a cousin of Lyle and Erik, testified about severe physical abuse that Petitioners had allegedly suffered at the hands of Jose. Respondent affirmatively alleges that Diane Vandermolen testified about alleged physical and verbal abuse by both Jose and Kitty. Respondent affirmatively alleges that Andy Cano, also a cousin, testified that Erik had confided to him that Jose was molesting Erik. Respondent affirmatively alleges that Andy Cano testified also that Erik always had bruises on his body. Respondent affirmatively alleges that 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. Respondent affirmatively alleges that Dr. Vicary testified that Erik suffered from an anxiety disorder that could affect his mental state. Respondent affirmatively alleges that Dr. Wilson testified that Erik suffered from Battered Person's Syndrome, depression, and post-traumatic stress disorder. Respondent affirmatively alleges that any new evidence of sexual abuse would be cumulative to this extensive evidence of sexual abuse.

Respondent affirmatively alleges that the Ninth Circuit held that "[t]he 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." (Ex. 1, p. 1034.) Respondent affirmatively alleges that the Ninth Circuit added: "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.)

Respondent affirmatively alleges that the Ninth Circuit upheld the trial court's limitation of the presentation of abuse evidence on multiple legal grounds. (Ex. 1, pp. 1030-1031.) These grounds included a finding that much of the evidence "was cumulative or lacking in foundation." (Ex. 1, pp. 1024-1025.)

Respondent denies that the trial court limited Erik Menendez from presenting any sexual assault evidence in the second trial. Respondent affirmatively alleges that Andy Cano testified in both trials. Respondent affirmatively alleges that at the second trial, Erik Menendez was given the option of reading into the record Lyle Menendez's testimony from the first trial, but chose not to.

Respondent affirmatively alleges that Lyle Menendez chose not to testify. Respondent affirmatively alleges that this decision was his to make, and his alone.

l.

Respondent denies the allegation that "jurors had one critical factual question to decide: were Erik and Lyle victims of sexual abuse?" (Petn., p. 1.) Respondent denies that

prosecutors' theory of guilt depended entirely on the contention that the abuse story was fabricated. Respondent denies the allegation that: "The state's theory in both trials was also straightforward. Erik and Lyle were lying about the sexual abuse." (Petn., p. 2.)

Respondent denies Petitioners' allegation that in light of the evidence excluded at the second trial, the prosecutor doubled down on the position that no abuse occurred.

Respondent affirmatively alleges that the prosecution repeatedly argued that whether abuse occurred was not the ultimate issue in the case, but that the ultimate issue was instead Petitioners' state of mind when they committed the murders:

> IF YOU WERE TO SPEND ALL YOUR TIME TALKING ABOUT WHETHER OR NOT THE DEFENDANTS WERE ABUSED, THAT WOULD BE ONE WAY OF VEERING AWAY, OR STEERING AWAY FROM THE REAL ULTIMATE ISSUE IN THIS CASE, WHICH IS THE DEFENDANT'S STATE OF MIND AT THE TIME OF THE COMMISSION OF THE CRIME.

(Ex. 6, 300RT 50961.)

Respondent affirmatively alleges that the prosecutor further explained that Petitioners could be guilty of first degree murder even if the jury believed the claims of abuse:

> YOU CAN HAVE TOTALLY DIFFERENT OPINIONS REGARDING WHY THE DEFENDANTS KILLED THEIR PARENTS AND STILL AGREE THAT THIS WAS A PREMEDITATED AND DELIBERATE MURDER. **LET'S SAY—TAKE FOR EXAMPLE THE ISSUE OF ABUSE. JUST ASSUME FOR THE MOMENT THE DEFENDANTS WERE IN FACT ABUSED, OKAY.**
>
> **WHAT HAPPENS AS A RESULT OF ABUSE? ABUSE CAN LEAD TO ANGER. ANGER CAN LEAD TO RAGE. RAGE CAN LEAD TO THE DESIRE FOR RETALIATION OR REVENGE.**
>
> **BUT LADIES AND GENTLEMEN, REVENGE CAN LEAD TO PREMEDITATION AND DELIBERATION, AND THAT IN TURN CAN LEAD TO MURDER**, YOU SEE.

(Ex. 6, 299RT 50961-50962, bold added.)

Respondent affirmatively alleges that the prosecution elsewhere argued that the jurors could believe that Petitioners had been molested and abused and still find the Petitioners guilty of first degree murder. (See, e.g., Ex. 6, 300RT 50965.)

Respondent affirmatively alleges that the California Court of Appeal found that the prosecutor's arguments were proper. (Ex, 7, pp. 103-106.)

Respondent affirmatively alleges that the Ninth Circuit also found that the prosecution's arguments were proper. (Ex. 1, pp. 1033-1035.)

m.

Respondent admits that the jury at the second trial convicted both Petitioners as charged.

n.

Respondent denies that Erik Menendez wrote the letter to Andy Cano attached as Exhibit A to the Petition. (Petn., p. 12 & Ex. A.) Respondent affirmatively alleges that the only witness who can theoretically confirm that Erik Menendez wrote the Cano Letter is Erik Menendez himself. Respondent affirmatively alleges that the California Supreme Court held in a similar circumstance: "As the attorney has died, defendant is probably the only witness who can confirm these facts. Nevertheless, he must prove them before he will be entitled to relief, and such proof will necessarily entail an assessment of his personal credibility. It seems manifest that other than flatly denying the truth of these factual allegations, respondent will not be able to allege facts tending to show defendant is not credible." (*People v. Duvall* (1995) 9 Cal.4th 464, 485 (*Duvall*).) Respondent affirmatively alleges that it intends to dispute the credibility of the Cano Letter and of Erik Menendez at an evidentiary hearing, if the Court sets one.

Respondent admits that jurors never heard about a purported December 1988 letter that Petitioner claims Erik Menendez wrote to his cousin, Andy Cano.

Respondent denies that Erik Menendez has sworn that he wrote the Cano Letter. Respondent affirmatively alleges that Erik Menendez in his declaration describes a letter to Cano only generally, without once averring that he wrote any specifically identified document. (See generally Petn., Ex. B.) Respondent affirmatively alleges that the Petition includes an unsworn email purportedly from one Robert Rand forwarding another purported email from one Marta Cano (Petn., Ex. C), and a declaration from counsel Cliff Gardner setting forth various hearsay statements from other witnesses such as Robert Rand and others (Petn., Ex. D). Respondent affirmatively alleges that

nowhere in the Petition does any witness aver under oath that they wrote or found a particular letter. Thus, Respondent affirmatively alleges that Petitioners' counsel's claim that Erik Menendez wrote the Cano letter is without proper foundation in the Petition.

Nevertheless, Respondent affirmatively alleges that there exist many reasons to doubt the credibility of the Cano Letter. Respondent affirmatively alleges that Petitioner Erik Menendez, who purportedly wrote the letter approximately eight months before killing his parents, did not testify that he ever wrote a letter to Andy Cano discussing the alleged abuse. Respondent affirmatively alleges that Andy Cano never testified that he received a letter from Petitioner Erik Menendez discussing any alleged abuse.

Respondent affirmatively alleges that when Andy Cano was asked if he ever told anyone about the abuse or memorialized it, he testified that he had not. (Ex. 6, 284RT 48167:16-48168:2.)

o.

Respondent denies the contents of Roy Rossello's declaration, attached as Exhibit F to the Petition. Respondent affirmatively alleges that the California Supreme Court has observed that "where the proper resolution of a case hinges on the credibility of witnesses, the general rule requiring the pleading of facts should not be enforced in such a draconian fashion so as to defeat the ends of justice." (*Duvall, supra*, 9 Cal.4th at p. 485.) Respondent affirmatively alleges that it intends to hold Petitioners to their burden of demonstrating the credibility of Rossello's allegations at an evidentiary hearing, if the Court sets one with respect to that claim.

Respondent affirmatively alleges if the Court orders an evidentiary hearing on Rossello's allegations, Petitioners will bear the burden of showing not just the credibility of the allegations but their relevance and materiality to the ultimate issues at Petitioners' trial. Respondent admits that jurors were not aware of Roy Rossello's allegations in Petitioner's trials. Respondent affirmatively alleges that Petitioners did not know about Roy Rossello's allegations concerning Jose Menendez at the time they killed their parents, or during either trial. Respondent affirmatively alleges that Rossello's allegations are not relevant to the jury's analysis of Petitioner's state of mind when they murdered their parents.

p.

Respondent denies Petitioners' allegation that had the jurors seen the letter Erik Menendez wrote to Andy Cano, and learned that Jose Menendez anally raped and orally copulated a 13- or 14 year-old boy in 1984, the prosecutor would not have been able to argue that "the abuse never happened," "[t]here is no corroboration of sexual abuse," Jose Menendez was not the "kind of man that would" abuse children and was "not a violent and brutal man." Respondent affirmatively alleges that Petitioner's assertion misstates the prosecution's argument and tries to reduce this case down to a single issue of whether sexual abuse occurred or did not occur when that was not the ultimate issue for the jury to decide.

Respondent affirmatively alleges that Petitioner's assertion is also speculative and based on pure conjecture on whether this allegation if true would have changed the jury's verdict. Respondent affirmatively alleges that the jury could believe that Petitioners were sexually abused by Jose Menendez and still find that Petitioners were guilty of willful, deliberate, and premeditated murder, and that the murders were done in lying in wait, and that the Petitioners conspired to murder their parents. Respondent affirmatively alleges that the prosecution made that same argument to the jury.

Respondent affirmatively alleges that the Andy Cano letter would not change the trial court's determination that there was no imminent threat that would justify instructing the jury on imperfect self-defense. Respondent affirmatively alleges that the Andy Cano letter would not change the Court of Appeal's finding that there was not an imminent threat to support an imperfect self-defense instruction. (Ex. 7, pp. 81-82.) Respondent affirmatively alleges that the Andy Cano letter would not change the trial court's determination that there was not substantial evidence presented to instruct the jury on heat of passion as to the killing of Kitty Menendez. Respondent affirmatively alleges that the Andy Cano letter would not change the Court of Appeal's finding that "[t]here is also another reason why the trial court would be justified in not giving the imperfect self-defense instruction 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.)

Respondent affirmatively alleges that the Roy Rossello allegations would not change the trial court's determination that there was no imminent threat that would justify instructing the jury on imperfect self-defense.

Respondent affirmatively alleges that Roy Rossello's allegations would not change the trial court's determination that there was not substantial evidence presented to instruct the jury on heat of passion as to the killing of Kitty Menendez.

VII.

Respondent affirmatively alleges that Petitioners planned to kill Jose and Kitty Menendez in advance of the shootings. Respondent affirmatively alleges on December 11, 1989, Lyle Menendez said to Dr. Jerome Oziel, speaking of Jose Menendez, "killing him had nothing to do with us." Respondent affirmatively alleges on December 11, 1989, Lyle Menendez said to Dr. Oziel, speaking of killing Jose Menendez, "it was just a question of Erik and I getting together and somebody bringing it up, and us realizing the value of it."

Respondent affirmatively alleges on December 11, 1989, Lyle Menendez said to Dr. Oziel, speaking of Kitty Menendez: "There was no way I was going to make a 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." Respondent affirmatively alleges on December 11, 1989, Lyle Menendez said to Dr. Oziel, speaking of Erik Menendez: "It had to be his own personal issue. If he felt the same way I did about killing mom."

VIII.

Respondent affirmatively alleges that Petitioners engaged in a series of attempts to fabricate evidence, hide evidence of their guilt of the murders of Jose and Kitty Menendez, and suborn perjury.

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

Respondent affirmatively alleges that Erik Menendez used the name Donovan Goodreau when purchasing the shotguns, and provided Goodreau's identification and a fake address. (Ex. 6, 260RT 43529:10-43530:4.)

Respondent affirmatively alleges that after shooting their parents, Petitioners picked up the shotgun shells. (Ex. 6, 261RT 43643:1-26.)

Respondent affirmatively alleges that after the shooting, Petitioners left their house to buy movie tickets in an attempt to create an alibi for the time of the murder. (Ex. 6, 273RT 45689:17- 45690:4.)

Respondent affirmatively alleges that Erik Menendez hid the murder weapons after the murder. (Ex. 6, 261RT 43659:15-43660:11.) Respondent affirmatively alleges that Petitioners then went to a gas station to dispose of additional evidence. (Ex. 6, 261RT 43661:10-24.)

Respondent affirmatively alleges that after the murders, Petitioners attempted to meet a friend, Perry Berman, to create an alibi. (Ex. 6, 263RT 44017:2- 44018:11.) Respondent affirmatively alleges that Berman testified that the plan to meet Petitioners was made hours before the murder. (Ex. 6, 224RT 36882:24-36883:25.) Respondent affirmatively alleges that Berman testified that Lyle Menendez had persistently asked Berman to meet at the Cheesecake Factory or at Petitioners' home. (Ex. 6, 224RT 36886:4-6; 224RT 36887:21-23; 224RT 36889:15-18; 224RT 36890:6-26.)

Respondent affirmatively alleges that Erik Menendez admitted lying to police about his involvement in the murders. (Ex. 6, 263RT 43999:14-44000:28; 44006:13-44007:1; 263RT 44008:15-22; 263RT 44013:10-44014:24.) Respondent affirmatively alleges that in Petitioners' first trial, Lyle Menendez also testified that he had lied to the police, family, friends, and the media about the murders. (Ex. 5, 90RT 14795:6-14796:5; 90RT 14799:2-5; 90RT 14810:2-20.)

Respondent affirmatively alleges that Lyle Menendez asked Brian Eslaminia to fabricate evidence and conspire to commit perjury for Petitioners. Respondent affirmatively alleges that Lyle Menendez wrote the letter to Brian Eslaminia attached to this Return as Exhibit 9. Respondent affirmatively alleges that in the letter, Lyle Menendez asked Eslaminia to testify to a false story described in the letter concerning Petitioners' efforts to obtain a firearm. Respondent

affirmatively alleges that in the letter, Lyle Menendez asked Eslaminia to testify that Eslaminia had given Erik Menendez a gun prior to the killing of Kitty and Jose Menendez. Respondent affirmatively alleges that Lyle Menendez's story about the gun was false. (Ex. 9.)

Respondent affirmatively alleges that Lyle Menendez tried to fabricate evidence that Jose Menendez had raped his girlfriend, Jamie Pisarcik. (Ex. 6, 235RT 39280:14; 235RT 39282:8.) Specifically, Respondent affirmatively alleges that Lyle Menendez asked Jamie Pisarcik to testify to a false story that Jose Menendez had raped her.

Respondent affirmatively alleges that Lyle Menendez suborned perjury from Traci Baker. Respondent affirmatively alleges that Lyle Menendez wrote the letter attached to this Return as Exhibit 11. Respondent affirmatively alleges that Exhibit 11 is a letter from Lyle Menendez to Traci Baker instructing her on how to testify at trial. Respondent affirmatively alleges that Lyle Menendez instructed Baker to tell a false story that Kitty Menendez had tried to poison her family. Respondent affirmatively alleges that Lyle Menendez instructed Baker to throw away the letter after she had absorbed the false story to which Lyle Menendez wanted her to testify. Respondent affirmatively alleges that Baker testified to this false story in Petitioners' first trial.

Respondent affirmatively alleges that in recorded conversations with Norma Novelli, Lyle Menendez discussed fabricating evidence and perjuring himself to try to discredit his recorded confession to Dr. Oziel. Respondent affirmatively alleges that Exhibit 10 to this Return is a transcript of one of those conversations. Respondent affirmatively alleges that in one conversation, Lyle Menendez discussed his plan to fabricate evidence that Dr. Oziel was attempting to blackmail Petitioners. Respondent affirmatively alleges that Lyle Menendez said: "I'm going to have to make something up to show this guy's motive," and added that being convincing in this effort to make something up "is no problem for me." (Ex. 10, p. 5.)

IX.

Respondent affirmatively alleges that Petitioner's citation of the Cano Letter is a matter that Petitioner may not allege on habeas, as habeas corpus is not a substitute for appeal, and thus "a defendant should not be allowed to raise on habeas corpus an issue that could have been presented at trial." (*Seaton*, *supra*, 34 Cal.4th at pp. 199-200.)

a.

Respondent denies that the allegations regarding the Cano Letter are timely filed. Respondent affirmatively alleges that, to the extent issues of timeliness revolve around allegations made by Petitioners, Respondent may deny those allegations based on Respondents' view that Petitioners have a history of deception, and Respondent intends to challenge their credibility at any evidentiary hearing, should the Court order one. (*Duvall*, *supra*, 9 Cal.4th at pp. 484-485.) Respondent denies that Petitioners are indigent, and denies that being indigent would justify the delay in filing the Petition.

b.

Respondent denies that Petitioners heard about the Cano Letter for the first time in 2015. Respondent affirmatively alleges that Erik Menendez, as the purported author of the Cano Letter, knew of its existence from the moment he wrote the letter, allegedly in late 1988. Respondent affirmatively alleges that Erik Menendez waited until 2023 to bring the claim—over 20 years after Cano died.

Respondent denies that Lyle Menendez learned of the Cano Letter in 2015. Respondent affirmatively alleges that Lyle Menendez has a history of lying and deceit, and Respondent intends to challenge his credibility on this and other issues if the Court orders an evidentiary hearing. Respondent affirmatively alleges that Lyle Menendez provides no credible or legally viable explanation or justification for waiting until 2023 to raise a claim based on the Cano Letter, even if he did learn about the Cano Letter in 2015.

c.

Respondent denies that Petitioners learned in 2018 that their trial lawyers could not recall ever seeing the Cano Letter. Respondent affirmatively alleges that Petitioners were present throughout both their trials and knew what evidence was and was not presented at trial.

Respondent admits that in 2018, journalist Robert Rand provided a copy of the Cano Letter to Cliff Gardner.

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d.

Respondent admits that Cliff Gardner claims he did not recall ever seeing the Cano Letter before 2018. However, Respondent affirmatively alleges that, if Erik Menendez actually did author the letter (which Respondent denies) then he would have been aware of it since 1988, and both Petitioners would have known the Cano Letter was not presented at their own trials, at which they were present.

e.

Respondent denies that Petitioners had copies of the transcripts of trial in 2018. Respondent affirmatively alleges that any such allegations depend on the credibility of Petitioners, which is disputed.

f.

Respondent admits that in late 2020, Court TV posted on its website a transcript of the second trial and a video of the first trial. Respondent denies that with assistance from their family, Petitioners were able to determine that the letter had not been offered (and excluded) at either trial. Respondent affirmatively alleges that Petitioners were present for their trial and already knew what evidence was and was not admitted.

g.

Respondent denies that in 2020, transcripts of interviews with potential witnesses were still being transcribed, to the extent that allegation depends upon the credibility of Petitioners.

h.

Respondent admits that Gardner learned of the Roy Rossello allegations in November of 2022. Respondent denies that Rossello provided a signed declaration in April 2023. Respondent reserves the right to challenge the credibility of Rossello at an evidentiary hearing.

i.

Respondent admits that the Petition was filed within five months of the ostensible date of the Rossello declaration. (Petn., p. 17.)

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X.

Respondent requests this Court take judicial notice pursuant to Evidence Code sections 452, subdivision (d) and 453 of all the evidence, records, documents, pleadings and transcripts on file in this case, and all court hearings in this case.

XI.

Respondent denies all allegations not otherwise admitted.

XII.

Respondent hereby incorporates by reference, as though set forth in haec verba, all attached exhibits and the attached Points and Authorities, submitted in support of this Return.

WHEREFORE, Respondent prays that the within Petition for writ of habeas corpus be denied without an evidentiary hearing.

DATED: August 7, 2025

Respectfully submitted,

NATHAN J. HOCHMAN
District Attorney

By: 

SETH CARMACK
Deputy District Attorney
Sex Crimes Division

MEMORANDUM OF POINTS AND AUTHORITIES

I
PETITIONER BEARS THE BURDEN TO PROVE EACH AND EVERY CLAIM RAISED IN THE PETITION

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

(*Herrera v. Collins* (1993) 506 U.S. 390, 399-400; *District Attorney's Office for Third Judicial Dist. v. Osborne* (2009) 557 U.S. 52, 68-69 [129 S.Ct. 2308, 2311, 174 L.Ed.2d 38].) 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; *In re Fields* (1990) 51 Cal.3d 1063, 1071; *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1296; *In re Martin* (1987) 44 Cal.3d 1, 28.) "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, superseded by statute on another ground as stated in *In re Steele* (2004) 32 Cal.4th 682, 691, italics in original.) "[A] judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity." (*Johnson v. Zerbst* (1937) 304 U.S. 458, 468, overruled on another ground by *Edwards v. Arizona* (1981) 451 U.S. 477, 488-489 [101 S.Ct. 1880, 1887, 68 L.Ed.2d 378].)

"Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them...." (*Duvall*, *supra*, 9 Cal.4th at p. 474, italics in original.) "A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus." (*Cox*, *supra*, 30 Cal.4th at

pp. 997-98, internal citations and quotation marks omitted; *In re Visciotti* (1996) 14 Cal.4th 325, 351.)

"To satisfy the initial burden of pleading adequate grounds for relief, . . . [t]he petition *should both* (i) state fully and with particularity the facts on which relief is sought [citations], as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts, and affidavits or declarations." (*Duvall*, *supra*, 9 Cal.4th at p. 474; *Clark*, *supra*, 5 Cal.4th at p. 781 fn. 16; *Harris*, *supra*, 5 Cal.4th 813, 827 fn. 5.)

If the court issues an order to show cause, the respondent must file a return, and facts alleged in the return must be denied in the traverse, or they are deemed true:

> [T]he factual allegations in the return are either admitted or disputed in the traverse and this interplay frames the factual issues that the court must decide. Facts set forth in the return that are not disputed in the traverse are deemed true.
>
> . . . .
>
> [A]s stated above, "[t]he factual allegations of the return *will be deemed true unless the petitioner in his traverse denies the truth of the respondent's allegations* and either realleges the facts set out in his petition, or by stipulation the petition is deemed a traverse." Thus, if a habeas corpus petitioner fails to reassert factual allegations in the traverse, stipulate that the petition should serve as a traverse, or except to the sufficiency of the return, "the allegations of the return are deemed admitted, and relief will be denied."

(*Duvall*, *supra*, 9 Cal.4th at pp. 477-478, citations omitted, italics in original.) "When, after considering the return and the traverse, the court finds material facts in dispute, it may appoint a referee and order an evidentiary hearing be held." (*Id.* at p. 478.) Conversely, if there are no material factual disputes to be decided, "the merits of a habeas corpus petition can be decided without an evidentiary hearing." (*Ibid.*)

The California Supreme Court has also acknowledged that in cases where the resolution of the case depends on the credibility of witnesses, courts will not impose a draconian

requirement that the respondent (or petitioner) plead facts to challenge the witnesses' credibility, but may deny the witnesses' statements, and articulate reasons to dispute the witnesses' statements:

> We thus acknowledge the possibility that a habeas corpus petition could contain factual allegations that, under the circumstances of a particular case, would be difficult or impossible for the respondent to contradict with contrary factual allegations prior to an evidentiary hearing. For example, in this case, the most important factual allegations in defendant's habeas corpus petition were that his trial attorney was aware that defendant was intoxicated at the time of the crime, and that counsel never discussed the matter with him. **As the attorney has died, defendant is probably the only witness who can confirm these facts. Nevertheless, he must prove them before he will be entitled to relief, and such proof will necessarily entail an assessment of his personal credibility. It seems manifest that other than flatly denying the truth of these factual allegations, respondent will not be able to allege facts tending to show defendant is not credible.**
>
> . . . .
>
> [P]roper resolution of a habeas corpus claim may hinge on the credibility of a witness. . . . **[W]here the proper resolution of a case hinges on the credibility of witnesses, the general rule requiring the pleading of facts should not be enforced in such a draconian fashion so as to defeat the ends of justice.** When one party (respondent for the return, petitioner for the traverse) can allege: (i) he or she has acted with due diligence; (ii) crucial information is not readily available; and (iii) that there is good reason to dispute certain alleged facts or question the credibility of certain declarants, courts evaluating the return and traverse should endeavor to determine whether there are facts legitimately in dispute that may require holding an evidentiary hearing.

(*Duvall*, *supra*, 9 Cal.4th at pp. 484-485, bold added.)

For the reasons discussed *post*, Petitioners' new evidence claims are meritless, and the claim based on the Cano Letter is procedurally barred. This Honorable Court should discharge the order to show cause and deny the Petition without the necessity of an evidentiary hearing.

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II
PETITIONERS' DOCUMENTED HISTORY OF LYING, SUBORNING PERJURY, AND FABRICATING EVIDENCE

Before analyzing Petitioners' "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.

A. Before the Murders

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

Before killing their parents, Petitioners visited a gun store in Santa Monica. (Ex. 6, 260RT 43505:4-7.) After visiting that gun store, they drove over two hours to San Diego to buy two shotguns. (Ex. 6, 260RT 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, 260RT 43529:10-43530:4.)

B. 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, 261RT 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, 273RT 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, 261RT 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, 261RT 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, 261RT 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 meeting time with Berman before the murders—one of the overt acts alleged in the conspiracy to commit murder that the jury

found true. (Ex. 6, 299RT 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, 263RT 44017:2- 44018:11.)

Contrary to Erik Menendez's testimony, Berman testified that the plan to meet Petitioners was made hours before the murder, corroborating the inference that Petitioners' alibi planning had preceded the murder. During the second trial, 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 HAVE 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, 224RT 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, 224RT 36886:4-6.)

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, 224RT 36887:21-23.) In response, Berman agreed to meet Petitioners at the Cheesecake Factory in 20 minutes. (Ex. 6, 224RT 36889:15-18.) After receiving this call, Berman received a second call from Lyle Menendez asking Berman to meet Petitioners at their home. (*Ibid.*) Berman stated he would not do that. (Ex. 6, 224RT 36890:6-26.)

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, 263RT 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 Berman; and 6) called 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 [*sic*] 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, 265RT 44179:28-44180:19.)

C. <u>After the 911 Call</u>

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, 263RT 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, 263RT 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, 263RT 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, 263RT 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, 90RT 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, 90RT 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, 90RT 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, 90RT 14812:6-14813:6.)

D. <u>Post-Arrest Fabrication of Evidence</u>

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, 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, 129RT 22267:10-22268:8.)

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

Months *after* Pisarcik provided him with the cases, Lyle Menendez disclosed the alleged molestation and confessed to the murders of his parents. During the first trial, 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, 129RT 22270:22 -22272:27.)

E. <u>Attempt to Fabricate A Story that Jose Menendez Had Raped Jamie Pisarcik</u>

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, 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, 235RT 39280:14; 39282:8.)

F. <u>The Eslaminia Letter: Attempt to Fabricate Gun Evidence</u>

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 (the "Eslaminia Letter") asking Eslaminia to *fabricate evidence* and conspire to *commit perjury* for Petitioners.[29] 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, 232RT 38864:17-18.) Eslaminia had been Erik Menendez's classmate and had visited Petitioners while they were in custody on the underlying case. 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, 232RT 38866:24-28.)

In the Eslaminia Letter, Lyle Menendez concocted a story he wanted Eslaminia to testify to at trial, to corroborate the same false story that Lyle Menendez would testify to when he took the stand. Lyle Menendez asked Eslaminia to testify that Eslaminia had given Erik Menendez a gun prior to the killing of Kitty and Jose Menendez. Lyle Menendez offered to provide Eslaminia with an "untraceable handgun" to corroborate the story if Eslaminia didn't have a gun himself. (Ex. 9.) Additionally, Lyle Menendez told Eslaminia to falsely portray Jose Menendez as potentially

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

violent, by testifying to a made-up statement about a father killing a son—taken from a scene in the movie "At Close Range"—that Eslaminia would attribute to Jose Menendez. The Eslaminia Letter also instructed 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 Eslaminia on how to destroy the Eslaminia Letter after reading it. (Ex. 9.)

G. <u>Fabricating Evidence During Trial</u>

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.[30] 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 Menendez planned to 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.
>
> 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.
>
> N. Oh, sure.
>
> L. Now, look at this guy, Glenn Stevens, yesterday—

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

N. So you've got to be just as convincing?

L. Oh, yeah, which is no problem for me. I mean, I can do that—

N. Yeah.

L. —just as well as he can.

(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 that Dr. Oziel had a financial motive to lie and that Petitioners were Dr. Oziel's hostages because of their confession tapes. Lyle Menendez testified to the following at Petitioners' first trial:

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, 89RT 14744:27-14745:15.)

It is against this well-established backdrop of Petitioners' deception and evidence fabrication that Respondent analyzes Petitioners' "new evidence" claims, in Section IV, *post*.

III
THE PETITION'S PREMISES ARE FUNDAMENTALLY FLAWED

Before delving into the substantive failures of Petitioners' instant new evidence claims and the applicable procedural bars, it is critical to first address the fundamental flaws in the premises of these claims. Petitioners build 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 presented to Petitioners' convicting jury: (1) did Petitioners conspire to murder their parents? (2) did Petitioners kill their parents? (3) did they do so by means of lying in wait? (4) 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 advance at least two entirely false assertions.

First, Petitioners falsely claim that the prosecutors agreed that the sole issue for the jury to decide was whether sexual abuse had occurred. Petitioners advance this claim through selective quotation of the prosecution's arguments and by ripping language out of context to make it sound like the exact opposite of its actual meaning.

The second false premise is Petitioners' contention that sexual assault evidence was excluded at the second trial. (Petn., pp. 2-4.) Through such specious argument and assertion, Petitioners endorse their faulty conclusion that they were convicted in the second trial only 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.

A. <u>The Prosecution Did Not Argue that Sexual Abuse Was the Central Issue at Trial</u>

Petitioners falsely argue that "jurors had one critical factual question to decide: were Erik and Lyle victims of sexual abuse?" (Petn., p. 1.) Petitioners twist the prosecutor's language completely out of context to claim that even prosecutors agreed that the question of sexual abuse was the central issue for the jury to decide. Petitioners argue in their Reply to the Informal Response ("Reply") that "the trial prosecutors forthrightly agreed that sexual abuse was 'what this case is all about.'" (Reply, p. 1.) Petitioners falsely claim that prosecutors' theory of guilt depended entirely on the contention that the abuse story was fabricated, stating in the Petition: "The state's theory in both trials was also straightforward. Erik and Lyle were lying about the sexual abuse." (Petn., p. 2.)

Petitioners utterly distort the record to the extent that they claim that the prosecution told the jury that the truth of the abuse allegations was the central issue in the trial. It is true that the

prosecutor disputed the veracity of the abuse claims at points in his argument. But in both his opening argument and rebuttal argument, the prosecutor *repeatedly emphasized* that focusing on the issue of abuse would be a **distraction** from the jury's proper focus: the issue of whether the murder was deliberate and premeditated:

> AND I GAVE YOU AS ONE OF THE EXAMPLES THAT COULD CAUSE A DEVIATION FROM YOUR FOCUS, OR A SIDESTEP FROM YOUR PROPER FOCUS, THE ISSUE OF ABUSE. IF YOU WERE TO SPEND ALL YOUR TIME TALKING ABOUT WHETHER OR NOT THE DEFENDANTS WERE ABUSED, THAT WOULD BE ONE WAY OF VEERING AWAY, OR STEERING AWAY FROM THE REAL ULTIMATE ISSUE IN THIS CASE, WHICH IS THE DEFENDANT'S STATE OF MIND AT THE TIME OF THE COMMISSION OF THE CRIME.

(Ex. 6, 299RT 50961.)

As one example among many, speaking of the evidence offered by defense witness Normal Puls that Erik Menendez sometimes spaced out when Puls was tutoring him, the prosecutor wondered: "AND WHAT IS THIS SUPPOSED TO PROVE? IS THIS THE SURE SIGN OF MOLESTATION?" (Ex. 6, 299RT 51479.) The prosecutor went on to characterize the issue of whether Erik Menendez was abused as an issue that was "MINOR" in nature—indeed, an issue far removed from the ultimate issues in the case:

> AND WHETHER OR NOT HE [ERIK MENENDEZ] WAS MOLESTED, IT DOESN'T PROVE THAT HE WAS FEARFUL OF HIS FATHER ON AUGUST THE 20TH OF 1989.
>
> SO EVIDENCE SUCH AS THIS IS NOT ONLY INCONCLUSIVE IN REGARD TO A MINOR ISSUE, BUT THE MINOR ISSUE IS SO FAR REMOVED FROM THE ULTIMATE ISSUES THAT YOU HAVE TO DECIDE THAT IT HAS LITTLE, IF NO VALUE.

(Ex. 6, 299RT 51481.) In his opening argument, the prosecutor also made clear that deciding the question of whether Jose Menendez abused his sons was *not* the jury's key purpose:

> **ARE YOU HERE TO DECIDE IF JOSE MENENDEZ MISTREATED HIS SONS? ARE YOU HERE TO DECIDE IF JOSE MENENDEZ MOLESTED ERIK MENENDEZ? WELL, THAT IS NOT YOUR KEY PURPOSE FOR BEING HERE.** THAT'S ONE OF THE ISSUES THAT HAS BEEN RAISED BY THE DEFENSE. IT WILL BE ARGUED BY THE DEFENSE, AND IT WILL BE ARGUED BY THE PROSECUTION. BUT IT'S IMPORTANT FOR YOU TO UNDERSTAND THE PRECISE ROLE OF THE JURY.

> YOU ARE BEING CALLED UPON TO ANSWER VERY SPECIFIC QUESTIONS, AND THAT IS NOT ONE OF THE SPECIFIC QUESTIONS THAT YOU ARE BEING CALLED UPON TO DECIDE: DID JOSE MENENDEZ DO THIS OR DO THAT? IT MAY EVENTUALLY BE PART OF YOUR DISCUSSION, AND IT SHOULD BE PART OF YOUR DISCUSSION. BUT IT'S IMPORTANT FOR YOU TO UNDERSTAND YOUR JOB SO THAT YOU CAN ALWAYS GET BACK ON TRACK, TO KNOW WHERE YOU ARE GOING, WHAT YOU ARE HERE TO DECIDE. **SO YOU CAN DECIDE THE QUESTION OF WHETHER JOSE MENENDEZ MOLESTED HIS SONS OR ABUSED HIS SONS IN ANY WAY, AND AS MUCH AS YOU WANT, BUT ALWAYS COME BACK TO THE CHARGES IN THIS CASE, AND ALWAYS COME BACK TO THE ELEMENTS OF THE OFFENSE.**

(Ex. 6, 299RT 50883, bold added.) In his opening argument, the prosecutor also made the point that while the alleged abuse and related issues of motive would likely be a topic of conversation for jurors, it was "NOT THE ULTIMATE ISSUE IN THIS CASE" because the jury could find for the prosecution on the *actual* ultimate issue—whether the murder was premeditated and deliberate—even if it believed the testimony about abuse:

> NOW, ONCE AGAIN, JUST AS WITH THE QUESTION OF ABUSE, IS THE QUESTION OF WHY THE DEFENDANTS KILLED THEIR PARENTS SOMETHING THAT YOU SHOULD DISCUSS? OF COURSE. OF COURSE. IT FOLLOWS, FROM THE NATURE OF THE EVIDENCE PRESENTED HERE. IT'S GOING TO BE ONE OF THE THINGS THAT YOU'RE GOING TO TALK ABOUT.
>
> ONCE AGAIN, **AS WITH THE QUESTION OF WHETHER OR NOT THE DEFENDANTS WERE ABUSED, BEAR IN MIND THAT THAT IS NOT THE ULTIMATE ISSUE IN THIS CASE.**
>
> NOW, WHEN THE DEFENSE ATTORNEYS ARGUE, I SUSPECT THAT THEY ARE GOING TO TELL YOU THAT THAT IS THE ISSUE IN THIS CASE. THE ISSUE IS WHY DID THE DEFENDANTS KILL THEIR PARENTS. **THAT'S REALLY NOT THE ULTIMATE ISSUE, AND HERE'S WHY.**
>
> YOU CAN HAVE TOTALLY DIFFERENT OPINIONS REGARDING WHY THE DEFENDANTS KILLED THEIR PARENTS AND STILL AGREE THAT THIS WAS A PREMEDITATED AND DELIBERATE MURDER. **LET'S SAY—TAKE FOR EXAMPLE THE ISSUE OF ABUSE. JUST ASSUME FOR THE MOMENT THE DEFENDANTS WERE IN FACT ABUSED, OKAY.**
>
> **WHAT HAPPENS AS A RESULT OF ABUSE? ABUSE CAN LEAD TO ANGER. ANGER CAN LEAD TO RAGE. RAGE CAN LEAD TO THE DESIRE FOR RETALIATION OR REVENGE.**

> **BUT LADIES AND GENTLEMEN, REVENGE CAN LEAD TO PREMEDITATION AND DELIBERATION, AND THAT IN TURN CAN LEAD TO MURDER**, YOU SEE.

(Ex. 6, 299RT 50961-50962, bold added.) Similarly, the prosecutor urged jurors to focus on deliberation and premeditation, and not to be distracted by a focus on the motive for the killings:

> NOW, ONE OF THE THINGS THAT THE DEFENSE TRIED TO DO IN THIS CASE, LADIES AND GENTLEMEN, IS TO GET YOU TO FOCUS, NOT ON THE TRUE MENTAL STATE WHICH IS IN ISSUE HERE, BUT TO FOCUS ON THE ISSUE OF MOTIVE, OF THE REASON WHY. . . .
>
> WHEN WE SAY THAT THE MENTAL STATE OF THE DEFENDANT IS AN ISSUE IN THIS CASE, WHAT ARE WE SAYING EXACTLY? WE ARE NOT SAYING THAT HIS WHOLE PSYCHO-SOCIAL MAKEUP IS WHAT IS IN ISSUE HERE. WE ARE TALKING ABOUT A SPECIFIC MENTAL STATE UNDER THE LAW; THAT IS, PREMEDITATION AND DELIBERATION.

(Ex. 6, 306RT 52237.) Elsewhere, the prosecutor again warned jurors not to get too caught up in analyzing questions of motive, urging them instead to focus on the legal question of the degree of the homicide, which depended on rendering findings on issues like premeditation and deliberation:

> THEY WANT YOU TO GO BACK THERE AND ASK QUESTIONS LIKE WHO'S ERIK MENENDEZ? WHAT MAKES ERIK MENENDEZ TICK? THAT'S NOT THE ISSUE. THAT'S NOT THE ISSUE THAT IS BEING PRESENTED TO YOU. **YOU'RE HERE TO RESPOND TO A LEGAL QUESTION, THAT IS, THE DEGREE OF HOMICIDE THAT THE DEFENDANTS ARE GUILTY OF. THAT IS THE SOLE ISSUE. . . .**

(Ex. 6, 306RT 52238, bold added.) The prosecutor noted that the range of potential motives for the murders was wide, with abuse forming only one of several possibilities:

> AS I SAID TO YOU, THE ISSUE BEFORE YOU IS ONE OF PREMEDITATION AND OF DELIBERATION. THAT IS THE CHARGED OFFENSE, FIRST-DEGREE MURDER, AND WHETHER THAT LED TO THE KILLINGS IN THIS CASE.
>
> WHAT THEY WOULD LIKE YOU TO DO IS TO CONSIDER THIS: WHY? ONCE YOU GET INTO WHY, YOU GET INTO A MORASS OF POSSIBILITIES. WAS IT GREED? WAS IT ANGER? WAS IT HATRED? WAS IT A DESIRE FOR INDEPENDENCE? WAS IT A DESIRE FOR FINANCIAL INDEPENDENCE?? WAS IT ABUSE? YOU COULD SUBDIVIDE THAT. WAS IT PHYSICAL ABUSE? WAS IT SEXUAL ABUSE? WAS IT SHAME FOR THEIR FAILURES?

(Ex. 6, 306RT 52239-52240.) These are not the words of a prosecutor who is arguing that the only issue for the jury to decide is whether Erik and Lyle Menendez were sexually abused.

While it is of course true that the prosecutor argued the state of the evidence regarding the abuse allegations—and argued that the evidence tended to show that the abuse excuse was contrived—the prosecutor nevertheless consistently advised the jury not to be distracted by those allegations, and implored jurors instead to focus on the evidence showing that Petitioners acted with a deliberate and premeditated state of mind in brutally murdering their parents.

In order to ignore the prosecutor's consistent pattern of telling the jury that a hyperfocus on the abuse allegations would be a distraction, Petitioners take a single remark from the prosecutor's rebuttal argument out of context to claim that the prosecution admitted that their case for guilt rose and fell with the abuse allegations. Petitioners says in their Reply:

> [T]he trial prosecutor recognized not only that "the allegations in this case are premised upon . . . sexual abuse" but that sexual abuse was "what this case is all about:"

(Reply, p. 7.) The Reply then quoted the prosecutor as saying:

> This was inevitable. It's inevitable from the type of defense that was chosen in this case, because it was, as I indicated to you, an abuse excuse. . . . .
>
> This was clear from day one that this was what this case is all about.

Looking at the remarks in their full context, the prosecutor's meaning was the *opposite* of what Petitioners claim. Petitioners claim that the prosecutor admitted that the question of abuse was the only question for the jury to decide—and that if the jury found that abuse had occurred, the case for conviction was destroyed. On the contrary, though, Respondent has shown, through numerous quotes above, that the prosecutor repeatedly maintained the opposite: that the "abuse excuse" was not just factually unsupported but indeed was a *distraction*, and that the jury could and should easily convict even if they found that Jose Menendez had abused Petitioners.

So what *did* the prosecutor mean, then, when he said: "This was clear from day one that this was what this case is all about"? To answer this question, the Court need only look at the prosecutor's remarks in their full context, instead of ripping them from context as Petitioner has

done. Viewed in context, the prosecutor was arguing that the *defense case* was all about the "abuse excuse"—*as an irrelevant distraction designed to cause the jury to ignore the real issues in the case.* This is clear from reading the prosecutor's rebuttal from the beginning:

> BY MR. CONN:
>
> GOOD AFTERNOON, LADIES AND GENTLEMEN.
>
> **BLAME THE VICTIM. ISN'T THAT WHAT THE DEFENSE IS ALL ABOUT?** I THINK IT WAS REALLY APPROPRIATE THAT MR. GESSLER ENDED THE WAY HE DID, BECAUSE THAT'S REALLY THE WAY THE DEFENSE STARTED. BLAME THE VICTIMS. FIND SOME FAULT WITH THE VICTIMS AND PUT EVERYTHING ON THEM. PUT ALL THE BLAME ON THEM. THAT'S WHAT THIS WHOLE DEFENSE HAS BEEN ABOUT FROM THE START.
>
> IT BEGAN [BY] ACCUSING THE VICTIMS OF PHYSICAL ABUSE AND SEXUAL ABUSE. AND IT FINALLY ENDED WITH BLAMING THEM FOR THEIR OWN DEATHS. THAT'S EXACTLY WHAT THEY WANT YOU TO DO IN THIS CASE. THEY WANT YOU TO FIND SOME FAULT WITH KITTY AND JOSE MENENDEZ AND MAKE THEM RESPONSIBLE FOR THEIR OWN DEATH.
>
> THIS WAS INEVITABLE. IT'S INEVITABLE FROM THE TYPE OF DEFENSE THAT WAS CHOSEN IN THIS CASE, BECAUSE IT WAS, AS I INDICATED TO YOU, AN ABUSE EXCUSE, A CAREFULLY CONTRIVED ONE, AN ELABORATE ONE, FILLED WITH A LOT OF DETAILS.
>
> THIS WAS CLEAR FROM DAY ONE THAT THIS IS WHAT THIS CASE IS ALL ABOUT. I TRIED TO PREVENT MR. GESSLER FROM MAKING THE TYPE OF ARGUMENT THAT HE JUST MADE HERE TODAY BY ASKING ERIK MENENDEZ QUESTIONS ABOUT THAT WHEN HE WAS ON THE WITNESS STAND.
>
> I ASKED HIM: "DO YOU BLAME YOUR FATHER FOR THIS? DO YOU BLAME YOUR MOTHER?"
>
> AND ERIK MENENDEZ SAID: "OH, NO, I DON'T. I DON'T BLAME THEM."
>
> OF COURSE HE'S NOT GOING TO ACCUSE HIS PARENTS DIRECTLY. INSTEAD, AS I INDICATED, HE'LL HAVE EXPERTS DO IT FOR HIM; AND FINALLY, IN THE END HE'LL HAVE ATTORNEYS STAND UP HERE AND DO IT FOR HIM.
>
> **BUT THAT'S ALWAYS BEEN WHAT THIS CASE HAS BEEN ABOUT. SHIFTING OF RESPONSIBILITY. DON'T BLAME ME. BLAME SOMEONE ELSE.** WHETHER IT'S THE PURCHASE OF THE GUNS, WHETHER IT'S THE

> PURCHASE OF THE AMMUNITION, WHETHER IT'S THE BURGLARIES, WHETHER IT'S GOING TO SAN DIEGO TO BUY WEAPONS, WHETHER IT'S ENDING UP IN THE DEN, NO MATTER WHAT IT IS, BLAME SOMEONE ELSE. SHIFT RESPONSIBILITY.
>
> THE TIME HAS COME, LADIES AND GENTLEMEN, TO REJECT THE ARGUMENT OF MR. GESSLER AND TO HOLD THE DEFENDANTS ACCOUNTABLE AND TO MAKE THE DEFENDANTS TAKE RESPONSIBILITY IN THIS CASE. I WOULD SUBMIT TO YOU, THAT IT'S A LITTLE BIT TOO LATE TO BE SHIFTING RESPONSIBILITY AND SAYING THAT THE VICTIMS IN THIS CASE ARE THE ONES WHO ARE RESPONSIBLE HERE.

(Ex. 6, 306RT 52213-52215, bold added.)

The argument here is entirely consistent with the pages of quotations provided above in this Return from the prosecutor's argument, urging jurors not to be sidetracked by the abuse evidence, which the prosecutor constantly urged jurors was a distraction. It is simply misleading for Petitioners to take this argument and present it as a concession by prosecutors that the only issue at trial was sexual abuse. Rather, as the prosecutor argued in the same rebuttal pages later, the question of motive was a diversion raised by the defense to shift attention from the crucial issue of premeditation and deliberation:

> DID THE DEFENDANT PREMEDITATE AND DELIBERATE BEFORE HE COMMITTED THE KILLINGS IN THIS CASE? THAT'S THE ISSUE. JUST AS THEY WANT YOU TO GET CAUGHT UP INTO A BROADER PSYCHOLOGICAL ISSUE, THEY ALSO WANT YOU TO GET CAUGHT UP IN THE QUESTION OF MOTIVE.
>
> THEY WOULD LIKE YOU TO GO BACK THERE AND TALK ABOUT MOTIVE, OR THE QUESTION WHY, AND THEN GET SO CAUGHT UP IN THAT DISCUSSION THAT YOU CAN NEVER REALLY TURN TO THE LEGAL ISSUE THAT YOU ARE CALLED UPON TO DECIDE HERE. . . . MOTIVE IS NOT AN ELEMENT OF THE OFFENSE.

(Ex. 6, 306RT 52238-52239.)

The Court will look in vain for any jury instruction in this case that told the jury that it was required to decide whether Petitioners were sexually molested. The Court will not find any special finding on the jury form that required the jury to determine whether Jose Menendez or Kitty Menendez committed sexual assault. Rather, as this Return has explained, the questions for the jury

were whether Petitioners conspired to murder their parents and did murder their parents; whether Petitioners deliberated and premeditated in committing the murders; and whether they committed the murders by means of lying in wait. The evidence answering all of those questions in the affirmative, as the Court of Appeal concluded, was "overwhelming." (Ex. 7, p. 14.)

B. 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, "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.) Petitioners' assertion is misleading for myriad reasons.

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

> Indeed, 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.) (bold added) The Ninth Circuit decision 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.) (bold added) Indeed, as the Ninth Circuit decision 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, 196RT 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, bold and italics 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 of Petitioners. 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) But Vandermolen did not have any *firsthand* knowledge of any sexual abuse having occurred. 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's 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, Andy Cano, the sole witness who testified at trial to corroborate 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 into the record Lyle Menendez's testimony from the first trial. But as the 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's lies before, during, and after trial. (Ex. 7, p. 108, italics added.)

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

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

In the second trial, Lyle Menendez chose not to testify—a decision that was his to make, and his alone. (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, Lyle Menendez's decision not to testify in the second trial was based in part on law enforcement's discovery that Petitioners had tried to fabricate evidence with various levels of success. After their first trial concluded and before their second trial commenced, the Beverly Hills Police Department discovered multiple incidents of both Petitioners attempting to manufacture evidence, although not always successfully.

1. 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, 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 Eslaminia on July 9, 1991, providing him a script of perjured testimony that he wished 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 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, 90RT 14978:26-14979:5.)

Yet in the Eslaminia Letter, Lyle Menendez asked 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' testimony 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.

2. <u>Lyle Menendez's Attempt to Fabricate a Rape Allegation Against Jose Menendez</u>

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, 129RT 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."

3. Lyle Menendez's Attempt to Fabricate a Story That Kitty Menendez Had Tried to Poison Her Family

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 (the "Baker Letter").[31] Ms. Baker was one of Lyle Menendez's girlfriends, and had been 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

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[31] 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, 104RT 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 into 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, 105RT 17631:7-10.)

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

> [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, 104RT 17362:7-9.)

Lastly, the Baker Letter instructed 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, 104RT 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, 103RT 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, 168RT 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, 174RT 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, 174RT 28065:22-26) or Lyle Menendez testified (Ex. 6, 174RT 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.

4. Lyle Menendez's Recorded Conversations with Norma Novelli

As discussed in Section II.G, *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. (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.

D. 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 kill (and ultimately killing) their parents, and to refute their previous claims and testimony concerning how they had murdered Kitty and Jose Menendez.

1. 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." (Ex. 6, 225RT 37148:21-23.) Mrs. Wright added: "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, 225RT 37148:23-25.) Randolph Wright is an attorney. (Ex. 6, 226RT 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, 225RT 37149:20-25.) Petitioners went to the Wrights' house that day. (Ex. 6, 225RT 37151:25.) When Erik Menendez first arrived at Klara Wright's house, he asked her if she knew anyone who was good with computers, because he suspected there was a will on the family computer. (Ex. 6, 225RT 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, 225RT 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, 225RT 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, 225RT 37157:27- 37158:8.) Mrs. Wright also testified as follows:

> 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, 225RT 37160:7-20.)

Mrs. Wright testified that once it was mentioned that a will might be in the family safe, both Petitioners left the Wrights' house to go home and locate the safe. (Ex. 6, 225RT 37161:1-26.) Petitioners returned to the Wrights' house with the safe. (Ex. 6, 225RT 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, 226RT 37278:17-28.)

2. Testimony of Pathologist and Accident Reconstruction Expert

In the second trial, the prosecution presented to the jury evidence from pathologist Dr. Robert Lawrence and accident reconstruction expert Dr. Roger McCarthy. Collectively, 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, 238RT 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, 238RT 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, 238RT 39868:14-15.) Dr. Lawrence further explained that the shot had been fired from back to front and at a downward angle. (Ex. 6, 238RT 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, 238RT 39867:8-13.) Dr. Lawrence described the wounds as follows:

> STARTING WITH THE BUCKSHOT WOUNDS ON MARY MENENDEZ, 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 THIGH 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, 238RT 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, 238RT 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, 241RT 40453:8-40454:8.) Dr. McCarthy testified that the second shot had been a contact wound to the back of Jose Menendez's head. (Ex. 6, 241RT 40456:21-40457:5.) Dr. McCarthy testified that Kitty Menendez had moved off the couch, causing the third shot to miss her. (Ex. 6, 241RT 40480:8-15.) Dr. McCarthy testified that the fourth shot hit Kitty Menendez in the right side of her face. (Ex. 6, 241RT 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, 243RT 40596:20-28.) The sixth shot struck Kitty Menendez in her right hand, upper throat, chin, and clavicle area. (Ex. 6, 243RT 40604:6-11.) The seventh shot hit Jose Menendez's left upper leg. (Ex. 6, 243RT 40610:25-26.) Dr. McCarthy testified that he could not specify if shot number seven had occurred before or after the shots to Kitty Menendez's legs. (Ex. 6, 243RT 40611:2-11.) Shots eight through ten had been fired at Kitty Menendez while she was on her back and struck her left leg. (Ex. 6, 243RT 40615:24-40616:7; 40631:1-40632:9.) The eleventh shot was birdshot—a different type of ammunition from the previous ten fired rounds—and struck Kitty Menendez in the face and on her shoulder. (Ex. 6, 243RT 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, 243RT 40637:4-13.) The twelfth and final shot left a contact wound to Kitty Menendez's left cheek. (Ex. 6, 243RT 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, 301RT 51188:14-21.) The Mafia-style killing of their parents was the original lie Petitioners had told to 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 had heard. (See generally Exs. 5 and 6.) In response to Erik Menendez's attorney's closing argument that the second-trial jurors were the third set of 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 GENTLEMEN, 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, 306RT 52312:9-52313:19.)

As the prosecution explained to the second-trial jury, in the second trial the prosecution was able to present substantially more evidence, including evidence of Petitioners' guilt of murder and conspiracy to commit murder, their attempts to fabricate evidence, their conspiracies to commit and suborn perjury, their motive, and facts inconsistent with their version of events.

For these reasons, there is no merit to Petitioners' sensational (yet baseless) allegations that they were convicted in the second trial only because the trial court improperly excluded evidence of sexual assault. Yet it is precisely these baseless allegations that Petitioners cite to support their assertion 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).) The Return turns to those pieces of evidence next.

IV
PETITIONERS HAVE NOT MADE A SHOWING MERITING AN EVIDENTIARY HEARING BASED ON "NEW EVIDENCE"

A. Standards Applicable to a Claim of Newly Discovered Evidence

Before 2017, a habeas petitioner claiming actual innocence based on newly discovered evidence was required to make an evidentiary showing that "would undermine the entire

prosecution case and point unerringly to innocence or reduced culpability." (*In re Bell*, *supra*, 42 Cal.4th at p. 637, internal quotation marks omitted.) Effective January 1, 2017, the Penal Code was amended to alter that standard, permitting courts to grant habeas corpus petitions presenting "[n]ew evidence . . . that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial." (§ 1473, subd. (b)(3)(A) [2017 version].) The amended statute required a habeas petitioner to present "new evidence" that "has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching." (§ 1473, subd. (b)(3)(B) [2017 version].)

In 2023, the Legislature again amended section 1473 (SB 97). (Stats. 2023, ch. 381, § 1.) Effective January 1, 2024, the definition of "new evidence" was amended, and the standard was reworded—though, as discussed *post*, not substantially changed. Section 1473, subdivision (b)(1)(C)(ii) now defines new evidence as "evidence that has not previously been presented and heard at trial and has been discovered after trial." (§ 1473, subd. (b)(1)(C)(ii).) Section 1473 no longer requires a habeas petitioner to demonstrate that the new evidence could not have been discovered prior to trial by the exercise of due diligence. Moreover, the amended statute no longer excludes from the definition of "new evidence" such evidence that is cumulative, corroborative, collateral, or impeaching.

Although the definition of new evidence has changed, a claim of new evidence still must meet a standard that is essentially unchanged from the standard that has applied since 2017. Section 1473, subdivision (b)(1)(C)(i), now specifies that a petition for writ of habeas corpus may be pursued if "[n]ew 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." (§ 1473, subd. (b)(1)(C)(i).) This standard, with minor changes in wording, is nearly identical to the previous standard, as is evident from a comparison of the old standard ("of such decisive force and value that it would have more likely than not changed the outcome at trial") with the new one ("sufficiently material and credible that it more likely than not would have changed the

outcome of the case"). In 2017 and today, the key question for a court to decide is: would the new evidence more likely than not change the outcome of the case?

Thus, the current version of the statute requires a habeas petitioner 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).) In this case, the alleged "new evidence" is not evidence that merits a retrial of this murder case under section 1473, for numerous reasons.

B. <u>The Cano Letter Does Not Constitute "New Evidence" Under Section 1473</u>

Petitioners claim the Cano Letter, which Erik Menendez purportedly sent to Andy Cano, is newly discovered evidence that compels a new trial. But the Cano Letter does not constitute "new evidence" meriting relief under the relevant statute.

As noted *ante*, a petition for writ of habeas corpus may be pursued if "[n]ew 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." (§ 1473, subd. (b)(1)(C)(i).) "New evidence" is defined as "evidence that has not previously been presented and heard at trial and has been discovered after trial." (§ 1473, subd. (b)(1)(C)(ii).)

The Cano Letter *does not* constitute "new evidence" justifying a new trial under the definitions and standards set forth in section 1473, subdivision (b)(1)(C), for several reasons: 1) the Cano Letter was not "discovered after trial" (§ 1473, subd. (b)(1)(C)(ii)) because Erik Menendez knew about it at the time of trial; 2) the Cano Letter was not "presented without substantial delay" (§ 1473, subd. (b)(1)(C)(i)) as required by section 1473; 3) the Cano Letter is not "admissible" (*ibid.*) evidence as it pertains to Lyle Menendez; and 4) the Cano Letter does not remotely qualify as

evidence that is "sufficiently material and credible that it more likely than not would have changed the outcome of the case" (*ibid.*).

1. <u>The Cano Letter Was Not "Discovered" After Trial</u>

First, the Cano Letter was not "discovered" after trial, according to Petitioners' own version of events. Assuming *arguendo* the truth of Petitioner's allegation that the letter was written by Erik Menendez in or around 1989 (Petn. p. 4)[32]—an unrealistic assumption given his documented history of deceit—Erik Menendez knew about the Cano Letter before his trial, meaning that it was not "discovered after trial" as required by section 1473. (§ 1473, subd. (b)(1)(C)(ii).)

One does not "discover" something one already knew about. The Oxford English Dictionary defines "discover" as follows: "To obtain sight or knowledge of or become aware of (a thing or person previously unknown or overlooked) *for the first time*; to find out, to come know of; to find in the course of a search or investigation."[33] It simply makes no sense to read section 1473 as including within the definition of "new evidence" evidence about which the defendant knew about before and during trial. Notably, Petitioner cites no case holding that evidence that a habeas petitioner knew about at the time of trial constitutes "new evidence" pursuant to section 1473.

In an analogous case, the Tenth Circuit Court of Appeals explained that evidence is not newly "discovered" if a habeas petitioner knew about the evidence at a previous time. (*Corson*

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[32] It is worth noting that the allegations of the circumstances surrounding the alleged unearthing of the Cano Letter are dependent on multiple levels of hearsay and are not supported by sworn affidavits as required by California law. Habeas petitioners are required to "include copies of reasonably available documentary evidence supporting the claim, including . . . affidavits or declarations." (*Duvall*, *supra*, 9 Cal.4th at p. 474; *Clark*, *supra*, 5 Cal.4th at p. 781 fn. 16; *Harris*, *supra*, 5 Cal.4th 813, 827 fn. 5.) Erik Menendez does not even clearly state that he wrote the Cano Letter, describing it only generally without once specifically averring that he wrote any particular specific document. (See generally Petn., Ex. B.) As for the letter itself, the Petition merely includes an unsworn email purportedly from one Robert Rand forwarding another purported email from one Marta Cano (Petn., Ex. C), and a declaration from counsel Cliff Gardner setting forth various hearsay statements from other witnesses such as Robert Rand and others (Petn., Ex. D). Nowhere in the Petition does any witness aver that they wrote or found a particular letter.

[33] (Oxford English Dict. (Mar. 2025) <https://www.oed.com/dictionary/discover_v?tab=meaning_and_use#284135028> [as of Jul. 21, 2025], italics added.)

v. Colorado (10th Cir. 2018) 722 Fed.Appen. 831 (*Corson*).)[34] In *Corson*, a habeas petitioner sought to avoid a federal one-year limitation period on habeas petitions pursuant to 28 U.S.C. § 2254(e)(1). That habeas petitioner asserted that his guilty plea to the crime of sexual assault on a child should be vacated because (he claimed) the state had failed to inform him of the victim's juvenile adjudication for falsely reporting an unrelated sexual assault. The court noted that another court had previously made a finding that the habeas petitioner had known of the false reporting before entering his guilty plea. Accordingly, the court held, the false reporting was not "new evidence," and the habeas petitioner, could not be said to have "discovered" the false reporting at a later date.

> Petitioner had knowledge of K.B.'s juvenile adjudication prior to pleading guilty, there was no "new evidence" discovered and subsection (D) does not apply. See, e.g., *Jackson v. Symmes*, 2008 WL 1733122, at *3-4 (D. Minn. Apr. 10, 2008). **Petitioner did not "discover" facts he already knew.**

(*Id.* at p. 834, bold added.) Similarly, Erik Menendez did not "discover" the Cano Letter decades after he himself wrote it. To find otherwise would make a mockery of section 1473's requirement that new evidence be "discovered after trial"—and would allow any criminal defendant to selectively hold onto knowledge he possessed at trial, and later present it after conviction as a way to get a second bite at the apple. Section 1473's definition of "new evidence" is crafted to prevent this sort of game-playing by habeas petitioners.

2. <u>The Cano Letter Was Not Presented Without Substantial Delay</u>

Even if Petitioner could somehow distort the plain meaning of the word "discover" to make it apply to something of which he has long been aware, Petitioners have not "presented" the Cano Letter "without substantial delay" as required by section 1473. (§ 1473, subd. (b)(1)(C)(i).)

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[34] Although this case was not published in West's reporter, it may be cited as persuasive authority in California courts. "Although we may not rely on unpublished California cases, the California Rules of Court do not prohibit citation to unpublished federal cases, which may properly be cited as persuasive, although not binding, authority. (*Airline Pilots Assn. Internat. v. United Airlines, Inc.* (2014) 223 Cal.App.4th 706, 724, fn. 7, 167 Cal.Rptr.3d 467; see also Cal. Rules of Court, rule 8.1115(a); Fed. Rules App. Proc., rule 32.1(a); U.S. Cir. Ct. Rules (10th Cir.), rule 32.1(A).)" (*Reynaud v. Technicolor Creative Services USA, Inc.* (2020) 46 Cal.App.5th 1007, 1022 fn. 9, internal quotation marks and citations omitted.)

As its purported author, Erik Menendez knew about the Cano Letter when he wrote it more than *36 years ago*—before both of his trials. Yet, he did not disclose the Cano Letter to his juries—or to any reviewing court for decades. Erik Menendez claims to have written (and thus to have known about) the Cano Letter *four years* before his first trial commenced in 1993, yet the records of both trials are devoid of any mention of it, by Erik Menendez or anyone else. (Exs. 1, 5, & 6.) Even when the prosecution repeatedly questioned the veracity of the alleged abuse, Erik Menendez *never mentioned or introduced* the Cano Letter. Significantly, Andy Cano, the alleged recipient of the Cano Letter, testified during the first trial for the sole purpose of claiming Erik Menendez had told Andy Cano that he had been molested prior to Petitioners murdering their parents. (Exs. 5 and 6.) Before testifying in that trial, Andy Cano's credibility was also questioned based on a car he was gifted from Erik Menendez before testifying. (Ex. 6, 284RT 48175:13–48176: 6.) It defies logic that Erik Menendez *never* examined Andy Cano about having received the Cano Letter or tried to introduce the Cano Letter into evidence through Andy Cano to salvage Cano's credibility. More incredibly, in the second trial, after having both testified before, neither Erik Menendez nor Andy Cano mentioned the Cano Letter. (Ex. 6.)

In a feeble attempt to excuse this substantial delay, Erik Menendez claims that it was 2015 when he "*first heard* something about a letter I had written to Andy in December of 1988," (Petn., Ex. B, Erik Menendez Decl., ¶ 5, italics added.) Erik Menendez claims he "first heard" of this letter (that he himself supposedly wrote) when he "heard about a Barbara Walters special in 2015 or 2016." (*Ibid.*) His excuse falls flat. Erik Menendez obviously did not "first hear" in 2015 of a letter he himself had supposedly written in 1988. Even if the Court interprets this obviously false statement as a claim by Erik Menendez that he was *reminded* of the Cano Letter in 2015, that does not change the fact that Erik Menendez knew of the Cano Letter over *26 years* earlier in late 1988 when he purportedly wrote it. Therefore, his presentation of this claim violates section 1473 in at least two ways: he did not "discover" the Cano Letter "after trial," and his presentation of this claim is substantially delayed, even if the Court were to start the timeliness clock in 2015 and not in 1988, when Erik Menendez first knew he had (supposedly) penned the Cano Letter. (§1473, subd. (b)(1)(C)(i)-(ii).)

As for Lyle Menendez, he claims to have learned of the Cano Letter in 2015, almost eight years before filing the Petition. (Petn. Ex. H, Lyle Menendez Decl., ¶ 4.) Even assuming *arguendo* that this declaration is true—an assumption that also strains credulity, given his own extensive history of documented deceitfulness and evidence fabrication in the underlying case—he, too, allowed years to pass before raising this claim.

To justify their substantial delay in filing this habeas petition, both Petitioners continue to make statements that contradict the record. They state they delayed in filing this Petition because they believed an individual could file only 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 were denied. The Ninth Circuit affirmed the denial of Petitioners' federal habeas petitions. (See Petn., p. 7; Ex. 1.)

Petitioners also claim that they did not learn until 2020 that the 1988 letter had not been offered at trial. But that claim is as spurious as the claim that Erik "discovered" a letter he himself wrote, decades after writing it. Petitioners were present at their own trials. They knew what evidence was offered in their trial and what evidence was not. Petitioners are routinely charged with knowledge of their own trials by courts reviewing habeas claims. There is no reason to apply a different set of rules to Erik and Lyle Menendez than the rules routinely applied to other habeas petitioners.

If Erik Menendez wrote the Cano Letter, he knew about its existence over 34 years before raising this claim. Lyle Menendez knew of the existence of 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.) The substantial nature of the delay is evident from the fact that the purported recipient of the letter, Andy Cano, has been deceased for over two decades, and can no longer be examined about the letter or why he never bothered to mention it in either of Petitioners' trials.

For these reasons, 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" under section 1473.

3. The Cano Letter Is Not "Admissible" Evidence as to Lyle Menendez

The Cano Letter is not even "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 any showing to the contrary, and thus, the Cano Letter is not "new evidence" on habeas corpus as it pertains to him, and indeed would likely have been ruled to be inadmissible hearsay as to him.

It should be noted that the trial court ruled inadmissible the testimony of numerous witnesses because Lyle Menendez refused to testify, for obvious reasons having to do with his desire to avoid being cross-examined regarding some of his statements made before the second trial. The Cano Letter would likely have been ruled inadmissible as to Lyle Menendez for the same reason. In his declaration attached to the Petition, Lyle Menendez has not even tried to aver that the Cano Letter would have changed his decision to testify (see generally Petn., Ex. H) and any such claim would be patently laughable.

4. The Cano Letter Is Not "Sufficiently Material and Credible that it More Likely than Not Would Have Changed the Outcome of the Case"

Finally, the Cano Letter is not "sufficiently material and credible that it more likely than not would have changed the outcome of the case" as to either Petitioner, as required by 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 substantial evidence of any *imminent* danger to Petitioners, and therefore, the trial court properly precluded the jury from hearing an instruction on imperfect self-defense. (Exs. 1, 6, 7.) Similarly, the Cano Letter, which purports to document a past act of alleged sexual molestation by Jose Menendez against Erik Menendez, does not add even a speck of evidence to the contention that Petitioners believed they were in imminent danger when they murdered their parents. Nor would the Cano Letter have

changed the trial court's rulings that Petitioners were not entitled to a heat of passion instruction as to Kitty Menendez.

At best, the Cano Letter is corroborative evidence that Erik Menendez told his cousin Andy Cano that his father was molesting him—a claim that both Andy Cano and Erik Menendez testified to at both trials. Respondent recognizes that the current statutory definition of new evidence on habeas corpus does not categorically exclude from the definition of "new evidence" such evidence that is "merely cumulative, corroborative, collateral or impeaching," even though the prior definition did contain such a categorical exclusion. (Cf. § 1473, subd. (b)(1)(C)(ii) & former § 1473, subd. (b)(3)(B).) Regardless, the Cano Letter fails to satisfy even the amended definition of "new evidence."

Petitioners claim that the Court must assume the truth of Petitioner's allegations. But as to claims based on newly discovered evidence, the California Supreme Court has said that the credibility of evidence goes to the issue of whether the evidence would have led to a different result at trial.

> [T]he trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable. *People v. Delgado* (1993) 5 Cal.4th 312, 329, 19 Cal.Rptr.2d 529, 851 P.2d 811; see Evid. Code § 780, subd. (h) [when assessing a witness's credibility, the trier of fact may consider a witness's prior inconsistent statements].)

(*Masters*, *supra*, 62 Cal.4th at p. 1082.) A notable inconsistency in a witness's statements is ample reason to discount a bid for a new trial, especially when "the trial evidence already gave the jury ample reason to doubt [the witness's] credibility." (*Ibid.*)

There are indeed notable inconsistencies in the relevant witnesses' testimony regarding the Cano Letter; namely, neither Erik Menendez not Andy Cano mentioned the Cano Letter in either trial. Worse for Petitioners, the Cano Letter is positively *inconsistent* with Erik Menendez's and Andy Cano's testimony in both trials. In both trials, Erik Menendez and Andy Cano testified that Erik Menendez had only disclosed alleged molestation to Andy Cano when Erik Menendez was 12 or 13 years old and Andy 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 Andy 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, 259RT 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, 259RT 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, 259RT 43352:27-43353:5.)

In the second trial, Andy 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, 284RT 48161:18-27.)

Andy Cano further testified about the number 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, 284RT 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, 284RT 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, 284RT 48163:5-14.)

Andy Cano also testified that besides his conversations on the subject with 13-year-old Erik Menendez when he was 10, and the other times documented above, 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 Andy Cano a car. (Ex. 6, 284RT 48173 7-25; 48176:3-6.)

Importantly, in the first trial, Andy Cano testified that Erik Menendez had ***never*** mentioned the alleged molestation to him after Erik Menendez had moved to California. This

testimony directly contradicted Petitioners' current allegations regarding when Erik Menendez had allegedly written the Cano Letter to Andy Cano. Andy 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, 104RT 17479-17480:11.)

As discussed, Andy Cano and Erik Menendez never testified about the Cano Letter in either trial. In both trials, Andy Cano's and Erik Menendez's testimony were oddly consistent on the timing of Erik Menendez's disclosure of the alleged molestation to Andy 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 Andy Cano purportedly had such great recall of what Erik Menendez told him when he was 10 years old.

The Cano Letter contradicts Andy Cano's testimony from the first trial that Erik Menendez and Andy Cano had never broached the subject of the alleged molestation with one another after Erik Menendez had moved to California. (Ex. 5, 104RT 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, 257RT 43084:14-17.)

If the Cano Letter is genuine, it defies logic that neither Andy Cano nor Erik Menendez raised the subject during Andy Cano's trial testimony. In the second trial, Andy 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, 284RT 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[R] COUSIN WAS SUPPOSEDLY BEING TOUCHED BY HIS FATHER.

A. NO. I REALLY WOULD THINK ABOUT IT.

(Ex. 6, 284RT 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, 284RT 48167:16-48168:2.)

If Andy Cano had truly received the Cano Letter (which Petitioners allege in this Petition was found amongst Andy Cano's personal effects after he died; see Petn., p. 4), he would have been a teenager, and the Cano Letter would have been a logical piece of evidence for the defense to present in support of Erik Menendez's molestation allegation—especially given the nature of the defense in both trials. If this letter had truly existed, it is not believable that neither Andy Cano nor Erik Menendez would have mentioned or introduced the Cano Letter when meeting with Erik Menendez's attorney, or in testimony given in two different trials.

The timing and the manner of Andy Cano's disclosure of the alleged molestation also raises questions about the credibility of the claim. In the second trial, Andy 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 Andy Cano and his mother, Marta Cano, met him and flew with Erik Menendez from Florida back to California. (Ex. 6, 284RT 48168: 20:22.) Per Andy Cano, not once during their time together in Florida or on the flight back to California, did Andy Cano and Erik Menendez discuss anything about the murders or alleged molestation. (Ex. 6, 284RT 48157:15-48158:1.)

Also, according to Andy Cano, he subsequently visited Erik Menendez, who was in custody awaiting his trial. (Ex. 6, 284RT 48170:21-23.) During that time, Erik Menendez gifted Andy Cano a car. (Ex. 6, 284RT 48176: 3-14.) After receiving a car from Erik Menendez and visiting Erik Menendez numerous times in jail, Andy 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, 284RT 48173:8:25.) Andy Cano testified he had never told anyone else, not even his mother, about the molestation. (Ex. 6, 284RT 48174.) Even more suspect, Petitioners

conveniently waited to proffer the Cano Letter until after Andy Cano had died, which precludes Respondent from examining Andy Cano about the Cano Letter in any proceedings.

Petitioners may try to argue that Erik Menendez simply forgot that he put his allegations about abuse into a letter to Andy Cano in 1988. But any such argument only highlights the lack of materiality of the Cano Letter in the first instance. Bear in mind that Petitioners are arguing that the Cano Letter, either by itself or in conjunction with the Rossello declaration, are so material that they are enough to counter "overwhelming" (Ex. 7, p. 14) evidence that they committed brutal shotgun murders of their parents as the parents sat watching television. They cannot credibly argue that the Cano Letter was *that* important—but at the same time, was also so insignificant in the mind of Erik Menendez that he simply forgot about it for 27 years. Petitioners cannot have it both ways. Either the Cano Letter is incredibly significant—in which case Erik Menendez could not have forgotten about it—or it is trivial enough for Erik Menendez to have forgotten about it . . . in which case it is obviously immaterial.

The simpler and more obvious explanation why neither Andy Cano nor Erik Menendez mentioned the Cano Letter at either trial is that it is a fabrication, fitting into a clear and unmistakable pattern on the part of both Petitioners to fabricate evidence to support their story about the alleged abusiveness and dangerousness of their parents.

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 Berman. Additionally, Petitioners hid evidence by picking up the shotgun shells, hiding the murder weapons and discarding their bloody clothes. They engaged in numerous attempts to have various people lie for them, as documented by written letters and witness testimony. Given this history of desperate efforts to fool the world about their murderous acts, it is not only possible but indeed probable that they would continue to falsify evidence to secure their freedom.

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 "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, 129RT 22267:10-22268:8.) After providing these cases to Lyle Menendez, Jamie Pisarcik had met with him in December 1990. (Ex. 5, 129RT 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, 235RT 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 had instructed her.

After Andy Cano's alleged disclosure of Erik Menendez's claims of molestation to Leslie Abramson, Lyle Menendez sent the six-page Eslaminia Letter to Erik Menendez's classmate, Brian Eslaminia, instructing him to fabricate evidence and perjure himself at trial. In the Eslaminia Letter Lyle Menendez informed 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 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 Eslaminia. In other parts of the Eslaminia Letter, Lyle Menendez concocted and scripted lies for 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 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 Eslaminia would attribute to Jose Menendez. It is no coincidence that this is the very same movie that formed the basis of Lyle Menendez's corrupt instructions to Jamie Pisarcik.

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:

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> (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 Eslaminia:

> (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.) [*sic*] Ill have Beatrice get it for you, if necessary)

(*Ibid.*) After explicitly and comprehensively detailing the false statements that Lyle Menendez asked Eslaminia to discuss with Petitioners' lawyers, and to 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 At Close Range 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, 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 ZOELLER?

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, 232RT 38871:18-25; 232RT 38872:22-26.)

Eslaminia also testified that he had never watched the movie "At Close Range" and never heard Jose Menendez mention anything about "At Close Range." (Ex. 6, 232RT 38884:20-28.) Eslaminia testified that he knew when he had received the Eslaminia Letter from Lyle Menendez that this was a lie. (Ex. 6, 232RT 38884: 26-28.)

Similar to their manipulation of Berman, the bribes and intimidation of Jamie Pisarcik regarding her testimony, and the gifting of the car to Andy Cano, the Eslaminia Letter evidences unremitting attempts by Petitioners to coordinate evidence fabrication through defense witnesses—all to support a false narrative that they hoped would justify their cold-blooded murder of their parents.

The Cano Letter fits directly into this pattern of deliberate deceit. Viewed in the light of Petitioners' documented history of manipulating and fabricating evidence in the underlying case (including through bribes and intimidation), together with the fact that the Cano Letter contradicts Andy Cano's and Erik Menendez's trial testimony, the Cano Letter is neither credible nor reliable. As such, the Cano Letter is not "new evidence" meriting a new trial 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).)

Even if this Court were to conclude, despite the copious evidence to the contrary,

that the Cano Letter is somehow credible, it still would not meet the statutory standard for relief, as it does nothing whatsoever to support the contention that Petitioners actually believed they were in *imminent* danger when they brutally killed their parents. The Cano Letter would have done nothing to alter the trial court's calculus in denying Petitioners an instruction on imperfect self-defense, or on heat of passion as to Kitty Menendez. Nor do Petitioners explain how the Cano Letter would have added materially to an argument that Petitioners acted in heat of passion as to Jose Menendez—especially in light of the overwhelming evidence of premeditation in this case.

Indeed, the overwhelming nature of the evidence in this case is a critical reason to discount the force of the Cano Letter. One Court of Appeal has observed that under section 1473, cases involving overwhelming evidence require an especially compelling showing of new evidence:

> The statute creates a sliding scale: **in a case where the evidence of guilt presented at trial was overwhelming, only the most compelling new evidence will provide a basis for habeas corpus relief**; on the other hand, if the trial was close, the new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner.

(*In re Sagin* (2019) 39 Cal.App.5th 570, 579-580, bold added;[35] cf. *In re Sassounian* (1995) 9 Cal.4th 535, 548-549 [holding that "it is not reasonably probable that petitioner could have obtained a different result" in the absence of a witness's testimony in part because "there was overwhelming evidence relating to the crime of first degree murder" apart from that witness's testimony]; *Cross v. Pelican Bay State Prison* (9th Cir. 2005) 142 Fed.Appen. 293 [no reasonable probability of a different result due to counsel's errors as habeas petitioner was uncooperative with his attorney and "there was overwhelming evidence" of defendant's guilt].) Put simply, in a case involving overwhelming evidence, only the most compelling evidence of

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[35] The *Sagin* court referred to the version of section 1473 in existence after amendments which went into effect in 2016. However, as discussed in Section IV.A, *ante*, the 2016 version of section 1473, while it redefines "new evidence" in certain ways, nevertheless sets forth a standard functionally identical to the current version of the statute, in which the central issue is whether the evidence "more likely than not" "changed the outcome" of the case.

innocence would change the result.

This common-sense observation has great significance in this case, because as the Court of Appeal observed, the evidence in this case was truly "overwhelming": "We find no abuse of discretion in the rulings of the trial court and affirm the convictions **based upon the overwhelming evidence presented against the defendants at trial**." (Ex. 7, p. 14, bold added.) As discussed *ante*, Petitioners were caught on tape callously discussing their premeditated deliberations about whether to murder their parents, in conversations which did not mention the alleged abuse they argued at trial and continue to argue on habeas. In addition to these recorded confessions, Erik Menendez confessed the murder to his friend as well. The California Supreme Court has noted that "a confession can "operate[ ] as a kind of evidentiary bombshell which shatters the defense" (*In re Sassounian*, supra, 59 Cal.4th at p. 548), and here there were two separate confessions. Moreover, Erik Menendez's testimony was wholly lacking in credibility, and made clear that any danger he might have feared was in the future and thus not imminent. (Ex. 7, pp. 27 & 82.) As the Court of Appeal observed: "There was significant evidence which undermined Erik's credibility, including false alibi statements, his efforts to portray the murders as business-related and confessions to Dr. Oziel and his best friend, Cignarelli. There was also evidence of financial motive for the crime." (Ex. 7, p. 27.) As detailed extensively above, the jury also heard extensive and damning evidence of Lyle Menendez's attempts to manipulate evidence, writing a letter (the Eslaminia Letter) attempting to suborn perjury, and providing Lyle's girlfriend Jamie Pisarcik with a false story that Jose Menendez had raped her. Given this sort of "overwhelming" evidence (Ex. 7, p. 14), "only the most compelling new evidence" (*In re Sagin*, *supra*, 39 Cal.App.5th at pp. 579-580) could justify a new trial. The Cano Letter is not the "compelling new evidence" that Petitioners wish it were.

Because Petitioners fail to allege facts supporting a contention that the Cano Letter is "new evidence" that would have led to a different result under the applicable statute, this Court should not grant an evidentiary hearing on this ground.

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C. Roy Rossello's Claim that Jose Menendez Sexually Molested Him Does Not Constitute "New Evidence" Justifying a New Trial under Section 1473

Petitioners also 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 irrelevant to Petitioners' state of mind, immaterial, and lacks credibility, in contravention of section 1473, subdivision (b)(1)(C)(i).

Initially, Petitioners do not establish that Rossello's testimony would have been relevant to their state of mind or otherwise material at trial. Rossello's testimony might well have been excluded under Evidence Code section 352 as too remote from the question of Petitioners' own state of mind, and likely to waste time on a tangential matter. The 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 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 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.

(Ex. 7, p. 41, bold and italics added.)

Similarly, the Court of Appeal found that the trial court had correctly sustained the prosecution's objections to a witness's opinion about Kitty Menendez's child-rearing style, finding that "[t]he questions were 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. 45, bold and italics added.)

In similar fashion, Rossello's current allegation of sexual abuse by Jose Menendez is not relevant 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 ***33 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 identically 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' admission that they learned of Rossello's allegations decades after the murders decimates the relevance of those allegations. A sexual abuse allegation Petitioners did not learn about for more than three decades *after* they murdered their parents[36] is 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.

Even if this evidence were technically admissible and found to be credible, it would be of so little force that Petitioners cannot meet their burden of showing that it more likely than not would have changed the outcome of the case. As has been repeatedly litigated in both Petitioners' direct appeal and in their appeal from the denials of their federal habeas petitions, Petitioners did not face *imminent* danger before they decided to kill their parents. (Exs. 1, 7.) Rossello's allegations do not change that basic fact—nor do they change the evidence 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 allegations, made decades after the murders, would not materially change the convicting trial evidence, or change the jury's finding that Petitioners conspired to kill their parents. Nor could Rossello's allegations logically affect the jury's evaluation of Petitioners' state of mind, since Petitioners admit they did not know of Rossello's allegations when they committed the murders.

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[36] Moreover, Rossello's unexplained decades-long delay in coming forward may be the topic of examination at an evidentiary hearing if the Court orders a hearing regarding Rossello's allegations. "The significant passage of time is a relevant circumstance to be considered when determining a statement's reliability." (*Masters*, *supra*, 62 Cal.4th at p. 1057.) While there may well be legitimate reasons that the victim of a sexual assault is reluctant to come forward, Rossello's declaration does not set forth any such reasons, and this topic may be explored at any evidentiary hearing.

It is worth recalling that Erik's counsel Leslie Abramson argued in the first trial: "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." (Ex. 5, 71RT 11792:22-11793:6.) Yet that appears to be precisely what Petitioners are arguing by submitting evidence such as the Rossello declaration.

Simply put, Petitioners make no showing that Rossello's declaration would even be relevant and admissible at a trial, much less "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.

V

PETITIONER'S NEW EVIDENCE CLAIM PERTAINING TO THE CANO LETTER IS PROCEDURALLY BARRED WITHOUT EXCEPTION, AS HABEAS CORPUS IS NOT A PROPER VEHICLE TO RAISE CLAIMS THAT SHOULD HAVE BEEN RAISED AT TRIAL, ON APPEAL, OR IN A PREVIOUS HABEAS PETITION, OR THAT ARE UNTIMELY

Petitioner Erik Menendez knew about the Cano Letter at trial, and trial and could have raised it at trial—and thus could have raised a claim based on that letter on appeal, or in a previous habeas corpus petition. But he did not. As a result, the claim is not the proper subject of a habeas petition by Erik Menendez, as it is successive. Additionally, the claim is untimely as to both Petitioners (in addition to lacking substantive merit for the reasons already discussed in Section IV.B, *ante*).

This Return will first survey the law related to procedural bars and then apply it to Petitioners' claim based on the Cano Letter.

A. Habeas Corpus Is Not a Proper Vehicle to Raise Claims that Could Have Been Raised at Trial or Were Raised or Could Have Been Raised on Direct Appeal or in a Previous Habeas Corpus Petition

Habeas corpus is not a vehicle for matters that could have been raised at trial. (*Seaton, supra*, 34 Cal.4th 193, 196-197, 200.)

> A criminal defendant, like any other party to an action, may not sit on his or her rights. Thus, just as a defendant generally may not raise on appeal a claim not raised at trial (see 17 Cal.Rptr.3d pp. 636-637, 95

> P.3d pp. 898-899, ante), **a defendant should not be allowed to raise on habeas corpus an issue that could have been presented at trial.** If a claim that was forfeited for appeal could nonetheless be raised in a habeas corpus proceeding, the main purpose of the forfeiture rule—to encourage prompt correction of trial errors and thereby avoid unnecessary retrials—would be defeated.

(*Id.* at pp. 199-200, bold added.) The *Seaton* court indicated that an exception could apply when the claim is based on new evidence not known at trial—but only when the new evidence *adds to the substance* of what the defense knew at the time of trial:

> Therefore, when a claim depends substantially on facts that the defense was unaware of and could not reasonably have known at trial, a failure to object at trial will not bar consideration of the claim in a habeas corpus proceeding. We caution, however, that **this exception applies only when the later discovered facts are essential to the claim. A habeas corpus petitioner may not avoid this procedural bar by relying on facts that, although newly learned, add nothing of substance to what the defense knew or should have known at the time of trial.**

(*Id.* at pp. 200-201, bold added.)

A number of related rules flow from the *Seaton* rule, starting with the rule that habeas corpus is not a vehicle to relitigate an appeal. "There may be no more venerable a procedural rule with respect to habeas corpus than what has come to be known as the *Waltreus* rule; that is, legal claims that have previously been raised and rejected on direct appeal ordinarily cannot be reraised in a collateral attack by filing a petition for a writ of habeas corpus." (*Reno*, *supra*, 55 Cal.4th at p. 477.) The California Supreme Court made clear in *Reno* that claims violating this rule are subject to *summary* denial:

> In *Waltreus*, a defendant filed a petition for a writ of habeas corpus, repeating several legal issues this court had already considered and found lacking in merit on direct appeal. We declined to address those renewed claims, noting simply that "[t]hese arguments were rejected on appeal, and habeas corpus ordinarily cannot serve as a second appeal." (*In re Waltreus*, *supra*, 62 Cal.2d at p. 225, 42 Cal.Rptr. 9, 397 P.2d 1001.)
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> We stated the rule plainly in *In re Harris*, *supra*, 5 Cal.4th at page 825, 21 Cal.Rptr.2d 373, 855 P.2d 391: "[W]hen a criminal defendant raises in a petition for a writ of habeas corpus an issue that was raised

> and rejected on direct appeal, **this court usually has denied the petition summarily**, citing *Waltreus*, *supra*, 62 Cal.2d 218, 42 Cal.Rptr. 9, 397 P.2d 1001.... **By citing *Waltreus* in our summary denial orders, we have intended to communicate that because the issue was previously raised and rejected on direct appeal, and because the petitioner does not allege sufficient justification for the issue's renewal on habeas corpus, the issue is procedurally barred from being raised again.**"

(*Ibid.*, bold added.)

A habeas petitioner cannot avoid the *Waltreus* bar by raising claims that *could have been* raised on appeal but were not. "Closely related to the *Waltreus* rule is the analogous one set forth in *In re Dixon*, *supra*, 41 Cal.2d at page 759, 264 P.2d 513: '[T]he writ [of habeas corpus] will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.'" (*Reno*, *supra*, 55 Cal.4th at p. 490; see also *Lindley*, *supra*, 29 Cal.2d at p. 723; *In re Garcia* (1977) 67 Cal.App.3d 60, 65; and *In re Gomez* (1973) 31 Cal.App.3d 728, 732.)

Related to the *Dixon* and *Waltreus* rules are the *Miller*[37] and *Horowitz/Clark*[38] rules. The California Supreme Court has explained in detail the *Miller* rule, which holds that a habeas petitioner may not bring subsequent claims that were already rejected in a previous habeas petition. (*Reno*, *supra*, 55 Cal.4th at pp. 496-497.) The *Reno* Court stated: "It is, of course, the rule that a petition for habeas corpus based on the same grounds as those of a previously denied petition will itself be denied when there has been no change in the facts or law substantially affecting the rights of the petitioner." (*Id.* at pp. 496-497, quoting *In re Martin* (1987) 44 Cal.3d 1, 27, fn. 3.) *Reno* observed: "The *Miller* rule is now, and for many years has been, black letter law applicable to habeas corpus petitions in this state." (*Reno*, *supra*, 55 Cal.4th at p. 496.) Explaining the policy behind the rule, the *Reno* Court explained that "the *Miller* rule recognizes that a litigant should raise a claim at the earliest practicable opportunity, and cannot—without persuasive justification—keep returning to the court for second and third bites of the same piece of fruit. . . . To hold otherwise

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[37] *Miller*, *supra*, 17 Cal.2d 734, 735.

[38] *Horowitz*, *supra*, 33 Cal.2d 534, 546–547; *Clark*, *supra*, 5 Cal.4th 750, 774-775.

would undermine society's strong and legitimate interest in the finality of its criminal judgments." (*Id.* at p. 497.)

Related to the *Miller* rule is the longstanding *Horowitz/Clark* rule: that a habeas petitioner may not raise claims in a subsequent habeas petition based on information that was known to the petitioner at the time of his or her first habeas petition:

> In addition to the 20 claims and subclaims that have already been raised and rejected in connection with petitioner's 1995 habeas corpus proceeding, petitioner raises several claims that *could have been raised* in that prior proceeding because their factual basis was known at the time he filed that first petition. This court has long considered such claims improper. As we explained in *In re Horowitz, supra,* 33 Cal.2d at pages 546–547, 203 P.2d 513: "[A]s to the presentation of new grounds based on matters known to the petitioner at the time of previous attacks upon the judgment, in *In re Drew* [, *supra,*] (1922) 188 Cal. 717 [at page] 722 [207 P. 249], it was pointed out that the applicant for habeas corpus 'not only had his day in court to attack the validity of this judgment, but ... had several such days, on each of which he could have urged this objection, but did not do so'; it was held that 'The petitioner cannot be allowed to present his reasons against the validity of the judgment against him piecemeal by successive proceedings for the same general purpose.' "
>
> We addressed the *Horowitz* rule more recently in *In re Clark, supra,* 5 Cal.4th at page 768, 21 Cal.Rptr.2d 509, 855 P.2d 729, explaining that we have "refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment. [Citations.] The rule was stated clearly in *In re Connor, supra,* 16 Cal.2d 701, 705, 108 P.2d 10: 'In this state a defendant is not permitted to try out his contentions piecemeal by successive proceedings attacking the validity of the judgment against him.' "

(*Reno*, *supra*, 55 Cal.4th at pp. 501-502.)

Thus, the current Petition is procedurally barred to the extent that either Petitioner previously presented the claims in the Petition to a court for review, *and* to the extent that either Petitioner has presented any of the claims in a piecemeal fashion, when he could have presented them previously.

> It is clear from decisions of this court..., which have created additional limitations on petitions for writs of habeas corpus, that [Penal Code] section 1475 has never been construed as the sole limitation on successive petitions and that the Legislature has not by the enactment

> of that section attempted to compel this court to entertain such petitions on their merits. As noted above, the court has emphasized that repetitious successive petitions are not permitted and [citations] has condemned piecemeal presentation of known claims....Before a successive petition will be entertained on its merits, the petitioner must explain and justify the failure to present claims in a timely manner in his prior petition or petitions. [¶] Before considering the merits of a second or successive petition, a California court will first ask whether the failure to present the claims underlying the new petition in a prior petition has been adequately explained, and whether that explanation justifies the piecemeal presentation of the petitioner's claims.

(*Clark*, *supra*, 5 Cal.4th at p. 774.)

"'It is, of course, the rule that a petition for habeas corpus based on the same grounds as those of a previously denied petition will itself be denied when there has been no change in the facts or law substantially affecting the rights of the petitioner.'" (*In re Martinez* (2009) 46 Cal.4th 945, 950, fn. 1, citing *In re Martin* (1987) 44 Cal.3d 1, 27, fn. 3.) "The court has also refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment." (*Id.* at p. 956.)

The *Waltreus* and *Dixon* requirements of exhaustion of the appellate remedy may be relaxed only if one of four "narrow" exceptions is met; namely, the claim must be one that "involves a fundamental constitutional error, or that the trial court lacked fundamental jurisdiction, or that the court acted in excess of its jurisdiction, or that there has been a postappeal change in the law." (*Reno*, *supra*, 55 Cal.4th at p. 481; see also *In re Miller* (1992) 6 Cal.App.4th 873, 881.) None of these exceptions applies to Petitioners' claims, as discussed in more detail in Section V.D, *post*.

B. Habeas Petitions Must Be Timely, and the Habeas Petitioner Bears the Burden to Justify Any Substantial Delay in Seeking Relief

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.) A habeas 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; see also *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1 ["In a habeas corpus proceeding, . . . the petitioner must justify any substantial delay in seeking relief"].)

This rule is not a mere technicality but is grounded in the reality that the passage of time can detrimentally affect the prosecution's ability to defend against claims, or to retry defendants for old crimes. 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, superseded by statute on other grounds as stated in *Banister v. Davis* (2020) ___ U.S. ___ [140 S.Ct. 1698, 1707, 207 L.Ed.2d 58], 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].) "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.)

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.) "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.)

"*Petitioner* has the burden of establishing the absence of 'substantial delay.' 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." (*In re Gallego* (1998) 18 Cal.4th 825, 832, italics in original.) 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.) 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*, *supra*, 6 Cal.App.4th at p. 881.)

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

(*In re Swain* (1949) 34 Cal.2d 300, 302-304.)

A habeas petitioner must meet his burden of establishing the absence of substantial delay through *specific allegations*, which may be supported by any relevant exhibits. (*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, bold added.)

Notably, 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.)

C. <u>The "New Evidence" Claim Based on the Cano Letter Is Successive and Untimely</u>

Petitioners' new evidence claim regarding the Cano Letter is procedurally barred as successive (as to Erik Menendez) and untimely (as to both Petitioners). Neither Petitioner has established a legally viable excuse or justification for its untimeliness, and Erik Menendez has failed to establish an excuse for its successiveness.

As discussed in more depth *ante*, Sections IV.B.1 and IV.B.2, Petitioner necessarily must concede that as the purported author of the Cano Letter, Erik Menendez knew of its existence from the moment he wrote the letter, allegedly in late 1988. Since Erik Menendez knew about the Cano Letter when he purportedly wrote it in 1988, he knew about it at the time of trial. Accordingly, he could have raised the issue of the Cano Letter at trial, on appeal, or in either of his previous habeas petitions. A claim based on the Cano Letter is thus procedurally barred as successive as to Petitioner Erik Menendez. (*Seaton*, *supra*, 34 Cal.4th at pp. 199-200; *Lindley*, *supra*, 29 Cal.2d at p. 723; *Dixon*, *supra*, 41 Cal.2d at p. 759; *Horowitz*, *supra*, 33 Cal.2d at pp. 546-547; *Clark*, *supra*, 5 Cal.4th at pp. 774-775; *Reno*, *supra*, 55 Cal.4th at p. 462.)

Moreover, the claim based on the Cano Letter is untimely as to both Petitioners.

Erik Menendez purportedly knew about the Cano Letter in 1988, when he supposedly wrote it. Yet he waited until 2023 to bring the claim—over 20 years after Cano died. In waiting until after Andy 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 Andy Cano's death died to present the Cano Letter to a court, Erik Menendez has conveniently prevented the prosecution from examining Andy Cano about the Cano Letter—

in particular, about the reasons Andy Cano did not mention that letter at either of Petitioner's trials.

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 too 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.

D. <u>The Claim Based on the Cano Letter Does Not Fall Within Any Exception to the Applicable Procedural Bars</u>

The procedural rules discussed above—including the *Seaton*, *Waltreus*, and *Dixon* rules, and the *In re Robbins* timeliness rules—are subject to exceptions. However, the claim in the Petition based on the Cano Letter does not fall within any of these exceptions.

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 other exceptions applies to the claim based on the Cano Letter. Petitioner points to no error of constitutional magnitude that "led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner." (*Clark*, *supra*, 5 Cal.4th at p. 797.) Nor are Petitioners under a sentence of death, and they do not claim to have been 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. Not only does this evidence fail to show Petitioners are actually innocent, Petitioners fail even to show that this claim meets the statutory definition of "new evidence." It certainly 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 successiveness and untimeliness. As such, this Court should summarily deny the claim.

CONCLUSION

Petitioners have failed to justify an evidentiary hearing on any of their claims. Procedurally, Petitioners' new evidence claim based on the Cano Letter is barred as successive (as to Erik Menendez) and untimely (as to both Petitioners), without exception. Substantively,

Petitioners' claims of allegedly "new evidence" claims fail the specific requirements of section 1473, subdivision (b)(1)(C). Petitioners do not make a showing otherwise.

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court discharge the order to show cause and summarily deny the Petition without the need for an evidentiary hearing.

Dated: August 7, 2025

Respectfully submitted,

NATHAN J. HOCHMAN
District Attorney of Los Angeles County
By:

SETH C. CARMACK
Deputy District Attorney

DECLARATION OF SERVICE BY MAIL/BY EMAIL/BY FAX

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

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

I am over 18 years of age, not party in the cause of *In re Erik Menendez and Joseph Lyle Menendez on Habeas Corpus*, Los Angeles County Superior Court case number BA068880, and I am employed in the Office of the District Attorney of Los Angeles County. In the above-entitled matter, on August 7, 2025, I served the:

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES; EXHIBITS

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

MARK GERAGOS
644 South Figueroa St.
Los Angeles, CA 90017

Cliff Gardner
1448 San Pablo Avenue
Berkeley, CA 94720

And emailed at the following email addresses:

Cliff Gardner (casteris@aol.com)
Mark Geragos (mark@geragos.com)

Executed on August 7, 2025, at Los Angeles, California.