IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **KENNETH EARL GAY,** On Habeas Corpus.	**CAPITAL CASE** S130263

Los Angeles County Superior Court No. A392702
The Honorable Dana Senit Henry

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

BILL LOCKYER, Attorney General
of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
SHARLENE A. HONNAKA
Deputy Attorney General
LANCE E. WINTERS
Supervising Deputy Attorney General
State Bar No. 162357

300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 576-1347
Facsimile: (213) 576-1300

Attorneys for Respondent

DEATH PENALTY

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PRELIMINARY STATEMENT

On June 2, 1983, petitioner and Raynard Cummings ("Cummings") shot and killed Police Officer Paul Verna. Pamela Cummings ("Pamela") was driving with petitioner in the passenger seat and her husband Cummings in the back seat when they were pulled over by Police Officer Paul Verna for a traffic violation. After Pamela exited the car and spoke to Officer Verna, the officer approached the car. The theory of the prosecution and the evidence at trial showed that Cummings shot Officer Verna as the officer leaned in the car; Cummings gave the gun to petitioner who exited the car and fired five more shots into the injured Officer Verna.

Petitioner was convicted of the first degree murder of Officer Verna (Pen. Code, § 187).[1/] The jury also found true the special circumstances that the murder was committed for the purpose of avoiding unlawful arrest (§ 190.2, subd. (a)(5)) and that the murder was an intentional killing of a peace officer engaged in the performance of his duties by one who knew or should have

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1. All statutory references will be to the Penal Code, unless otherwise noted.

known the officer was so engaged (§ 190.2, subd. (a)(7)). The jury also found that a principal was armed with a firearm (§ 12022, subd. (a)) and that petitioner personally used a firearm (§ 12022.5, subd. (a)). Petitioner was sentenced to death. Petitioner's murder conviction, the special-circumstance and firearm findings, and the sentence were affirmed on appeal. (*People v. Cummings* (1993) 4 Cal.4th 1233.)

On December 30, 1992, petitioner filed a petition for writ of habeas corpus in case number S030514. The Court ordered a reference hearing to resolve questions posed by the Court. While that hearing was pending, petitioner, acting in pro per, filed a second petition for writ of habeas corpus in case number S049121; the petition was filed and denied on August 28, 1995. On December 24, 1998, this Court ruled on petitioner's first petition for writ of habeas corpus and affirmed the conviction, and the special-circumstance and firearm findings, but reversed the death sentence. (*In re Gay* (1998) 19 Cal.4th 771.)[2/]

On December 28, 2004, petitioner filed a Petition for Writ of Habeas Corpus. On December 29, 2004, this Court requested an informal response, pursuant to Rule 60 of the California Rules of Court. Respondent respectfully files the instant response.[3/]

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2. A new jury trial on the penalty was held and the jury again fixed the penalty at death. The trial court sentenced petitioner to death for the murder of Officer Verna. Petitioner has filed an automatic appeal (§ 1239, subd. (b)), which is pending before this Court in case number S093765. The instant petition does not raise any claims attacking the penalty retrial.

3. Petitioner filed a subsequent petition on January 11, 2005, in case number S130598; the Court has requested an informal response to that petition as well.

ARGUMENT

I.

PETITIONER'S CLAIMS ARE UNTIMELY

In the instant petition, petitioner is only attacking his conviction for murder and the special-circumstance findings; he is *not* attacking the judgment of death rendered on December 4, 2000, after a retrial. Petitioner's conviction for murder and the special-circumstance findings were returned on May 31, 1985. (CT 2183-2185.) This Court decided petitioner's appeal from his conviction on April 29, 1993. Petitioner's first state habeas petition, which in part attacked his conviction and special-circumstance findings, was decided on December 24, 1998. Thus, petitioner took six years after his first habeas petition was denied to file the instant petition.

Despite this, petitioner contends, in a single sentence, that the instant petition is timely filed:

> Consistent with this Court's Policies, and applicable case law, this petition is timely filed within the presumptively timely period, and the claims presented herein are otherwise cognizable by virtue of petitioner's actual innocence as well as factual innocence within the meaning of *In re Clark* (1993) 5 Cal.4th 750.

(Petn. 14.)[4/]

Respondent submits the filing of this third habeas petition was substantially delayed, and petitioner fails to demonstrate either that the delay was justified by good cause or excusable under any factor recognized by this Court. In a capital case, the timeliness of a petition for a writ of habeas corpus is evaluated according to a four-pronged test set forth in *In re Robbins* (1998)

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4. Respondent will cite to the petition in the instant case as "Petn." and will refer to petitioner's first state petition, in case number S030514, as "1st Petn."

18 Cal.4th 770, 780-781. As stated in *In re Sanders* (1999) 21 Cal.4th 697, 704-705, which discusses *Robbins* and *Clark*, "In capital cases, a habeas corpus petitioner bears the burden of establishing the timeliness of his or her petition, which timeliness can be shown in one of four ways (in descending order) . . . ." First, a petition is presumptively timely if it is filed "within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal, or within 24 months after appointment of habeas corpus counsel, whichever is later." (Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, § 1-1.1.) The petitioner can also show timeliness in the remaining three ways:

> (ii) even if not presumptively timely, the petition was filed without substantial delay; (iii) even if the petition was filed after a substantial delay, good cause justifies the delay; or (iv) even if the petition was filed after a substantial delay without good cause, the petitioner comes within one of the four *Clark* exceptions.

(*In re Sanders*, *supra*, 21 Cal.4th at p. 705.) Here, petitioner has failed to establish the timeliness of the instant petition in any of the four ways articulated in *Robbins*.

A. The petition is neither presumptively timely nor was it filed without substantial delay or with good cause

As previously stated, petitioner's appeal was decided in 1993; his reply brief on appeal was filed on September 16, 1991. The instant petition was not filed, however, until December 2004, over 13 years after the deadline for presumptive timeliness. Thus, the petition is not presumptively timely.

Moreover, petitioner has not attempted to show the petition was filed without substantial delay. Delay is measured from the time petitioner knew of should have known the information supporting the claims:

> Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. A petitioner 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.

(*In re Robbins*, *supra*, 18 Cal.4th at p. 780, italics in original.) Here, petitioner does not make any assertions about when his claims were discovered. Therefore, he has failed to show the petition, filed 13 years after his appeal, was filed without substantial delay.

Finally, petitioner has failed to show good cause. Petitioner has the burden to establish good cause for any delay. (*In re Sanders, supra,* 21 Cal.4th at p. 722.) Petitioner does not even assert that he has good cause for any delay.

B. Petitioner has not established that any of the exceptions to the timeliness bar apply to this case

As discussed above, petitioner has not established that the instant petition is presumptively timely, was filed absent substantial delay, or that good cause exists to justify his delay. Furthermore, petitioner has also not established that any of the four recognized exceptions to the timeliness bar apply in this case.

This Court has recognized four exceptions that constitute a "fundamental miscarriage of justice" that will excuse substantial delay without good cause:

> A claim that is substantially delayed without good cause, and hence is untimely, nevertheless will be entertained on the merits if the petitioner demonstrates (i) 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; (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that 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; or (iv) that the petitioner was convicted or sentenced under an invalid statute.

(*In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781, italics omitted; accord, *In re Sanders*, 21 Cal.4th at pp. 704-705; *In re Clark*, *supra*, 5 Cal.4th at pp. 797-798.) Petitioner has the burden of establishing that an exception to the untimeliness bar applies. (*In re Robbins*, *supra*, 18 Cal.4th at p. 779; *In re Sanders*, *supra*, 21 Cal.4th at pp. 704-705.) Petitioner has not carried his burden in this case.

Petitioner claims that his petition falls within the "actual innocence" exception. (Petn. 14.)

To show actual innocence, the petitioner must provide evidence that will:

"undermine the entire prosecution case and point unerringly to innocence or reduced culpability." [Citation.] Evidence relevant only to an issue already disputed at trial, which does no more than conflict with trial evidence, does not constitute "'new evidence' that fundamentally undermines the judgment.'" [Citation.]

(*In re Clark*, *supra*, 5 Cal.4th at p. 798, fn. 33; accord, *In re Robbins*, *supra*, 18 Cal.4th at p. 812.) Moreover, the petitioner bears a "heavy burden" to show innocence:

Again, the petitioner would bear a heavy burden of satisfying the court that the evidence of innocence could not have been, and presently cannot be, refuted. The requirement that a petitioner demonstrate his or

her innocence requires more than a showing that the evidence might have raised a reasonable doubt as to the guilt of the petitioner. The petitioner must establish actual innocence, a standard that cannot be met with evidence that a reasonable jury could have rejected.

(*In re Clark, supra*, at p. 798, fn. 33.) In *In re Robbins, supra*, 18 Cal.4th at page 812, petitioner failed to establish that petitioner was actually innocent where he alleged perjury by a police detective who testified to the petitioner's confession to a crime.

Here, petitioner alleges actual innocence in claim 1. (Petn. 15-34.) But he fails to meet his "heavy burden" to "undermine the entire prosecution case and point unerringly to innocence or reduced culpability. [Citation.]" (*In re Clark, supra*, 5 Cal.4th at p. 798, fn. 33.)

Petitioner relies in part on witnesses presented at trial: Shequita Chamberlain and Oscar Martin, whose testimonies allegedly suggest Cummings was the sole shooter (Petn. 17-18); and Deputy McMullan, Deputy La Casella, Gilbert Gutierrez, who all testified to admissions by Cummings that allegedly suggest Cummings was the sole shooter (Petn. 20-21). Of course, the jury already had the opportunity to view this evidence to resolve the question of whether Cummings was the sole shooter. And the jury resolved the issue against petitioner. Petitioner alleges there are additional witnesses who could offer similar testimony, that the dark-skinned Black man (Cummings) was the one who did the shooting, and that Cummings made other statements suggesting he was the sole shooter. (Petn. 18-22.) However, this additional evidence, while perhaps providing additional support for the evidence that was already presented, would not "undermine the entire prosecution case and point unerringly to innocence."

In addition, petitioner attacks the testimony of the witnesses at trial who did identify him as a shooter in the murder. Petitioner claims such witnesses:

were coerced into identifying petitioner (Shannon Roberts, Robert Thompson); made inconsistent statements and may have been under the influence of narcotics (Marsha Holt, Gail Beasley); or were biased (Pamela Cummings). (Petn. 23-31.) Again, while petitioner may be able to now provide additional impeachment of witnesses who testified at trial, such evidence does not "point unerringly to innocence."

Finally, petitioner relies on expert testimony of: Dr. Solomon, who opines that petitioner could not have physically performed the shooting as described by the witnesses; and Dr. Michel, who could offer expert testimony impeaching the reliability of the eyewitness testimony. (Petn. 31-33.) But Dr. Solomon's opinion is based on an assumption about the amount of time between the first and second shots— an assumption that a jury might easily reject. Similarly, the jury could easily reject Dr. Michel's testimony. Indeed, at Gay's penalty phase retrial Dr. Michel testified (Penalty Retrial RT 3087-3153), but the jury still returned a verdict of death. As with petitioner's other allegations, these additional witnesses would not "undermine the entire prosecution case and point unerringly to innocence." (See *In re Gay*, *supra*, 19 Cal.4th at p. 779, fn. 4 [court rejected claim of innocence on the merits in prior state habeas petition].)

The Court has also said that it will consider claims of actual innocence based on newly discovered evidence notwithstanding delay. (*In re Clark*, *supra*, 5 Cal.4th at pp. 796-797.) However, petitioner does not allege anywhere in his claim of actual innocence that any of the evidence that purportedly shows his innocence has been *newly discovered*. Thus, claim 1 fails to demonstrate that petitioner falls within an exception to the bar against delayed petitions.

In sum, petitioner has failed to carry his burden to show actual innocence. He does not allege that he falls within any other exception to rules on timeliness. Therefore, because petitioner's petition is not presumptively

timely, was filed after substantial delay, does not show good cause, and does not fall within any exception to rules on timeliness, all of the claims in the petition should be denied as delayed.

II.

THE PETITION SHOULD BE DISMISSED AS SUCCESSIVE

A petitioner is not entitled to engage in piecemeal litigation by successive petitions attacking the validity of the judgment. (*In re Clark*, *supra*, 5 Cal.4th at p. 767.) Thus, new claims will not be considered in a successive petition: "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. [Citations.]" (*In re Clark*, *supra*, 5 Cal.4th at p. 767; *In re Horowitz* (1949) 33 Cal.2d 534, 546-547; *In re Drew* (1922) 188 Cal. 717, 722.) Similarly, claims previously rejected will not be considered in a successive petition: "It has long been the rule that absent a change in the applicable law or facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected. [Citations.]" (*In re Clark*, *supra*, 5 Cal.4th at p. 767; *In re Lynch* (1972) 8 Cal.3d 410, 439, fn. 26; *In re Horowitz, supra*, 33 Cal.2d at p. 546; *In re Miller* (1941) 17 Cal.2d 734, 735.)

In *In re Clark*, *supra*, 5 Cal.4th at page 774, this Court held, "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." Therefore, "in the future a habeas petitioner, . . . '"must show the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ."' [Citation.]" (*Id.* at p. 779.)

The instant petition is the third petition for writ of habeas corpus filed by petitioner in this Court. Yet petitioner has made no allegations as to when he discovered the facts that are the basis for any of his claims. Although most of the claims in the petition have previously been rejected by this Court in prior

petitions or on appeal, petitioner identifies no change in the law or facts. Thus, the instant petition is a successive petition.

As with delayed petitions, the only claims that will be considered in a successive petition are where the errors were a "fundamental miscarriage of justice." (*In re Clark*, *supra*, 5 Cal.4th at pp. 795-798.) As noted above, petitioner's only allegation of a fundamental miscarriage of justice is petitioner's allegation that he falls within the "actual innocence" exception. (Petn. 14.) However, as shown above (Argument I, B, *ante*), petitioner has failed to demonstrate actual innocence sufficient to excuse his successive petition. Therefore, petitioner has not shown a "fundamental miscarriage of justice," and his petition should be denied as successive.

III.

PETITIONER'S FAILURE TO RAISE CLAIMS AT TRIAL BARS THEIR CONSIDERATION ON HABEAS CORPUS

Petitioner's failure to raise several of his claims at trial bars their consideration on appeal. This Court recently clarified in *In re Seaton* (2004) 34 Cal.4th 193, 200, that the familiar rule requiring a defendant to object at trial in order to raise an error on appeal applies equally in the habeas context: "Thus, just as a defendant generally may not raise *on appeal* a claim not raised at trial [citation], a defendant should not be allowed to raise on *habeas corpus* an issue that could have been presented at trial." The only exception to this rule is "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." (*Ibid.*)

As to several of the claims raised in the petition, Petitioner could have raised the claim at trial, i.e., he was aware of the facts that were the basis of the claim, but he failed to do so. These claims are barred:

- In claim 6, petitioner claims the trial court's eight-day adjournment prior to jury deliberations violated petitioner's right to due process. (Petn. 140-141; *People v. Cummings*, *supra*, 4 Cal.4th at p. 1306 [petitioner did not object to adjournment].)

- In claim 7, petitioner claims the presence of uniformed officers in court during trial denied petitioner his constitutional rights. (Petn. 141-143; *People v. Cummings, supra*, 4 Cal.4th at p. 1298, fn. 41 [petitioner did not object to presence of officers].)

- In claim 8, petitioner claims the prosecutor's use of misleading physical simulations denied petitioner his constitutional rights. (Petn. 143-148; *People v. Cummings*, *supra*, 4 Cal.4th at p. 1291 [petitioner did not object to simulations].)

- In claim 18, petitioner claims the trial court's failure to give CALJIC No. 2.71.5 on adoptive admissions violated his constitutional rights. (Petn. 280-282; see RT 10218-10228 [petitioner did not request CALJIC No. 2.71.5 during discussion of jury instructions]; *People v. Carter* (2003) 30 Cal.4th 1166, 1198 [CALJIC No. 2.71.5 must be requested by defendant].)

- In claim 21, petitioner claims the failure to insure that all proceedings were on the record violated petitioner's constitutional rights. (Petn. 296-303; *People v. Cummings*, *supra*, 4 Cal.4th at p. 1333, fn. 70 [petitioner failed to request proceedings be on the record].)

As to other claims, petitioner fails to state when he became aware of the facts supporting the claim. Therefore, these claims are also barred:

- In claim 4, petitioner claims the prosecution violated petitioner's constitutional rights by committing egregious acts of misconduct. (Petn. 130-137.)

- In claim 5, petitioner claims unconstitutional juror misconduct occurred during trial. (Petn. 137-139.)

IV.

PETITIONER'S CLAIMS SHOULD BE REJECTED AS APPELLATE CLAIMS OR BECAUSE THEY FAIL TO STATE A PRIMA FACIE CASE FOR RELIEF

Most of petitioner's claims should be rejected because they were either previously presented on appeal or could have been presented on appeal. Moreover, none of the claims state a prima facie case for relief.

A. Appellate claims are barred

Neither claims that were actually raised and rejected on appeal (*In re Waltreus* (1965) 62 Cal.2d 218, 225), nor issues that could have been but were not (*In re Dixon* (1953) 41 Cal.2d 756, 759), will be considered on habeas corpus. A claim that is or could have been raised on appeal should be brought in a petition for writ of habeas corpus only where reference to matters of substance outside the record is necessary. (*In re Robbins, supra*, 18 Cal.4th at p. 814, fn. 34; *In re Bower* (1985) 38 Cal.3d 865, 872.)

Claims barred by *Dixon* and *Waltreus* will not be considered absent "strong justification" or applicability of one or four narrow exceptions, where petitioner alleges: (1) a "clear and fundamental constitutional error which "strikes at the heart of the trial process"; (2) the court lacks fundamental jurisdiction; (3) the court acted in excess of jurisdiction; or (4) an intervening change in the law. (*In re Harris* (1993) 5 Cal.4th 813, 825-829, 836-841; *In re Clark, supra*, 5 Cal.4th at p. 765.) Petitioner does not allege that any of his appellate claims fell within an exception to the *Dixon* and *Waltreus* bars.

B. Petitioner must allege a prima facie case for relief

A habeas corpus proceeding is a collateral attack upon a criminal judgment, which, because of societal interest in the finality of judgments, is presumed to be valid. (*People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Clark*,

supra, 5 Cal.4th at p. 764; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.) Such an attack is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension. (*In re Clark, supra,* 5 Cal.4th at pp. 766-767.) Petitioner thus bears "a heavy burden" to plead sufficient grounds for relief. (*People v. Viscotti* (1996) 14 Cal.4th 325, 351; accord, *In re Cudjo* (1999) 20 Cal.4th 673, 687.) To satisfy this burden, petitioner is required to plead with particularity the facts supporting each claim and provide reasonably available documentary evidence, such as affidavits or declarations. (*People v. Duvall, supra,* 9 Cal.4th at p. 474.) Petitioner "must set forth specific facts which, if true, would require issuance of the writ," and a petition that fails in this regard must be summarily denied for failure to state a prima facie case for relief. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1258.) Conclusory or speculative allegations are insufficient, especially when, as here, the petition was prepared by counsel. (*Ibid.*; *People v. Duvall, supra*, 9 Cal.4th at p. 474; *People v. Karis* (1988) 46 Cal.3d 612, 656.)

A petition is judged on the factual allegations contained within it, without reference to the possibility of supplementing the claims with facts to be developed later. (*In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.) A petitioner's obligation to provide specific factual obligations in the petition itself is not satisfied by generally "incorporating by reference" the facts set forth in the exhibits to the petition. (*In re Gallego* (1998) 18 Cal.4th 825, 837, fn. 12.)

C. Petitioner's claims should be rejected

Claim 1

In claim 1, petitioner claims he is factually innocent. (Petn. 15-34.) Petitioner raised a similar claim in his first state petition for writ of habeas

corpus. (1st Petn. 80-81, 224-28.) The Court rejected the claim on the merits. (*In re Gay*, *supra*, 19 Cal.4th at p. 779, fn. 4.)

There is no United States Supreme Court case recognizing a claim for relief based on actual innocence. In fact, the United States Supreme Court refused to recognize such a claim in a capital case, in *Herrera v. Collins* (1993) 506 U.S. 390, 400 [113 S.Ct. 853, 122 L.Ed.2d 203]. There, the court found that a petitioner's remedy for actual innocence is to seek executive clemency, which California offers. (*Id.* at pp. 416-417; see *Milone v. Camp* (7th Cir. 1994) 22 F.3d 693, 700 [no writ may issue on ground petitioner is innocent in non-capital case].)

However, as noted above, this Court has said that it will consider claims of actual innocence based on newly discovered evidence. (*In re Clark*, *supra*, 5 Cal.4th at pp. 796-797.) Assuming a claim of actual innocence exists, a petitioner would have an "extraordinarily high" burden to make a "truly persuasive" demonstration of actual innocence. (*Herrera v. Collins*, *supra*, 506 U.S. at 417; see *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, 1164-1165; *Griffin v. Delo* (8th Cir. 1994) 33 F.3d 895, 908; cf. *In re Clark*, *supra*, 5 Cal.4th at p. 798, fn. 33 ["heavy burden" to "undermine the entire prosecution case and point unerringly to innocence"].)

Again, as noted above, petitioner does not rely on newly discovered evidence. Nor does he meet the high burden necessary to make a "truly persuasive" demonstration of actual innocence. (Argument I, B, *ante*.) Therefore, his claim should be rejected.

Claim 2

In claim 2, petitioner claims his counsel's representation was unconstitutionally burdened by multiple conflicts. (Petn. 34-59.) Petitioner fails to plead a prima facie case.

"A criminal defendant's right to effective assistance of counsel, guaranteed by both the state and federal Constitutions, includes the right to representation free from conflicts of interest. [Citations.]" (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1009; accord, *People v. Frye* (1998) 18 Cal.4th 894, 998.) "Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests. [Citation.]" (*People v. Bonin* (1989) 47 Cal.3d 808, 835; accord, *People v. Sanchez* (1995) 12 Cal.4th 1, 45; *People v. Clark* (1993) 5 Cal.4th 950, 994.)

The United States Supreme Court has held, "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 348, footnote omitted [64 L.Ed.2d 333, 100 S.Ct. 1708]; *Burger v. Kemp* (1987) 483 U.S. 776, 783 [97 L.Ed.2d 638, 107 S. Ct. 3114].)

However, "To establish a violation of the same right under our state Constitution, a defendant need only show that the record supports an 'informed speculation' that counsel's representation of the defendant was adversely affected by the claimed conflict of interest. [Citations.]" (*People v. Kirkpatrick*, *supra*, 7 Cal.4th at p. 1009; accord, *People v. Frye*, *supra*, 18 Cal.4th at p. 998.) But "a showing that the alleged conflict prejudicially affected counsel's representation of the defendant is also required. [Citations.]" (*People v. Clark*, *supra*, 5 Cal.4th at p. 995.)

First, petitioner claims his trial counsel was burdened by conflicts in that he used fraudulent means to secure his appointment. Also, he alleges counsel had an illegal capping arrangement to use certain individuals, who facilitated the fraudulent appointment, as mental health experts. (Petn. 36-42.) This claim was raised in petitioner's first state habeas petition. (1st Petn. 174-176.) The