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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SIRHAN BISHARA SIRHAN Petitioner v. GEORGE GALAZA, WARDEN, et al, Respondent	CV-00-5868-CAS (AJW) PETITIONER'S OBJECTIONS TO MAGISTRATE JUDGE'S PROPOSED REPORT AND RECOMMENDATION; MEMORANDUM OF POINTS AND AUTHORITIES The Honorable Andrew J. Wistrich United States Magistrate Judge

Petitioner notes that the Magistrate Judge, after reviewing Petitioner's Reply for ten months has recommended that the Judge grant the Respondent's request and dismiss the Petition.

Petitioner agrees with the Magistrate that the assassination of Senator Kennedy was a national tragedy; one that has had a lasting, negative impact on the democratic history of our Republic. Petitioner, however, believes that the tragedy of the loss of leadership and values embraced by the Senator has been compounded by the failure of the criminal justice system to deliver justice to the Kennedy family, the citizens of the Republic and to Petitioner who, being actually innocent of the crime, has suffered an egregious miscarriage of justice. Petitioner requests this Habeas court not continue this deplorable history, but take the first step to right this historical wrong and, finally, give Petitioner his day in court where all of the evidence may finally be tested. In this Response and the objections it contains Petitioner is grateful for the factual contributions of long time researchers Lynn Mangan, Shane O'Sullivan, Phil Van Praag, and Tom O'Neil.

Inadvertantly, the Report begins by actually supporting Petitioner's claim of actual innocence. It states:

> "As Senator Kennedy stopped to shake hands with hotel employees, Petitioner walked toward him extending his arm. Instead of shaking Senator Kennedy's hand, Petitioner shot him."(CD 199 at p.1)

This recitation of the activity leading up to the shooting is a virtual admission of Petitioner's innocence since Senator Kennedy was hit by three bullets, fired in an upward angle (indicating that the shooter may have been kneeling behind the Senator) from behind him, by a weapon pressed up against his back with the fatal shot fired about an inch behind his right

ear. All shots left powder burns on the back of his jacket and on his skin behind his right ear.

The Report explicitly acknowledges, along with the statements of twelve eye witnesses, that Petitioner was, at all times, in front of the Senator, where, as the Report confirms, the Petitioner could have shaken hands with him.

Petitioner questions whether further comment is necessary in light of this embarrassingly absurd factual foundation for the recommendation that the Petition be dismissed.

Moving on, the Report seeks to assert a basis for once more denying Petitioner the opportunity to present the newly available evidence to the Court.

The Magistrate's Report initially focuses on procedural defects related to statutory tolling, equitable tolling and delayed accrual, totally ignoring the evidence of actual innocence not being presented at the Trial or not having been available at the time of the Trial and thus outside of Petitioner's due diligence and discovery capability.

Petitioner is faulted for not filing a "protective Petition" in Federal Court but, as Kennedy J. recently noted about the filing of such protective Petitions, in the recent oral arguments in the case of *Perkins v. McQuiggan* "… I'm not quite sure that wouldn't mean that you have a whole raft of – of petition-protective decisions waiting on the shelf in the district court. That—that—that causes its own congestion problems in the district court, it seems to me." (2/25/2013,Trans. P.6)

The Magistrate's Report initially focuses on procedural defects attributed to Petitioner's claims despite the Ninth Circuit Court of Appeals ruling in the case of *Lee v. Lampert* 653 F.3d 929,937 (9th Cir.2011)(en banc) and the court's clear statement, citing *Schlup v. Delo* 513 U.S.298,313-315,321 (1995) that a court may consider evidence in a Habeas claim which might otherwise be procedurally defaulted, where the evidence indicates that the Petitioner is actually innocent so that the failure to allow the claim to be heard could result in a miscarriage of justice. To pass through the *Schlup* gateway a Petitioner has to support his claim of constitutional error with credible evidence that was either not available at the time of Trial or not submitted for the jury's consideration. As the Respondent agrees, citing *Sistrunk v. Armenkis* 292 F. 3d 669,673 (9th Cir. 2002) (*en banc*), it is only necessary for the new evidence to cast doubt on the guilt of the Petitioner, not necessarily prove innocence.(CD 199 atP.17)

The Pruszynski Recording

In his discussion of the procedural issue of delayed accrual, early on, and prior to discussing the whole range of new evidence the Magistrate considers one element of Petitioner's new evidence, which forms the basis of Petitioner's claim of actual innocence,- the Pruszynski recording. The audio recording, of sounds in the pantry at the time of the shooting is known as the Pruszynski recording. The sounds on that tape, when analyzed with a computerized technology not available at the time of the assassination, clearly reveal that thirteen shots were fired, coming from two different directions –west to

east and east to west. That is, that shots were fired in front of the Senator and from behind him. In focusing on the issue of procedural defect, and ignoring the absence of the critically essential technology at the time, and indeed its unavailability until 2005, the Report focuses on the fact that the tape recording was available as early as 1988 and faults Petitioner for not exercising adequate due diligence and bringing it forward earlier. (CD 199 at pp.11-12)Thus, the critical fact is not that the tape was available to be discovered at an earlier time, but that it could not have been precisely analyzed and used for the evidentiary purpose it now serves.

Petitioner's expert Philip Van Praag, has qualifications and expertise which stand alone. The Report tries to advance the credentials of other technicians who largely employed naked ear listening and who did not have access to the computer program utilized by Van Praag. There is nothing in the report of the State's experts to indicate that there was any use of advanced means of testing (beyond basic spectrographic and time-based image analysis). Van Praag's establishment of a unique digital signature of a second gun is not discussed in the Magistrate's Report indicating that it was either not grasped by the Magistrate, or deliberately ignored. This also, raises the issue of whether or not Van Praag's report has even been read.

For the State to submit and also rely upon the opinion of a well known, long time, anti conspiracy/pro government writer- Mel Ayton- with no technical skills or background, in this highly complicated scientific, forensic area is disgraceful. It appears to be a desperate attempt to muddy the waters of truth.

Petitioner notes that even the findings of the most qualified of the "experts" put forward by the State (Harrison) appears more as a first cut analysis attempt, lacking the tools, time, appropriate pre-briefing instruction or some combination of those factors.

At any evidentiary hearing Petitioner respectfully suggests that this would all become painfully clear and even ludicrous to anyone considering the issue.

Brady and Ineffective Assistance of Counsel

It appears that the Magistrate's Report, perhaps for obvious reasons, ignores the fact that Petitioner's defense Counsel was, during the course of the Trial, under a federal indictment. As a matter of record he accepted, without even the most perfunctory examination or challenge, all of the State's ballistic evidence.(See discussion *infra*)

Consequently, it is totally irrelevant what the Petitioner knew, or should have known, at the time. What does matter is what his conflicted Counsel did at Trial with the evidence of actual innocence. He decided not to raise it or bring it before the Jury for their consideration. As a result, defense Counsel Cooper's indictment went away. He was rewarded for obtaining the guilty plea and death penalty sentence and his betrayal of Petitioner was protected by the State and subsequent defense Counsel until Attorney Larry Teeter became Petitioner's lawyer and began to look into what had actually transpired.

Actual Innocence

It cannot be stressed enough, as acknowledged in the Report, that the Ninth Circuit has held that "…where an

otherwise time-barred habeas petitioner demonstrates that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt, the petitioner may pass through the *Schlup* gateway and his constitutional claims heard on the merits." This is essential to prevent a miscarriage justice and is especially relevant in a case (as here) where the Petitioner demonstrates actual innocence. (CD 199 AT P. 16)

The Report confirms that the Petitioner must support his allegations of constitutional error with new, reliable evidence. The Report explicitly includes as "new evidence" evidence that was available, but not presented at Trial, citing *Griffen v, Johnson* 350 F. 3D 956,963 (9TH Cir. 2003,*cert. denied.)* This new supporting evidence may be exculpatory scientific evidence, (ie. Here the newly available analysis of the Pruszyinski tape), impartial eyewitness accounts,(ie all twelve witnesses who placed Petitioner always in front of the Senator) or other exculpatory scientifically developed evidence, (ie Dr. Daniel Brown's extensive (70 plus hours)psychological examination of Petitioner).

The Magistrate agrees that the habeas Judge must then consider all of the evidence and on the basis of the complete record, comply with Lee, 653 F.3d at 938 and make a determination as to whether properly instructed jurors, considering the evidence, would find the Petitioner guilty.

The critical standard, conceded by the Magistrate is not that the new evidence must prove Petitioner innocent beyond a reasonable doubt but that the measure be the standard set out in Sistrunk 292 F.3d 669,673,)9th Cir.2002) (en banc).In that case

the level of proof of doubt which was sufficient to compel consideration of claims, that might otherwise be procedurally barred, was based on evidence that cast doubt on the reliability of proof of guilt.

This, then, is the context in which the Magistrate must consider the evidence which was presented or omitted, though available or unavailable at Trial.

Evidence Presented at Trial

The Report correctly states that at the Trial the defense did not dispute the State's charge that the Petitioner fired the fatal shot which killed Senator Kennedy. Petitioner suggests to the Honorable Magistrate and the habeas Judge, that this should not come as a surprise in light of the fact that defense counsel was under a federal indictment throughout the Trial and, from the outset, set about the task of convincing his client that he was guilty and that their only effort should be devoted to saving his life. This was easily done since Petitioner had no recollection of the specific events at the time of the shooting.

The Report proceeds to review the evidence.

In summarizing the evidence presented at the Trial the Magistrate asserts that "… the evidence also established conclusively that he shot the other victims of the assault counts…." (CD 199 at p.17)Where is the backup for this assertion? The Report provides no reference to the Trial transcript testimony or other evidence that Petitioner's gun fired the bullets which wounded, and were taken from the victims.

This, not for the first time, is a fictional allegation and should be discarded from consideration.

Several pages of the Report are devoted to a narrative of largely irrelevant, ordinarily inadmissible information about the Petitioner's movements, activities and hearsay statements prior to and immediately after the shooting. The diminished capacity defense, pursued by defense counsel involved the testimony of two psychiatrists (who opined that he was a paranoid schizophrenic) along with the prosecution's psychiatrist who found him to be mentally ill but not psychotic. Another pointed omission by conflicted defense Counsel was the comprehensive evaluation of Dr. Simon Kallas, who spent extensive time with Petitioner, right after he was given the death penalty and who disagreed with any diagnosis of paranoid schizophrenia, psychosis or severe mental illness or disability.

The Magistrate's Report also omits defense Counsel's incredible failure to ask the Medical Examiner to identify the slug he removed from the Senator's neck and on which he placed the mark "TN31". To ignore bringing this most important available piece of ballistics evidence into consideration and evidence by the doctor who physically removed it is indefensible. As discussed *infra,* it has now become clear that the neck bullet introduced at Trial did not bear the "TN31" mark, but it appears it had the mark "DWTN".

In this line of conduct, Petitioner notes that the defense also failed to call to as a witness, the hospital doctor who removed the bullet from victim Goldstein and who placed his own marking on that bullet. (discussed *infra*)

Though ignoring these defense omissions, as noted above, the Magistrate's Report, nevertheless blithely, and without any source or transcript reference, asserts that it is undisputed that all the bullets which wounded the onlookers and killed the Senator, came from Petitioner's gun.

The Report next turns to a consideration of the "new evidence" which Petitioner acknowledges as being essential to his claim of actual innocence.

New Evidence

The Magistrate's Report explicitly avoids addressing the details of Petitioner's allegations of there being a second shooter and the existence of two guns firing in different directions though acknowledging Petitioner's contention that the new evidence of psychological manipulation, eliminates the essential element of intent, making it legally impossible for him to be liable for the murder. (CD 199 AT P.32)

The Pruszynski Tape Recording

As noted in an earlier section, Philip Van Praag's advanced computerized analysis of the tape recording which was running throughout the shooting period clearly indicated that 13 bullets were fired. The analysis also indicated that the shots came from two different directions- from in front and from behind the Senator- with some shots so close together they could not have come from the same gun.

The Report has the temerity to dispute Van Praag's seriously scientific analysis with "opinions" of other "experts"

like pro government/anti conspiracy book writer Mel Ayton, and other alleged audio technicians, none of whom had access to the highly sophisticated computerized program used by Van Praag. (CD199 at p.33).The Report, thus, gives new meaning to the designation of an "expert".

Petitioner respectfully suggests that a full evidentiary hearing would be able to compare and contrast the opposing views and, in Petitioner's view would conclusively discredit the Respondent's "experts" and their "opinions", and reveal the truth that there was a second shooter firing from a position, behind the Senator, and responsible for his murder.

Eyewitnesses To Petitioner's Position At the Time of the Shooting

The lone contention, set out in the Report, about the 12 eyewitnesses, whose statements concerning Petitioner's location at the time of the shooting were cited by the Petitioner, is that none of them actually saw where Petitioner was when the shots were fired. In fact, all 12, without exception, clearly stated that Petitioner was always in front of the Senator, with the statements only varying in terms of estimations of the distance between them. Not one mentioned seeing Petitioner reach behind the Senator to shoot him. It is important to remember that the Senator was hit by three bullets fired at close, powder burn range from behind.

Though the Senator may have turned his head, at some point, the statements of at least three witnesses clearly indicate that he had already finished shaking hands, was moving forward, and had turned his head back so that he was facing

Petitioner **before** any shots were fired.(In another section, see a full discussion of these observations, *infra).* The Report notes that because the Senator turned his head the Petitioner might have had an opportunity to shoot him behind the right ear even though no witness ever indicated seeing the Petitioner being that close. This fiction, however, also ignores the firing of the other three bullets (one missed the body and went through the shoulder pad of the Senator's jacket) which entered his body at close range from behind.

How the jury regarded this evidence was clearly dependent upon how conflicted defense counsel put it forward.

Evidence That Petitioner Was In Front of Senator Kennedy

The Report seeks to obfuscate the fact that the 12 witnesses, individually and independently, clearly stated that they observed the Petitioner as being in front of the Senator at all relevant times. The Report, pointedly, does not discuss the details of the Medical Examiner's Trial testimony (incidentally, not as a result of the brief examination by conflicted defense Counsel, but worked in during direct examination by the Prosecution)concerning the powder burn range from which the bullets were fired from behind the Senator in an upward angle.

All of the witnesses stated that Petitioner was in front of the Senator and the Magistrate acknowledges that the five who testified at the Trial did, without exception, confirm this fact, proving Petitioner's point. (CD 199 at page 35)

The Report, itself, further proves Petitioner's frontal position by contending that Petitioner went toward the Senator

"… extending his hand, pointing a revolver toward Senator Kennedy, and then firing that gun at Senator Kennedy…."(*ibid*)

So, all of the Petitioner's alleged actions were indisputedly carried out in front of the Senator.

The fact that this Trial evidence was confirmed by multiple additional witnesses is, in fact, new evidence and even overwhelming in its confirmatory power.

In desperation, the Report contends that because the Senator turned his head –not his body- as the shots were fired, this allowed Petitioner to shoot him behind his right ear.

Not only does this not explain, or even consider, how the other three shots –two of which entered his back at powder burn Range less than an inch away- could have been fired by Petitioner. It does appear that the Report is laying a foundation for the introduction of, as well as asking us to believe in the presence of three magic bullets.

In addition, apparently contradicting its own scenario, the Report contends that the Senator moved his hand between two of the gunshots. The fatal shot was fired close to the right ear, after which no such movement of the arm would have been possible. The Senator went straight to the floor. Consequently, it is obvious that the movement of the Senator's arm would have had to occur prior to him receiving the fatal shot and the conclusion of the Report has to be that the Petitioner fired the other shots to the back –when the Senator could react- before firing the fatal shot to the brain.

Thus, because of the forensic evidence we are asked to believe that Petitioner fired three shots – two into the

Senator's back- from an inch away, even though there is not a shred of evidence that the Petitioner ever faced the Senator's back, and then, somehow, with these initial wounds the Senator managed to turn his head to continue shaking hands with hotel staff, so that Petitioner could put a final bullet in his brain.

If the fatal brain shot was the first bullet the Senator took, there would have been no others since he would have gone straight down. Neither would he have been able to raise his arm.

If the fatal shot was the last shot- which it must have been- then, the Report is silent as to how Petitioner is supposed to have fired the other shots from the front.

The scenario put forward by the Report is errant nonsense. It is embarrassing to say the least and though it may have been due to the Magistrate's reliance upon uninformed Clerks, it should not see the light of day, much less be submitted to the habeas Judge.

But, truth and justice are at stake and Petitioner respectfully submits that neither the Magistrate or the Habeas Judge can, before the world, associate themselves with this fiction.

Evidence That Petitioner's Hand Was Pinned Down After Firing the First Shots

Petitioner contends that the evidence has revealed that his hand was pinned to the table after the second shot which was fired in front of the Senator.

The Magistrate's Report agrees that the Petitioner fired the remaining 6 – or at least 5- shots when his hand was pinned to the table and when he had no control over aiming the pistol.

(CD 199 at page 36)

But, the farce continues. The Report asks the Habeas Judge, and the world, to believe that with his gun hand pinned to the steam table, after the second, or remotely possible third shot, that Petitioner was still able to fire three precisely aimed, powder burn range shots into the Senator.

Evidence That Petitioner Was Too Far Away From Senator Kennedy To Inflict the Fatal Wound

Here, the Report focuses on the fatal shot, whilst ignoring the other three shots fired at close range in an upward angle. The Report even confirms the testimony of Uecker who stated that Petitioner was not just in front of him, being between him and the table, but obviously, also clearly in front of the Senator who was behind Uecker. (CD at page 37)

The Report admits that with the Petitioner in this obviously removed position, Uecker heard what sounded like a firecracker –a single shot- then he heard another shot as the Senator began to fall. Seeing Petitioner with a pistol in front of him, Uecker grabbed for the gun and forced Petitioner down on to the steam table (*ibid*) where though not in control of aiming the gun he continued to shoot.

So, the Report concludes, the jury could have been convinced that Petitioner, somehow, fired the fatal shot during this activity, completely, once again, ignoring the fact that the Senator received three other shots from behind at close range **prior** to being hit by the head shot which caused him to fall.

Even if Petitioner was close enough to have twisted himself into some position to have made it physically possible for him to have fired the fatal shot, - which Petitioner contends is clearly impossible because of his position in front of Eucker, who stated that Petitioner's gun was never closer than 1.5 feet, from, and in front of, the Senator (CD 199 at page 38) –

The question remains as to who fired the other three previous shots at close range from the rear. Once again, the Report ignores this critical fact.

The Report contains an enormous amount of speculation about what the jury may have believed (*ibid*) but, in this context, it is essential to understand that Petitioner's conflicted Counsel had agreed not to contest his client's guilt and was not going to dispute his guilt or be an advocate for his innocence, and this was bound to have a powerful affect on the jury. This is discussed in detail in a later section.

It is very revealing that the Report disputes the Prosecution's own witness- the Medical Examiner- with respect to the shooter's position, as it attributes it to the Petitioner. (*ibid* at page 38)

The Report goes on to attack the reliability of eyewitness testimony.(*ibid* at pages *38-39)* except that the same testimony, effectively exonerating Petitioner by focusing on his position was independently confirmed by, at least 12 witnesses. Petitioner submits that it is very unlikely that 12, or more, witnesses would independently and separately, confirm each other's observations. The Report continues to speculate

what the jury might have believed without ever revealing that conflicted defense Counsel was committed to his client's guilt and, as discussed below, explicitly committed this to the jury.

Evidence About the Angle of the Gun

The absurdity continues.

The Report acknowledges that the eyewitnesses were not able to precisely determine the angle of Petitioner's gun at the time of the shooting. (*ibid* at page 40), but concludes that "… nothing about these eyewitness accounts ruled out the Petitioner as the shooter." (*ibid*)

So, the evidence does not, by any semblance of imagination, prove that Petitioner's gun was being fired at the appropriate angle, but it does not preclude that possibility, turning on its head the usual standard of proof of guilt. Instead of stating that this evidentiary fact shows guilt beyond a reasonable doubt it is used to back up the assertion that Petitioner is possibly guilty or at least not innocent beyond a reasonable doubt.

The Position of the Senator's Head at the Time of the Shooting

As discussed earlier, the Report desperately attempts to Explain that it was possible for Petitioner to have shot the Senator, at close range - 1-2 inches behind his right ear- because at one point as he walked through the pantry he turned to shake hands with some hotel staff, thereby exposing his right profile for a brief time. Despite the range of other factors discussed earlier, which reveal this as fiction, at least three witnesses from separate and independent vantage points destroy this fantasy.

Kennedy staffer, Nina Rhodes, who was observing the Senator from about 6-7 feet behind him confirmed that she did see the Senator's left profile at one point, but then she said he turned to his right and continued to walk straight ahead. She said that she saw the back of his head and part of his shoulders and back as he proceeded onward and then she heard the first of 2 or 3 popping shots which did not seem to have wounded the Senator. Those first shots, then, occurred **after** he had begun to proceed straight ahead, not whilst he was stopped shaking hands.(See Exhibit A, Declaration of Nina Rhodes January 6, 2013)

Similarly, Karl Uecker, who was leading the Senator through the pantry, holding on to his right hand with his left hand, recalled that the Senator had stopped to shake hands with a dishwasher, but then he, Uecker, said he grabbed his hand after he had finished shaking hands and "… pulled him out of the crowd and towards the Colonial Room which was slightly to the right and in front of Kennedy…." It was then as they were proceeding straight ahead that he saw Petitioner "…directly in front of him…" who fired two or three shots, leading to Uecker grabbing the gun hand and forcing it on to the steam table. (LAPD interview of Karl A. Uecker,6-5-68).Hence, we have another eyewitness who clearly states that the shooting began after the Senator had finished shaking hands and was moving forward, directly facing- though somewhat behind Uecker- Petitioner.

Finally, Paul Schrade, who was himself wounded by a shot has consistently said that he was walking 6-8 feet behind the Senator and observed him shaking hands with hotel staff and then having finished those pleasantries, he saw the Senator turn away

from those employees and proceeded straight ahead through the pantry. He is positive that when the shooting began the Senator was facing Petitioner, as was he, by then, himself being only a few feet behind the Senator.(FBI Interview of Paul Schrade 6-7-68)

Consequently, these witnesses make it clear that at the time the shooting began, the Senator's right profile was not exposed due to his head having turned to the left as he shook hands. He had finished shaking hands and was walking straight ahead, directly toward Petitioner.

Defense Counsel's Closing Argument to the Jury Advocating His Client's Guilt

Conflicted defense Counsel's closing argument to the jury constitutes the best factual evidence of the presence of ineffective legal representation one can imagine.

Not only did Petitioner's conflicted Counsel refuse to undertake any investigation of the case before deciding that his client was guilty but he convinced Petitioner – who had no memory of the specific events at the time of the shooting- that he did it and that there was no defense against the evidence against him. Counsel Cooper insisted that they should only focus on saving his life and avoid the death penalty. This allowed Counsel to throw the case in order to save his own skin and make his indictment go away whilst he proceeded to ensure that the jury had such a negative picture of Petitioner that, in fact, the death penalty was imposed.

Is there any wonder that the prosecution and now the Magistrate's Report does not deal with the conflict of Petitioner's Trial Counsel?

For anyone interested in the integrity of the American criminal justice system, the reading of Petitioner's Counsel's closing argument to the jury will be a very painful experience.

At various points, the Report expresses the notion that the jury may or may not have believed certain exculpatory evidence but it becomes clear that this was not what was crucial to their determination. Petitioner's Counsel's conflict dominated performance was critical to their verdict, as even the most cursory analysis of the defense closing argument reveals.

It may be most useful, to illustrate this dynamic by dividing the closing remarks into three areas.

1.Guilt

2.Intent

Guilt

Defense Counsel made certain that the jury was never in doubt that his client was guilty and that he should never be allowed to return to civil society.

To emphasize this opinion, Counsel addressed the jury, on the issue of guilt or innocence in the following way:

"**Now, let me state at the outset that I want this to sink in if anything sinks in—we are not here to free a guilty man. We tell you as we always have, that he is guilty of having killed Senator Kennedy.**"(RT 8554 emp. added)

"**And as I have said before, we are not asking for an acquittal and we expect that under the evidence in this case, whether Mr. Sirhan likes it or not, under the facts of this case,he deserves to spend the rest of his life in the penitentiary.**" (RT 8555 emp. added)

"**You may say, "well, isn't this a case of direct evidence? Don't we know from dozens and dozens of witnesses that this defendant pulled the trigger that killed Senator Kennedy?"**

That of course is direct evidence; there is no question about that." (RT 8563 emp. added) (One has to wonder what Trial defense Counsel was sitting through in terms of the evidence he supposedly observed.)

"**I wouldn't want Sirhan Sirhan to be turned loose as he is dangerous, especially when the psychiatrists tell us that he is going to get worse and he is getting worse.**

There is a good Sirhan and a bad Sirhan and the bad Sirhan is nasty… we as lawyers owe the obligation to do whatwe think is right to the fullest extent of our ability but we also owe an obligation to society. And, I, for one, am not going to ask you to do otherwise than to bring in a verdict of guilty in the second degree." (RT 9567 emp. added)

Intent/ Diminished Capacity

Guilt aside, defense Counsel, particularly in this case with a wealth of psychiatric testimony (however, erroneous) indicating some degree of mental illness, could have been expected to focus on this mitigating factor. Petitioner did not

even get this benefit of his Counsel's argument. Please note the following:

"**There must be a specific intent to kill in murder of the first degree and murder of the second degree:and you will recall that most of all of the defense psychiatrist said that this defendant had the ability to form a specific intent to kill. He had the mental capacity to form the specific intent to kill.**" (RT 8585 emp. added)

"**You may assume, and I think it would be, from my point of view at least, as I view the evidence, illogical to suggest that this wasn't a premeditated -- willful, deliberate and premeditated murder. Mark that down.**" (RT 8546-8547 emp. added)

Even, at one point, arguing against the jury considering a lesser charge- manslaughter- he told them:

" **There is no suggestion in this case, so far as I view the evidence at least, that it was a sudden heat of passion which reduces it to manslaughter in one of its forms…".** (RT 1585 Emp. added)

At one point in his argument, Counsel had advised the jury:

"**Now in this case, on really the only issue you have before you, that is as to whether or not this defendant had diminished capacity. That's the only issue you have before you.**" (RT 8561 emp. added)

He then proceeded, step by step, to eliminate the possibility of the jury seriously considering the impact of any potential diminished capacity on the defendant's ability to form the intention to willfully and with premeditation murder the

Senator. He began this process by referring to Petitioner's alleged writing in a note book found in his room. The very legitimacy and origination of those writings which threaten political leaders and the government in general and the Senator in particular could only have set an inflammatory atmosphere for the jury's mind. (RT 8571-8572)

Throughout his closing argument, Petitioner's Trial Counsel never lost an opportunity to praise the prosecution's case and the prosecutors themselves. He, continually, strangely, elevated them, and the prosecution's case in the jury's eyes.

Since we know what was motivating him we should not be surprised however disappointed we might be that the prosecutors and the Trial Judge, who were aware of the conflict and who collaborated with the actions of defense Counsel, were not subject to sanctions.

Petitioner respectfully submits that the Magistrate and the habeas Judge have no such excuse. The acquiescence of a vulnerable, isolated defendant is no excuse or justification for the abuse of process which has resulted in him being incarcerated, now, for 45 years.

The truth has come home to roost. It is time to draw a line under this decades old miscarriage of justice.

Justice delayed can indeed be justice denied but, it can also be justice resurrected and redeemed.

As my French colleagues, who have reviewed this file say—*Les jeux sont faites.* The game is up.

It is time for the American criminal justice system to redeem itself with respect to this ongoing miscarriage of justice.

The Litany of Errors In the Report

A number of statements in the Report are set out without documentary authority and/or are clearly factually inaccurate on the basis of agreed facts, some of which are even put forward in other sections of the Report itself. This fact, obviously diminishes the credibility of the Report not only with respect to those particularly alleged facts but also concerning the Report in its entirety. To illustrate this point, Petitioner sets out an exemplary number of those statements.

1. **"Instead of shaking Senator Kennedy's hand, Petitioner shot him."** (page 1, lines 23-24)

Is this statement referring to the head shot or the other three shots fired at close range from behind the Senator, or somehow, both? Since the statement indicates that Petitioner was in a position in front of the Senator where he would have been able to shake his hand, he clearly could not have fired the other shots and the statement makes no sense at all unless one ignores the actual evidence.

2."**Not only did numerous witnesses see petitioner shoot Senator**…" (page 1, line 28 to page 2, line 1)

Here, the Report contradicts itself. On page 34 it states that "… none of the witnesses actually saw petitioner at the moment Senator Kennedy was first shot…." On page 40 the Report states that "…eyewitnesses on whom petitioner relies did not

actually see Senator Kennedy get shot". Who, then, are these numerous witnesses?

3."**Contrary to petitioner's contention, this audio recording** (the Pruszinski tape recording) **was available and could have been discovered in 1988,…"** (page 12, lines 8-16)

It is essential to understand that the new evidence is not the existence of the recording but, as noted elsewhere *supra,* the development of the computer based analytical program utilized by Phil Van Praag. This technology was simply not available until 2005. Consequently, the Report misrepresents Petitioner's contention. Petitioner has never contended that the physical tape recording, itself, was not available or could have been discovered as early as 1988.

4. The Report on page 20, lines 12-20 sets out an alleged incriminating conversation between Jesse Unruh and Petitioner (which Petitioner denies ever took place)without providing any documentary authority or verifying source. Long time, highly informed investigator Lynn Mangan never saw any indication of Petitioner's alleged remarks in the earliest records which she viewed.

5."**He joined the Rosecrucian Order in 1965.He performed several experiments such as concentrating on a mirror and seeing the face of Robert Kennedy instead of his own.**"

Petitioner did look into the mirror following ritual instructions from the Order, but the exercise was for the purpose of looking for his own aura. What is the source for the fiction that he was envisioning, or "seeing" the face of the Senator? There is no source or basis for such an allegation

which is put forward as a truthful account implying pre-meditation. It is pure nonsense, but, unfortunately, typical and reflective of the falsely incriminating orientation of this Report.

6.”**Perhaps most importantly, the eyewitness testimony consistently described Senator Kennedy as turning his head just as the shots were fired. That explains how the bullet could have struck the back of his head even if petitioner was technically ‘in front’of Senator Kennedy.”** (page 35, lines 13-17)

This erroneous statement that the Senator turned his head so that it was conceivable that he could have then taken a bullet (not in the back of the head) just behind the right ear, has been discussed earlier, and clearly refuted by three independent eyewitnesses who clearly state that the Senator had finished shaking hands –the reason for the turning of the head- and was walking forward clearly, frontally, facing Petitioner. Also as pointed out, *supra,* this ignores the other right to left, powder burn range shots fired up from behind the Senator.

7.”**Moreover, the ballistic evidence presented At trial corroborated the extensive eyewitness testimony that petitioner shot Senator Kennedy. Expert testimony showed the three bullets removed from the victims, including the bullet that struck Senator Kennedy’s neck, were fired from petitioner’s revolver, and that these bullets were .22 caliber Mini Mag ammunition(RT 4152-4153,4165). These bullets were the same type of ammunition bought by petitioner just days before the assassination. (RT 3762-3768, 3893-3897,4070,4076-4081,5153).”** (page 39, lines 6-13)

Petitioner, with the able assistance of ballistics investigator Lynn Mangan, discusses in detail, elsewhere, and in an earlier Reply, that the bullets introduced at Trial, as the Kennedy neck bullet and the Goldstein bullet, were substitutes for the actual bullets.

8.”**In addition, when he was arrested, petitioner had two caliber Mini-Mag bullets on his person.” (RT 3517-3519)**(page 39, lines 14-15)

This is patently false, and the result of sloppy research or deliberate misrepresentation, which, however, in fairness, may have resulted from a reliance on the Trial evidence whilst ignoring DeWayne Wolfer’s testimony before Judge Wenke’s Commission where he confirmed that the Petitioner’s pocket bullets were not Mini Mags but Federals.(pages 293-295, September, 1975 Hearing)

9.”**Petitioner’s gun was taken to the Grand Jury on June 6, 1968 and Wolfer testified before the Grand Jury on June 7, 1978 –**really means 1968-- **(LD 27 AT 128). Wolfer placed four of the test bullets into a Grand Jury evidence envelope(LD 27 AT 114, 129; LD 6,Ex.L)… and took the remaining three bullets backto his office in case further testing was needed. Those three remaining bullets were entered into evidence at petitioner’s trial (Exhibit 55). LD 27 at 103-105, 113-114, 120-123, 128-132, 136-139).** (page 43,lines 21-27 to page 44,lines 1-8)

Firstly, it is clear that there was no serial number provided in the transcript for the gun received into evidence by the Grand Jury(“LACGJ”).The serial number of Petitioner’s gun-

H53725- was later inferentially attached to this gun. This was an error, because the four "test" bullets were substitute bullets. They did not contain Wolfer's initials. Wolfer testified under oath that he always marked his test fired bullets with his initials. (Deposition of DeWayne Wolfer- *Wolfer v. Blehr #C8080. P. 100*). The Wenke, Garland inventory does not record Wolfer's initials on the four bullets, hence, the bullets are substitutes.

10."**Finally, Petitioner relies on statements of Nina Rhodes who was also in the kitchen at the time of the shooting…. Petitioner has not submitted a declaration from Rhodes.Instead, he relies upon Rhodes'statements as included in Phil Melanson's 1998 book,*Shadow Play (DN 195 AT 31)".***(page 48, lines 26-27 FN)

Petitioner takes and accepts this point of the Report and attaches a Declaration of Nina Rhodes to this Response as Exhibit A.

Petitioner respectfully submits that the errors contained in the Report, along with the strength of the new reliable evidence of actual innocence does meet the *Schlup* standard.

Further, as discussed *infra*, with agreement stated in the Report (page 52, lines 14-19) the powerful new evidence of hypno programming to which Petitioner was subjected, along with the overwhelming evidence of the presence of a second shooter, compels the conclusion that the absence of intent, malice and therefor, the requisite mental state, of the Petitioner in this case, is exculpatory, eliminating any notion of liability.

11."… **petitioner's possession of newspaper clippings about Senator Kennedy when he was apprehended in the act of shooting him.(RT 3521-3522,3526-3531).**

Once again, the Report asserts as an undisputed fact that Petitioner was shooting the Senator when he was apprehended and refers to Petitioner's possession of a newspaper which, understandably, would contain news about the Senator on that day. As Petitioner has repeatedly noted, throughout this Response, (*supra)* the facts and the evidence paint a completely different picture of what truly happened.

Ballistics Evidence

As elsewhere, with respect to new evidence raised by the Petitioner, the Report speculates about anomalies in the ballistic evidence, further supporting Petitioner's claim that a new trial, or at least, an evidentiary hearing is required and necessary to clarify many of the issues and establish the truth about what happened in the pantry on that fateful night.

Petitioner has previously established that the Wenke Commission Administrator, Patrick Garland, who the Report mistakenly identifies as one of the Examiners, described the ballistics evidence he received from the Clerk of the Trial Court. With respect to the bullet removed by the Medical Examiner, Thomas Noguchi, from the neck of Senator Kennedy and introduced into evidence at the Trial, the Report agrees that he recorded the markings on the base as being the letters "DWTN". (CD 199 at page 41)

It is, however, undisputed that the bullet removed from the Senator's neck had the marking "TN31" placed there by Dr.

Noguchi. Petitioner submits that the "DWTN" bullet introduced at Trial as the neck bullet was not the actual neck bullet but a substitute which was delivered to the to the Wenke Commission in 1975 by the Clerk who was simply following instructions and delivering evidence file.

Similarly, Garland recorded that the bullet he received as the one removed from victim Goldstein, had the marking of "6" On the base rather than the "x" mark placed on the actual bullet by the hospital doctor who removed it. Petitioner believes that this is a further example of another bullet being substituted for the one which should have been placed in evidence.

The Report addresses these discrepencies by blithely pronouncing them to be "…insufficient to show that Petitioner's gun did not fire the fatal bullet". (*ibid* at page 42)The Report goes on to lamely state that "… perhaps he simply was not asked to look for it". (referring to Garland)(*ibid* at pages 42 and 43) Not asked to look for it? Overlooked it? Garland, simply, recorded precisely what he saw on the base of the alleged Kennedy neck and Goldstein bullets introduced into evidence at the Trial.

Petitioner reiterates his contention that ballistics evidence, in at least these two instances was substituted and this fraud upon the Court is further indicated by the fact that:

1. The prosecution had its own analyst De Wayne Wolfer introduce the Kennedy neck bullet (Ex. 47);
2. Conflicted defense Counsel stipulated his acceptance of the State's ballistics evidence without conducting any examination of his own; and

3. The Medical Examiner, who actually removed the bullet during his autopsy, incredibly, was not asked either by the prosecution, or the defense, to identify the bullet he removed and marked for identification, only enhances the likelihood of substitution.

Petitioner submits that any remaining doubt about his Attorney contributing to a miscarriage of justice, could be properly examined and dispelled in a new Trial or an evidentiary hearing. In either of such proceedings the State would have an opportunity, for the first time, to defend its ballistic evidence.

The failure of the Respondent to agree to this impartial, credible proceeding speaks volumes about the low level of confidence it has in its own evidence, the consideration of which by the jury was clearly a significant element of their guilty verdict.

The Report disputes Petitioner's claim that the State's ballistics examiner, Wolfer, used a different weapon to test the evidence (DN 180 at page 28, 42-43) accepting Wolfer's trial testimony that the test bullets introduced as Exhibit 55 had been fired from Petitioner's revolver. (CD 199 at page 41) and that the test bullets had been compared with the bullets removed from victims. (RT 4136-4160) The Report further accepts as fact that Petitioner's gun was put in front of the Grand Jury on June 6, 1968. (CD 199 *ibid*)

Petitioner contends that there are issues to be resolved due to the fact that the labeling on the envelope containing the Exhibit 55 bullets indicated that the bullets inside came from a

pistol with the serial number H-18602 while the serial number of Petitioner's gun was H-53745.Wolfer admitted that he had, in fact, fired H-18602 for alleged "sound test" purposes. (RT 4181-4182) and that he had made a mistake in marking the envelope. (LD 27 at pages 122-125, 174-175, 185; CD 199 at page 45) The Trial jury was, of course, denied this evidence and also was not made aware of the fact that there is no record of the serial number of the gun placed in front of the Grand Jury.

The Report does accept and agree with the fact that the Wenke Commission Examiners concluded that they could not match the Kennedy neck bullet, as well as the bullets from victims Weisel and Goldstein with Petitioner's gun, though the three bullets appeared to have been fired from the same gun. (CD 199 at page 43)

Petitioner has previously shown (supra) that at least the Kennedy neck bullet and the Goldstein bullet, identified as the bullets introduced into evidence at Trial, did not have the markings placed on the base of the actual bullets by the doctors who removed them. Consequently, the Report's speculation about the gun from which the Wenke bullets came from is totally unsatisfactory.

As for the barrel of Petitioner's gun being fouled, how was that possible when the evidence was always under the State's control? No explanation is given. Petitioner should certainly not be prejudiced for damage done to evidence. In any event, no evidence is provided to support this speculation.

The Report dismisses all of these discrepencies as being the result of "…innocent mistakes or negligence…"; perhaps so, perhaps not.

The Petitioner reasonably submits that only a full hearing on the vital ballistics evidence which was not disputed or examined by conflicted defense Counsel, will establish the truth.

Only a new trial or evidentiary hearing will do away with the speculative basis for the Report's conclusions about the ballistics evidence.

Eyewitnesses Who Saw a Second Shooter

The Report discusses the observations of Evan Freed and Booker Griffin, both of whom indicated in separate statements that they had seen a second shooter.

Petitioner respectfully suggests that cumulative evidence, discussed in detail elsewhere in this Response is ample evidence of the presence of a second shooter, who unlike Petitioner was in the position – behind the Senator- from where the powder burn range shots were fired into his back and behind his right ear.

The Report also refers to the observations of Nina Rhodes, who was standing in the pantry behind the Senator and who clearly formed the opinion that shots were fired from behind the Senator.

The Report criticizes Petitioner for not submitting Ms Rhodes statement in the form of a Declaration. As noted earlier that has now been done and respectfully attached hereto as Exhibit A.

The Report Analysis

Petitioner respectfully submits that he has amply demonstrated that the Magistrate's Report has consistently distorted and misrepresented the facts surrounding the shooting og Senator Kennedy. This biased narrative continues in the Report's "analysis" which alleges that he pre-meditatively went to the Ambassador hotel with the intention of killing the Senator.

That he fired his gun eight times is not to be denied but the Report agrees with the fact that five or six of those firings took place when his shooting hand was pinned to the steam table in front of the Senator when Petitioner had no control over the gun. It was, of course, during this period when the Senator received four shots from behind at powder burn range.

The analysis focuses on alleged statements of Petitioner admitting responsibility made around the time of the shooting without explaining that his conflicted Counsel (himself under indictment) consciously convinced him that he was guilty even though Petitioner could not remember what had actually happened in the pantry.

The final thrust of the Report's analysis, that even if a second shooter was there, Petitioner was still guilty because there were "numerous eyewitnesses" who saw Petitioner shoot the Senator (CD 199 at page 51) is a repetition of a deliberate falsehood with no substantiation in the evidence. Petitioner has, conclusively, shown this allegation to be blatantly untrue and reminiscent of the technique of repeatedly telling a lie so that eventually it becomes believed.

As to Petitioner being aware of the presence of the second shooter, despite their being no credible evidence that this was the case, the Report rejects the possibility that coincidentally, a second shooter was on the scene, unbeknownst to Petitioner and also dismisses the opinion of Dr. Dan Brown who conducted extensive interview sessions of Petitioner establishing to his satisfaction that he had been hypno programmed (not just hypnotized, but hypno programmed as discussed below) over a specific period of time prior to the events in the pantry. (see *infra*)

Evidence Regarding Hypnotic Programming

The Report blatantly distorts and ignores the detailed evidence presented by the petitioner, reaching conclusions based on weak, non-scientific findings offered by respondents "experts".

While correctly stating the academic positions of petitioner's experts, Dr. Daniel Brown and Professor Alan Scheflin, the Report conveniently omits the substantial credentials and scientific findings of both. The Report fails to mention any of the numerous awards both have received for their achievements in the fields of hypnosis and mind control. Brown and Scheflin's work with experts from around the world are overlooked as well as the fact that both are qualified court experts on the subjects of brainwashing, mind control, coercive persuasion and the anti-social uses of hypnosis. Brown, who is also a qualified court expert on memory and trauma, has served as a consultant, expert witness for the United Nations, Office

of the Prosecutor, International War Crimes Tribunal for the Former Yugoslavia, The Hague, Netherlands (DN 180 Ex H at 31).

Scheflin's methodical history of the use of hypnosis by the CIA and other governmental agencies, which showed that hypnosis can and was used to induce anti-social behavior (DN 180 Ex G) is completely slanted in the Report (CD 199 at 53-54). Schfelin cited numerous experts and research projects to support his findings yet the Report mentioned only 2 CIA documents which raised the question whether hypnosis could produce anti-social behavior but avoided any document which answered that question (id). The Report not only fails to include that Scheflin "personally knew several of the leading researchers who participated in these programs." (DN 180-2 at 2) but implies his findings are based on old, inaccurate CIA memos.

The Reports treatment of Dr. Daniel Brown's findings is nothing short of bias; Brown's findings are presented in a derogatory, prejudical fashion, failing to acknowledge the scientific approach used by Brown in citing his findings and dismissing said findings without presenting any credible, supporting evidence.

Brown's analytic presentation of research on hypnosis and anti-social behavior clearly support his findings that hypnosis, and coercive persuasion can cause an individual to engage in involuntary acts (DN 180-3,6-18). Brown cites multitudes of research projects that prove that involuntary, anti-social behavior can and has been produced in an individual. The Magistrate's claim that "respondent cites evidence suggesting that many or most scientists agree that hypnotized persons

retain ultimate control over their actions and cannot be programed to commit antisocial acts against their will" (CD 199 at 60) is miss-leading as respondent has offered no such evidence. The Report further states that "Brown himself concedes that there are two schools of thought regarding hypnosis…" (id at 60) which is once again inaccurate. Brown raised, not conceded, the fact that though there are two recognized schools of thought which disagree about the role hypnosis plays in behavioral control said schools do not dispute the ability to produce behavioral control. Respondent's main hypnosis researcher, Wagstaff, himself concedes that " participants, regardless of whether hypnosis is used, are highly motivated to respond to the demands of the particular context… and will readly perform what appear to be dangerous and antisocial acts if required to do so." ***[DN 174 at page 18(Respondents Supplement Brief on Actual Innocence but quoting from article respondent had used page 1281 of article used) Once again, the Report unfairly twists the facts.

Dr. Brown's evidence presented to the Court is about the larger issue of "coercive persuasion" not the narrow issue of hypnotic programming per se, as Brown thinks a combination of drugs, hypnosis, sensory deprivation, and suggestive influence were used on petitioner.

Brown's evidence shows that petitioner has all of the risk factors of a small percentage of individuals who can be successfully programmed; petitioner was missing for two weeks and was in a unit with doctors; direct observation of petitioner's response to suggestions to shoot on command with

"range mode" alter personality behavior; petitioner was trained at a police firing range to shoot at vital human organs and petitioner was responding with automatic "range mode" behavior at the time of the assassination. The Magistrate concludes that Brown's evidence "falls short of demonstrating that the petitioner actually was subjected to mind control." (CN 199 at 61).

The standard is not to show who did the mind control; the standard is reasonable doubt. The Magistrate himself expresses reasonable doubt about the possibility of petitioner being under the influence of mind control; finding the theory that Petitioner was subject to mind control "intriguing" and further states that "the experts statements about the feasibility of hypno-programming and their opinions that petitioner was a good candidate for psychological manipulation may be sufficient to suggest that petitioner's mind-control theory is not impossible…" (id at 61). Presumptuous of the Magistrate to assume a juror would not express the same reasonable doubt. Though the Magistrate admits the possibility of mind-control he holds firmly to his pre-determined arguments against the scientific evidence presented by Brown…

The Magistrate opines that Brown's psychological assessment of the petitioner contradicts the psychiatric assessment of experts at the time of Trial. (CD at 63). Petitioner's argument is that the "schizophrenic" diagnosis given by both the defense and prosecution was based on an unscientific and invalid interpretation of the Rorschach. A scientific analysis for thought disorder using the Rorschach was developed in the 1970s

and 1980s-Holly Johnston's Thought Disorder Index and a modified version of the same-the Exner special scores. Both these indices were given in blind trials twice with respect to the original Rorschach raw data available at trial and twice with respect to a second Rorschach administered by Brown. All four tests showed no evidence of thought disorder and rule out that petitioner was, at the time of Trial, or ever was, schizophrenic. Dr. Brown's conclusions that petitioner was never schizophrenic were also corroborated by Dr. Simson-Kallas at San Quentin and by a recent prison psychologist at Pleasant Valley State Prison. (DN 180-3 at 3) The Report fails to consider that opinions of the experts at time of Trial were not based on scientific principles- a point that was the entire reason that later courts developed the Daubert standard. The report further fails to consider that for the numerous reasons raised *infra*, neither the experts at Trial or the conflicted defense counsel were interested in presenting the full facts to the jury.

The Report's statement that "the opinions of Brown and Scheflin are inconsistent with, and substantially contradicted by, the various psychiatrists who examined petitioner forty years earlier, contemporaneously with the crime" (CD at 63) is a another example of the Report's one sided presentation of the evidence. Dr. Simson-Kallas, a senior psychologist at San Quentin State Prison who was in charge of the prison's psychological testing, examined petitioner in a time frame that was 'contemporaneous' with the crime and found no medical evidence that petitioner was schizophrenic. Dr. Simson-Kallas submitted a notarized affidavit that was annexed to petitioner's

original Petition For Writ of Habeas Corpus (Super Ct. # A-233421; Supreme Court Crim. No 14026, at Special Ex. 25). Dr. Simson-Kallas was requested to examine the petitioner by Dr. Schmidt, the Chief Psychiatrist at San Quentin, who also saw no evidence that petitioner was psychotic or paranoid schizophrenic. Dr. Schmidt's professional observation was also made within a time frame that was 'contemporaneous' with the crime. Though Dr Simson-Kallis name has been mentioned numerous times through out the pleadings the respondent has always overlooked his observations and now the Report does the same.

The Report cites the *Griffen* case, "…it is clear that the mere presentation of new psychological evaluations… does not constitute a colorable showing of actual innocence." (CD at 60) but fails to grasp the difference between *Griffin* and the present case. In *Griffin,* no psychological evidence was offered or relied upon by the defense team, whereas in the present case petitioner's defense team centered their whole case on petitioner's mental state and then at Trial, lead Counsel, Grant Cooper misrepresented, distorted and omitted said evidence. The medical experts for the prosecution and defense had either witnessed first hand petitioner under hypnosis while awaiting trial or knew of it. The Report further states that "the evidence of hypnosis relied upon by petitioner, including the opinions of Brown,… is insufficient to make a colorable showing of actual innocence." (CD 61). Petitioner questions what a reasonable juror would have thought if the experts had testified truthfully in regard to his susceptibility to hypnosis at the time off his Trial?

The inculpatory writings found by the police at petitioners home are raised by the Report (CD at 21-22) as evidence of both petitioner's premeditation and guilt of the crime but once again just one side of the evidence is presented. It is reasonably established that the handwriting in the spiral notebooks is petitioner's own handwriting, but it was written by petitioner in an hypnotic state. Four independent handwriting analysis experts reviewed the writings in the spiral notebooks and three of the four concurred that the spiral notebooks were written in petitioner's own hand. Dr. Diamond opined that the writings in the notebooks must have been written by petitioner in a self hypnotic state. In February 1969, Diamond along with Dr. Pollack and Robert Kaiser witnessed petitioner, who Diamond had hypnotized and given a suggestion to write his name, engage in "automatic writing." Petitioner upon being awoken from the hypnotic state remained amnesic about the writings.[Shane O'Sullivan commenting on observations by Dr. Diamond; "Who Killed Bobby?" By Shane O'Sullivan; Sterling Publishing Co. Inc. 2008 at pg 252-256] Even after witnessing the above mentioned event neither the defense or prosecution experts, at Trial ever considered the possibility that petitioner's entries in his spiral notebooks, especially the inculpatory entries, were in response to hypnotic suggestions given by others, and were therefore involuntary.

Dr. Brown used a standardized measure of hypnotizability to show that petitioner is in the top percentile of the general population in hypnotizabitity. Furthermore, petitioner is typically amnesic for behaviors produced in an hypnotic state.

Brown hypnotized petitioner and introduced an automatic writing task. In an automatic writing task hypnotic suggestions are given that the dissociated hand will unconsciously and automatically write specific things in response to hypnotic suggestions, for which the hypnotized individual will become amnesic for in the waking state. Brown was able to show that petitioner responded at a high level to specific automatic writing suggestions, and that the written material was similar to that produced in petitioner's spiral notebooks. First, from these demonstrations by Brown it was established with reasonable certainty that petitioner produced most of what was written in the spiral notebooks while automatically writing in an hypnotic state. Second, it was established with reasonable certainty that petitioner remains completely amnesic for whatever he has automatically written in an hypnotic state.

Brown discovered that petitioner was an avid ham operator who spent hours on his short wave radio nearly every evening in the months before the assassination. Petitioner would often enter into a hypnotic state while he was communicating with others through his short wave radio. This memory report by petitioner raised the question as to whether others he was communicating with over his short wave radio might have given petitioner specific suggestions to write certain things in his spiral notebooks, including self incriminatory statements. To test this hypothesis, Brown suggested to petitioner in an hypnotic state to write down the kind of things he typically wrote in his spiral notebooks. In response to an hypnotic suggestion by another party (Brown), petitioner then wrote a

mixture of both neutral and inculpatory statements. Next Brown specifically introduced disguised, indirect inculpatory suggestions and petitioner automatically wrote suggestions that were clearly inculpatory. Upon waking from hypnosis petitioner was completely amnesic both for the act and the content of his automatic writing. Petitioner denied that the writing was actually his. These hypnotic demonstrations by Brown raise the very clear possibility that the inculpatory statements found in petitioner's spiral notebooks were involuntarily produced, namely that they were a product of an altered state of mind, namely hypnotic automatic writing, and also that the inculpatory statements were suggested to petitioner by a third party over his short wave radio in the months before the assassination while he was in an hypnotic state and thereby extremely vulnerable to automatically writing down exactly what was suggested to him, including automatically and involuntarily writing down statements that in advance of the assassination would eventually incriminate him as the sole assassin. The fact that petitioner spent hours each night on his short wave radio communicating to other parties and did this in an hypnotic state for which he was subsequently amnesic, was never considered at Trial, nor was the possibility that the content of inculpatory statements in his spiral notebooks were suggested by a third party while he was in a condition of hypnotic, involuntary automatic writing.

The Report's argument, that if petitioner said or wrote something inculpatory around the time of the assassination and Trial he must be guilty, fails to consider the very real issue

of involuntariness, especially since Brown established his extremely high hypnotizability, his extreme compulsive hypnotic response to automatic writing suggestions, his complete amnesia for the content of what he wrote in hypnosis, and his very specific and compulsive acceptance of third party hypnotic suggestions to write things that are clearly inculpatory and against his best interest.

Since the Report dismisses the scientific evidence submitted by both Brown and Scheflin and insists on stating that "hypnotized persons retain ultimate control over their actions and cannot be programmed to commit antisocial acts against their will" (CD 199 at 60) petitioner feels obligated to bring the results of two recent, more sensational studies to the Courts attention. Both studies used hypnosis to program individuals to commit anti-social acts and to have complete amnesia regarding said acts. The first study, conducted by a British hypnotist, Derren Brown, (no relation to Dr. Daniel Brown) was aired by the British Broadcasting Company (BBC) in October 2011. (Derren Brown; The Experiments; The Assassin, BBC. http;//www.youtube.com/watch?v=oC9J606soHA) Said study was specific to the evidence presented by Dr. Brown in petitioner's case. Neither petitioner, nor petitioner's counsel had any knowledge that said test was being conducted until after it was released. Random individuals were selected from a television audience and administered tests to check their abilities to be hypnotized. Under the first test, known as the "amnesia test" four individuals upon being hypnotized were instructed to forget their names- all four individuals were unable to recall their

names. Under the second test, the 'acid test', the same four individuals were shown a beaker of nitric acid and the effects it produced when poured over an object, they were then given protective gear, their own beakers of "nitric acid" (in fact each beaker held a non-harmful liquid). While under hypnosis they were instructed to throw the "nitric acid" in another person's face; all four individuals threw the "nitric acid". The purpose of these two tests was to find an individual that was within the small group of people that would commit an anti-social act while under hypnosis; one individual was selected. That individual was than subjected to two additional phases, "Marksman Mode" and "Trance Like Mode". Under the "Marksman Mode" the individual was taken to a 'gun range', hypnotized and taught to shoot at targets. He was then given the suggestion that whenever he shot he would go into 'marksman mode' and believe he was at a gun range shooting at targets. Phase two consisted of putting the individual into a 'trance-like' state provoked by a polka-dot design which left him with no memory of his actions. The individual, under hypnosis, was then taking to a theater in London to watch British entertainer, Stephen Fry. While sitting in the audience a woman wearing polka dots, walked into the aisle in front of him and while walking past him speaks Stephen Fry's name cueing him to shoot at the target. The individual stood up and started to shoot; Fry who had been informed of the experiment, fell to the stage and the individual sat back down in a trance like state. He was then led out to a room, and he had no recollection of his actions or of woman wearing polka dots. When shown a film of him shooting Fry he

mentioned "range" and "target". The individual was than deprogrammed.

The second 'study',(Brainwashed, Discovery Channel, October 2012; http://www.youtube.com/watch?v=kzpMK5oYioM) conducted by three psychologists, (Cynthia Meyersburg, Mark Stokes, and Jeff Kieliszewski) and a certified hypnotist (Tom Silver) started with one hundred eighty five people (185) who applied for the study, narrowed down to sixteen (16) people who fell into the highly hypnotizable category pursuant to the Stanford Scale, then narrowed down again to eleven (11) people after psychological tests were administered. This was labeled the 'recruitment stage' and all eleven (11) individuals were hypnotized and instructed to forget their names and all eleven (11) complied. Phase two, 'the social norm abandonment' helped to eliminate those that were not within the 4-5 percent group of highly hypnotizable consisted of instructing the eleven (11) individuals under hypnosis to remove their clothing in public at a restaurant. The three individuals that consented without hesitation moved on to the next phase-'cold water immersion'. The individual that passed phase three moved onto the fourth and last phase- 'assassination'. Under hypnosis the individual was instructed to shoot at a live person and to have no memory of doing so. The suggestions were followed exactly as stated. After the study the individual was de-programmed from both the hypnotic and amnesic states.

Petitioner cites these recent "studies" with the hope that the sensational aspect of them will stand out as all other research cited by Scheflin or Dr. Brown has been dismissed and

the above referenced studies produced such drastic anti-social behavior with amnesia within a short time frame, using hypnosis solely.

The Respondent's Response and Objections

By asserting that actual innocence is not an exception to the applicable statute of limitations, the Respondent appears not to be commenting on the law, as it is in the Ninth Circuit, but rather hoping that the Supreme Court in *Perkins v. McQuiggan*,670 F. 3d 665 (6th Cir. 2012)133 S. Ct. 527,184 L.Ed. 2d. 338 (2012) will alter the current law.

This is clearly an exercise in wishful thinking and has no place in a Memorandum on the Law, as it exists and is set out in *Lee* which follows the Supreme Court ruling in *Schlup.*

The *Schlup* gateway may be accessed by a Petitioner who puts forward credible, new evidence of actual innocence which reveals a miscarriage of justice by reason of a violation of a constitutional right, or rights, at trial, if the new evidence, which, if presented to the jury would, more likely than not, have resulted in no reasonable juror voting to convict.

In this respect, the type of new evidence includes exculpatory scientific evidence, trustworthy eyewitness accounts and physical evidence not presented at trial.

Petitioner has amply demonstrated the violation of his Sixth Amendment constitutional right through by the ineffective assistance of counsel as a result of his lawyer being heavily conflicted by means of being under indictment, himself. This conflict resulted in Counsel's coercion of a vulnerable Petitioner to admit guilt, along with defense counsel's

collaboration with the prosecution and the exclusion of exculpatory evidence, in addition to investigating the case and developing a theory of what really occurred backed up by all of the available evidence of actual innocence.

The unavailability, at the time of Trial, of the technology to conduct a comprehensive computer analysis of the Pruszinski tape recording, the failure of Counsel to call a number of additional eyewitnesses with exculpatory observations and the failure of Counsel to question and adequately examine the prosecution's ballistics evidence, deprived the jury of vital evidence.

Petitioner believes that if the jury had access to this evidence that it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.

Accordingly, Petitioner contends that he has more than met the burden of showing actual innocence under *Lee* and *Schlup.* Respondent also focuses on "due diligence" and procedural default but the actual innocence gateway under *Schlup* is outside the conventional statutory scheme which is more appropriately applied to taxation or quite title proceedings. Habeas claims draw upon the historic equitable powers of the Court to right wrongs and rectify miscarriages of justice. Historically,, the courts have maintained and utilized this equitable authority for this purpose.

As Justice O'Conner stated in *Withrow v.Williams* 507 US 680,113 S. Ct.1745 (1993) "A credible showing of innocence is sufficient standing alone to ...justify adjudication of a

prisoner's constitutional claim." In the Habeas context, then, actual innocence indicating a miscarriage of justice trumps due diligence and/ or procedural defects.

Despite the Respondent's efforts to elevate due diligence and any alleged State and Federal procedural defaults, Petitioner contends that the Law is clear in terms of Habeas claims where credible new evidence of actual innocence, as here, is before the Court. The principle set out in *Schlup* and *Lee* of the pre-eminence of actual innocence overcoming a miscarriage of justice overrides all procedural defaults –State or Federal. overrides all procedural defects – State or Federal.

Conclusion

Petitioner respectfully submits that he has met the requirements of the *Schlup* gateway and that the evidence of actual innocence and the existence of a miscarriage of justice flowing from the denial of his Sixth Amendment rights through the acts and omissions of his conflicted Trial Counsel is more than enough for the granting of the Writ.

In this respect, Petitioner submits the following:

1. Whether or not the Trial Court jury was subjected to substituted ballistics evidence, as Petitioner contends, may only be finally determined through the process of a new trial or an evidentiary hearing;
2. Whether or not any of the evidence bullets came from Petitioner's gun may only be finally resolved through a new trial or an evidentiary hearing;
3. Whether numerous witnesses saw Petitioner in front of the Senator during the fatal shooting, or behind him, at any

point in time, may only be finally determined at a new trial or an evidentiary hearing;

4. Whether Petitioner's gun arm was pinned to the steam table after the second shot, depriving him of having any control over where the robot like fired shots went, may only be finally determined during the course of a new trial or an evidentiary hearing;
5. Whether or not the Pruszinski tape recording revealed that 13 shots were fired, from two opposite directions, with some shots overlapping, at the time of the shooting, indicating the presence of a second shooter, may only be finally determined during the course of a new trial or an evidentiary hearing;
6. Whether or not defense Counsel's conflict of interest which existed throughout the Trial resulted in Petitioner being denied his Sixth Amendment right to effective assistance of counsel resulting in a guilty verdict with the death penalty, may only be finally ascertained in the course of a new trial or an evidentiary hearing;
7. Whether or not Petitioner was hypno programmed through the use of hypnosis and chemical resulting in his being controlled and manipulated to perform incriminating and distractive acts, along with suffering a specific memory loss of the actual events, may only be determined through the course of a new trial or an evidentiary hearing;
8. Whether or not as a result of the determination of all of the above issues and questions, a reasonable juror, more

likely than not, would find Petitioner guilty, beyond a reasonable doubt, of the murder of Senator Kennedy.

Petitioner submits that only through a new trial or, at least, an evidentiary hearing may these issues fully be resolved and a determination be made about the existence of actual innocence and a miscarriage of justice.

To this end, Petitioner respectfully requests that the Magistrate's Report and Recommendations to the Habeas Judge be revisited by the Magistrate and appropriately amended to recommend the issuance of an Order for a new trial, or, in the alternative that the an evidentiary hearing be scheduled.

Dated: March 28, 2013

Respectfully submitted,

/s/William F. Pepper

/s/ Laurie Dusek

Attorneys for *Petitioner*

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