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Kyron L. Hightower # T-89904
C.S.P-SAC
P.O. Box 290066
Represa, Ca 95671-0066

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IN THE UNITED STATES District Court
FOR THE NORTHERN DISTRICT OF California
SAN JOSE DIVISION

KYRON LAMONT HIGHTOWER, Petitioner,	C 07-1338 RMW (PR)
V.	TRAVERSE IN ANSWER
T. FELKER, WARDEN, Respondent.	TO RESPONDENT

Petitioner, Kyron Lamont Hightower, prisoner of California State Prison-Sacramento at Represa California. Makes these answers to the Respondents answer in defense for petitioner's Writ of Habeas Corpus and affirmatively denies all respondents allegations as Follows: (1) Petitioner is unlawfully in the custody of the California department of Corrections. (2) The cause of petitioner's confinement is an invalid Judgment of conviction in the Superior Court of California, County of Contra Costa Case Number #991501-8 (3) The petitioner is timely and is not successive or procedureally barred, all petitioner's claims have been exhausted through the California Supreme Court (4) The California Supreme Court did not cite or apply any opinion, of the United States Supreme Court, or make any determination of the facts, in rejecting petitioner's Ineffective of assistance of trial counsel petitioner was deprived of his right to due process do to the ineffective assistance of counsel in the presentation of a defense in violation of the Sixth Amendment (5) Ineffective assistance of counsel

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in counsel's failure to select a meritorious defense in violation of the Sixth Amendment; (6) Ineffective assistance of counsel in counsel's failure to investigate and present exculpatory evidence in violation of the Sixth Amendment (7) ineffective assistance of counsel in counsel's failure to object to prosecutorial misconduct in violation of the Sixth Amendment
(8) cumulative prejudice from ineffective assistance of counsel in violation of the Sixth Amendment
(9) Petitioner was deprived of his right to due process when the trial court sentenced him unfairly and erroneously. Petitioner is of the belief that an Evidentiary Hearing is necessary for the full and factual development of the claims articulated in this traverse. Petitioner respectfully prays the Honorable Court (1) Issues it's writs of Habeas Corpus to vacate the sentence imposed, and grant Him an Evidentiary Hearing (2) Grant Petitioner any/and such other relief as is appropriate and in the interest of Justice.
(3) Petitioner cites that due to his unskillfulness in criminal law litigation, this Honorable Court holds this pleading as a Pro se litigant to less stringent standards than that drafted by or for professional lawyers. See (Haines v. Kerner (1972) 404 U.S. 519. Petitioner also needs a lawyers assistance

Respectfully Submitted

Dated 3-24-08

Kyron L. Hightower
Kyron L. Hightower

Petitioner has cognizable claim: Pursuant to U.S.C. 2254 (d) a writ of Habeas Corpus is available on the basis that the petitioner conviction or sentence violated the constitution, laws, or treaties of the United States. Here, petitioner's case (1) Resulted in a decision that was contray to, and involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the presented in the state court proceedings (William v. Taylor (2000) 529 U.S. 362, 412.) As explained by the court, "Some Constitutional violations... by there very nature cast so much doubt on the fairness of the trial process that, as a matter of law they can never be considered harmless" Satterwhite v. Texas 486 U.S. 249, 256, 108 S.Ct 1792, 100 L.Ed 2d 284; Also Brecht v. Abrahamson 507 U.S. 619, 637, 638; ~~[illegible]~~ IN Brown v. Allen 334 U.S. 443, 458; 73 S.Ct 397, 97 L.Ed 469 (1953) The supreme court held All federal Constitutional rights that have been incorporated through the Fourtheen Amendment Due process clause and thereby made made applicable to the states are cognizable on federal Habeas Corpus and that a Habeas petitioner can press such a claim "EVEN If they had been fully and fairly adjudicated in the state Court (Jones v. Wood (9th Cir. 1997) 114 F.3d 1002, 1008-1010. The petitioner has burden and shown through Habeas Corpus that the State Courts decision was unreasonable (Woodford v. Visciotti (2002) 123 S.Ct 360.

Petitioner submits the Following Memorandum Of Points and Authorities in Support of Answer

Argument 1

THE RECORD CLEARLY ESTABLISHES THAT defense Counsel WAS INEFFECTIVE IN HIS PRESENTATION OF DEFENSE IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Respondent Claims that defense counsel Knew the LAW and was not ConstitutionALLy Deficient in His Choice of Defense. HowEVER, respondent is clearly mistaken.

Petitioner's Defense Counsel in His opening statement told the jury that the evidence would show petitioner and the victim had an argument, petitioner pulled out a gun then Chased the victim with the gun when the victim ran into the backyard. (RT 382, 385-386) The victim died of Gun shot wounds sustained while he was struggling with petitioner in the backyard. (RT 388) Counsel concluded his statement as follows:

I THINK AFTER you listen to ALL THE evidence, I THINK you are going to find that these are a very tragic set of circumstances. We had a Cauldron brewing that morning. ITS too bad that these things happened. Was it self-defense in the backyard, or was it brewing tempters such as through people didn't Know what they were doing and it was may manslaughter?

I don't Know. Ladies and Gentlemen you have been picked to choose which of those alternatives it is . . . (RT 390-391)

Shamoya Brown testified at petitioner's trial, and a videotape of her interview with police the day of the shooting was played to the jury. (RT 529)

Brown testified that she Knew petitioner and Neff, and had children by both. (RT 432, 442.) On the day of the shooting, Neff was at her home. Petitioner arrived later. (RT 433.) At some point she heard gunshots. She ran outside and discovered Neff in the back yard, he had been shot. (Id.)

During his examination of Brown defense counsel elicited the following testimony: Neff had refused to pay child support, and had threatened to Kill her if she persisted in trying to force him to pay it (RT 444-445) Neff had a violant tempter, and had repeatedly assaulted her in the past. (RT 445-446) After relationship with Neff ended she began a relationship WITH petitioner. (RT 447) Even after her relationship with Neff ended he physically abused her. Neff had come to her home armed with a firearm the night before the charge shooting occurred. (RT 447-449) On the day of the shooting, Neff climbed over a security gate to get her house. He was not invited. (RT 450.) At that point in time she and petitioner had separated, and petitioner had come over to return his set of Keys to her house. (RT 454.) Petitioner did not Know Neff was at the house before he arrived. (Id.) While she was in the bedroom tending to one of her children she heard petitioner tell Neff to "Keep petitioner name out of his mouth," to WHICH Neff responded, "Yea then we can take it outside." (RT 456; SCT 68-69) Soon after this her son Omardre can running into the house exclaiming that Neff had a gun and was trying to shoot petitioner. (RT 456-457) She ran outside screaming "Don't, don't shoot [petitioner]". She never saw petitioner, but found Neff lying in the backyard. (RT 457.)

The prosecutor then asked Brown if she had told the police her son "had it wrong, that he might have been excited, that he meant that [Petitioner] had the gun." Brown agreed that she had told police that because that was what she believed At the time (RT 465.)

Omardre Wilson, Brown's 7-year old son, was CALLED to testify by the prosecution. (RT 472, 476.) Omardre testified that he did not recall the events on the day of the SHOOTING. (RT 476

He had been "mixed up" when he testified at the preliminary hearing (RT 477) and when he made his statement to police after the shooting (RT 478.), ~~[illegible]~~ A videotape of Omardre's statement to police was played for the jury. (RT 496-497) The jury was provided with a partial Transcript of that Video (RT 494-495.) In that statement Omardre told the police that when petitioner arrived at the house, he and Neff started arguing. (SCT 32.) Omardre thought that petitioner said, "Let's take it outside". (SCT 33.) At First, the men were in the front yard. Neff warned petitioner, "You can't handle me." (SCT 35) At one point, the two men stood face to face and Neff said, "You don't want to hang -- you can't hang with me." (SCT 42.) Omardre then saw petitioner, wearing dark blue jeans and a Fubu coat, pull a gun out from his waist band and chase Neff to the back yard (SCT 55.) Neff ~~[illegible]~~ exclaimed, "I don't want to get shot," to which Omardre heard petitioner reply "You is" (SCT 35.) Omardre heard two shots but did not see the shooting. (SCT 47.)

Sixteen-year-old Priscilla Robinson was called as a witness by the prosecution. She was fifteen at the time of shooting and lived with her grandmother across the street from Shamoya Brown (RT 392.) Priscilla testified that she had been scared to testify at the preliminary hearing due to threats she had received. The intimidation was not attributable to petitioner or anyone He Knew, and the jury was so instructed (RT 398.) She said that she was not Afraid, however, to testify at trial, but claimed not to remember the incident (RT 398; 416.)

Priscilla was interviewed by police shortly after the shooting. A videotape of that interview was played to the jury (RT 408.) Priscilla told police that, through her window, she saw two MEN Arguing (SCT 6, 7.) She said that Neff looked angry

and shook his finger at petitioner, who was wearing a red fubu jacket. (SCT 8.) Neff pushed and threatened petitioner, saying, "I will knock you down right here." (SCT 8, 25.) She also heard Neff say, "Little youngster, you'd better step out my face." (SCT. 10, 26.) Petitioner had turned to walk away when Neff said something to petitioner; something about "Kill." (SCT 11.) In response, petitioner turned around, opened his jacket and pulled out a gun. (SCT 14.) After petitioner pulled out a gun, Neff started running toward the back yard of Brown's house, petitioner ran after him. Priscilla lost sight of petitioner and Neff when she left the window to call the police (SCT 16.)

Other prosecution witnesses testified that Neff suffered two gunshot wounds, one to his left thigh, the other to his chest. The latter was the fatal wound. (RT 594-596.) The muzzle of the gun was near contact with Neff's jacket when fired into his chest (RT 586), and the shot to his thigh could have occurred from a distance of one to several feet (RT 587.)

Defense Counsel called Dr Peter Barnett, who testified as an expert criminalist (RT 822, 825.) Dr Barnett, testified consistently with prosecution expert with respect to the proximity of the gun when it was fired (RT 831-833, 840-841.) He opined that Neff had been involved with a struggle at the time he was shot (RT 841-842), and that the gun could have been discharged inadvertently if two people were struggling over it (RT 842).

On cross-examination of Dr. Barnett the prosecutor adduced testimony that, given the evidence as the doctor knew it, there was virtually no possibility that Neff was holding the gun when he was shot. (RT 843-844.)

In closing argument defense counsel told the jury that petitioner had the gun but, since petitioner did not

"pull the gun and blast" Neff as soon as he and petitioner went outside, there was no intent to kill. (RT 983.) Counsel argued that petitioner was "very afraid" of Neff. (RT 984.) He stated that Priscilla Robinson should be believed above all other witnesses, and argued the jury "to be with Ms. Robinson" if there was any conflict between her testimony and that of other witnesses (RT 985-986.) Counsel confirmed that petitioner pulled the gun and pointed it at Neff arguing again that, because petitioner did not "blast" Neff right then, there was no intent to kill (RT 986.) Counsel insisted that there was "absolutely no question" petitioner was "lying in that tape" of his statement to police because "[Petitioner] had the Gun not the other guy. [Petitioner] chased, not the other guy." (RT 989.) Counsel went on to say, "I am going to ask [the Jury] to bring back a verdict of accident." because petitioner and Neff struggled over petitioner's gun in the back yard (RT. 992.) Counsel suggest that self-defense on petitioner's part was possible, but the killing was "probably a very unfortunate accident." (RT 994.)

Proir to the closing argument the trial court had instructed the jury that intent to kill was an element of voluntary Manslaughter (RT 889, 890), and that "the right of self-defense exists only as long as the real or apparent threatened danger continues to exist, the right to use force in self-defense ends" (RT 901-902.) The jury was also instructed in relevant part as follows:

> The unintentional killing of a human being is excusable and not unlawful when one, committed by accident and misfortune in the performance of a lawful act by lawful means; and two, when the person causing the death acted with that care and caution which would be exercised by an ordinary, careful and prudent individual under like circumstances. (RT 904.)

Points and Authorities

To establish a claim of ineffective assistance of counsel, petitioner must show that counsel's performance at the trial fell below an objective standard of reasonableness and that counsel's act or omissions prejuiced the defense. (Strickland v. WASHINGTON (1984) 466 U.S. 668, 688, 694.) Prejudice is established if there is a reasonable probability that the outcome of the trial would have been different had counsel not acted in the manner complained of (Id.) A "reasonable probability" is a probability sufficient to undermine confidence in the outcome" of the trial (Id at 695.) It is clear, however, that petitioner need not show that counsel's deficient conduct more likely than not altered the outcome in the case. A "preponderance" standard was explicitly rejected by the strickland Court. (Id. at 693.) In Cronic v. United STATES (1984) 466 U.S. 648, 656-657, the court stated:

> The adversarial process guaranteed by the sixth Amendment requires that the accused have counsel acting in the role of an advocate. The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing . . . [I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated (Internal quotations and citation omitted.)

The Sixth Amendment guarantees of effective assistance of counsel extends to closing arguments (see Bell v. Cone (2002) 535 U.S. 685, 701-702; Herring v. New York (1975) 422 U.S. 853, 865.) "In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." (

(Herring, 422 U.S. at 862.) Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact." (Ibid.)

As shown by the supporting facts, petitioner's trial began with defense counsel telling the jury that the evidence would show petitioner and Neff were having a heated argument when petitioner pulled out a gun and chased Neff into the back yard, where Neff was shot to death. Counsel made clear his intention to show that petitioner lost his temper during this confrontation with Neff and, as a result, was guilty of voluntary manslaughter, not murder.

Consistently with his opening statement, counsel adduced evidence to show that Neff was a violent individual who was known to carry a gun and physically abuse the mother of petitioner's children; that Neff challenged petitioner when petitioner told him to stop talking about him and, when petitioner went outside with Neff, the latter became very aggressive and threatening towards him. Then, when the petitioner began to way away, Neff said something to him that involved the word "Kill." When Neff made that statement, petitioner turned around, pulled out his gun, and chased Neff into the back yard where, likely during a struggle over the gun, petitioner shot Neff.

Under California law at the time of Petitioner's trial, voluntary manslaughter was defined as the unlawful killing of a human being without malice aforethought but with an intent to kill. (Penal Code §192(a); RT 889.) The element of malice normally associated with unlawful killing is negated, and murder is reduced to manslaughter, if the killing occurred upon sudden quarrel or heat of passion. (People v. Lasko (2000) 23 Cal. 4th 101, 108; RT 889.)

It cannot reasonably be disputed that the circumstances surrounding petitioner's shooting of Neff fit squarely into the then existing definition of voluntary manslaughter, or that it was counsel's intention to make that case to the jury.

However, as shown by the record, when it came time for counsel to "sharpen and clarify the issues for resolution by the trier of fact" (Herring, 422 U.S. at 862), counsel repeatedly argued that petitioner's actions prior to the shooting showed that he lacked any intent to Kill. Not only was this argument refuted by the evidence of petitioner saying he intended to shoot Neff after the latter threatened him (SCT 35), but an intent to Kill was an essential element of Voluntary manslaughter at that time (People v. Parras (2005) 128 Cal App 4th 1603, 1608.)

Ultimately, counsel asked the jury to find petitioner had acted in self-defense based on a possible struggle over the gun just before Neff was SHOT (RT 994), or that Neff's death was just "a very unfortunate accident," because young black men shooting and Killing other young black men was a "fact of life in Richmond (Ibid.)

The law, as explained to the jury by the trial court just before counsel made his argument, provided that an unintentional Killing committed by accident constituted excusable homicide only if the Killing occurred during "Performance of a lawful act by lawful means." (RT 904; Penal code §195.) The circumstance of the charged shooting could never qualify as a lawful act.

The right of self-defense existed "only as long as the real or apparant threatened danger continue[d] to exist" (RT 901-902.) Thus even if Neff's threat to Kill petitioner had been deemed sufficient to create the need for self-defense, the danger ceased the moment Neff ran from petitioner and, as the trial court further explained, the right to use force in self-defense ended

when the danger ceased to exist. (Ibid.)

Petitioner attorney had a duty to Know the law. (Strickland, 466 U.S. at 690.) There can be no doubt that counsel did not Know the law as it pertained to voluntary Manslaughterr.

when a defense attorney "conceded an important issue or withdrew a critical defense during closing argument, it would most likely be emphasized for the jury during the prosecutor's rebuttal argument." (People v. Moore (1988) 201 CAL.APP.3d 51, 57-58.)

This is precisely what happened in petitioner's CASE. THE prosecutor begun his rebuttal argument saying, "Probably an unfortunate accident. IT HAPPENS in Richmond. Well, that's real nice. Maybe the victim's Family can put that on a plaque and hang it over their mantle." (RT 996.) No doubt the jury found counsel's argument in that respect just as offensive as the prosecutor argued it was. Moreover, as the prosecutor pointed out, "IT happened in Richmond is no defense." (RT 998) The prosecutor continued:

> ~~Now [Defense Counsel] has essentially stood up and said this shooting which it~~
>
> Now Defense Counsel has essentially stood up and said this shooting was unintentional. It was an unintentional shooting, which, if it were to be believed, removes certain possible verdicts from your consideration; one of which is voluntary Manslaughter. You can only find voluntary Manslaughter upon an adequate legal provocation if the Killing was intentional. [counsel] has already claimed that it was unintentional. I AM going to ask you to make him stick to that.
>
> (RT 1004)

Petitioner respectfully submits that the record conclusively

demonstrates that counsel did not know the law as it related to the defense theory of the case and, as a direct result, petitioner was convicted of second degree murder instead of voluntary manslaughter.

Had counsel properly advanced the defense theory, the jury would have known that prior to the shooting, Neff had been looking for "petitioner while armed with a gun. (
Counsel would have explained to the jury that petitioner knew Neff had been talking about him which led to petitioner telling Neff to keep petitioner's "name out of his mouth," and how petitioner, knowing Neff was a violent man who ~~was~~ carried a gun, was both frightened of Neff and angry about the prior threats when Neff told petitioner to "take it outside" with him. (RT 456; SCT 68-69.) Counsel would have argued that when Neff threatened to kill petitioner during a highly charged confrontation in front of the house, petitioner was so overwhelmed with fear and anger that he simply exploded, and killed Neff in the HEAT OF PASSION.

As shown by the record, the above scenario was the defense theory, and it was obliterated by counsel's failure to know the law when he ARGUED TO the jury. Had counsel not acted as he did, there is at least a reasonable probability that the jury would have found petitioner guilty of Voluntary Manslaughter instead of Murder. (SEE Turner v. Duncan (9th. Cir. 1998) 158 F.3d 449, 456 [Probability of Manslaughter conviction sufficient to show prejudice under Stickland].) Petitioner is entitled to an evidentiary hearing and habeas relief on this claim of ineffective assistance of counsel.

ARGUMENT 2.

THE RECORD does ESTABLISH THAT COUNSEL WAS CONSTITUTIONALLY DEFICIENT IN His CHOICE OF Defenses.

IN order to aviod redundancy, petitioner respectfully incorporates herein by reference the facts in support of Ground, ante, in support of this Ground

Points and Authorities

As stated in the preceding Ground, in order to prevail on this claim of ineffective assistance of counsel under the controlling standard, petitioner must show that counsel's representation "fell below an objective standard of reasonableness" and that such deficient performance was reasonably likely to have affected the outcome of the trial. (Strickland, supra 466 U.S. at 687-688, 694.) The reasonableness of the attorney's performance is evaluated "Under prevailing professional norms." (Id. at 688.)

A Defense attorney is free to make any strategic choices he deems necessary for effective advocacy, and the reviewing courts defer to such choice as long as they are "Made after thorough investigation of law and fact." (Id. at 690.) Such deference, however, is not warranted if counsel fails to exercise "reasonable professional Judgment." (Id at 697.) and makes his decisions based on "ineptitude or lack of industry." (In re HALL (1981) 30 CAL. 3d 408, 427.) If unreasonable, even the broadest, strategic choices, SUCH as election of a theory of defense, are subject to scrutiny under the sixth Amendment. For EXAMPLE, in Phillips v. Woodford (9th Cir. 2001) 267 F.3d 966, 980 the court found a colorable claim of ineffective assistance sufficient to warrant an evidentiary hearing because counsel did not "reasonably select the alibi defense used at trial" While a stronger "SHOOT-OUT" defense could have been pursued after reasonable investigation and preparation.

Similarly, in Jennings v. Woodford (9th Cir. 2002) 290 F.3d 1006, 1014-1016, counsel was held to be ineffective because he "settled on a very weak alibi defense "early in his preparation of the case while stronger mental-state defenses were available to his clients. In Franklin v. Johnson (9th Cir 2002) 290 F.3d 1223, 1234-1236, deficient representation was found in the attorney's "decision to pursue the weak double jeopardy defense to the exclusion of all other possible defenses;" the court cited with approval to Sanders v. Ratelle (9th Cir. 1994) 21 F.3d 1446, 1460, where counsel made an unreasonable decision to pursue weak defenses while a "far more plausible defenses was available.

In the preceding Ground, petitioner analyzed the actions of his trial counsel as a good-faith effort to pursue the theory of defense outlined in his opening statement, which failed because counsel's lack of preparation and misunderstanding of the then controlling law caused him to elicit evidence and argue that the shooting was unintentional, thus makeing a conviction of voluntary Manslaughter impossible. In other words, Ground One is a claim of inept presentation of the theory of voluntary manslaughter. In this Ground petitioner will address the only other explaination of his attorney's actions, i.e., that at some point during the trial counsel made a deliberate decision to abandon the theory outlined in his opening statement and instead pursue the defense of accident as excusable Homicide. Below, petitioner will show that this choice of defense strategy was objectively unreasonable and that it directly affected the outcome of the trial. As

As shown by the supporting facts, in his closing argument counsel urged the jury to "bring back a verdict of Accident." (RT 992; See also RT 994.) There is only one explanation for that choice of defense: counsel failed to conduct even the must cursory review of the applicable law, was incapable of

applying the law to the evidence adduced at the trial, and--as he himself admitted on the record--"probably wasn't too wide awake" during the discussion of jury instructions. (RT 860.) While it's true that the concept of excusable homicide by accident and misfortune exists in California law, that defense is available only if the killing happened in the performance of a lawful act by lawful means without any unlawful intent or in a heat of passion without use of a dangerous weapon. (Penal Code § 195.) The jury was given the standard instructions reflecting these statutory provisions. (RT 904.) Even the most cursory review of the trial record shows that no reasonable person could find excusable Homicide under the circumstances of petitioner's case. As pointed out in the supporting facts, the evidence showed and defense counsel openly conceded-- that during a heated argument petitioner produced a gun, told Neff he was going to get shot, chased him into the back yard, and after some struggle shot and killed him. None of these actions can be described as lawful acts performed by lawful means; there was an unlawful intent to shoot (even if not necessarily to kill) the victim; and the use of a dangerous weapon was indisputable. Thus, the accident defense advanced by counsel was not simply "WEAK" as those critized in the Ninth Circuit cases listed above, but stillborn, defeated by the very terms of its definition and the undisputed basic facts of the case.

The "prevailing professional norms" used as the measure of an attorney's performance under the STRICKLAND standard (466 U.S. at 688) requires that counsel apply diligence, learning, skill, and mental ability reasonably necessary to represent his client (Rules of Professional Conduct, Rule 3-110(B)). In urging the jury to accept the accident defense, counsel exhibited nothing less than the complete absense of those basic components of competence; his choice of defenses was unreasonable to

the point of absurdity, falling far short of being the constitutionally required "rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." (In re Marquez (1992) 1 Cal. 4th 584, 602.)

This was not the case where the defense attorney, "convinced before trial that any defense is wholly frivolous," is force to violate his ethnical obligations for the sake of his constitutional duty not to concede his clients guilt. (McCoy v. Court of Appeals (1988) 486 U.S. 429, 435.) In order to avoid redundancy, petitioner respectfully refers the court to the facts and argument in support of Grounds One and THREE of this petition, wherein it is shown that the available evidence was sufficient to make the theory of voluntary manslaughter in a heat of passion or sudden quarrel not only viable but reasonably likely to succeed. This not only supports the findings that counsel's choice of defenses was unreasonable and his performance deficient under the first prong of the Strickland test, but also proves that, if not for the incongruous decision to pursue the accident defense, petitioner likely would have been convicted of manslaughter rather murder, a showing sufficient to satify STRICKLAND'S prejudice prong. (Turner v. Duncan, supra 158 F.3d at 457.)

Respondent also claims that ~~defense~~ Petitioner's defense counsel was not ineffective in his arguments and the instructions he requested and Respondent relies on courts giving the standard instruction regarding involuntary Manslaughter:

The crime of involuntary manslaughter is also lesser to that of murder charged in the information.

Every person who unlawfully Kills a Human being, without malice aforethought and without an intent to Kill, is guilty of the crime of involuntary Manslaughter in violation of Penal Code section 192, subdivision (b).

In order to, prove this crime, each of the following element must be proven:

1. A human being was Killed; and
2. The Killing was unlawful.

A Killing is unlawful within the meaning of this instruction if it occurred:

1. During the commission of an unlawful act (not amounting to a felony) which is dangerous to human life under the circumstances of its commission; or
2. In the commission of an act, ordinarily lawful, which involves a high degree of risk of death or great bodily harm, without due caution and circumspection. Exhibiting a firearm in violation of Penal Code section 417 (a0(2) and carrying a concealed weapon in violation of Penal Code Section 12025 (a)(2) are each crimes which constitute an "unlawful act" [not amounting to a felony]. CT 290.

Respondent next points to the jury being given defense requested instruction 5.3A regarding involuntary Manslaughter which stated: "When a person who is acting im what otherwise would be [SIC] self-defense Kills another human being without malice aforethought and without an

intent to Kill by using deadly force which was not justifiable under the circumstances, or by force which exceeded that which was reasonably necessary to repel the attack, that person is guilty of involuntary Manslaughter." CT297.

Respondent appears to over look that the very Instruction 53 A He or She relies on and other Manslaughter Instructions was completely undermined when the trial court gave The Prosecution requested instruction 66 B (See Grounds Five & SIX)

WHICH READS AS FOLLOWS: A person who Kills another person with malice aforethought maybe found guilty of murder even where the evidence otherwise establishes the right to self-defense, if the jury finds that the nature of the ATTACK did not justify the resort to deadly force, or that that the force used exceeded that which was reasonabley necessary to repel the ATTACK. (CT 312) This instruction was wholly erroneous and conflicting with 53 A, and was a mistatement of law and was surely prejudicial.

Judged by the principles set in (Fracis v. Franklin (1985) 471 U.S. 307) Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of Knowing which of the two irreconcilable instructions the jurors applied in reaching their Verdict (Francis v. Franklin Id 321.) and a reversal is warranted in Petitioner's case.

Petitioner would like to point out that defense counsel's failure to object when the prosecution submitted Jury Instruction # 66B and the judge's giving of it was Ineffective assistance of Counsel

Points And Authorities

It is well established that if a habeas petitioner can show that his rights were violated at trial and defense counsel's failure to object to such violation "fell" below and Objective standard of reasonableness under prevailing professional norms," petitioner would be entitled to habeas corpus relief upon a showing of a reasonable probability that counsel's incompetence in not objecting affecting the outcome of the trial (People v. Seaton (2004) 34 Cal 4th 193, 200; STRICKLAND v. WASHINGTON, supra 466 U.S. at 687-688.) Such reasonable probability, under STRICKLAND, can be found if counsel's deficient performance had an effect on even a single juror. (MAK v. Blodgett (9th Cir. 1992) 970 F.2d 614, 621.)

Accordingly, petitioner believes, prays, and submits that the above supporting facts of defense Counsel's performance ESTABLISHES THAT counsel was ignorant of the law of Manslaughter and was Constitutionally Deficient in His CHOICE OF Defense.

So petitioner respectfully urge this court to grant Him an evidentiary hearing and habeas Relief on this Claim of Ineffective assistance or any and such relief this Honorable court Deems necessary.

ARGUMENT 3.

Appellate/Petitioner WAS Denied Counsel By Counsel's FAilure To INVEStigate and Present Exculpatory Evidence.

Respond claims that defense Counsel could well have concluded that the testimony of Mr. Reginald Atkinson and Ms. Roquel Williams was both cumulative to other evidence and detrimental to his defense.

Appellant/Petitioner submits that Respondents argument is erroneous; No one testified on Appellant/Petitioner's behalf how mr. Neff had been looking for Appellant/petitioner for weeks prior to the Charge shooting.
Here the record clearly demonstrates that;
Prior to trial Appellant/Petitioner told his attorney of two witnesses petitioner/Appellant believed could benefit his defense (Exhibit B, C) These witnesses were Reginald Atkinson and Roquel Williams (Idid) Counsel neither investigated nor called either of those witnesses for Appellant's/Petitioner's defense (EX. B ; EX. C)
The attorney employed for the purpose of making a motion for NEW trial motion "was able to easily make contact with them and obtain their statements." (EXHibit D.)
Reginald Atkinson would have testified that he Knew both petitioner and Ernest Neff. He was aware that Neff had a reputation for carrying a gun, and had personally seen Neff carrying a gun on several occasions. A couple of weeks before the charged shooting, he observed Neff drive by petitioner's aunt's house asking about Appellant/Petitioner. (EX. B)
Roquel Williams would have testified that approximately two weeks before the shooting she saw Neff driving

by 227 South 7th street in Richmond, California, pointing what she thought was a gun. Around the same time, she was aware that Neff was "looking For" Appellant/Petitioner. (Ex) Shamoya Brown lived at the 7TH Street address (RT 115.)

Points and Authorities

While "Judicial scrutiny of counsel's performance must be highly deferentiac" (STRICKLAND, supra 466 U.S. at 689), both state and federal could have consistently found that "[a] Lawyer who fails adequately to investigate, and introduce into evidence [evidence] that... raise[s] sufficient doubt... to undermine confidence in the verdict, renders deficient performance." (Avila v. Galaza (9th Cir 2002) 297 F.3d 911, 918; Rose v. Superior Court (2000) 81 Cal. App. 4th 564, 571; People v. Pope (1979) 23 Cal. 3d 412, 425.) The failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence. (In re Neely (1993) 6 Cal. 4th 901, 919 [Counsel have an obligation to pursue diligently those leads indicating the existence of favorable defense evidence].)

As shown by the support facts, prior to the trial Appellant/Petitioner told his attorney of two witnesses he believed would assist and support the defense theory that he ~~[illegible]~~ SHOT NEFF in a heat of passion or upon a sudden quarrel and, thus, was guilty of voluntary Manslaughter, not murder. Counsel did not contact or CALL those witnesses to testify on Appellant/Petitioner's behalf. (SEE EXHIBITS B, C

These witnesses would have provided evidence that, during the period of approximately two weeks before the shooting, Neff had been driving by places petitioner was known to frequent "looking for" Appellant/Petitioner while armed with a gun. (Exs.)

It is well established that legally adequate provocation for voluntary manslaughter can be found based on events that take place over a period of weeks (see, e.g., People v. Wharton (1991) 53 Cal. 3d 522, 570-572; People v. Berry (1976) 18 Cal. 3d 509, 515), and that "[t]he provocation may be anything which arouses great fear, anger or jealousy" (People v. Fenenbock (1996) 46 Cal. App. 4th 1688, 1704; Berry, 18 Cal. 3d at 515

As shown in the facts supporting Ground evidence adduced at trial established that petitioner went to Shamoya Brown's house and Neff was there. When Appellant/Petitioner told Neff to "Keep his name out of his mouth," Neff told Appellant/Petitioner to "take it outside." (RT 456; SCT 68-69.) Once outside, Neff became very hostile and aggressive, and likely threatened to Kill Appellant/Petitioner. When Neff said something about "Kill" (SCT 11), Appellant/Petitioner produced a gun chased Neff, and shot him (SCT 14-16).

Contrary to Respondent's assertions; It cannot reasonably be disputed that Atkinson and Williams would have provided substantial evidence to support the defense theory of the shooting. The testimony of these witnesses would have allowed counsel to argue that Appellant/Petitioner knew Neff had been looking for him while armed with a gun, was both angry

frightened by that fact, and Neff's death threat outside Brown's house was the proverbial last straw which caused Appellant/Petitioner to explode in that anger and fear and Kill Neff.

Appellant/Petitioner believes that the foregoing demonstrates that counsel failed to investigate and present evidence which would have support the defense.

Appellant/Petitioner urges this Court that he is entitled to an evidentiary hearing and Habeas relief.

ARGUMENT 4.

TRIAL COUNSEL WAS PREJUDICIALLY INCOMPETENT BY FAILING TO OBJECT TO PROSECUTOR'S CLOSING ARGUMENT.

Petitioner/Appellant submits that Respondent's argument is erroneous; as shown in the preceding , the evidence at the trial established that Ernest "Donti" Neff, who had a substantial history of violence (RT 753), initiated a violent confrontation with petitioner/Appellant which ended with petitioner shooting and killing Neff. The jury was instructed that an unlawful killing upon a sudden quarrel or heat of passion is not murder but voluntary Manslaughter (RT 889-892.)

In closing argument, the prosecutor told the jurors that if, at the outset of deliberations, they agreed that the killing of Neff was unlawful, it was "presumptively" murder which could be brought "down to manslaughter" by "adequate provocation" or "down to involuntary Manslaughter, if you don't find malice aforethought." (RT 965-966)

The prosecutor engaged in a lengthy "explanation" of the legal definition of voluntary Manslaughter (RT 959-963). He described the emotions included in the legal standard as follows:

> It's not fear. Fear is not heat of passion, it's not revenge, not rage, anger, jealousy, anxiety, despair, in and of themselves. The law tells us that multiple emotions may exist in the mind of the person who chooses to kill, but that ultimately an unreasonable choice to kill intentionally is not heat of passion. (RT 961.)

The prosecutor explained legally sufficient provocation as follows:

... But the provocation has to be adequate under the law.

This is a law that goes back to the 1850s. The classic example that you might think of from TV or movies or something is the jealous husband walks in, catches his wife in bed with another man, and shoots the lover, and the lover is dead.

That once upon a time, an ordinarily reasonable person, perhaps in 1850 at the time of the gold rush, 1949 [sic], might have killed that way. But we have an evolving standard. The judge tells us, in essense, you set the standard for human life. You set the standard in this community as to what you want ~~the~~ an ordinarily reasonable prudent person to do.

I submit to you that the old example doesn't apply in the year 2000. I can give you an example. I can search for an example that would be adequate provocation to ~~reduce~~ justify reducing this type of intentional shooting to voluntary manslaughter.

Let me use a hypothetical involving myself. I have three kids three, six and nine. Suppose I come home from a hunting trip. I got guns in the car for some reason. I actually don't have any guns, but suppose I come home, I got guns in the car, and I get home and I -- you know, my child has been raped and murdered. I walk in and I discover he is raped and murdered right there. I got my gun. The rapist and the murderer is right there. I put the gun up to him. I say, you know, you're under arrest and he says, "screw you" or "you got me," or

just smiles at me. He leers at me. And I am so outraged, I am so angry, I am so furious, you know if I were in my normal state of mind I would not shoot him dead.

I would submit to you, under that set of facts, an ordinarily reasonable person might kill under that type of legally adequate provocation.

And in a situation like that, we would want that person to have their murder, my murder, the killer's murder mitigated down to a voluntary manslaughter.

But please, let's not prostitute this justification notion of some killings with adequate provocation that should be voluntary manslaughter. Let's not prostitute it and allow the defendant to get away with murder just because he killed his victim at the end of a verbal argument (RT 962-963)

The prosecutor repeated the same represenation in the final closing argument, stating that "legally sufficient provocation" exists only if "I come home and find my kids dead, raped, the killer right there" (RT 1005)

Also in the final argument, the prosecutor urged the jury to convict petitioner of murder because "WE" the "People," the "community" care about Neff and believe that "[m]urder is wrong." (RT 997.) The prosecutor told the jurors that if they believe the defense and "returned this verdict of accident that [defense counsel] has asked for, ... the defendant gets to ride down on the elevator with you folks." (RT 1013.) The prosecutor concluded his argument by reminding the jurors that he represent[ed] the People of the State of California," and stating, "On behalf of this community, I ask you ... for a verdict of murder." (Ibid)

Defense counsel did not object to any portion of the argument described above.

Points and Authorities

Contrary to Respondents assertitions that defense Counsel was not ineffective for failing to object to Prosecutor's Misconduct.

It is well established that if a habeas petitioner can show that his rights were violated at trial and defense counsel's failure to object to such a violation fell "below an objective standard of reasonableness under prevailing professional norms," petitioner would be entitled to habeas relief upon a showing of a reasonable probability that for counsel's incompetence in not objective affected the outcome of the trial. (People v. seaton (2004) 34 Cal. 4th 193, 200; STRICKLand v. WASHINGTON, supra 466 U.S. at 687-688.) Such reasonable probability, under STRICKLand, can be found if counsel's deficient performance had an effect on even a single juror. (MAK v Blodgett (9th Cir. 1992) 970 F.2d 614, 621.)

The principles proscribing prosecutorial misconduct are also well-defined. Under federal LAW, improper remarks by a prosecutor constitute misconduct if they "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." (Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643.) Under state law, "a prosecutor who uses deceptive or reprehensible methods to persuade ... the jury has committed misconduct, even if such action does not render the trial fundamentally unfair." (People v. Carter (2005) 36 Cal. 4th 1114, 1204.) As will be shown below, each of the prosecutor's statements listed in the supporting facts, as well as their cumulative effect (People v. Herring (1993) 20 Cal. App. 4th 1066, 1075),

amounted to prejudicial misconduct under the state and federal standards, and the resulting unfairness of the trial made defense counsel's failure to object and seek curative admonitions a violation of the Sixth Amendment guarantee of effective Assistance.

The prosecutor told the jury that, as a matter of law, an unlawful killing was presumed to be murder unless mitigated by additional factors: adequate provocation reduced the crime to manslaughter, while absence of malice further reduced it to involuntary manslaughter. (RT 905-906.) This argument was false and misleading for several reasons. First, nowhere in California homicide statutes is an unlawful killing presumed to be murder; it can be either murder or manslaughter, the defining bondary being Malice (Penal Code §§ 187, 195; People v. Cameron (1994) 30 Cal. App. 4th 591, 604, 605.) Second, the assertion that petitioner had to overcome some presumption of murder impermissibly shifted the burden of proof away from the prosecution (See Mullaney v. Wilbur (1975) 421 U.S. 684 [Prosecution must prove absence of heat of passion or sudden quarrel beyond a reasonable doubt].) Third, contrary to the argument, the finding of lack of malice would have entitled petitioner to acquittal of murder and a verdict of manslaughter, not further reduced the crime to involuntary manslaughter (See Penal Code § 192; People v. Blakeley (2000) 23 Cal. 4th 82, 87-88.) California homicide law is notoriously complex, and professional jurists continue to struggle with the need to develop comprehensible definitions of its basic concepts (see, e.g., People v. Nieto Benitez (1992)

4 Cal. 4th 91, 104, 111, 115; Blakeley, 23 Cal. 4th at 88, 91)); considering the high degree of confidence jurors are presumed to have in public prosecutors (Berger v. United States (1935) 295 U.S. 78, 88), the prosecutor's unchallenged yet blantantly incorrect "explanation" of the relationship between various forms of unlawful homicide was reasonably likely to mislead at least one of the jurors. "[I]t is improper for the prosecutor to misstate the law generally, and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (People v. Hill (1998) 17 Cal. 4th 800, 829) citations omitted.)

The prosecutor continued to capitalize on the complexity of the applicable law by focusing on the lesser included offense of voluntary Manslaughter (WHICH, as shown in the preceding Grounds, was the focus of the only viable theory of defense) and leading the jurors farther and farther away from its correct legal definition.

First, the prosecutor misrepresented one of the relevant instructions, which states, "Neither fear, revenge nor emotion, induce by and accompanying or following the intent to commit a felony, nor any and all of these emotional states in and of themselves constitute the heat of passion referred to in the law of voluntary Manslaughter." (RT 892) (EMPHASIS Added.) As shown by the supporting facts, the prosecutor omitted the emphasized portion of this instruction. (RT 961.) The resulting statement was the opposite of that existing in California law: instead of tell the jurors that heat of passion requires more than the emotions which inevitably accompany felonious intent, the prosecutor pronounced

fear, rage, anger, jealousy, anxiety, and despair completely irrelevant in this context. (Ibid.) The court have expressly recognized fear, rage, anger, jealousy and despair as emotions included in the applicable concept of "passion" (People v. Fenenbock, supra, 46 Cal. App. 4th at 1704 [fear, anger, or Jealousy]; People v. Berry, supra, 18 Cal. 3d at 515 [rage, anger, "Wild desperation"].) It is self-evident that sufficiently aroused anxiety like the rest of the emotions falsely discounted by the prosecutor, fits into the general definition of "any violent", intense, high-wrought or enthusiastic emotion other than revenge," accepted by law in the context of voluntary Manslaughter. (People v. Lasko, supra, 23 Cal. 4th at 106 (internal quotation marks and citations omitted.) The deception employed by the prosecutor was particularly likely to be effective because the argument contained some of the language from the court's instruction, thus creating the illusion of legitimacy.

It was, however, only a crude illusion: in the very next sentence, the prosecutor announced that "ultimately an unreasonable choice to Kill intentionally [WAS] not heat of passion." (RT 961). By law, at the time of petitioner's trial an "unreasonable" (I.e., unlawful) intentional Killing could be classified as heat of passion voluntary Manslaughter if any one of the emotions listed by the prosecutor were strong enough to cloud the defendant's judgment (RT 889-892; Lasko, 23 Cal. 4th at 110.) The prosecutor's argument's to the contrary was a text book example of "seek[ing] to mislead the ... jury by an artifice or false statement of ... law," prohibited to any member of the State Bar by Rule 5-200 (B) of the Rule of Professional Conduct.

It was not, however, the last nor even the most egregious effort to misrepresent the applicable law. That came next, when the prosecutor announced that the "classic example" of provocation sufficient to negate malice, that of a jealous ~~husband~~ husband who "catches his wife in bed with another man," satisfied the standard applicable only "at the time of the gold rush," which had long ago become obsolete. (RT 962.) According to the argument, that standard has since been replaced with one which permits a murder to be "mitigated down to a voluntary manslaughter" only in ~~the~~ almost improbably atrocious circumstances: when a hunter, upon return home, not simply finds his child raped and murdered but sees the rapist and murderer "smile[]" or "leer[]" at him. (RT 963) The prosecutor announced that a finding of manslaughter in circumstances any less egregious than those would be "prostitut[ion]" of the notion of "legally adequate provocation and specifically referred to "verbal argument" as insufficient to amount to such provocation. (Ibid)

It is self-evident that the prosecutor set the bar of adequate provocation impossibly high, pronouncing heat-of-~~blood~~ passion manslaughter a concept virtually inapplicable of modern legal reality. In that, he once again explicitly misrepresented the Law, which continues to hold "no specific type of provocation is required," and that, as noted above passion can consist of any "enthusiastic emotion." (Lasko, 23 Cal. 4th at 106.) The specific scenario relegated by the prosecutor to the irrelevant annals of centuries-old history, i.e., a homicidal act by a jealous and angry spouse caused by infidelity, has been recognized as sufficient provocation as recently as in People v. Berry (1976) 18 Cal. 3d at 515, and People v. Fenenbock (1996) 46 Cal. App.

4th at 1704. As for, "verbal argument", Berry found persuasive the reasoning in a prior decision which found provocation based, in part, on the victim's taunts (18 Cal. 3d at 515); Fenenbock relied on a case where the provocation consisted of a "sudden and violent quarrel" (46 Cal. App. 4th at 1704); in People v. Barton (1995) 12 Cal. 4th 186, 201-202, heat of passion was found when the defendant and the victim had a loud argument in which the victim called defendant's daughter a "bitch," which in People v. McCowan (1986) 182 Cal. App. 3d 1, 15, substantial evidence of provocation consisted of the defendant's wife making an "obscene gesture at him." In other words, if the prosecutor is to be believed, California courts continues to "prostitute" the applicable legal standard by making rulings diametrically opposite to the prosecutor's argument. These ruling, however, comprise the controlling law: the prosecutor was prohibited from misrepresenting it to the jury, and his argument fit squarely into the definition of misconduct.

As noted in the supporting facts, the prosecutor repeatedly reminded the juror that he was acting on behalf of the "People" and the community. (RT 997, 1015.) Such far less than subtle efforts to invoke the "prestige or reputation of [his] office in support of "his" case have been characterized as misconduct. (People v. Ayala (2000) 24 Cal. 4th 243, 288; United States v. Necoechea (9th Cir. 1993) 986 F.2d 1273, 1276.) The call to convict petitioner of murder made "[o]n behalf of" this community" (RT 1015) and because "we," "the community" care about the victim and believe that murder is wrong" (RT 997) was also an undisguised effort to convince the jurors to base their decision not on

evidence and the law but on the asserted need "to protect community values," which constitutes misconduct. (United States v. Koon (9th Cir. 1994) 34 F.3d 1416, 1443.) At least as improper was the prosecutor's statement, made at the very end of his final argument, that petitioner if acquitted, would "ride down on the elevator" with the jurors. (RT 1015.) This was a thinly veiled invitation to judge petitioner's guilt on whether or not the jurors would feel safe and comfortable enough to share an elevator ride with petitioner. Considering the undisputed evidence that petitioner Killed neff and that on a prior occasion he violently resisted arrest by a female police officer (RT 599-600), it would not have taken proof beyond a reasonable doubt to convince at least some of the jurors that they might not want to find themselves in the close confines of an elevator car with petitioner. Obviously, no part of that decision making process had anything to do with the principles of a fair trial based on the evidence and the law, and the prosecutor's misdirection of the jurors was misconduct.

The cumulative effect of the prosecutor's argument can be summarized as follows: relying on the authority of his office and the inherent trust enjoyed by public officers, the prosecutor gave the jurors an "explanation" of the complex law of homicide that was incorrect and misled the jurors into believing that they could not lawfully convict petitioner of heat of passion manslaughter, at the same time urging them to convict petitioner of murder to preserve community values and to make sure an unsavory character would not end up in an elevator with them. As shown in the proceding Grounds, voluntary

manslaughter was the only viable theory of defense; conversely even despite defense counsel's glaring error in its presentation, a fair jury guided by correct instructions from the bench could reasonably conclude that petitioner acted in the heat of passion and thus did not harbor the malice necessary for a murder conviction. However, counsel's tacit agreement with the prosecutor's misrepresentation of the controlling standard made the trial court's correct instructions virtually irrelevant: there was simply no reason for jurors to revisit the lengthy and complex instructions (see RT 859) rather than believe the Deputy District Attorney who told them that murder could be reduced to manslaughter only if the victim had just raped and murdered the defendant's child and laughed at the latter's attempt to arrest him.

Petitioner respectfully submits that the supporting facts show deceptive and reprehensible actions by the prosecutor which rendered the trial fundamentally unfair by removing any chance of success of the only potentially meritorious theory of defense. This was misconduct under both state and federal law. Defense counsel's implicit collaboration in such demolition of any hope for conviction of an offense less than murder satisfied both prongs of the test of ineffective assistance. (Strickland, 466 U.S. at 687, 694.) Petitioner urges this court to grant an evidentiary Hearing and habeas relief on this claim.

ARGUMENT 5.

THE ERRONEOUS instruction REGARDING THE ELEMENT OF A LESSER INCluded OFFENSE (MANSLAUGHTER) Did VIOLATE THE FEDERAL CONStitution and Did HAVE A SUBSTANTIAL AND INjurious EFFECT ON THE VERDICT.

Respondent concedes that the trial court erred by instructing the jury in regards to the lesser included offense of voluntary manslaughter that it had to find that petitioner had the intent to Kill in order to find Petitioner Guilty of voluntary Manslaughter.

~~Respondent asserts that~~

Respondent next asserts that this error does not raise a federal question: However, Respondent's argument fails because a claim of state instructional error can be the basis of federal Habeas relief if the error, considered in the light of all the instructions given in addition to the trial trial record: "so infected the entire trial that the resulting conviction violates due process" Estelle v. McGuire 502 U.S. 62, 72 (1991)

WHICH IS EXACTLY what transpired in Appellant/Petitioner's TRIAL. AS I WILL TRY TO EXPLAIN though I AM NO LAWYER.

Respondent contends on page 7 paragraph 2 that if the jury had truly believed that Appellant/Petitioner lacked malice and the intent to Kill, it would have convicted him of involuntary Manslaughter. Because it convicted Appellant/Petitioner of 2nd degree Murder, the jury had to find that petitioner/Appellant harbored either MALICE or an Intent to Kill.

Respondent next asserts that the trial court's instructions to the jury that a voluntary Manslaughter conviction (UNITED STATES v. Gaudin (1995) 515 U.S. 506, 522-523.)

was possible only if it found that malice was negated by Sudden quarrel or Heat of Passion. (RT 888-893; CT 283-289; CalJIC Nos. 8.40, 8.42, 8.44, 8.50.

But Respondent completely ignores that the challenged instructions must be evaluated in light of the instructions as a whole. (Estelle 502 U.S. at 72, as well as the arguments of counsel.) However when looked at as a whole that very Involuntary Manslaughter, the Respondent claims the jury would have found Appellant/Petitioner Guilty of had Appellant/Petitioner lacked malice and Intent to Kill was undermined by the Court's giving of Prosecution request instruction #66B WHICH WAS contradictory and a mistatement of the law as it pertained to Involuntary Manslaughter. And it effectively eliminating a Variable defense there by Appellant/Petitioner right to due process of law under the United States Constitution.

The error in instructing with an improper definition of Voluntary Manslaughter was exacerbated when the court gave the second erroneous instruction regarding imperfect Self-defense. (CALJIC 5.17 and Jury Instruction #66B) (Please see Argument #6)

The Federal Constitution guarantees a defendant the right to have the jury decide the existence of all the elements of the Offense of which he is convicted. The Sixth Amendment to the Federal Constitution gives a Criminal defendant the right to have a jury determine beyond a reasonable doubt, his guilt of every element of the crime WITH WHICH HE IS CHARGED

Here the record clearly demonstrates the jury did not have the option of convict Appellant/Petitioner of Involuntary Manslaughter under the theories presented and light of the erroneous instructions.

As has been pointed out the error can not be deemed harmless, because instructions that omit or otherwise misinform the jury of the Offense (preventing it from makeng a necessary factual finding) are Constitutionally defective. (U.S. Constitution's 6th Amendment; See Gaudin, supra 515 U.S. 506, 522-523.)

Appellant/Petitioner believes that the above stated erroneous instruction regarding the elements of the lesser enclided Offense Violated Appellant's/Petitioner's Federal Constitution rights and did have a Substantial and injurious effect on the verdict. (Brecht v. Abrahamson 507 U.S. 619, 637 (1993) The Brecht standard apples to all § 2254 cases, regardless of the type of harmless error review conducted by the state courts (Fry v. Pliler _U.S._, 127 S.Ct. 2321 (2007).

Accordingly petitioner/Appellant respectfully submits that He is entitled to an Evidentiary Hearing and Habeas relief

ARGUMENT 6.

THE ERRONEOUS JURY INSTRUCTION #66B VIOLATED THE FEDERAL CONSTITUTION AND HAD a Substantial and Injurious EFFECT ON THE VERDICT.

Respondent claims on page 8 that the erroneous Prosecution requested Jury Instruction #66B does not violate THE Federal Constitution. However respondent does not dispute that the court erred by instructing the jury in regards to jury Instruction #66B. Finally, Respondent tries to argue that even though it was error for the court to instruct the jury in regards to Jury Instruction #66B it did not violate the FEDERAL Constitution.

First off, One interpretation of the evidence advanced to the jury suggested that petitioner/APPELLANT Killed Donti in the actual but unreasonable belief in the necessity to defend himself. Accordingly the court instructed the jury with the manslaughter instruction for imperfect self-defense found in CALJIC 5.17 (CT 289). The court also gave a defense requested instruction telling the jury that "When a person who is acting in WHAT otherwise would be self-defense Kills another human being without Malice Aforethought and without an intent to Kill by using deadly force which was not justified under the circumstances, or by the use of force which EXCEEDED that WHICH WAS reasonably necessary to repel the attack, that person is guilty of involuntary Manslaughter." (RT 297, RT 898.)

These instructions were undermined, however, by the court's giving the prosecution requested instruction #66B WHICH READS AS Follows:

A person who Kills another person with malice aforethought maybe found guilty OF murder even where the evidence otherwise establishes THE right of self-defense, if the jury finds that the nature of the attack did not justify the resort to deadly force, or that force used exceeded that WHICH WAS reasonably necessary

to repel the attack. The erroneous Jury Instruction #66B went to the essential Heart of Appellant's/Petitioner's CASE.

Given the irreconcilable conflict the jury faced in being given inconsistent instructions on the theory of imperfect self-defense, there is no way to Know which instruction the jury followed in reaching it's verdict and the error must be deemed prejudicial (Francis v. Franklin (1985) 471 U.S. 307).

In Francis v. Franklin (1985) 471 U.S. 307, the jury was given conflicting instructions on the specific intent of murder. One instruction told the jury that it could presume that the defendant had an intent to act as he did while a second instruction explained that the government had the burden of Proof regarding the elements of the Offense. In reversing the conviction the United States Supreme Court held:

Even if a reasonable juror could have understood the prohibition of presuming "Criminal Intention" as applying to the element of intent, that instruction did no more than contradict the instruction in the immediately preceding sentence. A reasonable juror could have easily have resolved the contradiction in the instruction by choosing to abide by the mandatory presumption and ignore the prohibition of presumption. Nothing in these specific sentence or in the charge as awhole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and doesnot explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has noway of Knowing WHICH OF THE TWO irreconcilable instructions the jurors applied in reaching Their Verdict (Francis v. Franklin Id. at 321.).

Respondent can not fairly dispute that perhaps the jury read the two instructions together to mean that one who Kills in imperfect self-defense without malice is guilty of involuntary Manslaughter (Instructions #53A) While one who Kills in imperfect self-defense with malice is guilty of murder (Instructions #66B) not realizeng, of course that it is the imperfect-self-defense that itself negates Malice.

As has been pointed out and discussed in Argument , Instructions that omit or otherwise misform the jury of an element of the offense, preventing it form making a necessary factual finding are Constitutionally Defective (U.S Constitution Amend. VI; SEE U.S. V Gaudin, supra 515 U.S. 506, 522-523.

Petitioner submits that the errors from these contradictory instructions on imperfect self-defense along side other accurate ones was prejudicial error. Nothing in the instructions made clear to the jury that one of these contradictory instructions carried more weight than the Other. (Just like Francis v. Franklin 407 U.S. 307.) IF The jury believed that petitioner acted in imperfect self-defense, they would have convicted him of murder if they followed Jury Instruction #66B. This deprived Appellant/Petitioner a viable defense And the courts Instructional error violated Appellant/Petitioner Federal Constitutional rights to a fair Trial by jury and due process of Law (SEE Conde V Henry (9th Cir 1999) 198 F.3d 734

ARGUMENT 7.

The admission of a Videotaped interview Violated Petitioner's Right to Confrontation

Respondent claims that the error in admitting O's videotaped statement was not prejudicial because the only issue was what happened in the backyard, i.e, whether the gun was fired accidentally during a struggle, or whether petitioner shot Donti intentionally

Respondent is mistaken the prosecutor relied on the taped statement (Testimonial) of Omardre to the Detectives from the outset of the trial. "Priming the jury in his opening AS Follows:

"I don't expect Omardre, who may be taking his cues from his mother, Shamoya... to testify in great detail about anything he saw that morning. But what I anticipate is in one way, shape, form or another that you will have better evidence of WHAT Omardre saw and that will be through a videotape of His interview with the detectives later that day and you will see that he is a smart, aware, cognizant young child. And he will describe in great detail an argument [SIC] inside, the argument outside and the events that led up to the fatal shooting. (RT 377)

The prosecutor again referred to Omar's video during his opening telling the jury that they would watch the videotape and Hear Omar's story (RT 380) The prosecutor Relied heavily upon Omar's taped interview in presenting his case to the jury, referring to the tape repeatedly during his summation (RT 945, 948, 955, 957 966, 967, 971, 977, 1001, 1012.) The prosecution's theory

of murder was premised, in large part, upon O's redition of the facts (in the video) "Omar gives us the best indication of defendant's expressed intent to kill," argued the prosecutor. (RT 966) According to Omar, Kyron said "Let's take it outside"... according to Omar Donti says, "I don't want to get SHOT." Kyron says "You is" (RT 948, 966-967, 977).

The prosecutor argued that there was "no reason not to believe Omar when he is on that Videotape (RT 1015). From Omar's Statement the prosecutor argued that petitioner went to Shamoya's house started a fight with Donti and that KEISHA had warned Donti not to go Outside (RT 945, 948, 957.) KEISHA did not testify at trial. However, it was through Omar's hearsay testimony that the jury heard that KEISHA had warned Donti not to go outside with Petitioner.

The prosecutor's theory was that petitioner lured Donti outside and chased him into the backyard "So when He is lureing Donti Outside that morning not only does he have a fully loaded gun, he has a bullet right there in the chamber. He chose to bring the gun. He chose to conceal the gun. He chose to conceal his purpose an His advantage. He chose to take the argument outside. Per Omar during the videotaped interview, KEISHA [SIC] warned Donti not to go outside with the defendant (RT 948-977)

The prosecutor went on to tell the jury that since Petitioner had started the argument and was not afraid for his life, self-defense was not an option for the jury's consideration (RT 956) Once again relying on O's hearsay statements to

to make the argument:

"So there are two components (to self-defense) there it has to be reasonable and the defendant has to harbor a well founded fear. If either of those are absent, it's not self-defense. Now both of those are absent in this case. His conduct was patently unreasonable. He never feared a Damn thing. We know from Omar on the Video. The last part of the video — we know from Omar on the Video: Was Donti scared? Yes. Was Kyron scared? No. Omar was very very emphatic." (RT 955)

... so we know the defendant is over there at the house, and he's is loaded for bear with his concealed firearm. What is he doing with a concealed firearm. Ask yourself that. Omar, on the video, Detective Curran asks him: But you think — what makes you think that Kyron started it? Omar: Because he came in. He came in there. Talking to him And he didn't even do nothing. And he is talking about Donti. Donti was minding his own business.

Another question: Okay. And Kyron, you said, started arguing with Donti? Because Donti was minding his own business? Omar: Uh-huh. And then Kyron said let's take it outside. Again, Omar in the video - I will give you the exact quote I mentioned earlier. Question: Was Keyotta in the house when they started arguing? Answer: Yeah. Keyotta told Donti not to go outside" (RT 957)

Furthermore, the prosecutor argued that petitioner acted like a murder when he concealed evidence by taking the gun with him after the shooting. This again is derived solely from Omar's hearsay statements that petitioner ran by him with the gun in his

hand after two shots were fired. (ART 50)

Omar's testimony via the video added critical weight to the prosecutor's case in a form that was not subject to cross-examination. From the outset of petitioner's case Omar's has continued to stonewall the court and Petitioner. From the Preliminary Hearing to trial (EX. CT 31-41.) Omar has stated that he can't or couldn't remember therefore in essence limiting the petitioner's scope of cross-examination. Because that videotape interview was admitted into evidence and viewed by the jury Omar's professed lapse of memory as to the events that transpired so affected petitioner's right to cross-examination as to make a critical difference in the application of the Confrontation Clause in Petitioner's case.

THE STATE court reasoned in it's opinion Page 10. "Hightower's trial counsel's cross-examined O. the child inability to remember anything the incident certainly could have been exploited effectively on cross-examination!"

THAT being the case petitioner would like to cite/offer that statement from the state as evidence or and exhibit for counsel's Ineffective Assistance (SEE preceding One through Four.) IF THIS Honorable shell follow that reasoning.

While at trial Omar did relate background information about his family and said that Dorsti was not a nice man and that he liked petitioner, Omar offerred no evidence at all about the shooting (RT 480-484).

Petitioner respectfully submits that in the instant case there was no way to cross-examine Omar about the statements that he made to Detectives. His insistence that he could not remember anything about his statements Detective Curran completely precluded cross-examination about His Hearsay statements (EX-E pg31-41 preliminary Transcript)

There was no way to test the truth of the statements themselves. on this record the jury had no basis for evaluating the truth of the prior statements (California v. Green (1970) 399 U.S. 149.) The admission of a prior statement made by a witness who stonewalls AT TRIAL and refuses to answer any question on direct or cross-examination denies a defendant the right to Confrontation which contemplates a meaningful Opportunity to cross-examina the witness (People v. Rios (1985) 163 CAL App. 3d 852; People v. Newton (1970) 8 Cal App. 3d. 359, 385; People v. Shipe (1975) 49 Cal. App 3d 343 at pp. 349-351; DOUGLAS V. ALABAMA (1965) 380 U.S. 415, 419-420.)

The cross examination of Omar was in no way meaningful nor did it satify the Constitution Clause.

The California Supreme Court denied Petitioner 6TH Amend. claim on the basis of the Ruling in Delaware v. Fensterer 474 U.S. 15 stating that: "The confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion or evasion. To the contrary the confrontation Clause is generally satisfied when

the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination." Id. 21-22.

However petitioner's case is significantly different from that of Delaware.

In Delaware v. Fensterer the court stated: since there is no such out-of-court statements in this case, the adequacy of a later opportunity to cross-examine, as a substitute for Cross-Examination at the declaration was made, is not in question Id

WHICH IS THE EXACT opposit of WHAT TRANS-pired in petitioner's CASE. Omar stonewalled at the preliminary Hearing (EX. E) and stonewalled At trial.

Petitioner submits do to the rule announced in Crawford v. Washington 541 U.S. 36 (2004), 124 S.Ct 1353 regarding testimonial evidence by the United States Supreme Court the Petitioner's right to confrontation was violated and the violations of this right had a Substantial and injurious effect on the verdict. (Brecht v. Abrahamson 507 U.S. 619, 637.)

The case most similar to petitioner's is Bockting v. BAYER 399 F.3d 1010. Appellant was convicted of sexually abusing his six year old step-daughter, at Bockting's preliminary Hearing, the girl was able to answer questions about the deference between the truth and lie but became upset when asked about being touched by Bocking. Upon further questioning the girl (Autumn) said she could not remember what occurred with her father and

did not remember whether she had talked to detectives about the claimed assault. The judge declared her an unavailable witness, and the Preliminary hearing proceded with the mother and detective (Id at 1013)

At trial The Girl did not testify but her hearsay statements from the interview with the detective was used as Key evidence at trial. The judge found that the girl's hearsay statements were admissible because she was effectively unavailable for trial. Without the Opportunity to Cross Examine Autumn, Bockting was convicted and sentenced to life in Prison. (Bockting v. Bayer (9th Cir. 2005) 399 F.3d 1010, is pertinent to the issue presented here in Petitioner's ~~[illegible]~~ Traverse and Habeas for Several reasons. First, it is significant that the trial judge in Bockting's found the child witness to be unavailable where she was physically present at trial but apparently unwilling to testify (Id at 1010-1013) Like that of Omar at preliminary hearing, Autumn said that she could not remember basic facts. So too, did Omar's total failure to recollect events leading up to the shooting render him unavailable. Omar's video interview with detectives deprived petitioner of the cross-examination Guaranteed by Crawford v. Washington 541 U.S. 36.

Finally and significantly, the court in Bockting found that the admission of the girl's (Autumn) statement was not harmless beyond a reasonable doubt (Bockting Id. at 1022) Like the taped taped statement in the instant case the detective testimony, regarding the girl's (Autumn) interview

was so significant that the error could have and did materially affect[ed] the verdict (The admission of Omar's Video Statement did the same

Petitioner submits that ~~the~~ contrary to Respondent argument the admission of Omar's testimonial statements, petitioner believes he has shown the court Omar's statement through the video violated petitioner 6TH Amendment right to Confrontation and urges the court for an evidentiary Hearing and Habeas relief.

Without the video of Omar's interview with Detective Curran it is likely that the jury would have returned a verdict of Manslaughter (Chapman v. California (1967) 386 U.S. 18.

Petitioner was Denied a Fair trial when one Considers The Purported ERRORS Cumulatively.

Petitioner submits that He is entitled to Habeas relief based on cumulative prejudice arising from all of His claims of Error. The Ninth Circuit has held that the combined effect of multiple trial errors may violate due process. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir 2007). However, cumulative error is most likely to be found where the government's case is weak. See id at 928. Thomas v. Hubbard, 273 F.3d 1164, 1179-81 (9th. Cir 2002);

Petition has demonstrated prejudice to each claim individual claim, ~~however~~ and is entitled to Habeas Relief.

Where a petitioner has not demonstrated prejudice as to individual claims, no cumulative prejudice results Davis v. Woodford, 333 F.3d 982, 1007; see Mancuso v. Olivarez 292 F.3d 939, 957 (9th cir 2002) (where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation); United States v. Rivera, 900 F.2d 1462, 1472 (10th Cir 1990) ("cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors").

Under the Circumstance Here Habeas Relief and Evidentiary Hearing is Warranted.

EXHIBIT A

Declaration of Kyron Lamont Hightower

1. I would like to ask the Court to hold me to less stringent Rules than that of Attorney's because I am no lawyer, however, I did the best that I could.

2. I would like to ask that I be issued a lawyer so I may effective present my CASE as claims of error.

3. IF I've left anything out I submit my HABEAS Corpus in denial to any and all claims the Respondent HAS made.

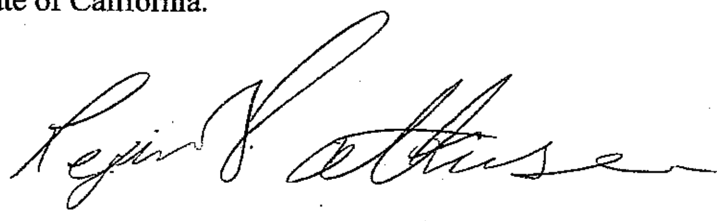
4. Petitioner submits that the aforementioned is true and declare under penalty of perjury it is correct.

DATE 3.24.08

Respectfully Submitted

Kyron L. Hightower

EXHIBIT B

1
2
3
DECLARATION OF REGINALD ATKINSON
4
5
I, REGINALD ATKINSON, declare as follows:
6
1. I met Ernest Neff in approximately 1990. I have known Kyron Hightower
7
since approximately 1988.
8
2. I was aware that prior to Ernest Neff's death, he had a reputation for
9
carrying a gun, and on several occasions I saw Mr. Neff carrying a gun in
10
his waistband.
11
12
3. A couple of weeks before the incident, I saw Mr. Neff drive by on Florida,
13
near 6th street asking about Kyron Hightower.
14
4. Trial counsel, James Ramsaur, never contacted me.
15
I declare under penalty of perjury that the foregoing is true and correct, except as to those
16
matters stated upon information and belief, and as to those matters, I believe them to be true.
17
Executed this 13th day of December, 2001, in the city of Emeryville, County of Alameda,
18
State of California.
19
20


REGINALD ATKINSON
21
22
23
24
25

EXHIBIT C

1 DECLARATION OF ROQUEL WILLIAMS

2 I, ROQUEL WILLIAMS, declare as follows:

3 1. Two weeks before Mr. Neff died, I was with Kyron Hightower standing in front of
4 Kryon Hightower's Aunt's house at 516 Florida Avenue. There, I saw Dante Neff
5 drive by 516 Florida Avenue pointing what appeared to be a gun at Kyron Hightower.
6 2. Around that same time, two weeks prior to the instant incident, I heard that Earnest
7 Neff was "looking for" Mr. Hightower.
8 3. Thereafter, I observed Mr. Neff drive by 516 Florida Avenue "almost on a daily
9 basis" making verbal threats and hand gestures towards Kryon Hightower.
10 4. I was never contacted by Mr. Hightower's trial lawyer.
11 I declare under penalty that the foregoing is true and correct, except as to those matters stated
12 upon information and belief, and as to those matters, I believe them to be true.
13 Executed this 6th day of November, 2001, in the city of Emeryville, County of Alameda,
14 State of California.
15
16 RAQUEL WILLIAMS
17
18
19
20
21
22
23
24
25

EXHIBIT D

1 DECLARATION OF KELLIN R. COOPER

2 I, Kellin R. Cooper, declare as follows:

3 1. I am a partner in the COOPER LAW OFFICES, counsel of record for KYRON
4 HIGHTOWER.

5 2. On May 26, 2000, I substituted in as counsel of record for Mr. Hightower for
6 purposes of preparing a motion for a new trial.

7 3. In July, 2000, I met with Mr. Hightower and was given the names of several
8 witnesses that had not been contacted by his previous attorney.

9 4. Subsequently, I met and interviewed three individuals: Edward Martin, Reginald
10 Atkinson, and Roquel Williams.

11 5. I was able to easily make contact with them and obtain their statements. (See
12 Attached Declaration).

13 I declare under penalty that the foregoing is true and correct, except as to those matters
14 stated upon information and belief, and as to those matters, I believe them to be true.

15 Executed this 31st day of December, 2001, in the city of Emeryville, County of Alameda,
16 State of California.

17

18

19

20 KELLIN R. COOPER

21

22

23

24

25

EXHIBIT E

1 THE CLERK: Do you want to stand up.

2 THE WITNESS: (Shaking head.)

3 THE COURT: You have to raise your right hand.

4 Look, why don't you just stand a minute, okay?

5 Just stand up. All right.

6 Do you want to stand up a minute, Omardre?

7 I'm asking you to do that.

8 THE WITNESS: I don't want to stand up.

9 MR. RAMSAUR: What did he say?

10 THE COURT: All right. Raise your right hand.

11 OMARDRE WILSON,

12 called as a witness by the People, was sworn under oath at

13 10:39 a.m., and testified as follows:

14 THE WITNESS: (Nodding head.)

15 THE COURT: You have to answer out loud, too.

16 THE WITNESS: Yes.

17 THE COURT: You can sit down.

18 DIRECT-EXAMINATION

19 MR. MACMASTER: Q. Omardre, do you want some

20 water?

21 A. No.

22 Q. Okay. You nervous about being here today?

23 A. No.

24 Q. No?

25 Would you rather be in school?

26 A. No.

27 Q. Okay. Omardre, I'm going to ask you a few

28 questions and then we will let you go. And see that

1 gentleman over there sitting next to Kyron Hightower? He is
2 going to ask you some questions, too. Okay?
3 Can you look at me when I ask you the questions?
4 Is that okay?
5 Omardre, where do you live?
6 A. 7th Street.
7 THE COURT: You know-- See this?
8 You can speak into that and you can pretend like
9 you're on a--
10 MR. MACMASTER: Radio show.
11 THE COURT: --radio show or something.
12 Answer out loud so everybody can hear you, okay?
13 MR. MACMASTER: Q. Omardre, do you know who's
14 sitting here to my left?
15 Do you remember Detective Curran?
16 A. Yes.
17 Q. Okay. Do you remember talking to her earlier this
18 year back in February?
19 A. No.
20 Q. How old are you now?
21 A. Eight.
22 Q. Okay. And when you were seven earlier, do you
23 remember when you were brought down to the police station to
24 talk to the detectives?
25 A. No.
26 Q. Omardre, are you scared to be here?
27 A. No.
28 Q. Okay. Didn't you just tell your mother outside the

1 court that you didn't want to testify?
2 A. I didn't.
3 Q. Why not?
4 A. Because.
5 Q. Because why?
6 A. I don't want to come in.
7 Q. Why not?
8 What are you worried about?
9 A. Nothing.
10 THE COURT: Omardre -- excuse me -- I didn't get
11 your last name.
12 What's your last name?
13 THE WITNESS: Wilson.
14 THE COURT: Okay. Thank you.
15 MR. MACMASTER: Q. Omardre, do you remember a man
16 who used to be called Dante?
17 A. Yes.
18 Q. Did Dante used to live with your mother?
19 A. No.
20 Q. Okay. Did Dante sometimes come over to your house
21 in Richmond?
22 A. Yes.
23 Q. And that's your house at 227 South 7th Street?
24 A. Yes.
25 Q. Do you know a man by the name of Kyron Hightower?
26 A. Yeah. That's my sister's daddy.
27 Q. And who is the sister that he is the daddy of?
28 A. Kyra and Cashmere.

1 Q. And how old are there?

2 A. My sister Cashmere is two and the other one is-- I

3 don't remember.

4 Q. Okay. And is Dante dead now?

5 A. Yes.

6 Q. He got shot in your backyard?

7 A. I don't remember.

8 Q. Okay. Let me ask you about-- Let me ask you this.

9 Do you think if you watched a tape for a few

10 minutes that would help you remember your conversation with

11 Detective Curran earlier this year?

12 A. No.

13 Q. Why don't we watch--

14 A. No.

15 Q. All right. Let me ask you this, then.

16 Did you tell Detective Curran back on the day that

17 Dante got shot a number of things about what happened

18 between Dante and Kyron?

19 A. I don't remember.

20 Q. Okay. Did you tell Detective Curran that Dante and

21 Kyron were arguing out in front of your house?

22 A. I don't remember that.

23 Q. Okay. Sure.

24 Do you remember telling Detective Curran and--

25 There was another detective there, Detective Dominic Medina,

26 the man detective we talked to this morning.

27 A. Yes.

28 Q. When I talk about this conversation that took place

1 back on the morning where Dante was shot, Omardre--
2 A. What?
3 Q. --I will be talking about the conversation that you
4 had with Detective Curran and Detective Medina from the
5 Richmond Police Department. Okay?
6 Didn't you tell the detectives that Kyron pulled a
7 gun out?
8 A. I don't remember that.
9 Q. Okay. You don't remember that.
10 Didn't you tell the detectives that Dante said, "I
11 don't want to get shot"?
12 A. I don't remember that.
13 Q. Okay. Sure.
14 Didn't you tell the detectives that Kyron
15 responded, "You is"?
16 A. What?
17 Q. Didn't you tell the detectives that after Kyron
18 pulled out a gun, Dante said, "I don't want to get shot"?
19 A. I don't remember that.
20 Q. And right after that, didn't you tell the
21 detectives that when that happened, Kyron said, "You is"?
22 A. I don't remember that.
23 Q. Okay. You are doing fine.
24 Didn't you tell the detectives that Dante looked
25 scared at that point?
26 A. I didn't say that.
27 Q. What did you say?
28 A. I don't know.

1 Q. Well, didn't you tell the detectives that Kyron
2 chased Dante into the backyard while pointing the gun at him?
3 A. I didn't say that.
4 Q. Okay. Didn't you tell the detectives that after
5 you heard gunshots in the backyard, you saw Kyron return
6 from the backyard still carrying the gun?
7 A. I don't remember. I don't remember that.
8 Q. You are doing fine.
9 Didn't you tell the detectives that Kyron with the
10 gun got on his bike and pedaled away?
11 A. I didn't say that.
12 Q. Okay. Didn't you tell the detectives -- and let's
13 back up to before when the shooting occurred -- didn't you
14 tell the detectives that they were arguing inside the house
15 and Kyron said, "Let's take it outside"?
16 A. I don't remember that.
17 Q. Okay. Well, didn't you tell the detectives that
18 someone in the house told Dante not to go outside with
19 Kyron?
20 A. I don't remember that.
21 Q. Okay. When you spoke to the detectives that
22 morning when Dante got shot -- Detective Curran sitting to
23 the left -- did you tell them the truth or tell them a lie?
24 A. Who?
25 Q. Detective Curran right here? Lori?
26 A. When?
27 Q. When you spoke on morning what Dante got shot.
28 A. I don't remember that.

1 Q. You don't remember that?
2 Well, why don't we watch a little bit of TV?
3 A. No.
4 Q. Just bear with me.
5 A. No. No.
6 I want out of this court.
7 THE COURT: I think he hasn't been questioned
8 whether he knows to tell the truth or a lie.
9 MR. MACMASTER: He swore to tell the truth,
10 Your Honor. And in fact the burden is not on my--
11 MR. RAMSAUR: I join in the Court.
12 Maybe different? Whether he knows the difference
13 between right and wrong?
14 THE COURT: Why don't you question him?
15 MR. MACMASTER: Q. Okay. Omardre, you know the
16 difference between a truth and a lie?
17 A. Yes.
18 Q. What's the truth?
19 A. The truth is when you tell something that you done.
20 Q. Is that good or bad to tell the truth?
21 A. Good.
22 Q. And when you tell a lie, do you get punished?
23 A. Yes.
24 Q. Okay. If I told you that this suit I'm wearing is
25 red, is that a truth or lie?
26 A. A lie.
27 Q. May the record reflect that I'm wearing a blue
28 suit?

1 And if I told you that the flag there behind the
2 judge is the American flag, is that the truth or a lie?
3 A. Truth.
4 Q. Thank you, Omardre.
5 Let's watch a little bit of TV.
6 A. No.
7 THE COURT: Do you want to pull the TV out?
8 THE WITNESS: I will run out of the court if I do.
9 MR. MACMASTER: Please don't.
10 THE WITNESS: Yes, I could.
11 THE COURT: You can't do that. You are in front of
12 a court now.
13 Do you know you have to answer the questions that
14 are asked of you and you can't speak any further until you
15 are asked a question?
16 THE WITNESS: Turn it on, I'm running out. Watch.
17 THE COURT: No, you are not.
18 I think his godmother better tell him or we will
19 take him into protective custody or something because he is
20 not going to get away with this.
21 MR. MACMASTER: Your Honor, I would like to have
22 this videotape marked People's next in order and a copy of
23 which is already provided to Counsel.
24 MR. RAMSAUR: Madam Clerk, what is that?
25 MR. MACMASTER: People's 18.
26 MR. RAMSAUR: People's 18.
27 (Videotape marked as People's
28 Exhibit Number 18 for

1 MR. MACMASTER: See, the court reporter is taking
2 down what you are saying.
3 THE WITNESS: Yes.
4 MR. MACMASTER: Q. So that means "Yes"?
5 So, Omardre--
6 A. What?
7 Q. When you spoke to the detectives, you told her the
8 truth about what you had seen, but you don't remember now
9 because that has been too long.
10 Is that what you are saying?
11 A. Uh-huh.
12 Q. Is that a "Yes"?
13 A. Yes.
14 MR. MACMASTER: Thank you.
15 I don't have any more questions for you at this
16 point, but that man may have some questions for you.
17 THE COURT: Okay.
18 CROSS-EXAMINATION
19 MR. RAMSAUR: Q. Omardre, have you ever seen that
20 tape before?
21 A. No.
22 Q. Do you remember when you went to the police
23 department with your mom?
24 A. No.
25 Q. Do you remember anything back in February that
26 happened with Kyron?
27 A. No.
28 Q. Are you telling the truth now?

1 A. Yes.

2 THE COURT: Nothing more?

3 MR. RAMSAUR: Nothing more, Judge.

4 THE WITNESS: Thank you.

5 THE COURT: Anything further?

6 MR. MACMASTER: A couple.

7 REDIRECT-EXAMINATION

8 MR. MACMASTER: Q. You said there on the tape that

9 you saw Kyron pull a gun from his waistband.

10 Do you remember that now?

11 A. (Witness shaking head.)

12 Q. You're shaking your head?

13 A. I saw it, but I don't remember.

14 Q. Okay. And you told the detective -- and we saw

15 that on the tape -- that Dante that had nothing in his hands

16 says, "I don't want to get shot" and Kyron says, "You is."

17 Do you remember that now?

18 A. Who said that?

19 Q. That's what you told the detectives on the tape.

20 Do you remember that now?

21 A. No.

22 Q. You said there on the tape when you were talking to

23 the detectives--

24 A. That was a long time ago.

25 Q. Sure.

26 You said that the gun was black and silver.

27 Do you remember that now?

28 A. No.

1 Q. Okay. You said Kyron was wearing a red and white
2 FUBU coat.
3 Do you remember that now?
4 A. A little.
5 Q. Beg pardon?
6 A. A little.
7 Q. He was wearing a red and white FUBU coat?
8 A. (Witness nodding head.)
9 Q. You're nodding "Yes."
10 Does that mean "Yes"?
11 A. Yes.
12 Q. Did you run and get your mother and tell her,
13 "Kyron just shot Dante"?
14 A. I don't remember that.
15 Q. Did you tell her two times?
16 A. What?
17 Q. Did you tell her two times?
18 A. I don't know.
19 MR. MACMASTER: That's all of the questions I
20 have, Omardre.
21 THE COURT: Okay. Nothing further?
22 MR. RAMSAUR: Nothing further.
23 THE COURT: Thank you.
24 You can leave now.
25 MR. MACMASTER: Subject to recall.
26 THE COURT: We will excuse him, but I don't imagine
27 that he has to come back. All right. Subject to recall.
28 Bye.

PROOF OF SERVICE

(C.C.P. §§1013(a); 2015.5; 28 U.S.C. §1746)

I, Kyron Lamont Hightower, am over the age of eighteen (18) years, and I (am) (am not) a party to the within cause of action. My address is:

Kyron Lamont Hightower #T-89904
C.S.P-SAC
P.O. BOX 290066
Represa, Ca 95671-0066

On, March 27, 2008, I served the following documents:

Traverse in Answer to Respontent
2) Copies for U.S. District Court
1) Copy for

on the below named individual(s) by depositing true and correct copies thereof in the United State mail in Represa, California, with postage fully prepaid thereon, addressed as follows:

1. United States District Court
Northern District of California
San Jose, Division
280 South First St. Room 2112
San Jose, Ca 95113-3095

2. Attorney General of California
455 Golden Gate Av. suite 11000
San Francisco, Ca 94102-3664

I have read the above statements and declare under the penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Executed this 24TH day of March, 2008, at California State Prison - Sacramento, Represa, California.

(Signature) Kyron L. Hight