S281858

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE DAVID L. SANDSTROM ON HABEAS CORPUS CASE NO. S281858

PETITIONER'S INFOMAL RESPONSE FROM PETITION FOR WRIT OF HABEAS CORPUS

DAVID SANDSTROM
MULE CREEK STATE PRISON
4001 HWY. 104
IONE, CA 95640
APRIL 10 2024

INTRODUCTION

In 2017, petitioner was convicted of two separate charges, The first set was; one count of P. C. 288.7(b) and one count of P. C. 288(a): The second set was two counts of P. C. 288(a).

Petitioner in this case argues;

Ground One: Trial Counsel not knowing the law and depriving this petitioner from making an informed decision during plea negotiations.

Ground Two: Trial Counsel's threat to defendant so that he would not testify.

Ground Three: Jury instruction error.

Attorney General and his associates have claimed a meritless claim on all grounds, and each argument from the Attorney General, et al. fail from a lack of evidence and/or lack of legal standing. The Attorney General, et al. had deliberately left out essential facts in this case; deliberately left out critical words from case law and used case law that is not on point to attest this petitioner's writ of habeas corpus and also failed to consider statutory or procedural trial faults.

COUNTER ARGUMENT OF "UNTIMELY PETITION"

This petition is not untimely. The second and third ground was denied by the San Bernardino, writ of habeas, court on April 16, 2020. This is true. The third ground was denied, by the same court, on January 29, 2020. This is true. It is understood by, this petitioner, that a delay of more than ninety (90) days is untimely so now submitting over three years looks untimely.

This petitioner did not delay. The petitioner followed the rules. The rule of not submitting "successive writs." It is well known that successive writs can and will be denied by the reviewing court. To have submitted a single ground, one at a time, each at a different time, as each was denied by the reviewing court, to the next court befor the final decision, of all of the grounds, would create a (catch 22) procedural default against the petitioner for any future or successive grounds that were to be filed when the lower court finally completes their review of the case. Furthermore, this petitioner was represented by counsel at the time of this, supposed, substantial delay. To piecemeal a writ of habeas corpus is frowned upon by all courts. This Supreme Court, in (in re Clark (1993) 5 Cal. 4th 750) summarily denied defendant, Clark's, second petition for not submitting all known claims in a single petition. The Attorney General, et al. is proposing a (catch 22) situation for the petitioner. The petitioneronly waited until the lower court completed its decision on all grounds that it held in limbo for the three years in questain. This petition was completed within sixty (60) days from the last court's decision.

To reiterate: Again in, (Clark) "in part III. B. of the opinion, the majority establishes a general rule that "all" habeas

corpus claims must be raised in a single petition . . ." The fact that this petitioner waited for the reviewing court to finalize their decision is the good cause for the delay of this habeas corpus. The three (3) timeless exceptions in (Clark) do not apply here. The successive or piecemeal rule, however does apply. Therefore these grounds should not be bared for untimeliness because the petitioner followed the "do not piecemeal rule." In in fact the three (3) exceptions were to apply, they too are easy to overcome with legal precedence. (1) "That the error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner." The writ of habeas judge, Judge Tavill, 'to paraphrase,' stated that the defendant did substantiate an alibi and then explained it away with the witness' mistake of time. The alibi is concrete. We will explore this in more detail later with ground three (3). (2) "That the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted." The petitioner provided both a testimonial alibi and a physical alibi to prove his innocence. We will, also, explore this in more detail later in ground three (3).

COUNTERARGUMENT TO "SHOULD HAVE BEEN RAISED ON DIRECT APPEAL"

"The general rule is that habeas corpus cannot serve as a substitute for an appeal, and in the absence of special circumstances' constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from judgement of convition." (in re Dixon (1953) 41 Cal. 2d 756, 759.) The (Dixon) rule is subject to four (4) exceptions: fundamental constitutional error, lack of

fundamental jurisdiction, judicial act in excess of jurisdiction, or change of law. See (in re Robbins (1998) 18 Cal. 4th 770, 814,) citing (in re Harris (1995) 5 Cal. 4th 813, 825, fn. 3 & 829-841.)

However, in 2012, in the case (in re Reno (2012) 55 Cal. 4th 428.) The rule shows that "claims of evidentiary insufficiency must be raised in eather a motion for new trial, on appeal, or both." This ground was raised on a motion for new trial by trial counsel.

Furthermore, this ground was requested to be raised in the appeal, to appellate counsel, Victoria Stafford, by the defendant, but appellate counsel, instead filed a Wende Brief (People vs. Wende (1979) 25 Cal. 3d 436.) Appellate counsel, also, instructed the defendant, not to file that ground on the appeal. See exhibit four (4) from writ of habeas corpus to this court. Letter from appellate counsel, Victoria Stafford, three (3) pages.

FAILURE TO STATE A PRIMA FACIE CASE ON INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARDS TO GROUNDS ONE AND TWO

Ground one (1) trial counsel was in fact, not just ineffective in his duties but, derelict in them when he failed to understand the penal code and how to interpret it. There is irrefutable proof that he did not know the law and could not have given accurate or any kind of sound advice tothe defendant during plea negotiations and during trial. Even after going over the jury instructions with the prosecution and the judge to determine what whould be read to the jury for their instructions and again having the law read to him during trial when the jury had them read to them, he still could not grasp the actual law that was in front of him. There is nothing to suggest otherwise. In his motion for new trial and later in his

sentencing memorandom he argued with the judge about the law and how the judge was wrong and he was right about the law on this point. And did it again in his sentencing memorandom. That real, physical, proof of an attorney who is derelict and therefore ineffective in his duties to understand the law, as a competant lawyer could and would, so that his client can make an informed decision. This is the crux of what ineffective assistance of counsel is.

Ground two (2) Trial counsel fif in fact threaten to abandon this petitioner during trial and did in fact reiterate with harsher language and continuing threats just befor the trial court judge, again, asked the defendant if he was going to testify in his own behalf. The defendant was under an existing and ongoing threat for his life by his attorney and could not answer the judge without loss of his only hope of continuing trial with an attorney. The prevailing norms that(People vs. Cox (1991) 53 Cal. 3d 618, 655) are referring to are for this purpose. No attorney would justify this offense against any defendant. This act is clearly out of the prevailing norms of trial counsel. The law is clear. No-one can force a defendant to or not to testify on their own behalf. For the Attorney General et al. to not concider this as ineffective assistance of counsel is preposterous in itself. No defendant should ever have to suffer this type of treatment from their lawyer. Criminal acts against a defendant by their attorney, especially during trial, must be considered to be outside of prevailing norms. There will be more on this later.

Both ground one (1) and ground two (2) demonstrate ineffectiveness by trial counsel.

Ground one (1) was deficient because a layer should know the law

that his client is being held to answer for. An attorney not knowing the law is detrimental to a defendant fighting for their life in a criminal court. This is a case of dereliction of duty to know and understand the law. Not knowing the law cannot be, in any way, a tactical decision. The prejudice shown here is the fact that the defendant received twenty-seven (27) years to life rather than twelve (12) years without a life sentence attached. This is not a shortcoming in the performance of trial counsel, it is a blatant failure of a defendant's right to counsel. An attorney who does not understa nd the law is not acting as an attorney that is guaranteed by the California and United States Constirution. The constitution is to assure that legal representation is provided to a defendant who needs legal representation, not merely to have a warm body next to them during trial.

Ground two (2) trial counsel did not say or do anything, whatsoever, to defend the defendant on the second set of charges he faced. The jury had nothing to debate. This United States Supreme Court (Citation) stated that "there is nothing more important that a defendant's testimony." In this case it was of even more importance. Trial counsel giving no defense for the second set of charges only left the jury with no option but to convict. There was nothing offered by the defense for the second set of charges, so without the defendant's testimony, the jury had nothing to debate (Citation). This must be concidered ineffective assistance of counsel. Furthermore, threatening to abandon the defendant in mid trial and then reiterating the threa t to tell the jury "that not even his attorney will stand up for him" cannot ever be considered professional conduct. Threatening to abandon the defendant during trial and continuing that threatthroughout trial is a violation of the law. An attorney

who does not defend his client during trial and forces, with threats, to keep the defendant from defending himself is ineffective assistance of counsel and is a violation of the California and United States Constitution to a degree of a criminal act against his client. Trial Counsel reasoned that the defendant would have been in a stressful situation and could not explain his behavior in front of the victim of this case. He forgets that "The cat was out of the bag." The defendant should have been able to explain his actions and deny others tothe jury. Trial counsel should have made an attempt to prepare the defendantfor taking the standand then made a decision with the defendanton whether or not to take the stand with those results, not using a phone call from years ago as his example. The prejudice here is that the jury had nothing to debate. No defense at all is the prejudice suffered here. No one will ever know what the jury would have done.

In (Nichols vs. Butler (1992) 953 F. 2d 1550) (11th Circuit Court) they declared that "an attorney who threatens to withdraw if defendant testified provided ineffective assistance" (Nichols). This right is personal to the defendant and cannot be waived eather by the trial court or by defense counsel" (Nichols). Professional Responsibility "A lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client including giving due notice tohis client, allowing more time for employment of other counsel and complying with applicable laws and rules" (Nichols). "Where trial has allready begun, the risk of prejudice tothe client from withdrawl of counsel is significant" (Nichols). "to coerce his client into remaining silent by threatening to abandon him mid-trial goes beyond the

bounds of proper adcocacy" (Nichols). "Where the very point of a trial is to determine whether an individual was involved in a criminal activity, the testimony of the individual himself must be considered of prime importance" (Nichols). "When the defendant testifies, the jury is given the opportunity to observe his demeanor and to judge his credibility firsthand" (Nichols). Furthermore, in (Nichols vs. Butler (1990) 971 F. 2d 518) (U.S. Court of Appeals for the Eleventh Circuit). "The violation was not harmless because the jury might have believed defendant's alibi testimony" (Nochols). This is a Federal Circuit Court case and not a California case. It is asked here, for this California Supreme Court to acknowledge this offense against the defendant and make new case law by ruling on this subject. Neglecting this ground is the acceptance and furtherance of criminal behavior by attorneys upon their clients.

FURTHER EXAMPLES OF INEFFECTIVE ASSISTANCE OF COUNSEL AND PREJUDICE FROM THE EVIDENTIARY HEARING

Ground one (1) Trial counsel has admitted, by a preponderance of the evidence, that he did not know the law. Within P.C. 288.7 (b) it states "as defined by P.C. 289." This is where the failure occures. The defendant had a copy of the Penal Code in jail and could not understand what the "as defined by P.C. 289" meant so he wrote down both Penal Code sections for his attorneys to explain to him the law. Although Co-Counsel, Davida Rosenthal, denied remembering this conversation at the West Valley Detention Center, it did in fact happen. Regardless of that, the fact that trial counsel could not grasp the law and argued it in two (2) motions to the court after trial is physical proof that he could not have given sould advice about the defendant's, actual risk of going to trial. The San

Bernardino District Attorney et al. and the San Bernardino Superior court, writ of habeas judge, Judge Tavill, have both tried to place the burden on the defendant for knowing and understanding the Penal Code and law since he copied sections 288.7 (b) and 289 word for word. It is the attorneys resonsability to know and understand the law not the defendant's. To place the burden on the defendant to understand the Penal Code would cancel out all respects to the California and United States Constitution's declaration for the need of an attorney. Placing the responsibility on the defendant to understand the law is against the spirit of the constitution's requirement for legal counsel. A defendant must be able to trust their attorney's interpretation of the law and must not be made the responsible party on the subject of the law.

With respect to ground one (1) This defendant was informed of the charges against him and he understood that he was facing two (2) life sentences from them along with other charges that could amount toan aditional twelve (12) years if convicted. However, trial counsel's explanation of the law and the showing of the police reports, to the defendant, that there was no evidence tosupport the two life charges and therefor the defendant understood that he was only facing the two charges that added up to twelve (12) years. The defendant was shown the evidence against him. That evidence, in the form of police reports and medical records, showed no "force, threats, duress, etc. or penetration in the evidence. Further proof of this is Trial Counsel's own hand writing on the police reports where he noted; no force, etc. and no penetration on them.

In the preliminary hearing the defendant, also, did not understand the process. He was told by trial counsel to "sit down and be quiet,

this will be over soon, it's just a formality." Again, placing the understanding of the legal system upon the defendant is against the spirit of the constitution's right to counsel clause. Furthermore, the defendant was held to answer for a second charge of 288.7 (b) on the second set of charges. However, there was no evidence of such an act presented to the court for that offense on the second set of charges. Trial counsel should have been paying attention and quashed that ground. The Attorney General et al. again wants to place the burden on the defendant to understand the law and the significance of a preliminary hearing, but that argument fails simply from a lack of evidence of any kind to support a conviction of P.C. 288.7 (b) during the preliminary hearing. It in fact was just a formality because of that. The defendant was held for a charge that the prosecution had no evidence tobe holding him for. No matter what was or was not said in the preliminary hearing, it was just a formality. So using that to show that the defendant knew the evidence against him and understand the ramifications of such a hearing is outlandish.

It is true, trial counsel gave no guarantee that the defendant could not be convicted. He was told that there was no evidence to convict. This case is on point with (in re Alvernaz (1992) 2 Cal. 4th 924). In the (Alvernaz) case, he was not given any guarantees, but recieved an improper description of the law. "Petitioner did not have a misconception as to the very nature of the proceeding and possible consequence" (Alvernaz). In (Alvernaz) this court, the California Supreme Court, rejected the defendant's contention that he would have accepted an offer if one were made. This Supreme Court, in (Alvernaz) uses the fact that he did not make a counter offer or

any offe r to the prosicution. Here in this case, the record shows that the defendant made a counter offer three (3) times to the prosicution. The three year counter offer from twelve (12) years was meaningful because the defendant believed that he was only facing a twelve (12) year sentence if convicted. The standard in (Alvernaz) is whether or not the defendant was "amicable" to accepting a plea from the prosicution, and not whether he would have taken the offered plea. Although a life sentence was hanging over the defendant's head, he understood that, because of no evidence to support a conviction on the two life charges, that he could not be convicted of them.

The Attorney General et al. is now pulling words out of conext when he writes that Trial Counsel,"Mr. Adler, testified he did not tell petitioner that section 288.7 (b) required proof of force, fear, or duress. (Resp. Exh. 11 at AGO-000396, 419.)" To contadict the Attorney General's et al. statement that "Adler testified he did not tell petitioner that section 288.7 subdivision (b) required proof of force, fear, or duress." Mr. Adler, said "no" and then quickly corrected himself with the fact that "I read him the instructions precisely as I read it out of the book." He is then asked again about force, etc. and he replies, "I cannot answer that question, I just don't know. I don't remember." Sadly Mr. Adler was in the late stages of dementia at the time of the evidentuary hearing, as noted by Judge Tavill in his denial of petition, and Mr. Adler was probably in disbelief of his condition at the time of the defendant's trial. The Attorney General et al. then quotes the trial instructions that were read to the jury toprove his point. However, by the time the jury instructions were read to the jury it was too late for the defendant.

Again, to furt her the fact that trial counsel did inform the defendantthat force, etc. were necessary and penetration was necessary, but there was no evidence to convict just look at the police reports and medical examination reports and you will see Mr. Adler's handwriting on them where he notes, ""no force" and "no penetration." This case is full of physical evidence to suport the defendant's contentions of ineffective assistance of counsel and nothing to counter or undermine that fact. The false knowledge of the law, by trial counsel, is the reson the defendant made the decision he made. He had no other information to go on. A defendant must be able to trust and believe his attorney when they explain the law and show them the evidence, or lack of evidence tosupport that law, against them when facing criminal charges and making decisions that will reflect the rest of their life.

This petitioner did not reject the prosicution's twelve (12) year offer, he countered that offer with a starting offer of three (3) years. To meet somewhere in the middle would have been appropriate to the defendant knowing he was only facing twelve (12) years. The fact that the defendant made a counter offer, multiple times, is "corroborated independently by objective evidence" (Alvernaz), and is proof that this petitioner was amendable to acceoting a plea from the prosicution as required in (Alvernaz). Again, the defendant was facing two (2) sets of charges. The first set of charges the defendant had an alibi and there was nothing given in the trial to suggest otherwise. The Attorney Genera l et al. using the writ of habeas corpus judge's words, Judge Tavill, contends that the defendant was "never willing to accept a reasonable settlement of the case." The standard is not "willing to accept a reasonable settlement," but whether the

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"defendant was amendable to acceoting a settlement" (Alvernaz). This defendant did not understand the actual possable sentence he was facing. Using the "never willing to accept a reasonable settlement of the case" cannot be graded because the defendant did not understand the real consequenses' of his case. Using that standard is an unrealistic holding of someone who has been misadvised to the strength of the prosicution'w case against him. The standard must be "amendable to accepting an offer" and thus avoiding trial.

The Attorney General et al. is also speculating that trial counsel wanted to settle the case. That is not true. He had been fully paid, well in advance, for trial and would have had to return the money that he had been paid for the trial above the cost of pretrial representation. Furthermore, trial counsel was being sued by two previous clients and had no money to pay the settlements. The same conditions, of these two clients, are similar to this case. Trial counsel failed to know and understand the law and failed to perform his duties as an attorney with a professional responsability. This Supreme Court declaired that Mr. Adler caused detrimental damage to his clients from failure to perform his duties.

GROUND ONE PREJUDICE

It is now argued that to establish prejudice, "a defendant must prove there is a reasonable probability that, but for counsel's deficent performance, the defendant would have accepted the profferd plea bargain and in turn it would have been accepted by the trial court" (Alvernaz). Point one has allready been established, by the defendant, by making a counter offer to the prosicution; the standard set in (Alvernaz).

The second point is of the possibility of the court acceoting

a plea offer from the prosicution has been established, in petitioner's writ, with data results from the department od Justice. The Attorney General et al. did not argue this data from the Departments of Justice.

The Attorney General et al. is pushing that "there was no ambiguity about what petitioner was accused of - both legally and factually - and was fully informed. (Resp. Exh. 11 at AG0000318.)" But there is ambiguity, of both the legal aspects and the facts of the petitioner's case. The writ of habeas corpus judge, Judge Tavill, stated, when commenting on the motion for new trial and sentencing memorandom, "constitute circumstantial and corroborating evidence that Mr. Adler may have been misinformed reguarding the meaning of the "as defined in section 289" language from subdivision (b) of section 288.7." Furthermore, Mr. Adler, in his letter tothe District Attorney of San Bernardino, stated that, in part, "no duress" "no evidence that (petitioner menaced the child nor was there evidence that he intemidated her." That notion that trial counsel did not request the CALCRIM for P.C. 289 is not true. He did request it to the prosicutor and the judge. That was near the end of the trial when he then informed the defendant that it was not going to be read tothe jury as an eliment of P.C. 288.7(b). However, after all of that, he still believed it to be so. Trial counsel later ergued that point in his motion for new trial, sentencing memorandom and to his letter to the District Attorney. Co-Counsel, Davida Rosenthal, although she denied it in the evidentuary hearing, did in fact inform the derendant, of the force, etc. requirements during a consultation at the West Valley Detention Center in San Bernardino. This was the only conversation that we had about that subject with her. All of the other times it was only with Mr. Adler, at the court house, down stairs in holding,

where we met over thirty (30) times, even though he testified that it was only a few times that we met there. Co-Counsel, Davida Rosenthal, never met with the defendant at the court house down stairs in holding.

GROUND TWO: TESTIFYING ON HIS OWN BEHALF

The fact that trial counsel violated the law, the constitution and moral judgement, when he threatened the defendant into not taking the stand in his own defense, is exactly what ineffective assistance is. Whether trial counsel "had strong beliefs that petitioner should not testify, and the "immense problems" with petitioner's possible testimony" (Resp. Exh. 5 at AGO 000165-166) means nothing for the point that a defendant has a constitutional right to testify, "even against trial counsel's advice" (citation). As to the points, that trial counsel uses to show his point of view, the cat was out of the bag. Remember, the defendant was facing two sets of charges, charged at different times, not one set. Yes, trial counsel was worried about the scond set of P.C. 288 (a) charges the defendant faced, but not the first set. However, trial counsel never said, nor did, even one thing to defendnthe difendant on the second set of charges he faced. "Without the defendant's testimony the jury had nothing to debate" (citation). That's the prejudice shown. Whether a defendant has an absolute tight to testify in his own behalf, or not, is meaningless when that person is under a current threat. Everyone has a right to not be robbed or assaulted. However, it happens all the time . It is well understood that you call for help, i.e. call the police, after the threat has passed. Trial counsel violated the defendant's right to testify in his own behalf and also failed to represent him on the second second st of charges he faced. The jury must have something to debate or there is no defense. No matter

trial counsel's reason, he had no right to threaten the defendant not to testify during trial. If he were so adept in his skills as an attorney, than he should have explained to the defendant that he would not allow him to testify in his own behalf well in advance, so the defendant could argue or replace the attorney befor trial. Furthermore, the defendant did not know that trial counsel had no plan to defend him on the second set of charges he faced. Although the defendant did inform trial counsel, in plenty of time, that he wished to testify, trial counsel waited until the jury was present to inform him otherwise. He knew that the defendant would not make a scene in front of the jury. Trial counselhad plenty of time to prepare the defendant but chose, instead, touse threats to persuade him to relent. Trial counsel stated in one of his letters that he "held no gun to the defendant's head." But that is exactly wha t he did. He held the defendant's life in his hands and used threats to get his way, just as criminals do. In (Nichols vs. Butler (1992) 953 F. 2d 1550, 1553) (11th Cir) "An attorney cannot threaten to withdraw during trial in order to coerce a defendant to relinquish his fundamental right to testify" (Nichols). Again, prejudice is shown by trial counsel's failure to defend his client and failing to a llow the defendant to defend himself. The jury must have something to debate (citation). This is not a harmless error. An attorney who does nothing to defend his client cannot be concidered effective and is therefor not harmless.

The Attorney General et al. ince again, wants toput all of the apples in one basket. There were two sets of charges, not one. He references the alibi. An alibi that is not in question. Multiple witnesses; employer, wife, victim's mother and father, along with

physical evidence; sign in sheet, medical reprt, and photograph provided by the prosicution during the father's testimony, the one who took and provided the photo, and the fact that the alibi was not chalanged in any was by the prosicution; cannot be combined with the second set of charges that were alleged to have occured "at dinner time!"

GROUND THREE JURY INSTRUCTIONS CALCRIM 207

It is undisouted that the petitioner and his wife were at the cabin on the dates provided by the prosicution. Here the Attorney General et al. uses (People vs. Richardson (2008) 43 Cal. 4th 959, 1027). However the (Richardson) case fails because it is off point. (Richardson) does not rely on an alibi for a defense and therefor is not relevent. In (People vs. Rojas (2015) 237 Cal. App. 4th 1298, 1304)(Rojas) fails because it is off point where he does not rely on an alibi. The Attorney General et al. claims that "there is no authority for the prposition that when a defendant offers a "partial" alibi, the witness must specify that the crime occured outside the period covered by the alibi" (People vs. Fortanel (1990) 222 Cal. App. 3d 1641.) This case is not on point because of the "vague" dates the witness declared. "The witness did not point to a particular day." Nore does the (fortanel) case set a specific time towhen the assault occured as this petitioner's case does. A "partial" alibi in (Fortanel) is for a set of dates that he cannot account for and not a specific date and time of an offense as this defendant's case is. In (Fortanel) he does not have an alibi for when the evidence showes the offense occured. In (People vs. Jennings (1991) 53 Cal. 3d 334 358-359) (Jennings) does not rely on the time but only the day of his offense. However, in (Jennings) it does state 'in part' "except

where time is a material ingrediant in the offense." And "when the prosic ution's proof establishes the offense occured on a particular day with the exclusion of other dates, and when the defense is an alibi or "lack of opportunity," it is improper to give the jury instructions using the "on or about" language."

In (People vs. Jones (____) 9 Cal. 3d at page 557) it says "it is error to give this instruction if the people's evidence fixes the commission of an offense at a particular time to the exclusion of any other time and the defendant has presented evidence of an alibi as to that particular time." Furthermore, it goes on with, the use note cautions the instruction is "improper if the evidence establishes two or more similar offenses upon either of which the jury might convict under a given count" (CALCRIM 207). In (People vs. Barney (____) 143 Cal. App. 3d 490), "however, if the defense is an alibi or, as here, lack of opportunity to commit the offense, the exact time of the commission becomes critically relivent to the maintenance of the defense" (Barney). "instruction which deflects the jury's attention from temporal detail may unconstitutionally impede the defense" (Barney). "The defendant is entitled as a matter of due process to have the time of the commission of the offense fixed in order to demonstrate he was elsewhere or otherwise disenabled from its commission" (Barney). In the defendant's case the time of the offenses is set by the witness and the second set of charges is set by, both, the witness and the defendant. The first set of charges is where the defendant has established his alibi. The witness, here, does not declare the time but describes the time; "late birds, morning, breakfast, befor skiing, pajamas, daylight, etc." and the defendant has a substantial alibi for that time, to include the

victim's parent's testimony, a photograph taken and provided by the father, the defendant's wife, petitioner's employer, and multiple documents from the employer for the time set by the evidence.

Again, the Attorney General et al. is combijing the two sets of charges into one. "Although petitioner offered an alibi defense for the mornings of January 11 and 12, 2014, the prosicution presented evidence that the crimes occured outside those times. Namely, petitioner's own statement during the pretext phone call in which he indicated he touched the victim in Big Bear during "dinner time."" The prosicution presented evidence of two sets of charges, one in the morning and the other at "dinner time." The instruction was not harmless. It allowed the jury to concider convicting the defendent outside the evidence. For a jury to disregard evidence, with permission to do so from the court, is the due process constitutional violation established here. The Attorney General et al. wants to tell stories about the jury and what they were thinking. "The jury rejected appellant's defense and concluded the crimes were committed by the petitioner in Big Bear that weekend demonstrating that the jury believed the victim regardless of the time descrepancy revealed by the evidence." "Petitione's own words in the pretext phone call establishes that he touched the victim during "dinner time." Once again, the Attorney General et al. has no justification to explain the first set of charges without combining the two sets of charges together. To reiterate, (CALCRIM 207 NOTES) "improper if the evidence establishes two or more similar offenses upon eather of which the jury might convict under a given count. The proof of this conflict of placing all charges in one set, insted of two, is another root for this argument. If the writ of habeas judge, Judge Tavil, the San

Bernardino District Attorney, the Attorney General et al. in the first informal response with the Appellate Court, and now the Attorney General et al. in this informal response, cannot distinguish between one and two sets of charges, then how can we expect a jury, who is not educated in the law and who does not read and live the legal system every day, to not also, be confused about this predicament? The reading of the (CALCRIM 207) "on or about" language was wrong. (People vs. Jennings (1991) 53 Cal. 3d 334, 358-359); ". . . it is error for the court to instruct that the prosicution need not specify." (People vs. Morris (1906) 3 Cal. App. 184, p. 463) ". . . it was in error to not instruct the jury to confine their concideration to the time that the prosicution's witness or evidence showed that the offense was committed." (People vs. Watts (1936) 18 Cal. App. 2d 20. 62 p. 1054) "The time of the alleged offenses were committed became material and it was the duty of the trial court to limit the jury to its concideration of the evidence totha period of the evidence." All three of those cases place the blame on the court for giving the "on or about language. Important note: The Attorney General et al. did not address this matter on whether this is a stautory fault of the court or not. I ask this court to please clerify this matter.

The Attorney General et al. claimes that this was a harmless error with respect to the instructions. He uses (People vs Alcoa (1992) 4 Cal. 4th 742) and (People vs Freeman (1978) 22 Cal. 3d 434). Both of these cases are off point because neither of these cases received the "on or about" language that could have caused the confusion and the disregarding of the evidence in question here. These two cases do not address the crux of this ground. The defendantunderstands that there is no requirement for the court to

read the alibi instructions tothe jury, but at the same time the jury must not be given instructions to disregard the alibi eather. That's where the fault rises from. The jury must not be given an out so thet can legally disregard the evidence. Not to hit a dead horse with a stick, but the Attorney General et al. once again combines the two sets of charges into one. "The lack of prejudice is understood by the extensive evidence of petitioner's guilt, including his admission during the pretext phone call." That phone call states two different times. "; was at work" and "at dinner time." There are two sets of chargeshere not one as the Attorney General et al. implies. Confusion is rampid in this case and must be corrected with proper jury instructions and not confusing ones.

A preponderance for proof that if the jury were to have heard the correct instructions that a different result could have been obtained as necessary to show prejudice. Judge Tavill, the writ of habeas judge, stated, "a fair reading of the trial testimony conferms that the defense established the molestation of jane did not occure at the time she erroneously recalled." This case had no time declared, but insted had the times described. "late birds, morning, breakfast, befor skiing, pajamas, daylight, etc." Judge tavil also commented on the fact that the jury followed the jury instructions correctly. If judge Tavill or the jury were to follow the alibi jury instructions, had they been given, the defendant would not have been convicted on the first set of charges. The question is, why didn't Judge Tavill follow the law when he decided the order to show cause from the original writ? He knew the law. The petitioner quoted them to him in his writ.

Lastly: "Because no charge can be more easily made and none more

difficult to disprove."(People vs. Neal (1948) 85 Cal. App. 2d 765, 195, p. 57): "Because of the recognised ease of conviction in a case of this kind, the courts are at pains to insist that a fair trial, in all respects, be accorded to the accused." (People vs. Adams (1939) 14 Cal. 2d 15, 495, p. 2d 146), (People vs. Burton (1961) 66 Cal. 2d 328): "Cases of this type, care must be taken to protect, fully, every legal right of the defendant." (People vs. Bentley (1955) 131, Cal. App. 2d 682, 281, p. 2d 1), (People vs. White (1958) 50 Cal. 2d 428, 325, p. 2d 985): This is a similar case to those cases. Therefor, the utmost "care must be taken to protect, fully, every legal right of the defendant." This defendant declares that a miscarriage of justice has occured, that the trial was fundamentally unfair, and trial counsel's multiple failures is the root of this.

CLOSING REMARKS

UNTIMELY PETITION

This writ of habeas corpus is not untimely. The petitioner followed the rules of not submitting successive writs. Successive writs are not alowed by the courts. The Attorney General et al. is proposing tha t the defendant should have produced three (3) separate writs, one at a time, as each one was denied by the reviewing court. That is preposterous.

SHOULD HAVE BEEN RAISED ON DIRECT APPEAL

The petitioner did try to have this ground raised on aopeal but appellate counsel refused todo so and informed the petitioner, to also, not rais that ground on appeal. This ground was, however, raised on a motion for new trial as in (in re Reno). This ground is fundamental to the defendant's right to a fair trial and must not be denied on a procedural fault. Procedural faults should not be used for denying a sig nifican ground, which would make one injustice to support another, a total failure of the justice system.

(People vs Tracy (1937) 18 Cal. App. 2d 444) "Where the record does not disclose any request made by the defendant for an instruction upon the subject of alibi, he may not for the first time present the point on appeal." I don't know if this case law doctrine has any relivance ninety (90) years later.

Ground one ineffective asstance of counsel

It is irrefutable that trial counsel, Franklin Adler, did not know the law and therefor could not have advised the defendant with any kind of sould advice. There is no evidence to prove that trial counsel understood the law with the exception of passing the Bar Licencing Exam forty (40) years prior. The burden cannot be placed

upon a defendant to know and understand the law, especially under the cercomstances of an attorney who could not understand it himself. There is no case law found to support the defendant must know and understand the law, let alone, above and beyond his attorney' capabilities.

GROUND ONE PREJUDICE

The disparity of twenty-seven years to life against a twelve year offer is the prejudice shown. This prejudice is on point with (Alvernaz) and is with similar conditions as well.

GROUND TWO INEFFECTIVE ASSTANCE OF COUNSEL

It is undisputed that trial counsel did not defend the defendant at his trial on the second set of charges and used threats to force the defendant to relinquish his right to defend himself as well. There can be no rational reason for this behavior by trial counsel.

GROUND TWO PREJUDICE

An attorney who failes toprovide a defense for a defendant, fails as an advocate as guaranteed by the California and United States Constitution. The prejudice is the failure to provide a defense and therefor sucuring a conviction, since the jury had no other choice but to convict. The defendant receiving a sentence to prison is the prejudice shown here.

GROUND THREE INEFFECTIVE ASSTANCE OF COUNSEL

The mistakes that trial counsel made were numerous. Not knowing the law, using threats to get his way, and not knowing about the CALCROM 207 notes where it says to not give this instruction when the defense is an aliby and when two similay charges are given at different periods.

CALCRIM 207

It is alleged the crime(s) occured on (or about) _____. The people are not required to prove that the crime(s) took place exactly on (that/those) day(s) but only that (it/they) happened reasonably close to (that/those) day(s).

CALCRIM 207 BENCH NOTES

The court has no soonte duty to give this instruction. This instruction should not be given: (1) when the evidence demonstrates that the offense was committed at a specific time and place and the defendant has presented defense of alibi or lack of opportunity, or (2) when two similar offenses are charged in seperate counts (People vs Jennings (1991) 52 Cal. 3d 334, 358-359) (People vs Jones (1973) 9 Cal. 3d 546, 557).

Trial counsel testified that he carried with him and read the CALCRIM to the defendant. Although trial counsel only testified to reading the CALCRIM that corresponds with the defendant's charges, this is proof that he did not read the CALCRIM 207 or even know about the CALCRIM 3400 alibi instructions. Trial counsel should have known about the CALCRIM alibi instructions and if he would have spent just a few minutes reading the CALCRIM 207 and CALCRIM 3400 then he would have never made this mistake.

CALCRIM , 3400 alibi

The people must prove that the defendant committed =====. The defendantcontends (he/she) did not commit (this/these) crim(s) and that (he/she) was somewhere else when the crim(s) (was/were) committed. The people must prove that the defendant was present and committed the crime(s) with which (he/she) is charged. The defendant does not need to prove (he/she) was elseware at the time of the crime.

If you have reasonable doubt about whether the defendant was present when the crime(s) (was/were) committed, you must find (him/her) not guilty.

DEFENDANT NEED NOT PROVE ALIBI, ONLY RAISE REASONABLE DOUBT

Alibi evidence need only raise a reasonable doubt that the defendant was not present at the scene of the crime. It is therefor error to instruct the jury (1) that an alibi must be proved by a preponderance of the evidence, (2) that the alibi evidence must convince the jury of the defendant's innocence, (3) that the jury must give less credit to the testimony of alibi witnesses, or (4) that the jury must give carful scrutiny or less weicgt to alibi evidence. (People vs. Costello (1943) Cal. 2d 760, 763. (135 p. 2d 14).

This case law brings the level of proof for the defendant to a lower standard then proof of innocence. This is all a preponderance of real evidence that trial counsel did not understand the law and what to do for the defendant's trial. He was in fact just a warm body. Although he defended the petitioner on the first set of charges all he really did was introduce evidence. He had no idea how to use the legal system to defend the defendant. With the exception of his Bar Association Licence he had no idea how to defend his client.

GROUND THREE PREJUDICE

This is a case of actual innocence. One peson's testimony against the surplus of testimonial and physical evidence must be concidered. It is understood that the jury is to determine the credibility of the witness, but physical evidence should have caused the dismissal of the first set of charges befor trial even began, To have been convicted on a charge where the court uses confusing methods to distract the jury's conciderations away from the efidence is prejudicial. For the court to inform the jury that they can step

outside of the time that the evidence shows is the injustice here, Remember there are two sets of charges here not one as has been shown here. Confusion is rampid in this case and must be corrected with proper jury instructions and not confusing ones. Recall that, Judge Tavill, the writ of habeas judge, stated, "A fair reading of the trial testimony confirms that the defense established the molestation of jain did not occure at the time she erroniously recalled." That alone should show that with proper legal counsel the results would have been different.

I the undersigned, say, I am the petitioner in this action. I declare under penalty of perjury under the laws of the state of California that the foregoing alligations and statements are true and correct.

David Sandstrom
DAVID SANDSTROM

APR 14 2024
DATE