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13 UNITED STATES COURT OF APPEALS
14 FOR THE NINTH CIRCUIT
15

17 SIRHAN BISHARA SIRHAN

18 Petitioner

20 v.

21 P.D.BRAZELTON, WARDEN, et al,

22 Respondent

No.: 15-55168

D.C. NO.: CV-00-5686-BRO (AJWx)

PETITIONER SIRHAN BISHARA
SIRHAN'S REQUEST FOR A
CERTIFICATE OF APPEALABILITY
UNDER TITLE 28 USC, SECTION 2253(C)

24 Comes now the Petitioner Sirhan Bishara Sirhan by his
25 undersigned counsel and files that his request for a Certificate
26 of Appealability ("COA") of the Order dated January 5, 2015 and
27 entered January 5, 2015 dismissing the Petition, and requests
28 this Honorable Court issue a COA, pursuant to Title 28, United

1 States Code § 2253 (c) (1) (B), and Rule 22 (b) Federal Rules of
2 Appellate Procedure. Rule 22(b) of the Federal Rules of
3 Appellate Procedure and Title 28 U.S.C. §2253 requires issuance
4 of a COA before an appeal may be heard of a denial of a petition
5 for relief under 28 U.S.C. §2255. Petitioner previously filed a
6 timely Notice of Appeal January 29, 2015 and entered January 29,
7 2015. Petitioner did not ask this Court to treat his Notice of
8 Appeal as a request for a COA as permitted under Rule 22 (b)
9 (2), instead he has elected to file this separate request which
10 is being filed in a timely manner.

11 The Antiterrorism and Effective Death Penalty Act ("AEDPA")
12 amended 28 U.S.C. 2253 to require that a Petitioner request a
13 COA instead of a Certificate of Probable Cause ("CPC") in order
14 to appeal the denial of a petition, unlike the procedure of
15 reissuance of a CPC, under the amended version of Section 2253,
16 the district court when granting the COA must indicate for which
17 specific issue or issues the Petitioner had made a substantial
18 showing of the denial of a constitutional right. 28 U.S.C.
19 §2253(c) (2), (3).

20 The Supreme Court in *Slack V. McDaniel*, 529 U.S. 473,
21 1205. Ct 1595, 146 L. Ed. 2d 542 (2000), held that in a Section
22 2254 or 2255 proceeding:

23 When a habeas corpus petitioner seeks to
24 initiate an appeal of the dismissal of a
25 habeas corpus petition after April 24, 1996
26 (the effective date of the AEDPA) the right
27 to appeal is governed by the Certificate of
28 Appealability (COA) requirements now found

1 at 28 U.S.C. §2253 (c) (1994 ad Svpp.111).

2 This is true whether the habeas corpus
3 petition was filed in the district court
4 before or after the AEDPA's effective date.

5 Subsection (c) as amended by the AEDPA, provides:

6 (1) Unless a circuit justice or judge issues a
7 Certificate of Appealability, an appeal may
8 not be taken to the Court of Appeals from;

9 (A) The final order in a habeas corpus proceeding
10 in which the detention complained of arises
11 out of process issued by a state court; or

12 (B) The final order in a proceeding under Section
13 2255.

14 (2) A Certificate of Appealability may issue
15 under paragraph (1) only if the applicant
16 has made a substantial showing of the denial
17 of a constitutional right.

18 (3) The Certificate of Appealability under
19 paragraph (1) shall indicate which specific
20 issue or issues satisfy the showing required
21 by paragraph (2).

22 In *Slack*, the Supreme Court explicitly laid out the test
23 that courts should apply in deciding whether to grant a COA,
24 both, as to claims dismissed by a district court on either the
25 merits or procedural grounds - **"Where a district court has**
26 **rejected the constitutional claims in the merits ... the**
27 **petitioner seeking a COA must demonstrate that reasonable**
28 **jurists would find the district court's assessment of the**

1 **constitutional claims debatable or wrong."** *Slack*, 529 U.S. at
2 484, 120 S. Ct. at 1604 (emphasis added)

3 Petitioner's petition and supporting Memoranda of law
4 raised such grounds.

5 The issues are:

- 6 **1. The Violation of Petitioner's Sixth Amendment Rights -**
7 **Ineffective Assistance of Counsel**
- 8 **2. The Denial of Due Process in Violation of Petitioner'S**
9 **14TH Amendment Rights**
- 10 **3. Petitioner's Actual Innocence**

11
12 **1. Ineffective Assistance of Counsel of Counsel**

13 The inadequacy of Petitioner's counsel is so blatantly
14 explicit that its rejection by the magistrate and the acceptance
15 by the court of this conclusion, is mind boggling. Petitioner's
16 counsel was under a federal, criminal indictment during the
17 entire trial. At the conclusion of the trial when Petitioner
18 was convicted and sentenced to death, it is undisputable that
19 that indictment went away - was not pursued.

20 The State, and the court below, asserts that Petitioner
21 waived any objections and accepted Grant Cooper as his counsel-
22 ignoring the vulnerability of the Petitioner who was advised by
23 the same conflicted lawyer that he was guilty, and the task was
24 to save his life; prevent a capital conviction. Petitioner had
25 no independent advice outside of this lawyer's contacts.

26 Given this history and context, which was set out before
27 the district court, it is necessary for this court to fully
28

1 understand what Petitioner's trial counsel did in his "defense"
2 of Petitioner.

3 A. He advised the court on January 6, 1969, that
4 he intended to assert the defense of diminished
5 capacity in an effort to avoid the first
6 degree murder charge and death penalty.

7 B. He stipulated to the authenticity of the
8 ballistics evidence introduced by the State,
9 especially People's Exhibit 47 - the alleged
10 neck bullet, without conducting any investigation.

11 C. He failed to investigate any other Possible
12 defense available to Petitioner.

13 D. He failed to move for a mistrial when the State
14 delayed the disclosure of the autopsy report.

15 The defense counsel, receiving absolutely no benefit for
16 Petitioner, on February 21, 1969, stipulated, without any
17 investigation, to the authenticity of bullets yet to be
18 introduced (RT3967). Most importantly, defense counsel's
19 stipulation was not made after a reasonable investigation, but
20 took, and accepted, at face value the State's contentions. Not
21 only did Petitioner's conflicted counsel refuse to conduct any
22 investigation before deciding that his client was guilty, but he
23 convinced Petitioner who had no memory of the specific events at
24 the time of the shooting, that he did it and that there was no
25 defense against the evidence against him. Specifically,
26 Petitioner stated, "I was told by my lead trial attorney, Grant
27 Cooper, that I shot and killed Senator Kennedy and that to deny
28

1 this would be completely futile." (Ex J Declaration of Sirhan
2 Sirhan 1:4-6, Aug 9, 1997).

3 Conflicted counsel Cooper's closing argument to the jury
4 constitutes the best evidence of ineffective legal
5 representation one could imagine.

6 On Guilt

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

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

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

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

21 **"You may say, "well, isn't this a case of direct evidence?**
22 **Don't we know from dozens and dozens of witnesses that this**
23 **defendant pulled the trigger that killed Senator Kennedy?"**
24 **That of course is direct evidence; there is no question about**
25 **that."** (RT 8563 emp. added) (One has to wonder what Trial
26 defense Counsel was sitting through in terms of the evidence he
27 supposedly observed.)
28

1 **"I wouldn't want Sirhan Sirhan to be turned loose as he is**
2 **dangerous, especially when the psychiatrists tell us that he is**
3 **going to get worse and he is getting worse. There is a good**
4 **Sirhan and a bad Sirhan and the bad Sirhan is nasty...we as**
5 **lawyers owe the obligation to do what we think is right to the**
6 **fullest extent of our ability but we also owe an obligation to**
7 **society. And, I, for one, am not going to ask you to do**
8 **otherwise than to bring in a verdict of guilty in the second**
9 **degree."** (RT 9567 emp. added)

10 **Intent/Diminished Capacity**

11 Guilt aside, defense Counsel, particularly in this case
12 with a wealth of psychiatric testimony (however, erroneous)
13 indicating some degree of mental illness, could have been
14 expected to focus on this mitigating factor. Petitioner did not
15 even get this benefit of his Counsel's argument. Please note
16 the following:

17 **"There must be a specific intent to kill in murder of the**
18 **first degree and murder of the second degree: and you will**
19 **recall that most of all of the defense psychiatrist said that**
20 **this defendant had the ability to form a specific intent to**
21 **kill. He had the mental capacity to form the specific intent to**
22 **kill."** (RT8585 emp. added)

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

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

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

5 At one point in his argument, Counsel had advised the jury:
6 **"Now in this case, on really the only issue you have before you,**
7 **that is as to whether or not this defendant had diminished**
8 **capacity. That's the only issue you have before you."** (RT 8561
9 emp. added)

10 He then proceeded, step by step, to eliminate the
11 possibility of the jury seriously considering the impact of any
12 potential diminished capacity on the defendant's ability to form
13 the intention to willfully and with premeditation murder the
14 Senator. He began this process by referring to Petitioner's
15 alleged writing in a notebook found in his room. There are
16 serious questions about the very legitimacy and origination of
17 those writings which threaten political leaders and the
18 government in general and the Senator in particular could only
19 have set an inflammatory atmosphere for the jury's mind. (RT
20 8571-8572)

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

25 Since we know what was motivating him we should not be
26 surprised, however disappointed we might be, that the
27 prosecutors and the Trial Judge, who were aware of the conflict
28

1 and who collaborated with the actions of defense counsel, were
2 not subject to sanctions.

3 Petitioner respectfully submits that the Magistrate and the
4 habeas Judge have no such excuse. The acquiescence of a
5 vulnerable, isolated defendant is no excuse or justification for
6 the abuse of process which has resulted in him being
7 incarcerated, now, for 46 years.

8 The truth has come home to roost. It is time to draw a line
9 under this decades old miscarriage of justice. Justice delayed
10 can indeed be justice denied but, it can also be justice
11 resurrected and redeemed. As my French colleagues, who have
12 reviewed this file say-*Les jeux sont faites*. The game is up.

13 The district court, basically, fundamentally, ignored
14 defense counsel's indictment which clearly underlays his
15 conflict and the resulting blatantly ineffective legal
16 assistance in violation of Petitioner's Sixth Amendment Rights.

17 The district court concedes that in *McQuiggan v. Perkins*,
18 the Supreme Court held that evidence proving actual innocence
19 may serve as a gateway for *Schlup* and have his constitutional
20 claims heard on the merits. (*Schlup*, 513 U.S. at 324) Actual
21 innocence may be found if it is more likely than not that no
22 reasonable juror would have found Petitioner guilty beyond a
23 reasonable doubt, and where post-conviction evidence undercuts
24 proof of guilt. See *Lee V. Lampert*, 653 F. 3d 929 (9th Cir.
25 2011)

26 Defense Counsel Cooper conducted no investigation on behalf
27 of his client and this insured the fact that evidence currently
28

1 being advanced on behalf of Petitioner was not considered by the
2 jury.

3 **2. The Brady and Strickland Due Process Violations**

4 The introduction of the bullet marked "DN" "TN" as the
5 bullet removed from the neck of the victim, instead of the
6 actual bullet removed by the medical examiner which was marked
7 "TN31", constituted the introduction of false evidence. The
8 collaboration of defense counsel - discussed *infra*-compounded
9 the *Brady, Strickland* violations.

10 The State's undisputed failure to disclose the autopsy
11 report, prior to trial, which revealed that the shooter was
12 behind Senator Kennedy and firing in an upward angle, Petitioner
13 was thus denied an opportunity to utilize available exculpatory
14 ballistics evidence and his uninformed concession by guilt was a
15 product of these violations. State's suppression of the fatal
16 bullet removed from the victim's neck and its delay in
17 disclosure of the autopsy report are not the only evidence
18 suppressed which violated Petitioner's right under *Brady*. The
19 State also suppressed evidence that more than eight bullets were
20 recovered at the scene. (See Ex. 80 to Petition Statement of FBI
21 Agent William A. Bailey, November 14, 1976)

22 The *Brady* criteria are clearly satisfied. The State
23 possessed and withheld evidence favorable to the defense and
24 with respect to ballistics evidence (*Supra*) replaced it with
25 substitute evidence by preventing the medical examiner from
26 being shown the neck bullet introduced into evidence because it
27 was not the one he removed and marked as "TN31" and he would have
28 so testified. Had the material evidence been available to the

1 judge and jury, there is every reasonable probability that the
2 outcome of the trial would have been different

3 **3.Actual Innocence**

4 Petitioner notes that it has taken the district court
5 nearly sixteen months to issue its decision. Petitioner contends
6 that the factual evidence of actual innocence is so explicit
7 even though the district court ultimately failed to acknowledge,
8 it, resulting in an erroneous dismissal without allowing
9 Petitioner's evidence to be heard under oath in an evidentiary
10 hearing.

11 The district court and Petitioner agree that in *McQuiggan*
12 *v. Perkins*, the Supreme Court held that proof of actual
13 innocence provides a gateway through which Petitioner may pass,
14 whether the impediment is a procedural bar or an assessment on
15 the merits, 133 S. Ct. 1924, 1928 (2013).

16 Petitioner agrees that with such possession of the facts,
17 the *Perkins* standard requires him to demonstrate that it is more
18 likely than not that no reasonable juror would have found him
19 guilty. *Lee v. Lampert*, 653 F. 3d. 929. 937 (9th Circuit 2011)
20 in accordance with *Schlup v. Pelo* 513 U.S. 298, 329 (1995).

21 Petitioner notes that both the Respondent and the district
22 court agree that under *Lee and Schlup*, if the evidence casts
23 doubt on the conviction by undercutting the reliability of the
24 proof of guilt, even if **not affirmatively proving innocence,**
25 **that can be enough to pass through the *Schlup* gateway to allow**
26 **consideration of otherwise barred cases. *Lee*, 653 f 3d at 938.**
27 Petitioner contends that this is the situation in the instant
28 case.

3.1 The Autopsy Report

The district court ignored the actual factual findings of the Medical Examiner. The victim, Senator Kennedy, was hit by four bullets fired at powder burn range from behind in an upward angle - meaning that the shooter was behind and beneath his target. Three bullets entered the Senator's body a fourth bullet went through his shoulder pad.

Every eyewitness places Petitioner in front (though with varying estimates of distance) of the Senator at all times. Further, significantly, multiple independent eyewitnesses confirm that Petitioner's shooting hand and gun were pinned to a table, out of his control, after he discharged a second shot. Petitioner does not deny that he fired a weapon that evening but does not remember how or why he did so.

Respondent and the court ignored the indisputable facts set out above. How could Petitioner have fired four powder burn shots into the Senator's body from behind and beneath the victim? No amount of chaos and turbulence could have put Petitioner on his knees behind the Senator to fire four upward shots. By focusing on the fatal head shot, fired about an inch from the Senator's right ear, aside from the logistical impossibility of Petitioner ever getting that close, the district court totally ignores the other three shots which, were indisputably fired with the weapon pressed against the Senator's body. However, inadvertent this omission must be rejected.

Even the most favorable witness statement for the prosecution, with respect to Petitioner's position, places him at least two feet in front of the Senator. Most agree with the

1 range of proximity being between five and seven feet. There is
2 absolutely no evidence that he was ever behind or facing the
3 back of the Senator.

4 **3.2 The Nina Rhodes-Hughes Declaration**

5 The district court's opinion in respect of the declaration
6 of Nina Rhodes-Hughes is, whether inadvertent or not, distorted
7 and inaccurate. In fact, Ms. Rhodes-Hughes states explicitly
8 that she followed Senator Kennedy into the pantry and was about
9 six or seven feet behind him when she heard sounds that she
10 thought, at first, were camera flash bulbs going off. She heard
11 two or three of those sounds - which clearly appear to be the
12 initial shots fired by Petitioner - and noticed that the Senator
13 did not appear to have been wounded by those shots, coming from
14 her left - Sirhan's direction. She noticed Rafer Johnson and
15 Rosie Grier running to this spot to her left joining other men
16 trying to subdue Petitioner. Then, though ignored by the
17 district court's opinion, she stated that she heard more
18 gunshots to her right where Senator Kennedy had been located.
19 She stated that three shots continued in a more rapid fire and
20 with a different sound. She then noticed that the Senator had
21 been shot, and she fainted, but only after she saw that the
22 Senator was down.

23 Nina Rhodes-Hughes said that, before fainting, she had
24 counted a total of between twelve and fourteen shots having been
25 fired from the two different locations. Petitioner is astounded
26 that Respondent, the Magistrate, and now the district court
27 judge has had the audacity to distort and otherwise ignore the
28 observations of this critical witness as it affects and

1 facilitates the actual innocence of Petitioner, and the fact
2 that it is more likely than not that, possessed of this evidence
3 and other evidence set out herein, that a juror acting in a
4 reasonable manner would not find Petitioner guilty beyond a
5 reasonable doubt.

6 **3.3 The Pruszynski Tape Recounting**

7 During the shooting, a reporter on the scene, Stanislaw
8 Pruszynski, inadvertently left his tape recorder on and, as a
9 result, clearly captured the sounds of the shots being fired.
10 In terms of qualifications and methodology, none of the
11 analyzing "experts" are no way near Petitioner's expert, Phillip
12 Van Praag. His analysis is detailed and explicit. The court
13 faults Petitioner for failing to exercise diligence in not
14 discovering and analyzing the tape earlier, but Van Praag, in
15 collaboration with Robert Joling, a Fellow and past president of
16 The American Forensic Science Institute, were able to analyze
17 the tape using technology and techniques not previously
18 available.

19 This analysis identified thirteen distinct "shot sounds" in
20 the tape (Ex. A Joling Decl.) (4: 25-27). Van Praag and Joling
21 have concluded that the sounds they heard were, in fact, gun
22 shots rather than, for example, balloons popping. Van Praag
23 states that the sound from a gunshot is caused by the vibration
24 of the weapon interacting with its mass. Bullets, because they
25 have a good deal of mass, resonate for a much longer period than
26 objects with a much lighter mass, such as balloons. He concluded
27 that the resonance he heard on the tape resonated for far too
28

1 long to be anything other than a discharged bullet, therefore;
2 he was certain that he heard thirteen distinct shot-sounds.

3 This determination clearly demonstrates the existence
4 of a second shooter since Petitioner's .22 caliber Iver Johnson
5 Revolver held eight bullets, and with his shooting hand pinned
6 to the table after the second shot, Petitioner was unable to
7 reload. This fact has never been disputed but is ignored by the
8 district court which to erroneously accept the assertion that
9 Petitioner was in control of his weapon when firing all eight
10 shots.

11 In addition, Van Praag's analysis is not limited to the
12 number of bullets fired. Rather, he also heard two sets of
13 "double shots" on the tape, i.e. two shots fired extremely close
14 together in time. The first set that Van Praag detected had a
15 separation of 149 milliseconds and the second set had a
16 separation of 122 milliseconds (roughly eight shots per second).
17 According to firearms experts, two or three shots per second is
18 fast. Using a precise model of Petitioner's low priced Iver
19 Johnson revolver, the Discovery channel in 2009 conducted a
20 rapid fire test. A noted firearms expert was used, and the
21 fastest two shot firing the expert could achieve was a shot
22 separation of 366 milliseconds, which clearly demonstrated that
23 Petitioner's weapon could not have been responsible for the
24 double shots, simply because he could not have pulled the
25 trigger in such rapid succession.

26 These forensic conclusions - ignored by the court - are, of
27 course, independently confirmed by the observations of Nina
28 Rhodes-Hughes as set out above. The district court relies on an

1 analysis of a dubbed copy of the tape by Phillip Harrison, which
2 appeared in a book and not under oath. Harrison allegedly
3 concluded that eight shots were fired. The court neglects to
4 state that Harrison did not have access to the advanced
5 technology utilized by Van Praag and Joling, was never sworn and
6 only quoted in a book with no follow up to give credibility to
7 the alleged conclusion.

8 Even though the court acknowledges the existence of
9 discrepancies amongst witness statements, it refuses to grant
10 Petitioner the obvious forum for their resolution - an
11 evidentiary hearing.

12 **3.4 Ballistics Evidence**

13 As discussed, *supra* Petitioner's counsel totally acquiesced
14 to the prosecution's position with respect to the ballistics
15 evidence introduced at trial. Defense counsel, incredibly,
16 conducted no independent ballistics investigation.

17 At trial, the State was allowed to put on its own witness
18 to testify about the critical bullet in evidence which allegedly
19 lodged in and was removed from the neck of the Senator.

20 The Medical Examiner, Thomas Noguchi, who actually removed
21 the neck bullet in the conduct of his autopsy, and who marked
22 the bullet "TN31", was not allowed to testify about this
23 procedure due to the collaboration of defense counsel and
24 prosecutor. Consequently, the State was allowed to introduce
25 into evidence by their witness, an alleged neck bullet which had
26 the marking "DN" "TN" whilst withholding from the defense the
27 actual bullet removed and marked "TN31" by the Medical Examiner
28 from the Senator's neck which he turned over to Sargent Jordan

1 of the LAPD. (Ex. D Mediocolegal Investigation on the Death of
2 Senator Robert F. Kennedy).

3 This would not have happened if Dr. Noguchi had been
4 allowed to identify the bullet he removed and marked going into
5 evidence. In the fact of this undisputed factual process, the
6 court below says that the issue raised by Petitioner in support
7 of his claim of actual innocence has been rejected previously,
8 and no merit is found in Petitioner's objections.

9 Petitioner submits that it cannot be argued with a straight
10 face that no reasonable juror, if confronted with these facts,
11 would accept the State's assertions as to this critical evidence
12 and the denial to the defense of the exculpatory evidence- the
13 actual bullet removed from the Senator's neck.

14 **3.5 The Hypno-programming of Petitioner**

15 Dr. Daniel Brown, a professor of clinical psychology at
16 The Harvard Medical School, spent seventy hours with Petitioner
17 administering standard tests, discussions under hypnosis, and
18 free recall, interview sessions. Dr. Brown is one of the world's
19 leading experts in hypnotic programming, a technique and
20 practice which has been developed and available to governmental
21 specialists throughout the world including the United States.

22 After these extensive sessions with Petitioner, Dr. Brown
23 concluded that Petitioner is highly suggestible and particularly
24 vulnerable to hypno-programming, and that on the night of
25 Senator Kennedy's assassination, Petitioner was, in fact,
26 responding to a hypnotic cue provided by a female handler who
27 attached herself to him at the Hotel. Dr. Brown states in his
28 declaration: "Mr. Sirhan did not go with the intent to shoot

1 Senator Kennedy, but did respond to a specific
2 hypnotic cue given to him by that woman to enter a
3 range mode, during which Mr. Sirhan automatically
4 responded with a flashback that he was shooting at
5 a firing range at Circle Targets. At that time, Mr.
6 Sirhan did not know that he was shooting at people,
7 nor did he know that he was shooting at Senator Kennedy.”
8 (Ex. 1 Brown Decl. at 8 10.1)

9 Dr. Brown’s analysis fully supports the notion that
10 Petitioner was in fact responding to a hypnotic cue on the night
11 of Senator Kennedy’s murder. Specifically, Dr. Brown concludes
12 that “(t)ouching Mr. Sirhan on his shoulder and/or turning him
13 around suggests an (sic) hypnotic cue to enter “range mode,” to
14 hypnotically hallucinate the firing range, and to fire
15 automatically upon cue.” Exhibit I, Brown Decl., at 14 ¶10.18.
16 Moreover, there is not a single shred of evidence to contradict
17 the account that Petitioner was in fact hypno-programmed.

18 The court rejects Dr. Brown’s conclusions as well as the
19 confirming opinion of Dr. Simon Kallas, the Department of
20 Corrections psychologist, who spent considerable time with
21 Petitioner after incarceration. Accordingly, Dr. Brown’s and Dr.
22 Kallas’ agree that Petitioner’s susceptibility to hypnotism,
23 combined with him being highly socially compliant, with a high
24 dissociative coping style, whi resulted in Petitioner being
25 manipulated and coerced to firing his weapon on the fateful
26 night. Professor Sheflin also provided a detailed history of the
27 development, use and reality of hypno-programming. In light of
28 this professional expertise the district court, without granting

1 an evidentiary hearing, dismisses the possibility, out of hand,
2 that if provided with this evidence, a reasonable juror would
3 have refused to convict. In addition, any reasonable juror would
4 have found it ludicrous that Petitioner's orchestrated statement
5 "I killed Robert Kennedy willfully, premeditatively, with twenty
6 years of malice aforethought" had any merit as the Petitioner
7 was twenty four when he made the statement. *Sirhan*, 7 Cal.3d at
8 720. Thus, Petitioner would have been four years old when he
9 began to have this "malice aforethought".

10 This statement is a prime example of Petitioner's
11 vulnerability and suggestibility but certainly cannot be taken
12 as a credible admission of guilt. The State and, now the
13 district court, confirm that Petitioner, as a four year old
14 harbored "malice aforethought" towards Robert Kennedy who,
15 himself, as a private citizen, would have only been twenty two
16 years of age. (Dkt. No.222 at 21.)

17 Petitioner contends that the gateway to *Schlup*, for
18 establishing actual innocence, has been satisfied and that
19 minimally this issue should be certified for review on appeal.

20 **Conclusion**

21 Wherefore, based on the foregoing arguments and authority,
22 Petitioner Sirhan Bishara Sirhan respectfully submits that he
23 has made a substantial showing of the denial of constitutional
24 rights as to all grounds set forth above and is entitled to the
25 issuance of a Certificate of Appealability as to all grounds.

26 Dated: February 3, 2015
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Respectfully submitted

William F. Pepper

Laurie D. Dusek

Attorneys for Petitioner

Sirhan Bishara Sirhan

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