

1 California Supreme Court held that "Where the reasons are not set forth in the minutes,  
2 the order dismissing may not be considered a dismissal under section 1385 [citations]".  
3 Orin, supra, at p. 944, quoting People v. Superior Court (Howard)(1968) 69 Cal. 2d 491,  
4 503.

5 In the instant case, the trial court's action cannot be properly characterized as  
6 a valid dismissal under section 1385. Before a court decides dismissal is appropriate  
7 under section 1385, the court must carefully evaluate the circumstances weighing the  
8 defendant's interests against those of society. Clearly that was not done in petitioner's  
9 case, as the trial court's primary objective in granting the motion to dismiss the first  
10 degree murder charge was to simplify the jury's task in finding petitioner guilty of  
11 second degree murder. This action by the trial court directly contradicted its  
12 instructions to the jury - requiring them to first unanimously find petitioner not  
13 guilty of first degree murder before rendering a verdict as to second degree murder as  
14 provided by CALJIC No. 8.75.

15 In addition, the trial court's decision to dismiss the greater offense in  
16 petitioner's case was clearly contrary to petitioner's right to a jury verdict free from  
17 judicial interference. Penal Code section 1385 was not intended to be used as a means to  
18 expedite jury deliberations and/or deny a defendant his right to have a jury decide what  
19 offense(s), in any, he is guilty of committing.

20 In the instant case, it was brought to the court's attention that one of the jurors  
21 ( juror number 4 ) was concerned about how long the jury would be held in petitioner's  
22 case without being able to unanimously agree upon a verdict - because that juror had a  
23 non-refundable airline ticket for the next day. Unfortunately, the trial court's desire  
24 for efficiency in petitioner's case overrode any consideration of petitioner's right to  
25 a fair trial. In fact, after dismissing the first degree murder charge and withdrawing  
26 it from the jury's consideration in petitioner's case, only minutes passed before the  
27 jury returned with a verdict of guilty as to second degree murder.

28 Petitioner submits that given the specific fact and circumstances as set forth

1 herein, the dismissal of the first degree charge in his case operated to deny him the  
2 right to a fair trial and the process of law. Accordingly, petitioner's conviction for  
3 second degree murder must be reversed and vacated.

4 Lastly, in an abundance of caution, petitioner contends that he was denied the  
5 right to effective assistance of counsel on appeal, in that even though petitioner  
6 requested appointed appellate counsel to raise the instant claims-counsel failed to  
7 raise said claim on direct appeal. Moreover, petitioner asserts that any delay in the  
8 filing of the instant petition is attributable to inadequate representation of appointed  
9 appellate counsel for failing to raise the claim(s) set forth herein on direct appeal.  
10 See Evitts v. Lucey, 469 U.S. 387 (1985); Delgado v. Lewis, 181 F. 3d 1087 (9th Cir.  
11 1999).

#### 12 ARGUMENT

#### 13 V.

14 PETITIONER WAS DENIED THE RIGHT TO A FAIR TRIAL AND  
15 DUE PROCESS OF LAW BY PROSECUTOR'S WAS UNFAIR WITH  
16 RESPECT TO THE DEMONSTRATION PRESENTED BY THE  
17 PROSECUTOR DURING EXAMINATION OF WITNESSES; AND  
18 KNOWING USE OF FALSE AND MISLEADING TESTIMONY, AND  
19 DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE  
20 A OBJECTION OR ADVISE TRIAL COURT AND/OR JURY OF  
21 SAID FALSE AND MISLEADING TESTIMONY.

22 The prosecutor used an unfair demonstration with respect to how the fatal wound  
23 could have been caused. This was in answer to petitioner's claim of self defense,  
24 this was clearly inappropriate. It was substantially more prejudicial than probative  
25 pursuant to Evidence Code section 352. It should have been objected to and then not  
26 allowed by the court. It constituted a violation of the fundamental Sixth Amendment  
27 right to a fair trial.

28 This particular case presented a number of very difficult factual questions and  
it was for the jury to determine based on the available evidence and not be influenced  
by a pantomime as to how the death may or may not have been cause. While this may  
not arise to quite the level of prosecutorial misconduct as in People v. Kelly (1977)



1 75 Cal. App. 3d 672, where there were 20 specific instances of misconduct, the  
2 allowance of the prosecutor to demonstrate the stabbing motion could only have  
3 served to mislead and confuse the jury. (See Dr. Jacobs report as (Ex "J")).

4 The prosecutor posed a couple of hypotheticals that lacked adequate foundation  
5 for Dr. Blackbourne. (R.T. P. 39, line 5, et seq). He grabbed a pen and, using one  
6 of the detectives, motioned as to how the injury was caused. Dr. Blackbourne had  
7 been testifying prior to this hypothetical concerning the nature of the wound but of  
8 course was clearly not in a position to give approximations as to how the injuries  
9 might have been caused. See (R.T. pages 36-40). This was clearly improper. The only  
10 thing that could be discussed were the depth and scope of the wound.

11 This carried over into the examination of the defense expert Dr. Eisele (See R.T.  
12 excerpt as (Ex "O") attached and incorporated herein by this reference) where again the  
13 prosecutor picked up a pair of scissors and then attempted to do a stabbing motion in  
14 order to demonstrate how the fatal wound might have been caused. This again should have  
15 been objected to and not permitted by the "court" because once again, Dr. Eisele was  
16 in a similar situation with respect to Dr. Blackbourne as they could not really  
17 speculate as to how the actual injuries were caused. Dr. Eisele was there simply to  
18 indicate that a person like petitioner with a prior injury to his arm could not have  
19 delivered such a blow and the expectation was that it would have been of a different  
20 shape. Therefore, the prosecutor is responsible for misconduct and petitioner would  
21 therefore request the court to grant a new trial as per Penal Code section 1181(5).

22 The prosecution theory that this killing was a first degree murder-either  
23 premeditated or committed by lying in wait-because Petitioner knew Land was an informant  
24 in narcotics case, seeking to have petitioner arrested for methamphetamine manufacturing  
25 This not only served to establish the type of motivation to plan a murder, but also acted  
26 to refute all the prosecution and defense evidence that Land sexually harassed  
27 petitioner's wife and friend, and provoked petitioner into a fight which Land dies.  
28 There, it was integral to the prosecutor's case, For any degree of murder, For the

1 prosecutor to prove that petitioner was a methamphetamine manufacturer who knew  
2 Michael Land was an El Cajon Police Department Narcotics Informant. (See 9 R.T. PP.  
3 940-952 [Prosecutor's Closing Argument]). In Reality, neither prosecution nor defense  
4 evidence lent any credence whatsoever to either allegation.

5 The prosecutor's open-ended offer of immunity to all but J.D. Fields (believed to  
6 have actively abetted the killing) was certainly not something common in murder case,  
7 (For their testimony against petitioner). Consequently, the not particularly consistent  
8 accounts of these witnesses tended to be visibly Colored to favor the prosecution;  
9 limit the Penal exposure of each witness; and protect J.D. Fields, who was at the least  
10 the son of a generous landlord who rented to parolees, David Frieese, Lavonne hampshire,  
11 Steven Schutt, Robert Sayre and as to Sarah Terry and Bonnie Fields, A lover and son,  
12 (See R.T. PP. 9-28).

13 Thus, while the prosecutor emphasized that these witnesses who handed the  
14 prosecutor petitioner's head were petitioner's friends, the operative word here is  
15 "were", because by trial these witnesses were mainly concerned with self-interest and  
16 the interest of those near and dear to them.

17 The review of their testimony conducted below establishes their bias/false and  
18 misleading testimony in favor of the prosecutor; the great extent as to which all were  
19 impeached on crucial and basic factual issues; and the fact that as many or more people  
20 depicted Land as carrying a knife, as attributed a knife to petitioner. Furthermore,  
21 none of the wildly varied statements of "planning" attributed to petitioner were taken  
22 as such by the jury, which did not agree there was a first degree murder. Thus,  
23 deference to the jury can only go so far in sustaining this verdict. In fact, the only  
24 rational inference from the whole record is that it cannot be clearly ascertained with  
25 any certainty what was said, and what occurred before after, and during the killing.  
26 Therefore, there was no solid evidence petitioner committed any homicide which could not  
27 be legally justified or excused.

28 In the instant case, petitioner's defense attorney, Sandra Resnick, received a copy



1 of the interviews and statements report prior to trial during the discovery process.  
2 For reasons unknown to petitioner, defense counsel never introduced these statements  
3 reports into evidence or utilized the findings contained therein in any manner. See  
4 Affidavits, Interviews and Letters from attorney Sandra Resnick "Discovery", attached  
5 hereto as EXHIBIT'S. "N"

6 PERJURED TESTIMONY:

7 At petitioner's trial, the prosecutor, Deputy District Attorney Daniel G. Lamborn,  
8 was well aware of the reports, letters and interviews conducted during the investi-  
9 gation. In fact, the prosecutor had in his possession a copy of "all the reports indi-  
10 cating the absence of any one seeing the "Fight" between Petitioner and Land, but chose  
11 to knowingly use the false and misleading testimony. After all, it was the prosecution  
12 who gave a copy of the discovery report to defense counsel during discovery prior to  
13 trial. However, neither the trial court nor the jury was ever made aware of this  
14 evidence nor the results contained therein. It seems that for some reason, "both" the  
15 prosecutor and defense counsel "chose" not to reveal the contents of these report's at  
16 petitioner's trial.

17 Instead, the prosecution chose to knowingly use the false and misleading testimony  
18 of these witnesses to obtain a criminal conviction in this case. At trial, Sarah Terry,  
19 David Friese and others were called as witnesses for the prosecution and "so-called"  
20 qualified as eye-witnesses to the events in this investigation. During direct examina-  
21 tion, by prosecutor Daniel G. Lamborn, the following testimony was elicited from witness  
22 Ms. Sarah Terry:

23 Question: "What did you do in your trailer?"

24 Answer: "I made sure my son was still sleeping,  
25 and then I heard Mike pull up and I  
WAS NOSEY."

26 Question: "By nose, were you looking outside  
27 your trailer?"

28 Answer: "Yes"

1 Question: "When you saw Mike pull up, would you  
2 describe that for us?"

3 Answer: "He pulled almost all the way up the  
4 driveway. He turned off his lights  
and parked behind Bonnie's camaro."

5 Question: "So as he's driving up the road, the  
6 headlights are on?"

7 Answer: "Yes."

8 Question: "He parks the car, turns off the headlights;  
9 is that correct?"

10 Answer: "No, He turned off the headlights before he  
11 pulled all the way up, I believe."

12 Question: "Okay, Turns them off and then stopped the car?"

13 Answer: "Uh-huh."

14 Question: "Is that a yes?"

15 Answer: "Yes."

16 See Reporter's Transcript page 142, attached hereto as EXHIBIT "O."

17 Prior to eliciting the above false and misleading testimony, the prosecutor  
18 actually solicited the following perjury from witness Ms. Terry, knowing the testimony  
19 to be false:

20 Question: "How light is it outside where you're looking?"

21 Answer: "It was pretty bright. almost a full moon."

22 Question: "Almost a full moon, was there any lighting  
23 around the trailers, as you recall?"

24 Answer: "My trailer was totally dark and Bonnie's trailer,  
25 she has a bright light on the outside of the  
battery room that was on."

26 Question: "The combination of that light, were you able to  
27 see what went on next?"

28 Answer: "Yes, fairly clearly."