3-24-2006

In Re: George A. Souliotes

Supreme Court for the State of California

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

Case No. S128395

In re GEORGE A. SOULIOTES,

Petitioner,

On *Habeas Corpus*

REPLY TO RESPONDENT'S INFORMAL RESPONSE

From the Decision of the Court of Appeal
Fifth Appellate District
Misc. Case No. F045003

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INTRODUCTION

With the ever-changing testimony of a single eyewitness and a non-existent motive, at Petitioner George Souliotes's trial, the State built its case around one piece of physical evidence – his shoes. The State convinced the jury that the science simply could not lie – that it could tell only one tale, the tale of Mr. Souliotes's guilt.

The newly discovered evidence presented to this Court regarding that crucial piece of evidence now tells a much different tale. In the face of this exonerating evidence, the State now argues that the shoes were not important at all. Despite the State's back-pedaling, however, the prosecutor's words at trial remain the same. The shoes indeed tell the tale – and this time it is a clear story of Mr. Souliotes's innocence.

In addition to presenting a newly discovered evidence claim, Mr. Souliotes brings the inter-related claims of ineffective assistance of counsel and violation of his right to consular assistance under the Vienna Convention. Unlike a typical claim of ineffective assistance, Mr. Souliotes does not ask the Court to divine what *might* have been had he been represented by competent counsel who presented witnesses in his defense. Rather, the hung jury in Mr. Souliotes's first trial shows the Court what *would* have been.

When defense counsel actually presented the jury with the witnesses he promised, when he challenged the prosecution's arson theory with more

than just cross-examination, when he presented live testimony concerning his client's finances and family – we know the jury did not return with a verdict of "guilty." Had Mr. Souliotes been given the representation to which he was entitled at his second trial, and had he been given access to Greek-speaking assistance without delay, the outcome would have been demonstrably different.

Mr. Souliotes deserved to have witnesses presented in his defense. He deserved to have an advocate who spoke his language. The recent technological advancements concerning the scientific evidence used to convict Mr. Souliotes highlight the grave injustice Mr. Souliotes suffered at his second trial. Accordingly, the Court must grant Mr. Souliotes's Second Amended Petition for Writ of *Habeas Corpus*.

ARGUMENT

I. RESPONDENT HAS FAILED TO REFUTE MR. SOULIOTES'S NEWLY DISCOVERED EVIDENCE CLAIM

A. Respondent Misstates the Standard for a Newly Discovered Evidence Claim

The parties agree that a *habeas* claim for newly discovered evidence may be brought where the "evidence casts fundamental doubt on the accuracy and reliability of the proceedings ..." Informal Response at 26, quoting *In re Clark* (1993) 5 Cal. 4th 750, 766; *People v. Gonzales* (1990) 51 Cal. 3d 1179, 1246.

Mr. Souliotes has presented new evidence to this Court concerning the medium petroleum distillates ("MPDs") found at the scene of the fire and subsequently on Mr. Souliotes's shoes. At trial, the prosecution argued that the MPDs linked Mr. Souliotes to the crime scene. Newly discovered evidence, however, conclusively demonstrates that the MPDs in the home and the MPDs on the shoes could *not* have come from the same source.

Respondent argues that this MPD evidence does not meet the standard for a newly discovered evidence claim because it does not "contradict eyewitness evidence" or "undermine the evidence showing petitioner's motive." Informal Response at 26-27. Respondent's cursory consideration of the MPD evidence fails to acknowledge the importance the prosecution placed upon the evidence at trial. Furthermore, Respondent's interpretation of the standard ignores the court's explanation in *In re Hall* that newly discovered evidence need not "specifically refute" "each bit of prosecutorial evidence." *In re Hall* (1982) 30 Cal. 3d 408, 423. Rather, the evidence must "undermine the entire prosecution case and point unerringly to innocence." *In re Clark*, 5 Cal. 4th at 766. Mr. Souliotes's evidence does just that.

As explained in Mr. Souliotes's opening brief, the only physical evidence the prosecution had at trial linking Mr. Souliotes to the crime scene was the presence of MPD residue on his shoes. The newly discovered evidence demonstrates conclusively that the chemical residue

found on items from the rental home could not have come from the same source as the chemical residue found on Mr. Souliotes's shoes. (Exh. B, ¶ 18.) The new evidence thus discredits the prosecution's evidence at trial which appeared to place Mr. Souliotes in the house at the time of the fire. Without this critical piece of scientific evidence, the prosecution's theory placing Mr. Souliotes at the scene of the fire is wholly undermined.

B. Respondent Mischaracterizes the Significance of the MPD Evidence at Trial

According to Respondent, the MPD shoe evidence "represents only a small part of the prosecution's case, and was by no means the strongest or most conclusive evidence pointing to petitioner's guilt." Informal Response at 28. Respondent drastically underestimates the importance placed on the evidence by the prosecution at trial. As Respondent points out, there was other evidence presented at trial – evidence that had nothing to do with MPDs or shoes. The State called an unreliable eyewitness with a constantly changing story. Monica Sandoval, the State's only eyewitness, initially described a vehicle vastly different from the Winnebago that she eventually identified, which was owned by Mr. Souliotes. (RT 5938-48.) Ms. Sandoval was also unable to make a positive identification at the line-up on the afternoon following the fire, and admitted that she did not get a good enough look at the perpetrator, but was suddenly able to identify Mr. Souliotes six months later at the preliminary hearing after seeing Mr.

Souliotes's photo in the paper several times. (RT 5887, 5890, 5952-53, 5995-98, 5960.) Ms. Sandoval faced criminal charges in January 1997 that were inexplicably dismissed. (RT 5864-65.)

The State also argued a financial motive theory that was full of holes. While the State implied that Mr. Souliotes set fire to his own house to collect insurance proceeds, testimony from the first trial established that Mr. Souliotes was financially secure and that there was virtually no monetary benefit to committing insurance fraud. (RT 3349-63.)

But, the one *scientific* piece of evidence that the State did have was the chemical residue found at the crime scene and on Mr. Souliotes's shoes. The MPDs tested by the DOJ were the one piece of evidence that seemingly could not be questioned. Despite what lingering doubts the jury may rightfully have had about Ms. Sandoval's dubious identifications or the State's perplexing and unsubstantiated motive theory, one single image remained burned into their collective minds: the image of George Souliotes's shoes covered with the same flammable substance found at the crime scene.

In its closing argument, the State emphasized the importance of the shoes to the case: "The most conclusive scientific evidence, on his shoes from wearing that morning, medium petroleum distillates. What set the fire? Medium petroleum distillates." (RT 9049.) The State ended its closing with what it believed to be its strongest piece of evidence, "I've

proven that it was an arson ... From that flows the rest. From that the finger of guilt points to the defendant. Doesn't point to the one-armed man. It points to George Souliotes because he's the one. **The shoes tell the tale.**" (RT 9050 (emphasis added).) While Respondent now understandably seeks to retreat from the shoe evidence it relied on at trial, it is simply false to claim that this evidence played anything other than a central role in the prosecution of Mr. Souliotes.

C. Respondent's Argument that MPDs Were Presented as a "Class of Substances, Not a Single Chemical" Is Disingenuous

By referencing the trial testimony of criminalist Sara Yoshida, Respondent argues that MPDs were presented at trial as "a class of substances, not a single chemical." Informal Response at 30. Respondent wholly ignores, however, how the MPD evidence was explained and argued to the jury. It is clear from the State's opening statement and closing argument that the jury was left with the distinct impression that the MPDs found in the rental home were the exact same substance found on Mr. Souliotes's shoes.

During its opening statement, the State explained to the jury,

> [The investigators] go inside the house. They find a pair of shoes that the defendant had been wearing earlier in the day and it hits with the hydrocarbon detector as well. So they take those shoes and they take them to D.O.J. D.O.J. says it has a medium petroleum distillate on it. *The same thing that was used to start the fire.*

(9 RT 5687-88 (emphasis added).) Again in the closing, the State emphasized the rarity of MPDs and implied to the jury that where they are found, they must come from the same source. The State noted,

> There was something else that was kind of unique, those medium petroleum distillates. We heard a lot about anything and everything could be a medium petroleum distillate. But again we have the theoretical possibilities, this academic kind of world and we have real life. Those firefighters go out to scenes all the time. They can tell the difference ... And in their experience these medium petroleum distillates were unusual, very unusual ..."

(RT 9033.) Furthermore, the State explicitly discounted the idea that MPDs could come from a variety of sources.

> Well, it could be shoe polish. Well, no, it can't be. Remember [DOJ expert] told us about that. You take it out of the can, just like Bruce Elliot said, when you open up the can maybe there's some ammonia in there right away, but eventually, poof, it's gone. The very nature of that stuff is for it to evaporate. [The DOJ expert] said she put shoe polish on the shoe and it tests for medium petroleum distillate. She leaves it out for a couple of days, tests it the same way, heating it, this big stuff about well, it could be the soles because you're melting it, you're burning it. No. We know the same thing in this case because later on when she retested the shoe that stuff was gone. It had evaporated ... It just so happened to be the shoes the defendant was wearing early in the day and it just so happens to be the same type of stuff that's found over at the house.

(RT 9033-34.)

At trial, the State argued strenuously to the jury that the MPDs found at the fire scene were the exact same chemical found on Mr. Souliotes's shoes. With only shaky eyewitness testimony and a questionable motive

theory at its disposal, the State placed an understandable emphasis on this scientific evidence, arguing that the shoes told the entire story – that they were, without question, the most important piece of evidence available to the State. Now, with that piece of evidence thoroughly debunked, Mr. Souliotes requests that the Court grant relief on the newly discovered evidence claim.

II. RESPONDENT HAS FAILED TO REFUTE MR. SOULIOTES'S CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL

A. Mr. Souliotes's Claim Is Timely

Respondent argues that Mr. Souliotes's ineffective assistance of counsel claim is untimely because over a year passed between the issuance of *remittitur* and the filing of Mr. Souliotes's initial *habeas* petition in the Superior Court. Informal Response at 24-26.[1] The standard for timeliness in non-capital *habeas* cases does not depend on a specified number of days, but rather on whether the petition was filed as promptly as circumstances allow. *See In re Stankewitz* (1985) 40 Cal. 3d 391. As explained in Mr. Souliotes's opening brief, Mr. Souliotes has been diligent in pursuit and presentation of his claim, and no substantial delay has occurred.

[1] Respondent notes in its Informal Response that the date of the Superior Court filing is unclear because Mr. Souliotes did not attach the petition as an exhibit. For clarification, Mr. Souliotes attaches the filed and endorsed copy showing the filing date of December 10, 2003 as Exhibit A to the accompanying Declaration of Randall S. Luskey in Support of Reply to Respondent's Informal Response, filed herewith.

Mr. Souliotes retained his present counsel, The Northern California Innocence Project and Orrick, Herrington & Sutcliffe LLP, in the fall of 2002. (Exh. T.[2]) Prior to that time, Mr. Souliotes was unable to evaluate his own claims adequately given his limited English and education. Such limitations have been recognized as good cause for delay. *See In re Saunders* (1970) 2 Cal. 3d 1033, 1040; *In re Spears* (1984) 157 Cal. App. 3d 1203, 1208.

Once Mr. Souliotes obtained counsel, they faced the overwhelming and time-consuming task of thoroughly reviewing the clerk's and reporter's transcripts from Mr. Souliotes's two trials. Mr. Souliotes's attorneys, on a *pro bono* basis, then conducted an in-depth investigation which included tracking down and obtaining declarations from each of the ten witnesses who testified on Mr. Souliotes's behalf at his first trial. California courts generally commend these sorts of *pro bono* engagements. *See, e.g.*, *Mowrer v. Superior Court* (1984) 155 Cal. App. 3d 262, 266 ("We admire and encourage these noble efforts and hope they increase."). If we wish to encourage these efforts in the future, the delay associated with the transition to new counsel must be excused. Given the volume of material and

[2] All references to exhibits are to the Declaration of Sasha Abrams in Support of Motion for Leave to File Second Amended Petition for Writ of *Habeas Corpus* unless otherwise noted.

witnesses involved, the time taken to file Mr. Souliotes's *habeas* petition is justified.

B. Respondent Cannot Refute Mr. Souliotes's *Prima Facie* Case for Ineffective Assistance of Counsel

The parties agree that a claim for ineffective assistance of counsel must demonstrate that: (1) the attorney's performance was so deficient that it fell below an objective standard of reasonableness; and (2) but for the deficient performance of counsel, petitioner would have had a more favorable outcome. *Strickland v. Washington* (1984) 466 U.S. 668, 687-88, 693; *People v. Benavides* (2005) 35 Cal. 4th 69, 92. Respondent is correct that trial counsel is afforded wide latitude to make strategic decisions, and that no one could function within a legal system that allowed for trial by hindsight or Monday morning quarterbacking. Mere words from trial counsel asserting that a reasoned decision occurred, however, are not sufficient to defeat an ineffective assistance of counsel claim. A decision that is wholly below the level of reasonable representation cannot be excused simply because an attorney decides to call it a strategy. Both the United States and California Constitutions protect criminal defendants from such callous inadequacy. *See, e.g., Siripongs v. Calderon* (9th Cir. 1994) 35 F.3d 1308 (mere assertion by the State that its decision not to mount a defense was "tactical" was insufficient where the "record ... does not contain any evidence from which it can be inferred that trial counsel's

decision ... was the result of an *informed*, tactical decision") (emphasis added).

1. Respondent Fails Adequately to Address the Impact Defense Counsel's Promises Regarding Dr. Myronuk Had on the Case

In his opening brief, Mr. Souliotes explained the detailed expert testimony from Dr. Myronuk which was promised to the jury by defense counsel. Opening Brief at 56-58. Respondent discounts these promises, explaining that "the jury learned about the expert's theory regarding the cause of the fire and learned the substance of his testimony during the second trial." Informal Response at 32. It is no secret, however, that the cross-examination of a prosecution expert does not carry the same weight or have the same impact as presenting one's own experts to answer hypotheticals and to explain various theories. The substance of Dr. Myronuk's theory was not presented with specificity, substantiation or persuasiveness through cross-examination.

The differences between the testimony of the expert witnesses on each side is stark. In the second trial, Dr. Myronuk's testimony would have countered the prosecution's arson experts on a number of key points. In response to the prosecution's arson theory that the perpetrator entered the home by prying open the sliding glass door from the back patio, Dr. Myronuk would have testified, as he did in the first trial, that there was no evidence of pry marks and that the door was double-paned and weighed

110 pounds such that someone attempting to pry it out of the frame would certainly have left a mark. (RST 3520.) Second, Dr. Myronuk would have countered the prosecution's theory that the fire was a liquid pour fire by showing how the patterns on the floors were instead caused by superheated liquid tar from the roof. (RST 3485.) Third, in response to the contention that the fire traveled from the garage into the kitchen, thereby demonstrating that arson could have started through the garage door, in the first trial Dr. Myronuk testified with extensive supporting documentation that the fire traveled exactly the opposite direction, from the kitchen to the garage. Finally, Dr. Myronuk would have bolstered the argument that a gas leak caused the fire with testimony about the abnormally intense burning in the vicinity of the stove, the potentially faulty brass flex hose connecting the gas line to the stove, and the various possible sources of ignition in the kitchen. (RST 3587.) His testimony would have stood in direct contrast to the prosecution's experts, who admitted that they had only ruled out the gas leak due to other evidence of arson. (RT 8641, 8791-92.)

The State's contention that "defense counsel was able to present [Dr. Myronuk's] theory to the jury" through cross-examination is undermined by the fact that this supposedly comprehensive presentation occupies a scant three pages of the trial transcript. (RT 8723-25.) All the jury learned through defense counsel's cross-examination of the State's experts is that another view existed. The State's experts, however, were given the

opportunity to look the jury in the eyes and discredit this view. Because defense counsel never called Dr. Myronuk to the stand, the jury never heard his theories first hand. Dr. Myronuk's testimony in the first trial takes up 361 pages of the transcript, and includes extensive testimony integrating various pieces of evidence with his theory. (RST 3468-3590, 3706-3945.) Defense counsel's cursory three-page summary of Dr. Myronuk's theory during the second trial – without any background, substantiation, or explanation upon which the theory is premised – is not a replacement for Dr. Myronuk's actual testimony. As the judge at the first trial instructed the jury, "[i]n resolving any conflict that may exist in the testimony of an expert witness, you should weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualification and believability of the expert witness, as well as the reasons for each opinion and the facts and other matters upon which it is based." (RST 4065.) At the second trial, the jury never heard this instruction because there was simply no defense expert ever presented to contradict the State's experts' testimony.

The amount of time spent by the prosecution discrediting the defense's phantom expert based on his failure to appear highlights the error committed by defense counsel in failing to call Dr. Myronuk as a live witness. The prosecution derisively referred to Dr. Myronuk repeatedly as "Waldo" (RT 9015-16), referencing the popular children's character

"Where's Waldo" who is notoriously difficult to locate. The prosecution also referred to Dr. Myronuk as "mythical Dr. Fire." (RT 9017.) And if the jury had any occasion to believe the mythical Dr. Myronuk's theories as presented through cross-examination, they surely did not after the State argued,

> You're supposed to judge the believability of the expert witness – how believable is Dr. Myronuk when you haven't seen him? ... Dr. Myronuk did not come to court and did not subject himself to cross-examination ... Is that very believable? Somebody that won't even come and answer questions. So under those instructions the Judge gave you, guess what. You can throw out everything that he says.

(RT 9020.) The State was able to effectively "throw out" Dr. Myronuk as the witness who didn't even show up, when, in fact, Dr. Myronuk was willing to testify, expecting to testify, and troubled when he wasn't asked to testify. (Exh. E.)

2. Respondent's Characterization of Defense Counsel's Decision Regarding Dr. Myronuk as Strategic Is Unreasonable

Respondent attempts to side-step defense counsel's failure to call Dr. Myronuk by suggesting that it was the result of a tactical decision. Informal Response at 33. Respondent claims that Dr. Myronuk, after all, was a "cheerleader" and defense counsel had observed him in their first trial "and they were in the best position to judge whether the witness was more helpful or harmful to their client's case." *Id.* While these things may be true, it is clear from defense counsel's opening statement in the second

trial that he had made the tactical decision to use Dr. Myronuk in Mr. Souliotes's defense. There is no other explanation for the repeated references to Dr. Myronuk's testimony and the promises made to the jury that they would in fact hear a theory of the case from the defense that did not include arson. By promising a crucial expert who never materialized, defense counsel unquestionably prejudiced the outcome of Mr. Souliotes's trial.

3. Respondent's Piece-Meal Attempt to Address Defense Counsel's Failure to Call Other Witnesses Ignores the Cumulative Effect of Such Error

In addition to Dr. Myronuk, defense counsel failed to call nine other available defense witnesses to testify on Mr. Souliotes's behalf during the second trial. Respondent addresses each of these witnesses one at a time in its Informal Response, arguing a variety of reasons as to why each individual was not crucial to Mr. Souliotes's defense. Respondent's strategy, however, ignores the cumulative effect that failing to call *any* witnesses had on the outcome of Mr. Souliotes's trial. Cumulatively, the actions of defense counsel indicate that they abandoned any viable defense of Mr. Souliotes.

As the court held in *Corona*,

> ... when trial counsel fails to acquire facts necessary to a crucial defense *or to follow the facts already in his possession* or to develop facts to which his attention is called ... his failure to raise a defense or defenses which could have been

> established by making the aforestated requisite efforts *cannot be justified by reference to trial strategy or tactics.*

People v. Corona (1978) 80 Cal. App. 3d 684, 706 (emphasis added). Indeed, the promise to call a witness and then the failure to do so indicates the *opposite* of a "rational, tactical" strategy, for there is no conceivable explanation of how such behavior could ultimately help Mr. Souliotes. Such a decision only served to "shock" and "anger" certain jurors. (Exh. O at 9.)[3]

Moreover, defense counsel's failure to call any defense witness from the first trial because of a belief that the prosecution had failed to prove its case indicates an unreasonable defense strategy. The prosecution presented a substantially similar case in the second trial. Defense counsel has no reasonable explanation for how a failure to call any witnesses would lead to a similar or better result for Mr. Souliotes.

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[3] Respondent argues that the juror interviews contained in Exhibit O, as well as the polygraph tests, are inadmissible evidence. This argument is premature. In petitioning the Court for an Order to Show Cause, Mr. Souliotes simply must plead adequate facts that allow the Court to make a preliminary determination that Mr. Souliotes is entitled to relief. *See* California Rules of Court Rule 4.551(c)(1) (2006) ("the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his ... factual allegations were proved"); *People v. Duval* (1995) 9 Cal. 4th 464, 474 (petitioner has the "burden initially to *plead* sufficient grounds for relief, and then later to *prove* them"); *People v. Romero* (1994) 8 Cal. 4th 728, 737-38. An evidentiary hearing, rather than the pleading stage, is the proper forum to determine the admissibility of evidence.

Taken as a whole, defense counsels' actions indicate that they had no strategy at all. The *Alcala* court considered counsel's ineffective assistance along with other errors which took place at the trial, such as the improper exclusion of certain witnesses by the court, holding that "the cumulative effect of these errors 'operated to deprive Alcala of a fundamentally fair trial.' ... even if no single error were [sufficiently] prejudicial, 'their cumulative effect may nevertheless be so prejudicial as to require reversal.'" *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893, citing *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211. The court found that the "cumulative impact of these errors goes to the heart of the prosecution's theory of the case and undermines every important element of proof offered by the prosecution against Alcala." *Id.* Similarly, the cumulative effect of defense counsel's failure to call a single defense witness from the first trial served to deprive Mr. Souliotes of a defense in this matter. The testimony that defense counsel failed to present would have attacked every aspect of the prosecution's theory of the case. The relative length of the jury deliberations at the two trials is illustrative of the impact defense counsel's failure to call witnesses had on the jury. At the first trial, the jury deliberated for three days before their deadlock vote was accepted. At the second trial, the jury deliberated for less than five and a half hours before returning their guilty verdict. (RT 9257, 9263.)

Respondent claims that Mr. Souliotes was not prejudiced by defense counsel's failure to call any witnesses to show the absence of a financial motive because none of these witnesses "directly contradict[ed]" the State's motive theory presented at the second trial. Informal Response at 35. Mr. Souliotes disagrees. The State presented Mr. Marks' testimony that Mr. Souliotes was "in dire financial straits." Informal Response at 35, citing at 7018-20. Several witnesses – including Shazad Contractor, Gary Nelson, Jill LeBlanc and Demetre Souliotes – testified during the first trial that, as of January 1997, Mr. Souliotes was financially secure. Memorandum of Points and Authorities in Support of Second Amended Petition for *Habeas Corpus* ("P&A") at 69-72. All were available to testify at the second trial (Exhs. F, J, M, and N) and defense counsel's decision not to present any testimony to refute financial motive is inexplicable.

The failure of defense counsel to present any witnesses from the first trial undermined Mr. Souliotes's defense and resulted in an improper jury verdict. For these reasons, Mr. Souliotes asks for relief on his second *habeas* claim for ineffective assistance of counsel.

III. RESPONDENT HAS FAILED TO REFUTE MR. SOULIOTES'S VIENNA CONVENTION CLAIM

A. Mr. Souliotes's Claim Is Timely

Though Respondent argues that Mr. Souliotes's Vienna Convention claim is untimely (Informal Response at 45), it was filed without substantial

delay. Delay is measured from the time Mr. Souliotes knew, or reasonably should have known, of "the information offered in support of the claim *and* the legal basis for the claim." *Bennett v. Muller* (9th Cir. 2003) 322 F.3d 573, 581, citing *In re Robbins* (1998) 18 Cal. 4th 770, 787 (emphasis added). While Respondent is correct that Mr. Souliotes knew that he was not a citizen of the United States at the time of his trial, he did not know of the legal basis for his Vienna Convention claim until the ICJ's *Avena* decision and the U.S. Supreme Court's subsequent grant of *certiorari* in *Medellin*. *Medellin v. Dretke* (2004) 125 S.Ct. 686; *Avena (Mex. v. U.S.)* 2003 I.C.J. 128 (Jan 9).

Respondent asserts that the passage of over four years between Mr. Souliotes's sentencing and the filing of his Vienna Convention claim makes his argument *per se* untimely. Informal Response at 45. California courts, however, do not impose a definite standard as to a minimum amount of time that constitutes a substantial delay. *Bennett,* 322 F.3d at 579-80. Mr. Souliotes's delay in filing his Vienna Convention claim should be excused because it was reasonable and explainable. *In re Harris* (1993) 5 Cal. 4th 813, 828 ("a petitioner seeking relief on habeas corpus need only file a petition without substantial delay, or, if delayed, adequately explain the delay"). Mr. Souliotes was diligent in the presentation of his claim once he realized its legal basis and the transition to new *habeas* counsel explains his delay in filing.

Respondent's timeliness position represents something of a Catch-22. When law enforcement officers or other State authorities disregard their obligation to notify a detained foreign national of his right to consular assistance "without delay," it is counter-intuitive to punish the foreign national for failing to assert that right immediately.

B. Mr. Souliotes's Vienna Convention Claim Is Not Procedurally Defaulted

Respondent cites *Breard* and argues that Mr. Souliotes's Vienna Convention claim is procedurally defaulted because it was not raised at trial or in his appeal. *See Breard v. Greene* (1998) 523 U.S. 371, 375. The ICJ's decisions in both *LaGrand* and *Avena*, however, postdate and contradict *Breard*, in holding that "procedural default rules cannot bar review of the petitioner's claim." *Avena,* ¶¶ 113-14; *LaGrand* (*F.R.G. v. U.S.*) 2001 I.C.J. 104 (Jun. 27). Recognizing the tension between the ICJ's *Avena* mandate and the *Breard* opinion, the U.S. Supreme Court has granted *certiorari* to resolve this impasse and will hear oral arguments in *Bustillo v. Johnson* (Nov. 7, 2005), 2005 U.S. LEXIS 8220, on March 29, 2006. At the very least, Mr. Souliotes raises this claim in his current petition as a means of protecting it for further review should the Supreme Court find such a claim viable and appropriate.

Additionally, Mr. Souliotes should be excused for not asserting his Vienna Convention rights during the trial or the direct appeal. Mr.

Souliotes spoke almost no English upon arriving in this country from Greece and he continued to struggle with language at the time of his trials and direct appeal. Mr. Souliotes's extremely limited understanding of the legal *system* combined with defense counsel's ineffective representation during his trials, explains why Mr. Souliotes was unaware of his Article 36 rights. Courts have previously found that such educational and access difficulties were good cause for delay. *See, e.g., In re Saunders* (1970) 2 Cal. 3d 1033, 1040. *Habeas corpus* represents the first forum in which Mr. Souliotes knew of the availability of a claim under the Vienna Convention. Procedurally barring him from raising such a claim is unjust.

Article 36 of the Vienna Convention does create an individually enforceable right to consular assistance. *See Avena*, ¶¶ 121-22, 153(9) (254A, 274A). Respondent correctly points out that some federal courts have ignored the *Avena* decision and found that the Vienna Convention does not create enforceable rights. Informal Response at 44. However, the Supreme Court has historically recognized that treaties create individually enforceable rights. *See, e.g., Owings v. Norwood's Lessee* (1809) 9 U.S. (5 Cranch) 344, 348 (Marshall, C.J.) ("Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected."). The Supreme Court looks to resolve this

conflict between the federal courts and the ICJ in *Bustillo* in the coming months.

C. Mr. Souliotes's Consular Notification Claim Is Cognizable in This Court

Respondent argues that Mr. Souliotes does not state any recognized basis for relief under the Vienna Convention because he did not inform the police he was a Greek citizen. Informal Response at 45. In fact, Mr. Souliotes did personally inform Detective Butler that he was a Greek citizen. (Exh. V, ¶ 7.) Additionally, Mr. Souliotes showed his wallet, containing his green card, to an investigating officer (Exh. W, pg. 7), and told the detectives that he was originally from Greece. (Exh. V, ¶ 5; Exh. X, pg. 3.) The detectives even discussed Mr. Souliotes's upbringing and childhood in Greece. (Exh. X, pg. 3.) The police had reason to know that Mr. Souliotes was not a United States citizen, and was thus subject to the protections of the Vienna Convention.

Respondent also alleges that Mr. Souliotes should have known to contact the Greek consulate on his own. Informal Response at 45-46. This claim is without merit. It is true that Mr. Souliotes was familiar with the existence of the Greek Consulate. However, knowledge of passport renewal procedures is entirely distinct from knowledge of international treaties. Respondent's argument also confuses the obligations imposed by

the Vienna Convention. It was the responsibility of the authorities to notify Mr. Souliotes of his rights under Article 36, not the other way around.

D. Respondent Misstates the Standard for Prejudice Under Article 36 of the Vienna Convention

While Respondent repeatedly asserts that Mr. Souliotes suffered no actual harm, Respondent ignores Mr. Souliotes's argument that he need not make such a showing to establish prejudice under Article 36. Mr. Souliotes need only demonstrate that (1) he did not know he had a right to consular assistance; (2) he would have availed himself of that right had he known of it; and (3) it was likely that the consulate would have provided assistance. *See, e.g., U.S. v. Rangel-Gonzales* (9th Cir. 1980) 617 F.2d 529; *Torres v. Oklahoma* (Okl. Cr. Sept. 6, 2005) 2005 OK CR 17, at *4. Mr. Souliotes has met that burden. *See* P&A at 94.

Respondent mischaracterizes Mr. Souliotes's prejudice claim. Mr. Souliotes is not claiming, as Respondent suggests, that California law *entitles* him to a Greek-speaking attorney. Instead, Mr. Souliotes contends that contact with the Greek consulate would have provided him with the language assistance and connections necessary to comprehend fully the gravity of the charges against him. *Id.* Mr. Souliotes was awakened at his house on January 15, 1997 and thrust into a legal system with rules and procedures entirely foreign to him. Mr. Souliotes never hired an attorney at any time leading up to his arraignment. Immediate consular access would

have put Mr. Souliotes in a better position to obtain legal and investigative assistance. For these reasons, Mr. Souliotes asks for relief on his third claim for denial of consular assistance.

CONCLUSION

The evidence which once provided the only credible link between Mr. Souliotes and the crime for which he is charged has been conclusively discredited. Winding his way through the labyrinth of an already convoluted foreign legal system, Mr. Souliotes was denied his constitutional right to competent counsel and his Vienna Convention right to consular access. The newly discovered MPD evidence establishes that Mr. Souliotes has indeed been trapped in a maze he should never have entered. Had he been provided the representation and guidance he deserved, such a miscarriage of justice would never have occurred.

For the foregoing reasons, and the reasons stated in Mr. Souliotes's opening brief, Mr. Souliotes respectfully requests that the Court grant his Second Amended Petition for *Habeas Corpus*.

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Dated: March 24, 2006

Respectfully submitted,

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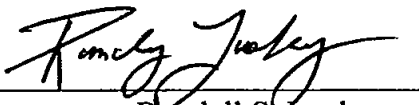

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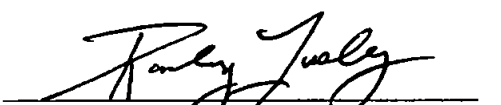
CERTIFICATE OF COMPLIANCE
WITH APPELLATE RULE 28.1(d)(1)

The undersigned hereby certifies that the foregoing Reply to Respondent's Informal Response, which was prepared on a computer word processing program, not counting the cover page, table of contents, table of authorities, this certificate, or the certificate of service, is 5,814 words in length, as determined by the word count function of the word processing program.



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