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Case No. 05-55665

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES FRANKLIN MURDOCH Jr.,

PETITIONER/APPELLANT,

v.

ROY CASTRO, WARDEN; BILL LOCKYER, ATTORNEY GENERAL, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

RESPONDENT/APPELLEE.

CASE NO. 05-55665

DC NO. CV 99-06900
RSWL Central District of California, Los Angeles

PETITION FOR PANEL REHEARING

AND

PETITION FOR REHEARING EN BANC

Seymour I. Amster, Esq.
State Bar No. 105308
Law Offices of Seymour I. Amster
6320 Van Nuys Blvd., Suite 300
Van Nuys, CA 91401

(818) 947-0104

Attorney for Petitioner

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INTRODUCTION

This is the second time this case has been before this court. The first time this case was before this court, this court in a published decision by the Honorable Stephen S. Trott, found that petitioner's sixth amendment right had been violated and remanded the matter back to the district court to review a letter.

This case is concerning a robbery murder that occurred in 1983. The case remained unsolved for nearly a decade, until a fingerprint found at the crime scene was matched to an individual named Dino Dinardo (hereafter "Dinardo").

To escape a life sentence Dinardo agreed to testify against petitioner. Dinardo had already been found guilty by a jury and sentenced to life without the possibility of parole when he made an agreement with the State to testify against petitioner.

After the trial against petitioner had begun and before Dinardo was to testify, it came to light, that Dinardo had written a letter exonerating petitioner. The trial court refused to have the letter published to trial counsel under the guise of the attorney-client privilege. Thus Dinardo was never confronted with his written statement declaring petitioner to have never committed a crime with himself.

Every court that has reviewed this matter has asserted that the prosecution's case was weak against petitioner. That without the testimony of Dinardo a conviction would not have been forthcoming against petitioner.

Recently a panel of this court made a decision in Murdoch v. Castro No. 05-55665 (hereafter "Murdoch II") that conflicts with this court's decision in *Murdoch v. Castro*, 365 F.3d 699 (9th Cir. 2004) , (hereafter "Murdoch I".) Consideration by the full court is therefore necessary to secure and maintain

uniformity of the court's decisions. FRAP 35.

In a reasoned decision this court, in Murdoch I, held that "a criminal defendant's rights under the Sixth Amendment may overcome a third party's assertion of the attorney-client privilege[1]. (*Murdoch I*, 365 F.3d at 706.)

This court deduced that the contents of the letter contained factual assertions which might provide impeachment evidence that would render Dinardo's testimony useless. (*Murdoch I*, 365 F.3d at 705.) In contemplation of the content of factual assertions to that effect, this court decided that the petitioner would be entitled to relief.

Thus this court remanded this matter to the district court to review the letter written by Dinardo that had been shielded from effective cross examination based on the assertion of the attorney/client privilege. The magistrate found that the letter was exactly as the court had predicted in Murdoch I.

The district court magistrate reported that "the letter contained "factual assertions regarding petitioner, Murdoch's (hereafter "petitioner") participation in the robbery-murder which were inconsistent with and which contradict Dinardo's trial testimony and Dinardo's statement to the police upon his arrest on June 30, 1994.[2]"

The magistrate further concluded that "it thus appears from the factual situation in this case that the (letter) is exactly as the opinion of the Ninth Circuit of Appeals speculated that it might be.[3]"

The magistrate found, however, that the letter lacked probative value and

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[1] The Murdoch Court ruled on the substance of the then unavailable letter.

[2] Decision Page 10, Record on Appeal page 51.

[3] Decision Page 14, Record on Appeal page 55.

exclusion was harmless error. The district court adopted that recommendation and in Murdoch II, a subsequent decision conflicted with the decision in Murdoch I. The dissent in Murdoch II remained consistent with this court's position in Murdoch I.

DISCUSSION

1. The Evidentiary Privilege Must Yield to Ensure Petitioner the Right to Engage in Effective Confrontation of the Witness Through Cross-Examination as Demanded by the Sixth Amendment; Denial of that Right was Injurious and Fatal to Petitioner's Defense.

The exclusion of the only evidence exonerating petitioner and revealing inconsistent statements made by Dinardo regarding petitioner's involvement derailed the greatest legal engine ever invented for the discovery of truth. Cross-examination earned that description in *California v. Green* , 399 U.S. 149, 158, 90 S.Ct. 1930 (1970), by virtue of its critical fact-finding function which equips the trier of fact with evidence sufficient to weigh the credibility of the witnesses.

Cross-examination was the only effective method of uncovering the untruthfulness of Dinardo's testimony about promises made during the unrecorded, one and one-half hour interview with the police. When Dinardo denied any promises in return for giving police the desired statement, exclusion of the letter reduced trial counsel's cross-examination to billowy inferences about his truthfulness that served to impeach Dinardo in a general and qualitatively inferior sense.

Our United States Supreme Court stated in the landmark decision previously cited that "[T]he cross-examiner is permitted to *delve* [emphasis added] into the witness' story to test the witness' perceptions and memory, [and] ...has traditionally been allowed to impeach, i.e., discredit, the witness." (See *California v. Green , supra,* 399 U.S. 149.)

Dinardo's story was double-sided. The statement made during the police interview was attributed to coercion by Dinardo in his letter. The flip side of the story was Dinardo's in-court testimony which excluded the coercion claim. The presentation of only one side of the story could not be classified as an opportunity to delve into facts that would glean impeachment evidence sufficient for the jury to evaluate the witness' credibility. The jury was robbed of the tangibility of impeachment specific to the statement in the letter, as general inferences served only to swat at the central issue. The only impeachment that would have given the petitioner a full and effective cross-examination was impeachment specific to the statement made in the letter which was probative to the extent that it directly contradicted Dinardo's in-court testimony. Without the letter, even success in establishing the existence of an aura of unreliability was ineffective. The proffered cross-examination bore sufficiently upon Dinardo's inconsistent statement which was the nucleus around which the weaker corroborating testimony was constructed. Nonetheless, counsel was restricted to some peripheral statements that went to general impeachment exploring the plea bargain and Dinardo's initial denial and his off the cuff implication of another person. The quality of a confrontation armed with only implication and inference was the equivalent of revving an engine in a car with no tires. It did nothing to advance the jury toward an informative assessment of Dinardo's credibility.

This court has recognized in *U.S. v. Adamson*, 291 F.3d 606, 609 (9th Cir. 2002), that "although the confrontation clause 'does not guarantee unbounded scope in examination,' *United States v. Lo*, 231 F.3d 471, 482 (9th Cir. 2000), it does guarantee 'an opportunity for *effective* cross-examination'."(See *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431 (1986.).)

The limited line of questioning to the exclusion of the letter allowed trial

counsel to merely nick at the superficial issues surrounding the central, inconsistency. The quality of the cross-examination was less than effective to guarantee petitioner's Sixth Amendment right to full and effective confrontation. *Murdoch I* correctly asserted, that general impeachment is inferior to impeachment based on a prior inconsistent statement. (See *Murdoch I*, 365 F.3d at 705.)[4]

2. Dinardo's "predictable denial" does not negate the appropriateness of cross-examination of his statement.

The majority in Murdoch II took issue with the statement at the end of the body of the letter, exonerating petitioner. Specifically, Dinardo ended the letter by saying: "Mr. Murdoch and I did not commit any crime." Dinardo concluded with what may be classified as a "predictable denial." However, that interpretation discounts Dinardo's knowledge that he was aware of the physical evidence which connected him to the crime. During the police interview with Dinardo, the police disclosed to him that they had found his fingerprint at the scene of the crime.

Another plausible, alternate interpretation is that the grammatical structure of the sentence was defective. In stating that he and petitioner, Murdoch, did not commit a crime, Dinardo does not affirmatively assert his innocence. He stops short of articulating such a denial outright. Even under the contrary interpretation, any such assertion does not warrant rejection of the entire letter, as the motivation associated with such a denial is proper fodder for examination.

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[4] It should be noted that the majority opinion in Murdoch II basically contradicts this opinion. Their position was that trial counsel did not need the letter because he was given a general opportunity to cross examine. It almost seems that the majority did not agree with the decision in Murdoch I and tried to find a way to reevaluate the wisdom of that decision with the issuance of another published decision on the issue.

For it has been determined by multiple decisions of this court in contradiction to Murdoch II that "[W]ide latitude in cross-examination is especially appropriate when the key witness is an accomplice of the accused." *Murdoch I*, 365 F.3d at 704 ; *Burr v. Sullivan*, 618 F.2d 583, 587 (9th Cir. 1980.); *United States v. Mayans*, 17 F.3d 1174, 1184 (9th Cir. 1994).

Furthermore it has been determined that the right to cross-examination is "especially important with respect to accomplices or other witnesses who may have substantial reason to cooperate with the government."(See *United States v. Mayans, supra*, 17 F.3d at 1184; *United States v. Onori*, 535 F.2d 938, 945 (5th Cir. 1976)).

The magistrate judge adopted the view that the statement was a denial of both Dinardo's participation in the crime and petitioner's and therefore the statement was at least *half false* in view of the physical evidence connecting Dinardo to the crime[5]. This should have led to the conclusion by the majority that the remaining one half truth contained in the letter was sufficient to raise a suggestion that all of Dinardo's testimony lacked credibility and should therefore, not be believed.

This is because this court has determined that "[A] prior inconsistent statement is admissible to raise the *suggestion* that if a witness makes inconsistent statements, then his entire testimony may not be credible." (See *U.S. v. Fowler*, 421 F.3d 1027, (9th Cir. 2005.) ; *United States v. Bao*, 189 F.3d 860, 865-66 (9th Cir. 1999) .)

The case at hand is practically identical to this court's decision in the case of *U.S. v. Adamson*, 291 F.3d 606 (9th Cir. 2002). In the *Adamson* case, the

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[5] See dissenting opinion Murdoch II @ page 7148 referencing the magistrate's recommendation.

defendant was found guilty by a jury. Upon review from that conviction this court found that by limiting his trial counsel from cross-examining a witness who was an accomplice a violation of the defendant's right to confrontation occurred and that violation of defendant's right to confrontation was not harmless error.

In *Adamson* , as in this case the witness made a plea agreement with the prosecution. The subject of disputed examination in the *Adamson* case was also a pre-trial interview which was inconsistent with the witness' in-court testimony. Specifically the *Adamson* trial counsel sought to introduce the witness' pre-trial silence during an interview which the jury might have found to be inconsistent with the witness' denial at trial, that he was not complicit in the wire fraud. This court found in *Adamson* that counsel's questioning was appropriate to impeach the witness' credibility and in fact, went to the heart of his credibility. (See *U.S. v. Adamson, supra*, 291 F.3d at 613.)

Even beyond the immediate taint of the witness' reliability relating to the veracity of their in-court statement, the court found that it raised doubt as to the reliability of his in-court testimony, and his out-of-court motivation to testify. (See *U.S. v. Adamson, supra*, 291 F.3d at 613.)

The *Adamson* case is not the only time a Circuit court has ruled in this manner. For the Eleventh Circuit has observed that, where the specter of a disciplinary action and a criminal prosecution hung over a witness's head until he told a official that the defendant was responsible for the alleged criminal conduct, evidence of witness' *prior failure* to implicate the defendant raised the possibility that the witness testified against the defendant solely to protect himself. (See *U.S. v. Sheffield*, 992 F.2d 1164, 1168 (11th Cir. 1993).)

Similarly, Dinardo's *prior failure* to remain consistent in his implication of petitioner raised an identical suggestion of an ulterior motive to give incriminating

testimony.[6] Only the letter provided a means of publishing this fact to the jury.

The solicitation of general impeachment evidence pertaining to Dinardo's conviction, his predictable denial, and his initial implication of someone else named Charles or Chuck provided no more insight to the jury than did the *Adamson* witness' statement "that's true." But the letter was a powerful tool of greater weight than his predictable denials, that would have eradicated the believability of his testimony.

The letter would have made his predictable denials ludicrous. Because the letter was a written admission that he lied to the police. Thus when did he lie when he talked to the police or in the letter? Either way one can only conclude he is a liar. How can a liar be believed beyond a reasonable doubt? Thus how could any jury have found petitioner guilty when the prosecution's entire case was built around the author of the letter? The contents of the letter were more believable than his testimony or his statements to the police. The letter spoke the truth. That he did not commit this crime with the petitioner.

Why is this stated? Because the letter was written at a time before he was sentenced to life and after his confrontation with the police. In other words the letter was written at a time when he had hope and was not beholden to the State. It was written at a time when he was not facing arrest, and at a time when he had not been convicted by a jury and sentenced to life.

The letter was written at a time when he had the motive to be truthful. For it was written at a time when he had hope. Hope that a jury would find him not guilty.

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[6] The reasons were based either on promises made by the officers during the unrecorded portion of his testimony, as documented in the letter or for other reasons logically deductible.

Thus when he wrote the letter he was not under the influence of the state. Neither by their prosecutors nor their police. Therefore his state of mind was different when he wrote the letter than at any other time he was questioned.

Thus not only were the contents of the letter important, but the state of mind when he wrote the letter was important. Trial counsel never had the opportunity to publish to the jury that Dinardo attested to petitioner's innocence at a time when he was not beholden to the state.

The publication of this fact would have counteracted Dinardo's implication of petitioner and would have given the jury balance and perspective to Dinardo's denials because it measured his desperation. On one end of the spectrum were the general denials, ranging all the way up to the desperate act of implicating a man and actually following through with his falsity as supported by sworn statements and testimony. On the other end of the spectrum was the exoneration of the same man when Dinardo had hope and a reason not to feel desperate.

In *Adamson* this court reasoned that the statement "that's true" would be meaningless to the jury for the purpose of assessing credibility and lacking in context. The witness' silence in addition to his statement "that's true" were found to be proper subjects for cross-examination and the former was excluded in error.

Just as the statement "that's true" was found meaningless to the jury for the purpose of assessing credibility and lacking in context, so too did the exclusion of the letter leave the jurors with an incomplete perspective. The letter was far more compelling than silence. The jury, in this case, would have been required to interpret the meaning of the letter in conjunction with the inconsistent statements made by the witness in the same manner that the jury as finders of fact would have been free to evaluate the witness' silence in the *Adamson* case.

There can be no question that the jury would have assigned great weight to

the letter. With the utilization of the letter the jury would have been free to reject or accept the whole or part of the testimony from Dinardo. Clearly they would have had no choice but to reject the testimony of Dinardo when it came to implicating petitioner. Exclusion of the letter denied the jury access to the information it needed in order to appraise Dinardo's biases , motivations, and truthfulness in regards to his testimony.

The evidence surrounding Dinardo was appropriately classified in a comment by the court. "the state's case was otherwise weak" and "cannot sustain Murdoch's guilt" (See *Murdoch I* 365 F.3d at 701,706.)

The assessment of the flaws, in the dissenting opinion in Murdoch II, afflicting the identification which formed the basis for the witness testimony was concise and succinct. The failure of one witness to identify petitioner in a photo line-up, the misidentification of the petitioner as the rifle-bearer, and finally the third witnesses equivocation during his testimony where he admitted he could not be positive of his identification; all combined to exalt the accomplice's testimony, Dinardo's testimony, to crucial star witness. Dinardo's accomplice testimony was essential to both rehabilitate the other witnesses and to solidify the State's theory. The impact of his testimony was therefore the foundation of the jury's verdict of guilt.

3. The Majority's failure to analyze this case under the standard enunciated in Brecht v. Abrahamson was clear error.

This court in Murdoch I, decided that the attorney-client privilege could not be used to infringe upon a defendant's sixth amendment right to cross-examination. That the state trial court erred when it allowed the attorney-client privilege to be utilized to prevent a defendant access to a letter written by a witness that could be used to cross examine the witness.

Even the magistrate concluded that the state courts' decisions concerning the

letter was "contrary to, or involved an unreasonable application of , clearly established Federal law, as determined by the Supreme Court of the United States. (*Murdoch II* at 7140.)

Even the magistrate went on to utilize the standard of review under *Brecht* to determine if the error was harmless or not. *(Murdoch II* at 7141.)

The majority in *Murdoch II* did not utilize the *Brecht* standard of review. They embarked on an analysis to determine if petitioner's Sixth amendment rights were violated by the exclusion of the letter without utilizing the *Brecht* standard of review. What standard of review they utilized is a mystery because they do not state what standard they utilize. What case law gave the precedent to utilize the mysterious standard of review that they utilized is also unfathomable , because they do not mention the cases.

The minority opinion clearly utilizes the standard of review as stated in *Brecht*. Utilizing this method the proper conclusion was reached. That being that the petition should be granted.

The standard of review for constitutional errors on habeas petitions was of course enunciated in the decision of *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993). The standard of review the Supreme Court stated to utilize in *Brecht* was of course the one proclaimed in the case of *Kotteakos v. U.S.*, 328 U.S. 750, 66 S.Ct. 1239 (1946).

Thus the error made by the state trial court of excluding the letter for purposes of cross examined should be reviewed under the standard that when "all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand" (*Kotteakos v. U.S.,supra,* 328 U.S. at 764.)

Furthermore if one cannot say, with fair assurance, after pondering all that

happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. *(Kotteakos v. U.S.,supra,* 328 U.S. at 764.)

Utilizing this standard there is no choice but to grant the petition. Clearly the error was of a substantial influence. For the utilization of the letter would have convinced the jury that Dinardo was a liar and his implication of petitioner was not believable.

For the cross-examination was not effective because exclusion of the letter foreclosed the opportunity to present the palpable extent of Dinardo's falsity. The jury was denied access to the factual tools needed to appraise Dinardo's truthfullness.

Because the general impeachment was not tethered to any concrete support, the inconsistency did not evolve into effective specific impeachment. As a result, the jury concluded that the defense inconsistencies were nothing more than the product of typical defense posturing.

Defense questions had to compete with the believability of the witness' testimony against petitioner. Because the exclusion of the letter resulted in the defense not having anything concrete to show that Dinardo was a liar. Only questions. But with the letter, trial counsel would have had more than questions to demonstrate Dinardo was a liar. He would have had a statement that contradicted Dinardo's statement to the police and his trial testimony.

Petitioner was prejudiced by his disadvantage in the "credibility contest"

that this court has described as significant. This limitation on cross examination was so complete that it amounted to a denial of the constitutional right of confrontation, which supports review based on whether the error was harmless. (See *U.S. v. Adamson, supra,* 291 F.3d at 614 ; *U.S. v. Harris*, 185 F.3d 999, 1008 (9th Cir. 1999.) ; *U.S. v. McKinney*, 707 F.2d 381, 385 (9th Cir. 1983.))

Error cannot be said to have not had a substantial influence where the witness was admittedly crucial to the government's case and the evidence went to the heart of the one bias that went unexplored. The testimony was not cumulative because there was no other piece of evidence that reflected an admission by Dinardo that he was falsely implicating petitioner.

More importantly, Dinardo's inconsistency would have reverberated throughout his whole trial testimony when he was *confronted* with the letter. Only then would the jury have facts adequate to assess his credibility and decide whether to disregard his testimony implicating petitioner.

The detective's denial that he coerced the witness was not conclusive. His proposed testimony denying that he coerced Dinardo would make the admission of the letter and Dinardo's inconsistent testimony even more crucial because the detective's testimony would prompt an adversarial response which would only properly be the inconsistent statement made in connection with the existence of the letter. "The confrontation clause guarantees that the prosecution's case will be subject to "the rigorous adversarial testing that is the norm of the Anglo-American criminal proceedings." (See *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 3163 (1990.)

CONCLUSION

The exclusion of the letter evidence violated petitioner's rights under the confrontation clause. "At the core of the Confrontation Clause is the right of every defendant to test the credibility of witnesses through cross-examination." (See *Boggs v. Collins*, 226 F.3d 728, 736 (6th Cir. 2000.)

Petitioner was prohibited from advancing to the point where he could poignantly confront the crucial inconsistency at the heart of the case against him. Cross-examination is the legal engine that is meant to move towards the discovery of truth but in this case it has driven the petitioner through an unfair trial and into prison for life without the possibility of parole.

The crime occurred in 1983 , the trial occurred more than ten years later. At the time of the trial Dinardo testified under the threat of a life sentence. When the police interviewed him he gave a statement under the threat of arrest.

If Dinardo testified at a new trial he would be able to testify beholden to no one. He would have no fifth amendment right, for he would have already have served his time for the offense. He would be free to tell the truth.

So doesn't justice require another trial in this case? What harm would the state be exposed to other than a financial one? If any of the other witnesses were not around it would not matter much. They were not that important any way. Besides they were effectively cross-examined and their testimony could be read in the record.

But in another trial Dinardo would be free to tell the truth, not give a statement under the threat of a life sentence or arrest. At another trial he could be questioned concerning the letter. It could be determined why he wrote it, it could be determined if it was the truth or his statement to the police was the truth.

As a society we should be concerned with the truth. Can anyone be

comfortable that the truth has occurred in this case ? How can one be where there are so many questions left unanswered ? What was the truth the letter or the testimony?

With so many questions left unanswered how can their be any faith in the verdict against petitioner? The failure of confronting Dinardo with the letter and hearing his responses is clearly an error that leaves grave doubt in the conviction. Thus this conviction cannot stand. This petition needs to be granted so a proper inquiry can be made to determine if Dinardo is telling the truth or not when he implicated petitioner.

Respectfully submitted,

SEYMOUR I. AMSTER
Attorney for Petitioner

05-55665

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES FRANKLIN MURDOCH, JR.,

Petitioner-Appellant,

v.

ROY CASTRO, Warden,

Respondent-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. CV-99-6900-RSWL
The Honorable Ronald S. W. Lew, Judge

OPPOSITION TO PETITION FOR REHEARING AND REHEARING EN BANC

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

KENNETH C. BYRNE
Supervising Deputy Attorney General

RAMA R. MALINE
Deputy Attorney General
State Bar No. 187923
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2287
Fax: (213) 897-6496

Attorneys for Respondent

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES FRANKLIN MURDOCH, JR.,

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Respondent-Appellee.

INTRODUCTION

On July 26, 2007, this Court directed Respondent-Appellee to file a response to Petitioner-Appellant's Petition For Panel Rehearing And Petition For Rehearing En Banc (hereafter "Rehearing Petition"), in which Petitioner requested rehearing of this Court's panel opinion in *Murdoch v. Castro*, 489 F.3d 1063 (9th Cir. 2007) (*Murdoch II*).[1/] For the reasons stated herein, Respondent respectfully requests that this Court deny Petitioner's request for rehearing as no point of law or fact was overlooked or misapprehended in the panel opinion. Fed. R. App. P.

1. Appellee-Respondent hereinafter refers to himself as "Respondent" and to Appellant-Petitioner as "Petitioner."

40. Furthermore, Respondent requests that this Court deny Petitioner's request for rehearing en banc as the panel opinion is not in conflict with any other case of this Court and these proceedings do not involve an issue of exceptional importance. Fed. R. App. P. 35.

ARGUMENT

THIS COURT SHOULD DENY PETITIONER'S REQUEST FOR REHEARING AS THE PANEL DECISION DID NOT OVERLOOK OR MISAPPREHEND ANY POINT OF LAW OR FACT, AND REHEARING IS UNNECESSARY TO MAINTAIN UNIFORMITY OF DECISION AND THESE PROCEEDINGS DO NOT INVOLVE AN ISSUE OF EXCEPTIONAL IMPORTANCE

Petitioner has failed to demonstrate that this Court overlooked or misapprehended any fact or point of law in its opinion. Furthermore, the panel decision does not conflict with a decision of the United States Supreme Court or of this Court thereby making rehearing unnecessary to secure and maintain uniformity of this Court's decisions. Petitioner fails to cite any cases, except for the two opinions generated as a result of this case, that are in conflict with the decisions in this case. Additionally, these proceedings do not involve an issue of exceptional importance. Finally, Petitioner's Rehearing Petition is mostly an attempt by him to reargue issues already decided against him.

A. Petitioner Has Failed To Demonstrate That This Court Overlooked Or Misapprehended Any Fact Or Point Of Law, And Panel Rehearing Is Therefore Inappropriate

A petition for rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(a)(2). The purpose of a petition for rehearing is very limited;

it is "to ensure that the panel properly considered all relevant information in rendering its decision." *Armster v. United States District Court*, 806 F.2d 1347, 1356 (9th Cir. 1986). A petition for rehearing is not designed to afford a party the opportunity to reargue its case. *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962).

During a majority of the Rehearing Petition, Petitioner is merely rearguing his contention that he was denied the right to effective cross-examination by exclusion of the letter written by Dino Dinardo. (Rehearing Pet. at 3-10.) Essentially, Petitioner is raising the same arguments which were already rejected by the panel majority. Petitioner perfunctorily mentions the standard for granting rehearing (*see* Rehearing Pet. at 1-3), but fails to develop his argument regarding whether the standard was met in this case. Accordingly, Petitioner's claim regarding why rehearing should be granted in this case should be rejected. *See Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1182 (9th Cir. 2001) ("Issues raised in a brief which are not supported by argument are deemed abandoned.").

Petitioner further claims that the panel majority's failure to analyze this case under *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) was clear error. (Rehearing Pet. at 10-13.) Petitioner is mistaken. The Court in *Murdoch II* found that there was no error. *Murdoch II*, 489 F.3d at 1069-70. Analysis done pursuant

to *Brecht* presumes that there was error. Under the *Brecht* "harmless error" standard, relief must be denied unless the habeas petitioner can show that the error caused actual prejudice. *Brecht v. Abrahamson*, 507 U.S. at 638. Logically, relief must also be denied if there is no error at all. There is no requirement that an appellate court discuss prejudice when no error is found. Petitioner has not cited any authority imposing such a duty. Thus, Petitioner's claim in this regard should be rejected.

As is evident from the foregoing, Petitioner has failed to demonstrate that this Court overlooked or misapprehended any fact or point of law in its opinion, and as such, his request for rehearing of the panel decision should be denied.

B. This Court Should Deny Petitioner's Request For Rehearing En Banc Because Rehearing Is Unnecessary To Maintain Uniformity Of Decision And The Proceedings Do Not Involve A Question Of Exceptional Importance

Rule 35 of the Federal Rules of Appellate Procedure provides: "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (a) en banc consideration is necessary to maintain uniformity of the court's decisions; or (b) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35; *see also United States v. Wylie*, 625 F.2d 1371, 1378 n.10 (9th Cir. 1980) ("[E]n banc hearings are disfavored."). The "function of en banc

hearings is not to review alleged errors for the benefit of losing litigants." *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) (en banc), citing *Western Pacific R Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 256-59, 73 S. Ct. 656, 97 L. Ed. 986 (1953).

Petitioner herein has not alleged, much less demonstrated, that the instant case is in conflict with any other cases of this Circuit. Instead, Petitioner asserts that rehearing is necessary to secure and maintain uniformity of this Court's decisions. In this regard, Petitioner claims that the decision in *Murdoch II* conflicted with this Court's decision in *Murdoch v. Castro,* 365 F.3d 699, 705 (9th Cir. 2004) ("*Murdoch I*"). (Rehearing Pet. at 1-3.) Petitioner misreads both these decisions, and accordingly his claim is erroneous.

In *Murdoch II*, this Court found that the law of the case doctrine applied as follows:

> The starting point of our analysis is thus the law-of-the-case doctrine, which "'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)).

> "This rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Id.* (quoting 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice 118 (1984)). "For the doctrine to apply, the issue in question must have been 'decided explicitly or by necessary implication in [the] previous disposition.'" *Milgard Tempering v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir.1990) (quoting *Liberty Mutual Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir.1982)) (alteration in original). [Footnote]

Murdoch II, 489 F.3d at 1067-68. Under the law of the case doctrine, "the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc) (*quoting In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996)).

This Court's decision that the law of the case doctrine applied demonstrates that the same law, not conflicting law, was used in *Murdoch I* and *Murdoch II*. Furthermore, this Court recognized the fundamental holding of *Murdoch I* that "under the right set of facts, Supreme Court precedent suggests the Sixth Amendment right to confrontation could support admission of the letter, even against a valid claim of attorney-client privilege. *Murdoch I*, 365 F.3d at

706." *Murdoch II*, 489 F.3d at 1068. Therefore, *Murdoch I* and *Murdoch II* applied the same legal principles involving the constitutional balance between the Sixth Amendment and the attorney-client privilege. Thus, *Murdoch I* and *Murdoch II* are not in conflict, as Petitioner claims.

Moreover, *Murdoch I* did not come to a decision regarding the withholding of the letter. *See Murdoch I*, 365 F.3d at 706; *Murdoch II*, 489 F.3d at 1066 ["Without knowing the contents of the letter, however, we could not make a determination of whether Murdoch's confrontation rights had been violated."] Instead, in *Murdoch I*, this Court remanded the case with the following instructions to the district court: "We instruct the district court to use its process to obtain the letter. Once the letter is obtained, the district court shall then determine in camera and as the court deems appropriate whether, as applied to the totality of facts in this case, the denial of access to Dinardo's letter resulted in an unconstitutional denial of Murdoch's Sixth Amendment right to confront witnesses." *Murdoch I*, 365 F.3d at 706; *see Murdoch II*, 489 F.3d at 1064. Therefore, in *Murdoch I*, this Court did not make a decision regarding whether exclusion of Dinardo's letter violated Petitioner's Sixth Amendment rights.

Pursuant to the remand order, the magistrate judge reviewed Dinardo's letter and found that "the exclusion of the letter from evidence did not

substantially diminish Murdoch's right to effective cross-examination." *Murdoch II*, 489 F.3d at 1067. This Court upheld that finding and agreed with the analysis of the magistrate judge stating: "Although we can imagine a letter of such probative value that its exclusion would render cross-examination constitutionally defective, *Dinardo's letter is not such a letter.*" *Id.* at 1069 (emphasis added). This Court then held: "In light of the low probative value of the letter and the otherwise effective cross-examination, we hold that Murdoch's constitutional right to confrontation did not require the disclosure of Dinardo's letter to Murdoch's counsel." *Id.* at 1069-70.

As is clear from the above, this Court in *Murdoch II* decided that Petitioner's Sixth Amendment rights were not violated by exclusion of the letter. However, this Court could not reach a decision on this point in *Murdoch I* due to the absence of the letter. Therefore, *Murdoch II* reached the ultimate question regarding whether Petitioner's Sixth Amendment rights were violated by the exclusion of the letter, whereas *Murdoch I* did not. It is clear that the *Murdoch I* and *Murdoch II* are not conflicting decisions as Petitioner claims. In fact, both decisions cite the same relevant legal principles regarding the balance between the Sixth Amendment and the attorney-client privilege. As to these two decisions, en banc consideration is unnecessary to secure or maintain uniformity of this Court's

decisions. *See* Fed. R. App. P. 35(a)(1).

Petitioner compares his case to *United States v. Adamson*, 291 F.3d 606 (2002). (Rehearing Pet. at 6-10.) However, Petitioner's case is distinguishable from the *Adamson* case. In *Adamson*, the defendant's brother (John) testified against the defendant (Richard) at trial. During cross-examination, the defense sought to impeach the defendant's brother by showing that he had implicitly adopted statements made by the defendant and that the defendant's statements during a previous interview were inconsistent with his brother's testimony at trial. *United States v. Adamson*, 291 F.3d at 611. The government objected on hearsay grounds. *Id.* at 611. The district court sustained the objection. *Id.* The district court further ruled that the defendant could impeach his brother only with statements that the brother himself had made during the interview, but excluded the defendant's statements under Federal Rule of Evidence 403. *Id.*

On appeal, the defendant contended that the district court violated his constitutional right of confrontation by prohibiting him from attacking his brother's credibility at trial. *United States v. Adamson*, 291 F.3d at 612. This Court agreed with the defendant "[b]ecause the trial court's rulings unnecessarily limited relevant, probative, and perhaps crucial evidence concerning the credibility of a key government witness." *Id.*

The *Adamson* case is inapposite to Petitioner's case. Initially, Respondent notes that this Court cited the *Adamson* case in its *Murdoch II* opinion and presumably already considered its applicability to the current case. *See Murdoch II*, 489 F.3d at 1068-1069. In any event, the *Adamson* court found:

> After entering into a plea agreement with the government, John testified that he and [the defendant] had fabricated the explanations that they had set forth at the HP interview. John's in-court testimony was therefore inconsistent with his prior silence at the HP interview. This inconsistency cuts to the heart of John's credibility: not only does John's prior silence cast doubt on the reliability of his in-court testimony, but it also raises questions regarding John's motivation to testify. (Citation.)

United States v. Adamson, 291 F.3d at 612. Therefore, "[b]y limiting the scope of the defense's cross-examination, the district court effectively precluded [the defendant] from attacking John's credibility and denied the jury access to the information it needed in order to appraise John's biases and motivations." *Id.*

Unlike the defense in *Adamson*, Petitioner's defense counsel was able to effectively cross-examine Dinardo without the letter. As this Court correctly found:

> . . . Murdoch's counsel was able, by effective cross-examination, to raise

doubts as to Dinardo's biases and motivations. Dinardo testified that his sentence was reduced to "about five years" in exchange for his testimony. He testified about his previous theft convictions, both before and after the robbery in question. He testified to prior inconsistent statements: that at the time of his arrest he initially denied any involvement in the crime; that he "would have said whatever it took to get out of custody" including "point [ing] out someone else" involved in the crime; that he pleaded "not guilty" at his own trial and "avoid[ed] responsibility" for the crime; and that his story had changed from earlier claims that the police had coerced his confession. Dinardo equivocated on the stand when confronted with prior inconsistent testimony: "I testified to that? ... I -- I can't remember testifying like that. If I could see it, I could probably remember." In sum, Dinardo's cross-examinations were effective.

See Murdoch II, 489 F.3d at 1069.

Unlike defense counsel in *Adamson*, Petitioner's defense counsel was able to impeach Dinardo with his prior inconsistent statements. Furthermore, Petitioner's defense counsel was able to attack Dinardo's credibility in spite of the exclusion of the letter protected by attorney-client privilege. Thus, unlike the defense in *Adamson*, Petitioner's trial counsel effectively cross-examined Dinardo.

In addition, Petitioner has failed to demonstrate that the instant case presents an issue of "exceptional importance." Fed. R. App. P. 35; *see* Rehearing Petition at 1-15. The instant case is extremely fact-intensive and the legal claims raised herein are unlikely to reoccur with any significant degree of regularity. *See Sony Electronics, Inc. v. United States*, 382 F.3d 1337 (Fed. Cir. 2004). Furthermore, as Judge Reinhardt observed in *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003):

> To rehear a case en banc simply on the basis that it involves an important issue would undermine the three-judge panel system and create an impractical and crushing burden on what otherwise should be, as Rule 35(a) suggests, an exceptional occurrence. See Fed. R. App. P. 35(a) ("An en banc hearing or rehearing is not favored . . . ."). According to statistics kept by the Clerk of the court, in 2002 this court decided 5,190 cases on the merits, more than 98% of which were finally decided by three-judge panels. These decisions are not measures of "rough justice," later to be refined by the en banc court. Unless they decide issues of exceptional importance erroneously, create a direct intra-circuit split, or unless the interests of justice require that the decision be corrected, the

opinions of three-judge panels should constitute the final action of this court.

Id. at 470 (J. Reinhardt concur. opn.).

Based on the foregoing, Petitioner has failed to demonstrate that en banc consideration is necessary to maintain uniformity of this Court's decisions or that these proceeding involve a question of exceptional importance, and as such, his request for rehearing en banc should be denied. Fed. R. App. P. 35; *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992).

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that this Court deny Petitioner's Request for Panel Rehearing and Rehearing En Banc.

Dated: August 15, 2007

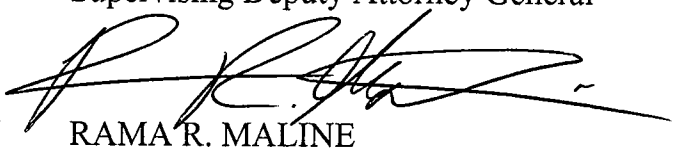
Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

KENNETH C. BYRNE
Supervising Deputy Attorney General



RAMA R. MALINE
Deputy Attorney General
Attorneys for Respondent

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