No. 07-7770

In the Supreme Court of the United States

CHRISTOPHER ADAM GEIER, *Petitioner,*

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
DONALD E. DENICOLA
Deputy Solicitor General
HOLLY D. WILKENS
Supervising Deputy Attorney General
ANDREW S. MESTMAN
Deputy Attorney General
Counsel of Record
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2458
Fax: (619) 645-2271
Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED

Whether the results of a DNA laboratory report, which represented the contemporaneous record of observable events made by a laboratory analyst, are a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006).

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STATEMENT

Respondent relies on the facts as stated in the California Supreme Court's opinion. *People v. Geier*, 41 Cal. 4th 555, 562-71. (Pet. App. A at 2-13.) In summary, in late 1990, Geier, a soldier stationed at Fort Irwin near Barstow California, raped and killed an acquaintance and fellow soldier, Erin Tynan, before taking a handgun from her closet.

Approximately one month later, Geier agreed to kill the ex-wife of his sergeant at Fort Irwin for proceeds from a life insurance policy. Geier and a recruited colleague drove to Louisiana where Geier shot Gail Lebouef in the face, using the gun he had taken from Tynan's apartment following her murder. Lebouef survived the shooting and subsequently identified Geier as the shooter.

Some two months later, Geier agreed to murder the husband of his sergeant's lover, Curtis James Dean, again in exchange for life insurance proceeds. On February 8, 1991,

while Dean slept, Geier and an accomplice beat and stabbed Dean to death. Dean was stabbed 38 times.

At trial, Dr. Robin Cotton, Laboratory Director at Cellmark, testified regarding the DNA analysis of semen found on a vaginal swab from Erin Tynan, Geier's first murder victim [1/], based on her experience and review of X-rays and the report and notes of Cellmark Biologist Paula Yates, who conducted the DNA analysis. 21 RT 5358, 5430-5431.[2/] Dr. Cotton had testified as an expert witness throughout the United States in various state and federal courts concerning DNA analysis. 21 RT 5268. Dr. Cotton indicated that as Lab Director she oversees and supervises all the scientific testing done in the laboratory, including the testing done by Yates. 21 RT 5260-5261. She testified as to the procedures and protocols of the Cellmark lab for conducting DNA testing, which were appropriately followed in this case. 21 RT 5358-5364, 5432, 5436-5437. She had studied the report prepared in this matter which she cosigned, as well as Yates' handwritten notes and X-rays taken during the analysis process. 21 RT 5430-5432. Dr. Cotton opined that the genetic profile from sperm present on the vaginal swabs taken from Tynan matched appellant. 21 RT 5446-5447, 5453. She further opined that the probabilities of a statistical match were one in every 5.7 million Caucasians. Using a more conservative calculation, the probabilities were one in 53,000. 21 RT 5453-5454. It was her opinion that Geier's DNA profile was rare. 21 RT 5453.

On July 21, 1995, a California jury found Geier guilty of the first degree murder and rape of Erin Tynan (Cal. Penal Code, §§ 187, subd. (a), 261, subd. (a)(2).), first degree

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1. The question presented has no bearing on the Curtis James Dean or Gail Lebouef cases.

2. The Reporter's Transcript of the trial is referenced herein as RT.

murder and conspiracy to commit the murder of Curtis James Dean (Cal. Penal Code §§ 182[1], 187, subd (a)), and conspiracy to commit the murder of Gail Lebouef. (Cal. Penal Code, §§ 182[1], 187) The jury found true "special circumstance" allegations that the murder of Tynan was committed while Geier was engaged in the commission of, the attempted commission of the crime of rape (Cal. Penal Code, § 190.2, subd. (a)(17)), that the murder of Dean was committed for financial gain, by means of lying in wait, and that Geier committed multiple murders. (Cal. Penal Code, §§ 190.2, subds. (a)(1), (a)(3), and (a)(15).) (Pet. App. A, at 1.) Geier was sentenced to death.

An automatic appeal to the California Supreme Court followed. Cal. Penal Code § 1239(b). In his appeal, Geier contended that admission of Dr. Cotton's testimony with regard to the Erin Tynan rape and murder violated his Sixth Amendment confrontation right as construed by the high court in *Crawford v. Washington,* 541 U.S. 36 (2004), because her opinion regarding the match between defendant's DNA and DNA extracted from the vaginal swabs was based on testing that she did not personally conduct.

The California Supreme Court affirmed the judgment and death sentence on July 2, 2007. (Pet. App. A, at 2, 84.) The California Supreme Court rejected Geier's claim that the admission of the DNA report through Dr. Cotton's testimony violated *Crawford v. Washington*, holding the DNA report was not testimonial for purposes of *Crawford* and *Davis v. Washington*, 547 U.S. 813 (2006). (Pet. App. A, p. 65-66.)

Geier's certiorari petition was filed with this Court on November 14, 2007, and was placed on the docket on November 21, 2007. He currently has a habeas corpus petition pending before the California Supreme Court.

REASONS FOR DENYING THE WRIT

THE CALIFORNIA SUPREME COURT'S DECISION THAT THE RESULTS OF A DNA LABORATORY REPORT WAS NOT A TESTIMONIAL STATEMENT IS CONSISTENT WITH THIS COURT'S HOLDINGS IN *CRAWFORD* AND *DAVIS*

Geier contends that state and federal courts are deeply divided by the question his petition presents, and that the California Supreme Court's decision is incorrect in holding that the results of a DNA laboratory report, which represented the observable events made by a laboratory analyst, are not a testimonial statement within the meaning of *Crawford*. Geier's reliance on a split of authority to support a grant of certiorari is misplaced. While all of the cases he cites in an effort to show a "significant" split of authority are post-*Crawford*, the majority of those cases are also pre-*Davis*. Accordingly, the petition fails to establish a percolated lower court dispute regarding admission of a laboratory report in the post-*Crawford* and post-*Davis* era. Moreover, here, the California Supreme Court correctly followed United States Supreme Court precedent in concluding that the DNA test results admitted through Dr. Cotton were not testimonial and therefore that its admission did not violate the Sixth Amendment of the United States Constitution. Further, this case is not an appropriate vehicle for this Court to further define what is "testimonial" under *Crawford* and *Davis*, because the issue is non-dispositive in the instant matter, and because there is second and independent death judgment, free from any alleged error. The Court should deny the writ.[3/]

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3. This Court has denied certiorari in several cases raising similar Sixth Amendment claims. See e.g. *City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005) *cert*

A. The Petition Fails to Establish That There Is a Percolated Lower Court Dispute Regarding Admission of a Laboratory Report in the Post-*Crawford* and Post-*Davis* Era

Geier contends that federal and state courts are "severely" split regarding whether scientific test results constitute testimonial evidence within the meaning of *Crawford v. Washington*. (Pet. at 6-9.) However, much of petitioner's authority predates *Davis*, in which this Court provided further clarification and guidance on determining what constitutes a "testimonial" out-of-court statement and therefore the need to resolve a conflict is illusory as there has been insufficient time since this Court's decision in *Davis* for the issue presented here to percolate in the lower courts.[4/]

Prior to *Crawford*, an unavailable witness's out-of-court statement against a criminal defendant was admissible if it bore "adequate 'indicia of reliability.' " *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). This test was met if the statement fell within a "firmly rooted hearsay

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denied, 547 U.S. 1071 (2006); *State v. Forte*, 629 S.E.2d 137 (N.C. 2005) *cert denied*,126 S. Ct. 557 (2006); *Napier v. State*, 827 N.E. 2d 565 (Ind. Ct. App. 2005) *cert denied*, 127 S. Ct. 1437 (2006); *State v. Craig*, 853 N.E.2d 621 (Ohio 2006) *cert denied*, 127 S. Ct. 1374 (2007); *State v. Campbell*, 719 N. W. 2d 374 (N.D. 2006) *cert denied* 127 S. Ct. 1150 (2007). Further, a similar issue is currently pending before this court in *Melendez-Diaz v. Massachusetts*, No. 07-591.

4. Ten of the 18 cases in section I of the petition cited to show the split of authority were decided before this Court decided *Davis v. Washington* on June 19, 2006 [see *State v. Crager*, 844 N.E.2d 390 (Ohio Ct. App. 2005); *City of Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005); *State v. Rogers*, 780 N.Y.2d 393, 397 (N.Y. App. Div. 2004); *People v. Lonsby*, 707 N.W.2d 610, 620-621 (Mich. App. 2005); *State v. Berezansky*, 899 A.2d 306, 312-313 (N.J. Super. Ct. App. Div. 2006) ; *State v. Forte*, 629 S.E.2d 137, 142-144 (N.C. 2005); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005); *State v. Dedmon*, 102 P.3d 628, 636 (N.M. 2004); *Rollins v. State*, 897 A.2d 821, 844-846 (Md. 2006) ; *State v. Lackey*, 120 P.3d 332, 348-352 (Kan. 2005).] Pet. at 6-9.

exception" or bore "particularized guarantees of trustworthiness." *Ibid.* *Crawford* abandoned this approach to such statements, however, and held that testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the confrontation clause unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 59.

In *Crawford v. Washington*, 541 U.S. at 43, this Court traced the historical origins of the Confrontation Clause. It determined that the principal evil to which the Confrontation Clause was the use of ex parte examinations as evidence against the accused. "The Sixth Amendment must be interpreted with this focus in mind." *Crawford*, 541 U.S. at 50.

The Court acknowledged three "formulations" that might define the core class of "testimonial" statements: (1) ex parte in-court testimony or its functional equivalent – affidavits, custodial examinations, prior testimony or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions"; and (3) "statements made under circumstances which would lead an objective witness to believe the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51-52.

Leaving the definition of "testimonial" to another day, the Court held that the term applies to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations, which are the modern practices most closely resembling the abuses the Confrontation Clause meant to resolve. *Crawford*, 541 U.S. at 68.

On the other hand, *Crawford* made it clear that "not all hearsay implicates the Sixth Amendment's core concerns," *Crawford*, 541 U.S. at 51. In discussing whether historical sources supported the conclusion that there were exceptions to the general rule of exclusion of hearsay evidence, the Court noted that most of the hearsay exceptions covered statements that were not "'testimonial,'" such as business records. *Crawford,* 541 U.S. at 53-56.This Court made it clear in *Crawford* that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ." *Crawford*, 541 U.S. at 50-52.

Davis consolidated two separate domestic violence criminal convictions, *Davis v. Washington* and *Hammon v. Indiana*, and presented this Court with the opportunity to further define "testimonial statements." *Davis*, 126 S. Ct. at 2273. In *Davis*, the relevant statements were made to a 911 operator from an alleged victim of a domestic disturbance. *Davis*, 126 S. Ct. at 2271. In *Hammon*, police responded to the scene of a domestic disturbance where they contacted the defendant and his wife. The defendant and his wife were separated by the police, the wife was asked specific questions regarding what happened between her and her husband, and the police had her fill out and sign an affidavit. *Davis*, 126 S. Ct. at 2272-73.

This Court held that statements are nontestimonial when made in the course of a police interrogation where the circumstances objectively indicate the primary purpose of the questioning is to enable the police to meet an ongoing emergency. Statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 126 S. Ct. at 2273-74. The

Court reiterated that the "perimeter" of the group of statements which fall under the prohibitions in the Confrontation Clause are those which involve a "solemn declaration or affirmation made for the purposes of establishing or proving some fact," and include a formal statement made to a government officer. *Davis*, 126 S. Ct. at 2274-75.

Davis clarified aspects of the *Crawford* decision and further introduced another factor to consider on the question of what constitutes a "testimonial" out-of-court statement, pertaining to the circumstances under which the statement was made. The bulk of authority petitioner cites to show a conflict was decided without benefit and guidance of the *Davis* case and thus these cases did not necessarily consider the circumstances under which the statement was made, such as whether or not the statement described a past fact, or contemporaneous observation, in reaching their respective conclusions. See, e.g., *State v. Crager*, 844 N.E.2d 392, 397 (2005) ("Lab reports and DNA reports prepared by BCI are generally prepared and kept in the course of a regularly conducted business. However, such reports are prepared wholly in anticipation of litigation. As such, while these reports fall within the general parameters of the business records exception, we find that the fact that these reports are prepared solely for prosecution makes them testimonial.") Thus, the need to resolve a conflict alleged by petitioner is illusory as there has been insufficient time since this Court's 2006 decision in *Davis* for the issue presented here to percolate in the lower courts. Consequently, the petition should be denied.

B. The California Supreme Court's Decision in *People v. Geier* Is Consistent With This Court's Jurisprudence

On appeal to the California Supreme Court, Geier contended that admission of Dr. Cotton's testimony violated his Sixth Amendment confrontation right as construed by this

court in *Crawford v. Washington*, because her opinion regarding the match between defendant's DNA and DNA extracted from the vaginal swabs was based on testing that she did not personally conduct. See *Geier,* 41 Cal. 4th at 593-608. (Pet. App. A. at 45-67.)

The California Supreme Court reviewed this Court's decisions in both *Crawford* and *Davis*, and noted neither case directly addressed the question of whether scientific evidence such as a DNA report is testimonial. *Geier*, 41 Cal. 4th at 596-98, 602-4. (Pet. App. A. at 50-52, 58-61.) However, after interpreting the holdings in both *Crawford* and *Davis*, the California court ultimately held the scientific opinion evidence presented through the testimony of Dr. Cotton was non-testimonial because it represented the contemporaneous representation of observable events and, therefore, its admission did not violate the Confrontation Clause as construed in *Crawford*:

> "While we have found no single analysis of the applicability of *Crawford* and *Davis* to the kind of scientific evidence at issue in this case to be entirely persuasive, we are nonetheless more persuaded by those cases concluding that such evidence is not testimonial, based on our own interpretation of *Crawford* and *Davis*. For our purposes in this case, involving the admission of a DNA report, what we extract from those decisions is that a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial."

Geier, 41 Cal. 4th at 605. (Pet. App. A at 61-62.)

The second point the California Supreme Court found was the critical one in this context. *Geier*, 41 Cal.4th at 605. The California Supreme Court drew a distinction between contemporaneous recordations of observable events and the documentation of past events. The court identified the "crucial point" as "whether the statement represents the

contemporaneous recordation of observable events," and noted that evidence is not testimonial just because it might be reasonably anticipated that it would be used at trial. *Geier*, 41 Cal.4th at 607. The DNA report "constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events. That is, [the analyst] recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." *Geier*, 41 Cal.4th at 605-606.) Moreover, other circumstances typically present in the context of "statements [] made in laboratory reports and other types of forensic evidence" further indicated their nontestimonial nature, including that such analyses are generated as part of a standardized scientific protocol; are conducted pursuant to the analyst's profession and during a routine, nonadversarial process meant to ensure accurate analysis; and are neutral, rather than accusatory. *Geier*, 41 Cal.4th at p. 607.

The California court concluded:

> Accordingly, even under this earlier authority, the circumstances under which Yates's report and notes were generated, and not whether they would be available for use at trial, would have been determinative of whether they were testimonial, and pursuant to this authority they would not have been. *Davis* confirms that the critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial but the circumstances under which the statement was made. We conclude therefore that the DNA report was not testimonial for purposes of *Crawford* and *Davis*.

Geier, 41 Cal.4th at p. 607. (Pet. App. A, p. 65-66.)

The California Supreme Court correctly applied this Court's decisions in *Crawford* and *Davis*. *Davis* dictates that the circumstance in which a statement is made is a significant factor in determining whether or not the statement is testimonial within *Crawford*. Such

determination requires the case-by-case approach that was adhered to by the California Supreme Court. See *Davis*, 126 S. Ct. at 2277-78; see also *People v. Stechly*, 225 Ill. 2d 246, 870 N.E.2d 333, 363, 312 Ill. Dec. 268 (Ill. 2007) (*Crawford* and *Davis* make clear that determining whether statement is testimonial must be made on a case-by-case basis); cf. *United States v. Brito*, 427 F.3d 53, 61 (1st Cir. 2005) (decided before *Davis*) (determining whether statements made during 911 call are testimonial "require an ad hoc, case-by-case approach"), cert. denied, 126 S. Ct. 2983, 165 L. Ed. 2d 989 (2006).

The California Supreme Court's approach to scientific evidence in this context does not render *Crawford* "nugatory" as petitioner contends. Whether a scientific report constitutes a contemporaneous recordation of observable events can be readily determined by the trial court. If it does, it "bears little resemblance to the civil-law abuses the Confrontation Clause targeted" (*Crawford*, 541 U.S. at 51) and, therefore, it is not testimonial within the meaning of *Crawford* and *Davis*.

In sum, the California Supreme Court properly applied *Crawford* and *Davis* and concluded that the Confrontation Clause was satisfied by Dr. Cotton's testimony. Accordingly, there is no need for this Court to decide any issue relating to the California Supreme Court's decision.

C. A Grant of Certiorari Is Not Proper Because This Issue Is Non-Dispositive in The Instant Matter

Finally, this case is a poor vehicle for the Court to further evaluate and define what is "testimonial" within the meaning of *Crawford* and *Davis*. Even if certiorari is granted and this Court ultimately concludes Dr. Cotton's testimony was improper under *Crawford* and *Davis*, petitioner still would not prevail there was ample evidence supporting the guilty

verdict and thus any alleged error must be deemed harmless beyond a reasonable doubt. As the California Supreme Court explained:

> Even if Dr. Cotton's reliance on Yates's report violated defendant's Sixth Amendment rights as construed by Crawford, any error was harmless. Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L. Ed. 2d 705, 87 S. Ct. 824]. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [89 L. Ed. 2d 674, 106 S. Ct. 1431].) "Since Chapman, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall, supra*, at p. 681.) The harmless error inquiry asks: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States* (1999) 527 U.S. 1, 18 [144 L. Ed. 2d 35, 119 S. Ct. 1827].) Here the answer is yes.
>
> Hairs found embedded in the broken nails of the victim were consistent with defendant's hair. The only item missing from the victim's apartment was the Jennings .22-caliber handgun, which defendant had sold to Tynan's boyfriend, William Jones, Jr., and which defendant was aware was in Tynan's possession. Defendant had also expressed a sexual interest in the victim during a conversation with Jones. After Tynan's murder, defendant was then seen cleaning a gun similar to the Jennings handgun. Defendant spoke of details of the murder that had not been made public and remarked that the victim "had gotten what she deserved." A ballistics expert testified that there was a good likelihood that the gun defendant used in the attempted murder of Lebouef was a Jennings .22-caliber handgun similar to the one taken from Tynan's apartment. Defendant told Winstein, his accomplice in the Lebouef attempted murder, that he killed Tynan. In light of this evidence, we conclude that any error in the admission of DNA evidence was harmless beyond a reasonable doubt.

Geier, 41 Cal.4th at p. 608. (Pet. App. A, at 66-67.)

Moreover, even if this Court were to conclude Geier's convictions for the Tynan rape and murder should be reversed because the laboratory report was improperly used to secure Geier's convictions with regard to these crimes, Geier's first degree murder and conspiracy

to commit the murder of Curtis James Dean and the special circumstance allegations that the murder of Dean was committed for financial gain, and by means of lying in wait, would remain standing. Given the evidence in aggravation surrounding Geier's other crimes, it is clear beyond a reasonable doubt that Geier's sentence would not have been different absent consideration of the Tynan rape and murder during the penalty phase of Geier's trial. Accordingly, his sentence of death would still be upheld even if his conviction for the rape and murder of Tynan were to be reversed. *Chapman v. California*, 386 U.S. 18, 24 (1967).

Additionally, any error was further harmless because evidence regarding the laboratory report was admissible at the penalty phase of Geier's trial. While this Court has not specifically addressed whether *Crawford* applies in the context of capital sentencing procedures, which are generally governed by due process principals, this Court has held, in *Williams v. New York*, 337 U.S. 241 (1949), that a judge's ability to exercise broad discretion at sentencing should not be restricted by limitations on uncross-examined hearsay evidence. Indeed, in *Gardner v. Florida*, 430 U.S. 349 (1977), this Court noted that "[t]he fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights." *Gardner*, 430 U.S. at 358 n.9.

In sum, contrary to petitioner's claim, there has been insufficient time since this Court's decision in *Davis* for the issue presented here to percolate in the lower courts. Moreover, the California Supreme Court's decision in *Geier* was correct and consistent with this Court's precedent. Last, this case presents a poor vehicle for this Court to further refine Sixth Amendment jurisprudence under *Crawford* and *Davis* because a decision from the Court on this issue would not affect the final outcome in this matter.

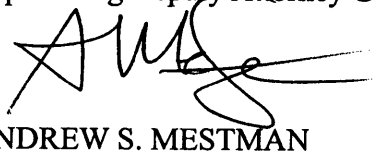
CONCLUSION

For the preceding reasons, respondent respectfully requests that the instant petition for writ of certiorari be denied.

Dated: December 17, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
DONALD E. DENICOLA
Deputy Solicitor General
HOLLY D. WILKENS
Supervising Deputy Attorney General



ANDREW S. MESTMAN
Deputy Attorney General
Counsel of Record

Counsel for Respondent

AM:adc
80189112.wpd

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

EDMUND G. BROWN JR.
Attorney General of
the State of California
ANDREW MESTMAN
Deputy Attorney General

110 West A Street, Suite 1100
P.O. Box 85266
San Diego, CA 92186-5266

No: 07-7770

CHRISTOPHER ADAM GEIER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and ten (10) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Barry Helft (Via Fed Ex)
Chief Deputy State Public Defender
State Public Defender's Office - San Francisco
221 Main St., 10th Floor
San Francisco, CA 94105
(Attorney for Defendant and Appellant)
(3 Copies)

Glen Niemy, Esq. (Via Fed Ex)
P.O. Box 764
Bridgton, Maine 04009
(3 Copies)

Michael G. Millman
Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

Mary Jameson, Supervisor
Capital Case Coordinator
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-3600

The Honorable Michael A. Ramos, District Attorney
San Bernardino County District Attorney's Office
316 North Mountain View Avenue
San Bernardino, CA 92415-0004

County of San Bernardino
Appeals & Appellate District
Superior Court of California
401 North Arrowhead Avenue
San Bernardino, CA 92415-0063

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 17th day of December, 2007.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.
Dated at San Diego, California, December 17, 2007.

ALICIA CURIEL

State of CALIFORNIA
County of SAN DIEGO

Subscribed and sworn to before me
this 17th day of December 2007.

Notary Public in and for said County and State

JOAN AMANDA DODDS
Comm. # 1515155
NOTARY PUBLIC - CALIFORNIA
San Diego County
My Comm. Expires Sept. 24, 2008