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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MIGUEL ANGEL BACIGALUPO,)	Case No. S079656
)	
Petitioner,)	Related Supreme Court No. S004764
)	
On Habeas Corpus.)	Santa Clara County Superior Ct. No. 93351

PETITION FOR WRIT OF HABEAS CORPUS

DEATH PENALTY CASE

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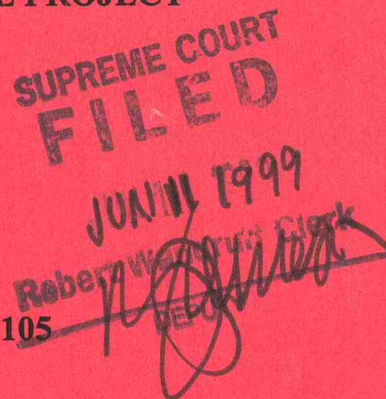

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PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner, Miguel Angel Bacigalupo, through his counsel, hereby petitions this Court for issuance of a petition for writ of habeas corpus. The facts and causes for issuance of this writ are set out below.

I. JURISDICTIONAL AND PROCEDURAL ALLEGATIONS

1. Petitioner is unlawfully held in custody at the California State Prison at San Quentin by Jeanne Woodford, Acting Warden thereof, and Calvin Terhune, Director of the California Department of Corrections, in violation of petitioner's fundamental rights under the state and federal Constitutions and the laws of California and the United States of America.

2. Petitioner is confined pursuant to a judgment of conviction and sentence of death rendered by the Superior Court of the State of California, in and for the County of Santa Clara, and entered on June 12, 1987, in the case titled People v. Miguel Angel Bacigalupo, Santa Clara County Superior Court No. 93351.

3. On April 30, 1984 the Santa Clara County district attorney filed a six count information against Mr. Bacigalupo. CT 184-86. Counts one and two each charged Mr. Bacigalupo with murder in violation of

California Penal Code section 187. CT 184-85. Each count added two special circumstance allegations: conviction of multiple murders within California Penal Code section 190.3(a)(3) and murder during the course of a robbery within former section 190.2(a)(17)(i). CT 184-85. Each count also added a firearm use allegation within sections 1203.06 and 12022.5. CT 184-85. Counts three and four each charged Mr. Bacigalupo with robbery in violation of section 211. CT 185. Each count repeated the firearm use allegations contained in counts one and two. CT 185-86. The fifth count charged Mr. Bacigalupo with possession of a concealable firearm by an ex-felon in violation of section 12021(a). CT 186.[1] Finally, the information added two prior felony allegations against Mr. Bacigalupo. CT 186. Mr. Bacigalupo pled not guilty and denied the special circumstance and enhancement allegations. CT 189.

4. On February 25, 1987 the district attorney amended the information to delete the multiple murder special circumstance with respect to the count one murder charge. CT 281. Also on February 25, 1987, the district attorney filed a "Notice of Intention to Introduce Evidence in Aggravation." CT 284-85.

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[1] As originally filed, the fifth count was mislabeled count six. CT 185-86.

5. Before trial began, Mr. Bacigalupo moved to suppress statements he made to police upon his arrest. CT 286. In addition, Mr. Bacigalupo moved to suppress physical evidence pursuant to Calif. Evidence Code section 1538.5. CT 474-80. The trial court denied the motion to suppress statements as well as the bulk of the physical evidence. CT 290.

6. Trial began on April 2, 1987. CT 346. Mr. Bacigalupo's counsel presented no evidence. CT 342. On April 9, 1987, following a 2½-day jury trial on guilt or innocence, a Santa Clara County Superior Court jury found petitioner guilty of violations of California Penal Code sections 187 (first-degree murders of Orestes and Jose Guerrero) and 211 (two counts of robbery). CT 338. The jury also found that petitioner personally used a handgun during the commission of each offense. Cal. Penal Code § 12022. The jury further found the robbery-murder and multiple-murder special circumstance allegations to be true, thus elevating petitioner's minimum sentence to life imprisonment without possibility of parole and rendering him eligible for the death penalty. Former Cal. Penal Code § 190.2(a)(17)(i); § 190.2(a)(3); CT 357.

7. On April 10, 1987, Mr. Bacigalupo waived his right to a jury trial on the truth of the prior convictions. CT 335. The court heard

testimony on the prior convictions as well as the count five charge of possession of a concealable firearm by an ex-felon. CT 335. The court found Mr. Bacigalupo guilty as charged in count five, the first prior not true and the second prior true. CT 336.

8. The penalty phase began on April 14, 1987. CT 326. Closing arguments in the penalty phase concluded on April 17, 1987. CT 326.

9. On April 20, 1987, the jury returned a verdict imposing a sentence of death on petitioner. CT 326.

10. On June 12, 1987, petitioner's motions for modification of the death sentence were denied by the superior court, and judgment was pronounced. The superior court formally imposed a death sentence. CT 534, 538.

11. The court also sentenced petitioner to five years in state prison for the robbery convictions and two additional years for the firearm-use enhancements; the two-year term was stayed, and the five-year was stayed pending the execution of the two-year sentence. RT 4072.

12. On September 12, 1988, petitioner filed a pro per petition for writ of habeas corpus in the California Supreme Court. In re Bacigalupo, No. S007168. It was denied without opinion on September 22, 1988.

13. Appeal to the California Supreme Court was automatic. Cal. Penal Code § 1239(b); Cal. Const., art. VI, §11. This Court affirmed the decision on December 9, 1991. People v. Bacigalupo (I), 1 Cal. 4th 103 (1991). On May 29, 1992, Mr. Bacigalupo filed a Petition for Certiorari, arguing that the United States Supreme Court should vacate the state court's December 9, 1991 decision and remand for reconsideration in light of Stringer v. Black, 503 U.S. 222 (1992). See Bacigalupo v. California, No. 91-8445, Petition for Writ of Certiorari. On October 5, 1992, the United States Supreme Court agreed, granted certiorari, vacated the California Supreme Court's decision, and remanded for reconsideration in light of Stringer v. Black. Bacigalupo v. California, 506 U.S. 802 (1992).

14. On January 22, 1993, petitioner filed his opening brief on remand from the United States Supreme Court. On December 7, 1993 this Court again affirmed the judgment in its entirety. People v. Bacigalupo (II), 6 Cal. 4th 457 (1993). On June 30, 1994, certiorari was denied. Bacigalupo v. California, 512 U.S. 1253 (1994).

15. On May 10, 1993, petitioner filed a petition for writ of habeas corpus in this Court. In re Miguel Angel Bacigalupo, Cal. Supr. Ct. No. S032738. On May 12, 1994, this Court denied the petition without issuance

of an order to show cause and, thus, without an evidentiary hearing having been held. The Court's one-page denial order stated that:

> "The petition for writ of habeas corpus is DENIED as untimely (Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policies 1-1.2 and 1-2; In re Swain, 34 Cal. 2d 300, 302 (1949)) and on the merits. In addition, allegations VIII, IX, X, and XI, and XVI(b)(3) were raised and rejected on appeal. (In re Waltreus, 62 Cal. 2d 218, 225 (1965); In re Clark, 5 Cal. 4th 750, 765 (1993).)"

16. On August 3, 1994, petitioner, acting pro per, filed in the United States District Court a request for stay of execution and a request for counsel. On August 3, 1994, the federal court issued a stay of execution. This stay has subsequently been extended through July 30, 1999.

17. On July 28, 1995, the federal court appointed the California Appellate Project, Michael G. Millman, Executive Director, and Karen S. Schryver, Staff Attorney, and Robert S. Mahler, of Seattle, Washington, to represent petitioner in connection with the federal habeas corpus proceedings.

18. On April 18 and 21, 1997, the federal court ruled that the 28 U.S.C. section 2244(d) limitations period applicable to the filing of a habeas corpus petition in this case was equitably tolled for extraordinary reasons beyond petitioner's control, until October 29, 1997. On October 29, 1997

petitioner filed a petition for writ of habeas corpus in the United States District Court.

19. On October 21, 1997, the federal court issued a briefing schedule to litigate the exhaustion status of the claims in the federal petition, and further ruled that "[t]he statute of limitations on all exhausted claims is [equitably] tolled from April 23, 1997, to and including thirty (30) days from this court's order identifying any unexhausted claims filed in the federal petition." On May 12, 1999, the federal court denied respondent's motion to dismiss the petition due to unexhausted claims and granted petitioner's motion to strike the unexhausted allegations and claims and stay the proceedings and hold the petition in abeyance until the completion of state exhaustion proceedings. The federal court ordered petitioner to file a petition for writ of habeas in the California Supreme Court on or before June 11, 1999.

20. Other than the proceedings discussed above, petitioner has not filed any petition, application, or motion with respect to the judgment at issue in the present petition.

II. THE PETITION IS TIMELY AND PROPERLY BEFORE THIS COURT.

1. The petition in this case is timely and filed without substantial delay. On June 6, 1989, this Court announced the adoption of Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and for Compensation of Counsel in Connection With Those Petitions ("Habeas Standards"). The Habeas Standards concerning timeliness were subsequently amended on September 28, 1989, September 19, 1990, January 27, 1992, December 21, 1992, July 29, 1993, December 22, 1993, June 20, 1996, January 22, 1997, January 22, 1998 and February 4, 1998.[2]

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[2] The current Habeas Standards provide in pertinent part as follows:

> "1-1. . . . All petitions for writs of habeas corpus should be filed without substantial delay.
>
> ...
>
> "1-1.2. A petition filed more than 90 days after the final due date for the filing of appellant's reply brief on the direct appeal, or more than 24 months after appointment of habeas corpus counsel, whichever is later, may establish absence of substantial delay if it alleges with specificity facts showing that the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim <u>and</u> (b) became aware, or should have become aware, of the legal basis for the claim.
>
> ...
>
> "1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular

(continued...)

2. This petition is being filed without substantial delay. Furthermore, any delay which has occurred is justified by good cause.

3. Cliff Gardner was appointed as lead counsel by this Court on January 19, 1988, to represent Petitioner in the automatic appeal from the convictions and judgment of death entered following the trial. On November 4, 1991, Melissa Johnson was appointed as associate counsel. Decl. of Cliff Gardner at ¶ 2.

4. During the period from 1991 to 1994, petitioner requested from this Court a total of $72,350 to conduct an adequate investigation in petitioner's case. Petitioner's case is unique in that it required an international background investigation, due to the fact that petitioner grew up in Lima, Peru, Mexico City, Mexico, New York City, New York and Madrid, Spain. On November 25, 1991, counsel filed a request for reimbursement of almost $24,000 spent for a preliminary investigation of the ineffective assistance of trial counsel and other potential habeas corpus issues and for authorization of $13,350 for further investigation. On April

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[2](...continued)
circumstances sufficient to justify substantial delay. . . ."

Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3, Standards 1-1, et seq.; see also In re Clark, 5 Cal.4th 750, 911 (1993).

22nd and 23rd 1992, this Court approved only $2,685 for expenses and authorized further funds totaling $3,350 and denied the remainder of petitioner's request. On May 10, 1993, counsel again filed a request for investigative and expert funds with this Court asking for almost $35,000. This Court denied the entire request on April 27, 1994.

5. Without the benefit of most of the requested funds, previous state appellate counsel filed a petition for writ of habeas corpus with this Court on May 10, 1993. Approximately nine declarations filed in support of the petition were the work-product of counsel and his expert, who were not adequately compensated for their work by this Court.

6. At that point, petitioner's counsel were placed in an impossible financial position. This Court refused to fund an adequate habeas investigation, so counsel were unable to conduct any further preliminary investigation in an effort to meet the habeas standards. Counsel also had their reimbursement of funds request cut by almost $21,000. Deprivation of the funds caused a substantial hardship in both counsel's professional and personal lives. They were unable to advance any further funds for additional investigation, because there was no prospect of the Court's reimbursing such expenditures, and they had already been severely

financially damaged by the Court's refusal to compensate their request for reimbursement. Decl. Of Cliff Gardner at ¶ ¶ 4, 9, 10, 11.

7. To meet the 1989 standards for additional funds, counsel had to conduct additional investigation in order to explain why such funding was necessary. However, additional funding was necessary just to do the preliminary investigation to explain why additional funding was necessary; such funding was precluded by the 1989 standards, and petitioner and his counsel were hopelessly enmeshed in a "Catch-22."

8. The Court's denial of adequate funds to investigate potential claims denied petitioner his constitutional rights to life, liberty, due process, heightened capital case due process, equal protection, effective assistance of counsel, and reliability in imposition of the death penalty, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, and article I, sections 1,7,15,16, and 17 of the California Constitution.

9. On December 9, 1991, this Court affirmed petitioner's conviction and sentence on direct appeal. In 1992, Petitioner's counsel spent considerable time and effort in the preparation and presentation of a Petition for Writ of Certiorari to the United States Supreme Court. On October 5, 1992, the United States Supreme Court granted certiorari,

vacated the California Supreme Court's decision, and remanded for reconsideration in light of Stringer v. Black.

10. On January 22, 1993, petitioner filed his opening brief on remand from the United States Supreme Court. On December 7, 1993 this Court again affirmed the judgment in its entirety. On June 30, 1994, certiorari was denied.

11. On August 3, 1994, petitioner, acting pro per, filed in the United States District Court a request for stay of execution and a request for counsel. Almost one year later, on July 28, 1995, the federal court appointed the California Appellate Project, Michael G. Millman, Executive Director, and Karen S. Schryver, Staff Attorney, and Robert S. Mahler, of Seattle, Washington, to represent petitioner in connection with the federal habeas corpus proceedings.

12. During the first month after appointment, Mr. Mahler and Ms. Schryver began to familiarize themselves with the case and read the pleadings filed by petitioner's previous state appellate counsel. On August 29, 1995, they filed on behalf of petitioner a Statement of Non-Frivolous Issues. Decl. of Karen Schryver, at ¶ 2, dated February 5, 1997.

13. For the next seven and one half months, Mr. Mahler and Ms. Schryver read the almost 6,000 page transcript, reviewed the dozen banker

boxes of files from state appellate counsel, and conducted a preliminary local investigation. Id. at ¶ 3.

14. On April 19, 1996, Mr. Mahler and Ms. Schryver filed Petitioner's Ex Parte Request for Expert and Investigative Funds. Ms. Schryver's office, The California Appellate Project (CAP), had previously hired and trained a Spanish-speaking investigator to conduct the investigation in petitioner's case for the summer and fall of 1996. Id. at ¶ 4.

15. After waiting over five and one-half months for the federal court to rule on petitioner's funds request, on October 8, 1996, counsel for petitioner wrote an ex parte letter to the federal court expressing concern for the delay. Counsel were worried about having sufficient time to conduct an adequate investigation after the federal court ruled. After waiting five more weeks, on November 14, 1996, counsel again wrote an ex parte letter to the federal court urging the court to rule on petitioner's funds request. Id. at ¶5.

16. On November 26, 1996, the federal court issued an order partially granting petitioner's funds request. Due to the fact that petitioner's funds request was pending in federal court for over seven months, from April 19, 1996, to November 26, 1996, counsel were unable to proceed with the bulk of the investigation in petitioner's case and the factual development of the claims for the habeas corpus petition. Id. at ¶ 6.

17. After the federal court's November 26, 1996 order, counsel for petitioner moved expeditiously to commence the habeas corpus investigation. However, circumstances beyond their control slowed the progress. Mr. Mahler was out of the country in January 1997, on a trip that was planned a year in advance. Also, CAP's Spanish-speaking investigator hired to conduct petitioner's investigation completed his one-year employment contract with CAP and left on February 14, 1997. Counsel then had to locate and employ new Spanish-speaking investigative help for petitioner's case. Id. at ¶ 7. CAP was not able to hire a new Spanish-speaking investigator until the summer of 1997. The federal court subsequently partially granted two additional funds requests on April 9, 1997 and August 25, 1997. Petitioner continued an on going bona fide investigation after these dates.

18. Due to the federal court's consideration of the initial federal funds request for over seven months, the factual development of petitioner's case was significantly delayed. The investigation in petitioner's case was complex and located in distant geographical areas. It was not possible for counsel for petitioner to adequately complete the factual investigation and draft the habeas corpus petition in the months remaining until April 23, 1997. In order to meaningfully pursue the factual and legal development of

petitioner's claims, it was necessary for petitioner to be afforded an adequate amount of time to conduct the investigation. Id. at 8.

19. On April 21, 1997, the federal court ruled that the 28 U.S.C. section 2244(d) limitations period applicable to the filing of a habeas corpus petition in this case was equitably tolled for extraordinary reasons beyond petitioner's control, until October 29, 1997. Bacigalupo v. Calderon, U.S.D.C. No. C 94-2761 DLJ, Order dated April 21, 1997. On October 29, 1997, petitioner filed a petition for writ of habeas corpus in the United States District Court.

20. Additionally, on October 21, 1997, the federal court issued a briefing schedule to litigate the exhaustion status of the claims in the federal petition, and further ruled that "[t]he statute of limitations on all exhausted claims is [equitably] tolled from April 23, 1997, to and including thirty (30) days from this court's order identifying any unexhausted claims filed in the federal petition." Bacigalupo v. Calderon, U.S.D.C. No. C 94-2761 DLJ, Order dated October 21, 1997. On May 12, 1999, the federal court denied respondent's motion to dismiss the petition due to unexhausted claims and granted petitioner's motion to strike the unexhausted allegations and claims and stay the proceedings and hold the petition in abeyance until the completion of state exhaustion proceedings. The federal court ordered

petitioner to file a petition for writ of habeas in the California Supreme Court on or before June 11, 1999. Bacigalupo v. Calderon, U.S.D.C. No. C-94-2761 DLJ, Order dated May 12, 1999. By the filing of this petition, petitioner is in compliance with the federal court's order.

21. If this Court determines that the Habeas Standards apply to petitioner's case, then exceptions thereto are warranted as follows: (a) because an ex post facto application of such rules on these facts would violate due process; (b) because this Court's refusal to provide adequate funding made compliance with the standards impossible; and (c) in the alternative, previous state counsel's failure to request additional investigative funds, to conduct an investigation and to investigate additional habeas claims constitute ineffective assistance of appellate counsel.

22. This petition is timely filed pursuant to this Court's Policies Regarding Cases Arising From Judgments of Death ("Policies"). Standard 1-1 of the Habeas Standards requires appellate counsel to conduct a habeas investigation, but only of "potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal." Appellate counsel is not required to conduct an investigation "having as its object uncovering all possible factual bases for a collateral attack on the judgment."

23. Standard 1-1.2 provides that a petition is filed without substantial delay if it is filed within a reasonable time after petitioner or counsel knew or should have known the legal or factual basis for the claim raised. If there has been "substantial delay" as to any claim, petitioner "may establish good cause by showing particular circumstances sufficient to justify substantial delay."

24. Petitioner meets these standards. This petition is based on facts that were not known to appellate counsel and that were only recently discovered in the course of a federal habeas corpus investigation that this Court would not fund under its rules. Prior to the federal habeas investigation, petitioner could not obtain the facts now presented in support of claims, some of which require the evaluation and assistance of experts. Further, investigation of trial counsel's and appellate counsel's ineffective assistance gave rise to other claims alleged herein.

25. Additionally, under this Court's rules against piecemeal litigation, it was proper not to present the remaining claims in this petition until the ongoing investigation of Claims A, B, C, D, E, F, G, I and J had been completed. In re Robbins, 18 Cal.4th 770, 708, 805-06 (1998); In re Gallego, 18 Cal.4th 825, 834, 838, fn. 13 (1998).

26. Additionally, in order to have been able to raise these claims in the previous habeas corpus petition, petitioner or his counsel either had to have been actually aware of the claims or else should have been aware of the claim because the grounds for the claims had affirmatively "come to counsel's attention in the course of preparing the appeal." Policies Regarding Cases Arising from Judgments of Death, Policy 3, Std. 1-1; accord In re Clark, 5 Cal.4th 750, 783-84 (1993); In re Robbins, 18 Cal.4th at 781. Neither scenario is true in the present case. Petitioner was not aware of the specific additional factual allegations for Claims A, B, C, D, E, F, G, I and J until after he was able to obtain funds in federal court, well after the previous habeas petition had been denied. As for the juror misconduct claim: 1) the facts supporting that claim were the product of a privately funded initial investigation, 2) this Court denied funds for an adequate investigation, and 3) after the initial investigation, previous counsel ran out of available funds and could not complete the investigation.

27. As for Claims C, J, L, O, Q and R petitioner and previous counsel did not know, and should not have reasonably known of such facts, because neither the appellate record nor any other source that came to appellate counsel's attention contained any "triggering facts" to warrant further investigation, within the meaning of Robbins, Gallego, Clark, and

Standard 1-1. Declaration of Cliff Gardner at ¶ 15. The crucial facts for the claim only came to light because of a later investigation conducted in, and authorized by, the federal court.

28. Additionally, petitioner reasonably failed to discover at an earlier time the additional information in Claims A, B, C, D, E, F, G, I and J and the supporting exhibits because previous appellate counsel requested funds on November 25, 1991 and May 10, 1993, totaling almost $72,350 to investigate potentially meritorious claims, and was denied most of the funds by this Court on April 22, 23 1992 and April 27, 1994. Decl. of Cliff Gardner at ¶ 4; see also In re Gallego, 18 Cal.4th 825, 835, fn.8 [A reasonable failure to discover additional information as a result of a denial of funds relevant to application of procedural defaults.] Also, a significant amount of payment in expenses for previous state appellate counsel was disallowed by this Court over the course of petitioner's appeal and habeas proceedings. Decl. of Cliff Gardner at ¶ 4. Although previous counsel expended $21,000, counsel were never compensated for that work by this Court and what limited investigation he was able to do was paid for privately by counsel causing a significant financial burden on their law practices. Decl. Of Cliff Gardner at ¶ 9. At that point all funds were exhausted and no other funds were available to petitioner. Id.; see also In re

Gallego, 18 Cal. 4th 825, 833, 834 ["private appointed counsel . . . under no obligation to fund such an investigation out-of-pocket"; [T]ime for promptly filing the claim commences "after obtaining investigation from another source."]. Previous counsel were unable to conduct any further investigations, or advance any further funds for investigation, because they had already expended substantial amounts of money without reimbursement, and there was no prospect of the Court's reimbursing any future expenditures. Decl. of Cliff Gardner at ¶ 10.

29. In order to request additional funds under the 1989 Habeas Standards, previous counsel would have had to conduct more investigation to explain why additional funding was necessary. However, at that point previous counsel had already expended substantial funds and further funds were unavailable. Therefore, previous counsel was unable to reapply and explain to the Court why additional funding was necessary. Decl. of Cliff Gardner at ¶ 11. It was not until petitioner was appointed counsel in federal court and that court partially authorized investigative funds on November 26, 1996, April 9, 1997, and August 25, 1997, that petitioner was able to reasonably discover preliminary facts to support the allegations in this claim. An on-going bona fide investigation to discover information to

further support the claims has continued after the authorization of funds in federal court. Thus, the claims are timely presented.[3]

30. The facts upon which most of the claims are based first became known when they were discovered by petitioner's federal counsel, pursuant to investigation authorized by the federal court. At no time during the direct appeal was petitioner or his appointed counsel aware of the facts set forth in many of these claims. Decl. of Cliff Gardner at ¶¶ 15, 16. Moreover, there was no delay by petitioner in discovering the crucial facts in federal court. To the contrary, the district court found that extraordinary circumstances beyond petitioner's control existed in the case that required the federal court to extend the deadlines for filing his federal habeas petition to October 29, 1997, and his state petition to June 11, 1999, to enable petitioner's counsel to properly carry out their duties in the district court. See Bacigalupo v. Calderon, U.S.D.C. No. C 94-2761 DLJ, orders dated April 21, 1997, October 21, 1997 and May 12, 1999; Decl. of Karen Schryver.

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[3] The bar against successive petitions does not apply to this case. The two prior habeas petitions in this case were filed on September 12, 1988 and May 10, 1993, prior to the date of finality of Clark. For the reasons stated in In re Robbins, 18 Cal.4th 770, 788, fn.9 (1998), the successive bar does not apply.

31. Even if it had been possible to raise some claims prior to the federally funded investigation, asserting such claims without others that required investigation would have resulted in the presentation of related claims in a piecemeal fashion which would not have allowed petitioner to accurately convey to this Court the breakdown of the adversarial system due to trial counsel's and appellate counsel's ineffective assistance, compounded by prejudicial errors of the trial court. Furthermore, the filing of successive petitions, even raising different claims, is discouraged by this Court, and such petitions may be denied consideration unless good cause is shown for failure to present the claims in the first-filed petition. In re Clark, supra, 5 Cal.4th at 774. Petitioner's filing of this petition even as his investigation into its claims is ongoing shows that there is no substantial delay as to claims based upon former counsel's ineffectiveness, and that good cause exists for any delay in filing claims that could have been presented earlier.

32. Even if this court finds there has been unjustified delay in filing this petition, any such delay fits within several exceptions outlined in In re Clark, supra, 5 Cal.4th at 775. These include:

a. Petitioner's capital trials were fundamentally unfair due to errors of a constitutional magnitude. Absent such errors it is highly

probable that no reasonable jury would have returned a verdict of death. These errors include, but are not limited to, the ineffectiveness of petitioner's counsel at trial and or appeal; and other errors set forth in this Petition.

b. The jury which imposed the death penalty was given so "grossly misleading [a] profile of the petitioner" and/or the facts of the offense that absent such error no reasonable jury would have returned a verdict of death.

c. Petitioner's capital trials and his appeals were conducted under statutory schemes and procedures that were so constitutionally flawed as to be invalid.

33. This Court should consider all claims raised in this petition, including any claims which were unsuccessfully raised or which could have been raised on appeal, since the "claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process. . . ." In re Harris, 5 Cal.4th 813, 834 (1993).

34. The assertion of the claims in this petition at this time does not prejudice respondent.

35. This petition contains claims of ineffective assistance of appellate counsel, prosecutorial misconduct, a failure by trial counsel to

investigate or present valid evidence at the guilt and penalty phases, and incompetence to stand trial, among other claims. These errors combined to deprive petitioner of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their counterparts in the California Constitution.

36. A miscarriage of justice resulted from these multiple violations of petitioner's constitutional rights. At trial, through the ineffective assistance of trial counsel, petitioner was deprived of the presentation of a meaningful defense and compelling mitigating evidence, although both were available and would have been presented by reasonably competent counsel.

37. The claims asserted in this Petition are cognizable in a habeas corpus proceeding and were brought in a timely manner and without substantial delay. If this Court concludes that petitioner's appellate counsel had a duty to uncover and present the facts contained in this Petition, even after this Court refused, by rule and order, to provide adequate funds for such investigation, then the assistance rendered by appellate counsel fell below a standard of representation expected of a reasonably competent criminal appellate attorney. The facts warranting petitioner's entitlement to relief on the merits are set forth in each claim below.

a. Petitioner did not knowingly, voluntarily or intelligently fail to raise these claims at an earlier time or deliberately bypass any available state proceeding.

b. Because a death sentence is different in kind from all other sentences, both in its finality and its irrevocability, petitioner's claims set out herein are entitled to consideration.

c. Failure to consider these claims would violate Article I, Section II, and Article VI, Section 10, of the California Constitution, Penal Code Sections 1423, et seq., and Article I, Section 9, Paragraph 2, of the United States Constitution.

38. If this Court concludes that appellate counsel did not have a duty to investigate the claims and discover the facts set out below, and/or if this Court concludes that such investigation was rendered impossible due to lack of investigative funds, then presentation of the claims in this Petition is not delayed and this Petition must be deemed timely.

39. Finally, at all times petitioner has been represented by court-appointed counsel not of his own choosing. The control of the litigation has at all times been in the hands of counsel, not petitioner. See People v. Kelly, 1 Cal.4th 495, 546 (1992); In re Horton, 54 Cal.3d 82, 94-95 (1991). The timing of the litigation has been determined by counsel, not petitioner,

in accordance with their best understanding of the rules and practices of this Court and the Federal courts. If this Court concludes that substantial delay has occurred without good cause, it is not the doing of petitioner and should not be relied upon to deny him relief.

40. The facts presented in this Petition illustrate only part of what a competent trial counsel could have learned and presented in petitioner's defense, and also illustrate what appellate counsel could have discovered previously if this Court had provided funds, so that they could conduct a broader habeas investigation. The investigation in this case is ongoing and has not been completed. Petitioner will move this Court for leave to amend and supplement the Petition as additional facts become available.

41. Because petitioner has not been provided a reasonable opportunity for a complete factual development through discovery, adequate funding, access to this Court's subpoena power and an evidentiary hearing, all of the evidence in support of the claims in this Petition is not presently obtained or obtainable. Nevertheless, the evidence that is available and set out below supports each claim and justifies issuance of an order to show cause and relief.

42. Additionally, petitioner respectfully suggests that the Habeas Standards are not enforceable rules of court. The Judicial Council is vested

with the power to promulgate rules of procedure by the California Constitution, Article VI, section 6. As this Court has recognized, the court is not itself "vested with formal, quasi-legislative, rule making power, either by the California Constitution or the Legislature." Reynolds v. Superior Court, 12 Cal.3d 834, 849 (1974). As the Court stated in Reynolds, supra, "[t]he only body outside the Legislature accorded an approximation of such quasi-legislative rule making competence is the Judicial Council, created by Article VI, Section 6, of the California Constitution and empowered thereby, inter alia, to 'adopt rules for court administration, practice and procedure, not inconsistent with statute.'" Reynolds v. Superior Court, 12 Cal.3d at 849 n.23. This does not mean that the Court is powerless to craft or refine standards of practice by means of stare decisis, where through the adversary process such issues can be resolved between litigants in a true case or controversy; but it does mean that the Court is not vested with the power to publish and enforce its own general rules of practice, particularly where such rules purport to amend and

restrict the rights granted under the statutes and the formal Rules,[4] as has been done in the Habeas Standards.

43. Moreover, the Habeas Standards, both in their original form and as they have been amended from time to time, further violate petitioner's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 7, subdivision (a), and section 15 of the California Constitution, because they are vague and fail to provide sufficient notice to petitioners and counsel of what is required to satisfy them. It would be unconscionable and unconstitutional for Petitioner's life to turn on whether or not this Court's subsequent determination of what is or is not "substantial delay" and a "reasonable time," and what counsel "should have known," agrees with counsel's interpretation of the same indefinite phrases.

44. In addition, the application of the Habeas Standards only to death-sentenced defendants denies equal protection of the laws, since

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[4] The procedures for habeas corpus adjudication have been codified by the Legislature at sections 1473-1508, and contain no time limitations such as those set forth in the Policies. The Judicial Council has regulated habeas corpus practice in this Court by Rules 24, 50, 56.5 and 60, and such practice in the superior courts by Rules 201 and 260. None of these Rules specify time limitations such as those set forth in the Habeas Standards. The authority of courts to adopt local rules is limited to rules "not inconsistent with law or with the rules adopted and prescribed by the Judicial Council." Gov. Code § 68070.

defendants not under sentence of death are routinely permitted to exhaust all appellate remedies prior to commencement of collateral writ proceedings, without being threatened with forfeiture of meritorious claims if they are not brought contemporaneously with their direct appeal. No substantial governmental interest is served by this discriminatory requirement, and certainly none which outweighs the substantial intrusion upon defendants' rights to due process and effective assistance of counsel which flows from its prohibition upon the normal sequential approach of appellate resolution followed by collateral proceedings. Persons sentenced to death are an identifiable, denigrated minority group broadly subjected to public hatred and opprobrium and as such are entitled to careful judicial protection of their right to the equal protection of the laws. Addressing another issue, the unanimous court, speaking through Justice Arabian, recently said, "[I]t would be anomalous if not unconscionable to formulate a less favorable rule for those under judgment of death, thereby implicating equal protection as well as due process." People v. Superior Court (Marks), 1 Cal.4th 56, 77 n.19 (1991).

III. CLAIMS

A. Trial Counsel Unreasonably Failed to Adequately Investigate and Present Psychiatric, Medical and Neurological Evidence and Cultural, Family and Personal Background Information That Would Have Supported Mental State Defenses to Guilt and Significant Evidence in Mitigation

1. Petitioner's conviction and sentence of death were obtained in violation of his rights to due process, fair trial, present a defense, unbiased jury, jury trial, effective assistance of counsel, confrontation and cross-examination, and a reliable guilt and penalty determination, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution because trial counsel failed to render effective assistance of counsel at the guilt and penalty phases of trial, by failing to adequately investigate and present psychiatric, medical and neurological evidence, including organic brain damage, and cultural, family and personal background information that would have supported mental state defenses to guilt and significant evidence in mitigation. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

2. Petitioner hereby incorporates by reference as if set forth fully herein Claims B, C, D, E, F. G, H and I, Arguments I and II from Appellant's Opening Brief on direct appeal in this case before this Court and Claims VI, VII, XI, XII, XIII, XIV, XV, from In re Bacigalupo, No. S032738, the Declaration of Dr. Renato Alarcon and all supporting exhibits, the Declaration of Russell Kuebel, and the juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab. This claim has already been presented to this Court in In re Bacigalupo, No. S032738, Claims VII, XII, XIII, XIV, and XV and Exhibits F, G, H, and I. Petitioner is presenting this claim again to this Court in order to add additional factual support and exhibits which were the product of recent investigative funding authorized by the United States District Court.

3. Petitioner is Peruvian, born and raised until age eight in the poverty-stricken urban slums of Lima, Peru. Fleeing from his extremely violent and abusive father, his family moved to Mexico City and then to New York City in the 1970's. Petitioner's cultural and ethnic background affected every aspect of his life. His cultural background defined his beliefs about himself and the world around him, influencing his perceptions and

actions throughout his life, including his impaired mental state, and the belief that he was acting under duress at the time of the offenses.

4. Because petitioner's state of mind reflects his unique cultural heritage as a Peruvian, no mental health evaluation or social history of petitioner is complete, reliable, or accurate unless it incorporates and considers how his racial and cultural background affected his perceptions and behavior.

5. Because petitioner's state of mind was also shaped by his family and personal experiences, a reasonably accurate and complete account of those experiences is essential to a reliable assessment of his mental health.

6. Petitioner's trial counsel failed to adequately investigate petitioner's cultural, family, and personal background, consult and present testimony by lay and expert witnesses, and recognize and utilize testimony concerning the central role this historical and cultural evidence played in assessment of petitioner's mental state, his belief he was acting under extreme duress, moral culpability, or the appropriateness of the death penalty. Petitioner's counsel, therefore, failed to adequately present this crucial evidence to potential mental health experts including an adequately culturally informed social history expert, who could have explained how

culture, race, the historical background of Peruvians, and cultural factors influenced and shaped petitioner's development as a child and functioning as an adult. As importantly, he unreasonably failed to present this powerful mitigating evidence of petitioner's experiences, history, and their impact on him, to the jury that decided petitioner's fate.

7. Petitioner's background and experiences, and ultimately his social and psychiatric functioning, can only be understood in the context of the culture and country in which he and his family were born. His experiences and upbringing were marked by the extreme poverty, hopelessness, serious illnesses, violence and despair that have long plagued the impoverished urban slum areas of Lima, Peru, and by his own family's struggle with poverty and violent abuse before fleeing to seek the promise of a better life in the United States.

8. Petitioner was born into an extended family system that suffered from multiple, significant, and enduring impairments over generations of his family's history. His multi-generational family system included serious and debilitating medical and mental illness, substance abuse, extreme poverty and malnutrition, and racial discrimination, all posing enormous obstacles to normal development. His family history was

also significant for multi-generational patterns of neglect, as well as physical and emotional abuse.

9. A strong and well-developed body of mental health literature identifies a range of risk factors associated with the development of psychiatric illness. Identified risk factors include biological predisposition to mental illness; exposure to psychological trauma in childhood; lack of familial stability; inconsistent, inadequate and punitive parenting; physical abuse and neglect; exposure to domestic violence; early and excessive drug use; cognitive dysfunction and learning deficits; and lack of meaningful support in the community or home. Petitioner's familial and personal history was positive for every one of these risk factors, thus significantly increasing the likelihood that he and his relatives suffer from serious psychological, social, and/or neuropsychological impairment.

10. Many serious and chronic mental illnesses, including some that petitioner has exhibited symptoms of, are believed to have a prominent biological or genetic component. Many disorders are known to have a heritable or genetic component, or to aggregate familially. See Diagnostic and Statistical Manual of Mental Disorders, (4th ed. 1994) ("DSM IV").

11. Social, environmental and behavioral factors are important aspects to consider in developing a comprehensive overview of a life

history. For example, a critical component in the assessment of the integrity of psychological functioning is assessment of the presence, magnitude, and degree of exposure to psychosocial stressors. According to the DSM-IV, a psychosocial or environmental problem may be a negative life event, an environmental difficulty or deficiency, a familial or other interpersonal stress, an inadequacy of social support or personal resources, or other problems relating to the context in which a person's difficulties have developed. Assessment to psychosocial stressors is an important part of a mental health evaluation, as psychosocial stressors often play a contributing role in the development or exacerbation of serious mental illness.

12. Many social, environmental, and behavioral factors played an important role in shaping the dynamics and functioning of petitioner's family. Petitioner's multi generational family history is significant for: poverty; malnutrition; public health risks; lack of access to medical care; abandonment; dislocation; physical, medical and educational neglect; physical and emotional abuse; and serious domestic violence among members of the extended family. Thus, the multi-generational lineage which formed the framework of petitioner's life was inherently weak and damaged at the time of his birth.

13. Petitioner's personal history was shaped in large part by his family's history, experiences, and level of functioning and behavior. He was an unwanted child; his mother had left his father because of his extreme abuse, and he subsequently raped her. Petitioner's father did not recognize him as his son until he was around seven or eight. When he was present, he was physically abusive, controlling, possessive, and exhibited inappropriate and bizarre behavior. Petitioner's mother, preoccupied with the exigencies of her own mental illness and the demands of older children, was ill-equipped to raise him, and often left him to his own devices. Petitioner witnessed erratic and violent behavior within the home, and watched in fear as his father beat his mother, his sister, and his brother, often enacted in the context of alcoholic rages. Petitioner himself was beaten and seen with bruises on his face at the age of one year old.

14. Described as a quiet, withdrawn, and fearful child, petitioner suffered from a head injury around the age of three or four in an automobile accident. He was vulnerable to rejection by other children, even in his own family. Indicators of attentional and/or learning deficits were apparent early in petitioner's academic career; however, they were either unidentified or not addressed.

15. A follower, petitioner was introduced to alcohol and then drugs at an early age, when he moved to New York City. He soon learned that using substances helped mask his increasing mental health symptoms and anxiety. He experienced difficulties in school, particularly because there were no bilingual education or special education classes available to him, but he continued to make an effort. Unrecognized and untreated brain impairments, including severe deficits in cognitive abilities, severely limited his ability to achieve academically and occupationally.

16. Trial counsel failed to obtain a complete medical history of petitioner, which would have shown that he had suffered a series of serious head injuries. As mentioned, petitioner suffered a head injury as the result of a car accident around the age of three or four, which caused temporary blindness. He received a cerebral concussion and subsequent brain damage as a result of an automobile accident and severe beatings endured at the hands of the New York Police in 1978. He suffered other head injuries in the New York prisons in February 1980 and December 1980. Petitioner had a continuing history and symptoms of cerebral trauma, which was documented during petitioner's incarceration in New York from 1978 through 1983 and readily available to trial counsel.

17. Petitioner had academic difficulties throughout his childhood development. Many of his school records reveal that his academic achievement was below other children his age, and he often received low to failing grades. While in the orphanage in Spain, he was placed in remedial classes. When incarcerated at age sixteen, corrections officials determined that he would need assistance in reading and math.

18. Beginning early in his teenage years, petitioner was introduced to the use of drugs. He used marijuana, speed, PCP, LSD, barbiturates, and cocaine at an early age. Although he had no juvenile record, he had two arrests as a teen for minor drug offenses. He was under the influence of drugs and alcohol when he was arrested at the age of sixteen for involvement in an armed robbery with an older co-defendant, and for drug related offenses. New York prison officials recommended treatment based on his history of drug involvement, including stimulants and PCP, prior to his arrest in 1978.

19. The New York prison authorities had recognized that petitioner needed psychiatric treatment while incarcerated, yet ignored that need. Petitioner's clinical depression and anxiety were noted medically immediately after he was incarcerated for the first time in July 1978. In September, 1978, petitioner was placed on Mellaril, an anti-psychotic

medication, because he became agitated and burned his right arm with cigarettes. Intensive psychiatric treatment while incarcerated was recommended by the probation department in September 1978, but it was not made available to petitioner.

20. During his prison incarceration in New York, records reveal that petitioner had extensive scars on his arms which he stated were the result of his attempts to eradicate tattoo marks and to prove his manhood by self-mutilation.

21. In November 1979, petitioner was again treated for a self-inflicted wound on his arm. He was placed on psychiatric observation for clinical depression. After his release from observation, the prison psychiatrist requested to see petitioner monthly "to give psychiatric support," but these examinations were not provided to petitioner.

22. In August 1980, petitioner was again admitted to psychiatric observation in the prison because he had inflicted multiple cuts on his forearm. Petitioner stated he had done so in response to the serious homosexual advances of other inmates. The psychiatrist observed: "He is a young inmate and in all probability what he states is true." Petitioner was placed in protective custody, and received no psychiatric treatment.

23. In October 1980, petitioner attempted suicide by setting his cell on fire. He received no treatment. In February 1981, petitioner requested a psychological referral. A referral was to be made, but was not provided. In August 1981, petitioner was to be referred to the Mental Hygiene unit in the prison because he had attempted suicide in the past. Again, he was provided no treatment.

24. In March 1982, petitioner was placed on psychiatric medication for clinical depression. He had numerous self-inflicted razor lacerations on his right forearm.

25. In the period leading up to the capital offense, petitioner was emotionally devastated by the unsolved murder of his older brother, Luis Bacigalupo, Jr., who was his closest friend and who had attempted to care for him. Luis, Jr. was murdered by organized crime members on the streets of New York and the police never arrested or charged a suspect with his murder.

26. After petitioner was released from prison, and he returned to live with his mother in California, he was threatened by members of organized crime that his mother, stepfather and he would be killed if he did not kill the Guerrero brothers before January 1, 1984. Petitioner told the

police that he was involved in the homicides because he was acting under duress from the "Columbian Mafia's" threats.

27. Petitioner suffers from serious neuropsychological impairment and organic brain dysfunction. Every aspect of petitioner's life is affected by his significant neurological impairments, and any attempt to understand petitioner or his actions must take proper consideration of his brain damage. Based on the results of a complete neuropsychological evaluation, there is substantial evidence that petitioner suffers from cognitive and sensor-motor deficits associated with moderate neuropsychological impairment. The evidence for this brain related dysfunction is seen at various levels of analysis of the battery including: 1) an impaired level of performance on a number of measures; 2) unexpected patterns in intellectual test performance and 3) in unusual performance differences seen in comparisons of the right and left sides of the body.

28. The primary summary measure for the Halstead-Reitan Battery, the General Neuropsychological Deficit Scale (G-NDS) indicated that petitioner suffers from moderate neuropsychological impairment. Petitioner obtained a score of 41 on this index with the moderate impairment range falling between 41 and 67. His Halstead Impairment Index (HII), a measure of the consistency of findings of brain impairment

on selected tests, was .9 (on a scale of 0.0 to 1.0, with 1.0 being the highest level of impairment). Petitioner's impairments are lateralized to the left hemisphere of the brain. His score on the Left Neuropsychological Deficit Scale was 9 whereas his score on the Right Neuropsychological Deficit Scale was only 1 -- a difference suggesting substantially greater impairment within the left hemisphere. Petitioner's brain dysfunction involves abnormal tactual and motor functions.

29. Petitioner's intelligence measures in the borderline intellectual range. The borderline intellectual range is just above the range defined for mental retardation, which is an IQ score of 70-75 or less. Petitioner's score is 83 on the Wechsler Adult Intelligence Scale-Revised (WAIS-R) on the Full Scale IQ (FSIQ), which falls within the borderline range. His Verbal IQ is 80 (borderline) and his Performance IQ is 88 (low average). Petitioner's memory is particularly poor for verbal materials and his thinking is particularly concrete.

30. Petitioner has significant neurological signs that also support organic brain damage. A neurological examination reveals indications of left hemisphere brain damage, frontal lobe damage and diffuse brain dysfunction by the following abnormalities: 1) a positive right Babinski's sign; 2) sucking reflex; 3) snout reflex; 4) persistent glabellar; 5) bilateral

grasp; and 6) paratonia. Petitioner also suffers from serious mental health illness and/or disorder, including psychosis, delusions, mood disorder and depression.

31. Additionally, petitioner was under the influence of drugs and alcohol at the time of the capital offenses. He told the police that he had ten glasses of wine to drink and that he took drugs in a liquid form before the offenses. A police lab report revealed that his blood alcohol level taken almost twelve hours after the offenses, measured .06%. Given the reduction of alcohol in his blood over time, and the drug usage, he was highly intoxicated at the time of the offenses.

32. The ingestion of even small amounts of alcohol and illegal drugs significantly affects petitioner's brain damaged condition. Studies have shown through, for instance, the use of computer-assisted electroencephalography such as the Brain Electrical Activity Map, (which can measure the behavioral and neurophysiologic effects of substances), that the effects of such substances can be particularly dramatic on a person with brain damage. Abnormalities of electrical conduction are pronounced with the ingestion of drugs by a brain damaged subject. Petitioner has a history of poly-drug use and petitioner ingested a liquid drug and alcohol before the capital offenses occurred. Since petitioner suffers from frontal

lobe and left hemisphere damage and other diffuse brain damage, ingestion of such substances will almost certainly accentuate his neurological impairments and could very possibly induce uncontrollable behavior, seizures, or blackouts. The effects these substances have on a brain damaged person, such as petitioner, cannot be compared to the effects they have on a person without brain damage.

33. Petitioner's psychiatric symptoms had intensified by the time of his pretrial incarceration on capital charges. His symptoms included anxiety, clinical depression, nightmares, sleep disturbance, visualizing events he knew never occurred, headaches, nosebleeds, stomach problems, skin problems, and food allergies.

34. In January 1984, petitioner was severely depressed, contemplating suicide, and tearful. He received no treatment. In October and November 1985, and again in January 1987, petitioner was medically treated for self-inflicted burns to his arm; despite his history of self-mutilation, he was not psychiatrically evaluated.

35. Petitioner and some of his family members had significant life experiences and cultural beliefs that led them to believe that in most instances the police and other authorities in Peru were to be feared, and were often unhelpful, corrupt or dangerous to citizens. These beliefs were

reinforced while living in the United States. Petitioner's brother, Luis, Jr., was killed by organized crime members in New York and the police never apprehended or prosecuted a suspect or discovered the reason for his murder. No explanation or assistance was provided to petitioner's family. Petitioner himself was twice severely beaten in the head by the New York police when he was apprehended for an armed robbery and drug related offenses when he was sixteen years old. When petitioner was in the New York prison system at a young age he was repeatedly attacked by aggressive older prisoners and the officials failed to adequately protect him. When petitioner was arrested for the capital offenses, he told the San Jose police that he was involved in the offenses because he and his family were threatened by the Columbian Mafia, and that he needed protection. Petitioner also stated his belief that the San Jose police would kill him upon arrest. The police stated that he was a liar and that he was never threatened.

36. Petitioner's strong indicators of organic brain damage, brain dysfunction, cognitive impairments, mental illness, and cultural beliefs were present at the time when the offenses occurred. These neuropsychological and neurological evaluations were available to trial counsel at the time of petitioner's trial. If a competent neurologist, psychiatrist, neuropsychologist, and cultural expert had evaluated petitioner

after he was arrested in 1984 or during trial in 1987, the results of the evaluation would have revealed significant mental illness and/or disorder and neurological damage which most likely would have dramatically affected his ability to form the requisite mental states for the capital offenses and/or provide significant support for petitioner's belief that he was acting under duress at the time of the offenses.

37. Despite evidence to support several available mental state defenses, including serious mental illness and/or disorder, intoxication, organic brain damage, insanity, and acting under extreme duress, trial counsel failed to present any evidence at the guilt phase trial. Trial counsel failed to adequately investigate any mental state defenses, and failed to consult with qualified experts, such as psychiatrists, neuropsychologists, neurologists, and cultural experts to prepare and present a mental state defense.

38. Trial counsel's failure to adequately investigate and present evidence of mental state defenses at the guilt or penalty phase of trial fell below the standard of competence reasonably to be expected of defense counsel in a capital case.

39. There is a reasonable probability that in the absence of trial counsel's errors and omissions a result more favorable to petitioner would

have occurred at either the guilt phase or the penalty phase of trial. See juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab.

B. Trial Counsel Unreasonably Failed to Investigate and Present Mitigating Psychiatric, Medical, and Family and Personal Background and Cultural Evidence at the Penalty Phase

1. Petitioner's sentence of death was obtained in violation of his rights to due process, fair trial, present a defense, unbiased jury, jury trial, effective assistance of counsel, confrontation and cross-examination, and a reliable penalty determination, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution because trial counsel unreasonably failed to investigate, prepare and present mitigating psychiatric, medical, family and personal background and cultural evidence concerning petitioner at the penalty phase of trial. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

2. Petitioner hereby incorporates by reference as if set forth fully herein Claims A, C, D, E, F, G, H and I, Arguments I and II from

Appellant's Opening Brief on direct appeal in this case before this Court and Claims VI, VII, XI, XII, XIII, XIV, XV, from In re Bacigalupo, No. S032738, the Declaration of Dr. Renato Alarcon and all supporting exhibits, the Declaration of Russell Kuebel and the juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab. This claim has already been presented to this Court in In re Bacigalupo, No. S032738, Claims VI, VII, XII, XIII, XIV, and XV and Exhibits F, G, H, and I. Petitioner is presenting this claim again to this Court in order to add additional factual support and exhibits which were the product of recent investigative funding authorized by the United States District Court.

3. The effective assistance of counsel and due process, per the Sixth and Fourteenth Amendments, guarantee a criminal defendant the constitutional right to have defense counsel, at a minimum, conduct such a reasonable investigation as to enable him to make informed decisions about how best to proceed. Strickland v. Washington, 466 U.S. 668, 691 (1984); Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994). This requires a prompt, adequate investigation of the facts of the case, including all avenues leading to facts relevant to degree of penalty, consideration of viable theories, and development of evidence to support those theories (Henderson v. Sargent,

926 F.2d 706, 711 (8th Cir. 1991)), including evaluating potential witness testimony, preparing selected witnesses to testify, and presenting their testimony competently. See Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991).

4. The failure to exercise reasonable diligence to produce exculpatory or mitigating evidence, the failure to present it to the relevant fact-finder, and the decision to employ strategy resulting from lack of diligence in preparation and investigation are not protected by the presumption in favor or counsel. Absent proper investigation, counsel can not make proper strategic decisions. Strickland v. Washington, supra, 466 U.S. at 691. Failure to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy. Failure to locate or present such evidence is ineffective assistance of counsel, in violation of the Sixth Amendment, whether the evidence involves the defendant's previous mental health reports, (Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991)), and/or the defendant and his family's background of factors associated with mental illness. E.g., Bouchillon v. Collins, 907 F.2d 589, 595 (5th Cir. 1990), Becton v. Barnett, 920 F.2d 1190, 1192 (4th Cir. 1990); Lloyd v. Whitley, 977 F.2d 149, 155 (5th Cir. 1992) [e.g., mother sustained toxic poisoning one month before defendant's birth, family history of

epilepsy, defendant's history of head injuries, defendant's history of chemical abuse]; Mak v. Blodgett, 970 F.2d 614, 617 (9th Cir. 1992) [defendant's background, family relationships and cultural factors affecting behavior].

5. Counsel failed to competently investigate and present evidence and argument concerning petitioner's Peruvian background and related experiences as a penalty phase cultural defense and evidence in mitigation, under section 190.3, subdivisions (d), (g), (h), and (k) [any extenuating factor]. Such mitigation evidence is commonly presented in capital cases and is not merely admissible but required under case law. E.g., see Mak v. Blodgett, supra, 970 F.2d at 617-19; Brewer v. Aiken, 935 F.2d 850, 858-59 (7th Cir. 1991). Such evidence was also critical to an understanding of petitioner's mental impairments, history, family interactions, etc., and could have also been highly relevant to and admissible evidence in mitigation under section 190.3, subdivision (k), and also potentially relevant to an understanding of evidence in mitigation pertaining to petitioner's mental illness, per subdivisions (d) [extreme mental or emotional disturbance], (g) [acted under extreme duress or substantial domination of another person], and (h) [capacity impaired by mental disease or defect, or the affects of intoxication].

6. Trial counsel failed to adequately recognize, investigate, consult with and prepare appropriate lay witnesses and experts, and present evidence of petitioner's full social history, including inter alia petitioner's unique cultural background, in mitigation or penalty. Counsel failed to obtain adequate expert advice, and present expert or lay testimony regarding the culture, race, and historical background of Peruvians, of the experience of petitioner's family migration from Lima, Peru to Mexico City to New York to Madrid, Spain to California, of the experience of petitioner's family moving from rural subsistence farming in the mountain villages of Peru to the extreme urban poverty in Lima, to the unfamiliarity of New York City, of the experience of growing up with an extremely violent and abusive father, and family history of abuse, neglect, domestic violence, tragedy, poverty, malnutrition, and serious medical and mental illnesses, of growing up experiencing racial discrimination and stigmatization, and how cultural factors as well as his unique experiences during his childhood and youth influenced and shaped petitioner's development as a child, and his functioning as an adult.

7. Trial counsel's failure to develop a complete social and cultural history regarding petitioner was prejudicial, since it was necessary not only as independent mitigation, but as a foundation for the opinions of

reasonably competent mental health professionals providing assistance at both guilt and penalty phases, per the requisite standard of care in the relevant mental health professions.

8. The following facts, among others to be presented, evidence the mitigating nature of petitioner's background and social history, and support the mental state defenses that counsel failed to present. This important and relevant mitigating psychiatric, medical, and familial and cultural background evidence was available at the time of trial. Trial counsel failed to investigate or present this important evidence at the penalty phase of trial.

9. At the penalty phase of petitioner's capital trial, trial counsel presented testimony from only three witnesses: (1) petitioner's mother, Iraida Dina Golden; (2) a minister who visited petitioner in jail, Richard Lyon; and (3) Dr. John Brady.

10. Trial counsel failed to interview other relatives of petitioner, including but not limited to his father, sister, cousins, aunts and uncles, who would have provided additional background evidence demonstrating that petitioner was abused and neglected as a child.

11. Trial counsel failed to investigate, develop, and present evidence concerning petitioner's history and its impact upon his

development and functioning. The available evidence that trial counsel failed to investigate and present included, but was not limited to information concerning: the various cultures in which petitioner was raised; the dysfunctional dynamics of his immediate family; physical and emotional abuse; physical and educational neglect; learning difficulties; abandonment; institutionalization during his teens in a Spanish orphanage and an adult New York prison, both resulting in exposure to highly traumatic experiences; psychoactive substance abuse and its effects; psychiatric symptoms of increasing intensity; and petitioner's positive adjustment to secure custody.

12. Petitioner was born in Lima, Peru on September 23, 1961. It was not until 1972 that he entered the United States with his mother. His childhood was extremely troubled due to his family's extreme poverty and the influence of an extremely abusive father. Malnutrition pervaded his family at various levels resulting in anemia and most likely retarding behavioral development. His father, severely mentally ill and violent, and his mother, an undernourished and abused orphan, were not able to provide a healthy environment for petitioner. Added to this, petitioner was the product of the rape of his mother by his father, which further exacerbated the domestic violence he would witness between his parents and toward

him. The neglect of petitioner and abandonment he experienced by every important person in his life created a world view of isolation and mistrust.

13. Petitioner spent his early childhood years in a country with a very different environment than that of the United States. His cultural background is absolutely necessary to understanding petitioner's life history. As an immigrant from Peru, petitioner was uprooted several times from one culture to another during his childhood. These drastic changes in petitioner's environment without much emotional support, provided him as a developing youth, with markedly different explanations of what it meant to live and survive. It is necessary to understand the ways in which the environment in his country of origin affected him as a child. Having experienced different customs, concerns and values, petitioner formed a very different picture of the world than if he had spent his early childhood in the United States.

14. Petitioner is originally from and grew up in a Latin American country where extreme poverty is the norm for a broad specter of the population. There is no comparison to the poverty levels in the United States. Until very recently, there has not been an effective system of welfare or any form of health care or systems of employment for the majority of the population in Peru. Peru has had one of the highest infant

mortality rates and the lowest life expectancy rates in Latin and Central America. Rural villages are only very recently starting to be connected to the rest of the country with telecommunication systems. Subsistence farming has been the most common form of survival in the lowest sectors of the population. Due to continual serious public health problems, such as lack of sanitation, epidemics such as yellow fever are recurring and difficult to control. Other diseases due to contaminated water and food, such as typhoid fever, are very common and until recently, were life threatening. Having been born and raised in this environment for generations, both sides of petitioner's family were affected by every mentioned aspect of Peruvian society.

15. Petitioner's paternal and maternal sides of the family are from the mountainous Sierra regions of Peru. Petitioner's maternal grandparents, Julia Cucufate and Maximo Padilla, came from Chasquitambo, a small village northeast of Lima, at the foothills of the Andean range. Petitioner's paternal grandmother, Juana Begazzo, came from a village called Cotawasi which is in southern Peru. It is in a rural area outside the city of Arequipa, further into the Andean range and far from the capital city of Lima. Petitioner's paternal grandfather Elias Bacigalupo, originated from Chile, from descendants from Italy.

16. Petitioner's family has been victim to tragedy across multiple generations. Petitioner's ancestors attempted to survive in a culture recovering from the imposition of colonialism and the discrimination and poverty that accompanied it. They worked hard their entire lives as farm workers to create a small place where they could live and actualize their extremely modest dreams. However, again and again, they were faced with loss and tragedy. Yet as was the tradition of their ancestors, the pacifist indigenous tribes that worked under the Incan Empire and were later dominated by the Spaniards, they continued to struggle and feel blessed if they had some food to eat and a small plot of land they could call their own.

17. As with many Peruvian families, petitioner's relatives were caught in the throws of a turbulent Peruvian history. With the repeated military coups, radical change of governments and terrorist invasions, the rural existence was very much affected by what happened in the political arena. Inevitably involved in politics, these humble farmers found themselves faced with offers of the installation of a small school, vaccination post or a telephone in their village, if they would promise allegiance to a particular political party. Later, during the more aggressive terrorist movements, instead of being offered privileges, the poorest people were often threatened with losing their belongings, loved ones or lives, if

they did not align themselves with the terrorist politics. The police, as many people will attest, including petitioner's family members, often exacerbated the situation by bribing people and abusing their authority. Coupling the military and governmental problems with an underpaid, severely corrupt police force, the people from the lowest sectors often found no one to protect them as they were cast aside in each political upheaval for power.

18. Beginning in the 1950's entire families migrated to the large capital city of Lima, hoping to escape the starvation present in the rural areas. Life in the Sierra areas, offered subsistence farming as basically the only option for survival. This drastic migration caused many socio-economic disasters resulting in vast slum areas with widespread unemployment, and housing, food and energy shortages. "Shanty towns" were erected on large dirt hillsides in the downtown area and all around the outskirts of Lima. These settlements consisted of an accumulation of shacks made from straw, adobe, or whatever free materials were available, and they were filled with people from the rural areas. The structures were grouped together to form small settlements, but they lacked running water, toilet facilities, electricity, or telephone lines. Many rural families who came to the big city hoping to find alternatives to selling their crops in

Sierran markets, found themselves, like petitioner's mother, selling other farmers' produce in markets in the center of Lima.

19. Such living conditions, predictably provided a fertile site for disease and hardship. As described by petitioner's family members, life in Lima, was a daily struggle for survival. Food, was a luxury and several generations felt the effects of malnutrition. Their memories are filled with descriptions of exhaustion and desperation for food. Due to this earlier lack of nutrition, anemia afflicted some of the women in petitioner's family. Medical care was nearly absent for the poorer sectors of the population and living conditions inhuman, as is reflected in Peru's extremely high infant mortality rate and low life expectancy. Petitioner's family experience exemplifies this: petitioner's maternal grandparents suffered early deaths and children in several generations suffered or died of serious illnesses before reaching school age.

20. Petitioner's paternal grandmother, was one of many children who were sent to live in the city of Lima, by families who hoped they may be offered a better life. Often children were sent to the city because the family could not afford to support the child any longer and they hoped the child would find work and be able to send money home.

21. From her rural village Cotawasi, petitioner's paternal grandmother, Juana Begazzo, was sent to a convent in Lima when she was a very young child. Cotawasi is such a small pueblo that it cannot be found on a map, as is the case with some farmer's settlements. Petitioner's relatives describe it as a tiny village in which everyone was family in one way or another. Here Juana lived with her mother and siblings, farming a small plot of land on which they cultivated typical Peruvian crops such as sweet potato and yucca. Unfortunately, their harvest was not enough to sustain the entire family, so Juana's mother had to make the choice to send some of her children away, in hopes that they would find a better situation. A convent was one of the few alternatives because there little Juana could work for the nuns in exchange for room and board. Separated from her family at a young age, Juana was left to fend for herself, and though she had sporadic contact with her siblings in the years to come, she did not return to Cotawasi to visit until she was much older.

22. Convent life was difficult and rigorous, but at least it was a refuge from the streets of Lima. Juana acquired intensive religious training which she eventually passed on to her children and grandchildren. These religious beliefs helped the family endure great hardships and tragedy. Grandmother Juana prayed daily and learned to castigate herself for her

wrong doings. She learned to honor all of the Saints and participated in important holy processions. She lived out her adolescence in this intensely religious environment for several years.

23. Around the age of fifteen, Juana entered into a relationship with an older man, Melchor Castro. Melchor sold bread to the convent, which Juana picked up every morning for the nuns' breakfasts. Melchor took an interest in her, and this innocent girl, who had gone directly from a small pueblo in the mountains to the convent, became pregnant with her first child, Juan Castro.

24. Melchor Castro left her shortly thereafter, so Juana was forced to leave the convent and support herself and her child alone. Juana began to work in houses as a servant, washing clothes and cooking to support herself and her child. She then met Elias Bacigalupo, petitioner's grandfather. He was a member of the household for which she worked and as is common in Peruvian domestic servant situations, as her patron, he had the unspoken right to initiate a sexual relationship with her if he desired. From this situation, petitioner's father, Luis Bacigalupo was born. Juana was soon asked to leave the house with her newborn and her boy.

25. Around the age of seventeen, Juana was initiated into adulthood, with two young children and no way to support them. Adding to

the difficult situation, she became pregnant once more with a third child. This relationship lasted a short time, due to the father, Daniel Rivera Sr.'s violent nature and disinterest in being part of a family. Juana then met Felix Garcia and had five remaining children: Pedro, Eduardo, Ernesto, Dora and Guillermo. Though this relationship lasted on and off for quite a while, Felix Garcia, was an abusive man who drank a great deal and contributed very little to the support of their children.

26. Juana now had eight children, each of which she had delivered at home without any medical assistance. Intermixed with the births were at least five miscarriages. One dead fetus had to be surgically removed from her uterus, because by the time she was able to seek medical care, it had already started to decompose. She also had at least one daughter that died at a very young age. She did not have access to any system of prenatal care during maternity. She had never even had the chance to learn from her mother or other elder women about pregnancy and child rearing because she had lost their influence at such a young age. She had not been given any form of sexual education or informed of the possibilities of birth control at the convent, so she simply accepted her situation and did the best she could with her young children.

27. Faced now with the maintenance of eight children, Juana spent the rest of her life working. This situation was an extreme version of what was typical in Peru due to the lack of support for women in general. There was no effective system of requiring men to contribute to the support of their children. The wages paid to an uneducated woman were so low that they were often not enough to support even the woman. Juana's children, (petitioner's paternal aunts and uncles), sometimes went without food and often looked forward to school because there was a chance they would receive free food or a glass of milk. Left to their own resources, they learned to take care of themselves and work at an early age to help their mother with the family's survival.

28. Juana found a small one room apartment in which her and her children lived for years. There was no electricity or running water and the floor was made of dirt. They slept together on straw mattresses and cooked with firewood. At night Juana continued sewing and washing, by the light of kerosene lamps. She was up again by five in the morning cooking breakfast for her children and preparing her day's work.

29. Petitioner's step-grandfather, Felix Garcia, came and went from the household. He was a severe alcoholic and eventually died from gangrene due to his diabetic condition. Described as a tall, black man, he

served in the army and then went into construction work. Because of his alcoholism, he never worked steadily and was generally supported by Juana. His children and step-children, petitioner's aunts and uncles, describe him as a frightening presence. They remember trying to protect their mother from Felix's constant beatings. Petitioner's father, Luis, remembers watching his stepfather at all times, trying to anticipate his violent episodes. As a young boy, he tried to defend his mother from these violent attacks several times.

30. Due to his father's heritage, Luis was born lighter-skinned than his siblings. Racial discrimination occurred in every facet of Peruvian society, from naming the darkest child "chola" (one with indigenous blood) or "morena"(the dark one), to giving better food and opportunities for education to the lightest child. Such was the situation of the family, as Luis's siblings describe having to work at an earlier age and being given less schooling (until third or fourth grade) because of their darker skin color. The few times it was possible, Luis' mother gave him better food, while the rest of the children were given only broth. Petitioner's father was raised with the belief that he was somehow superior to those around him because of his lighter skin color. This belief was later very detrimental to

petitioner as Luis refused to accept paternity -- because petitioner was born with a darker skin color.

31. Despite the better treatment, at a young age Luis was afflicted with a very debilitating illness. He experienced paralysis and a very high fever. He was taken to a doctor, who diagnosed him as having a very serious case of meningitis. He eventually regained his motor abilities and after a few months he was able to walk again. This type of meningitis was most likely Poliomyelitis, a form of meningitis that causes infantile paralysis. The virus' attack on the brain, the temporary paralyses, and possible respiratory failure, most likely caused some brain damage and contributed to Luis' inability to cope with basic responsibilities such as steady work and caring for his children as an adult.

32. Luis was an abusive young boy, self centered and demanding. He spent a great deal of time alone and only came home to eat and be with his mother, with whom he had an intensely dependent relationship. He was very aggressive, often getting into fights with others his age. He drank a great deal of alcohol during periods of his life and would have violent fits during his drinking episodes. Even his siblings were afraid of him and tried to stay away from him.

33. Petitioner's maternal ancestors experienced, as much, if not more tragedy than the paternal side. Petitioner's maternal grandparents, Maximo Padilla and Julia Cucufate, died when petitioner's mother was about four years old. Maximo and Julia had three children: Valeriano, Reynaldo and petitioner's mother, Iraida. They lived in the small mountain village, Chasquitambo, in an adobe and straw hut and had a small plot of land which they farmed. Petitioner's grandmother often traveled by mule to faraway villages to trade some of their produce for cheese and other products.

34. Once when Grandmother Julia was away on one of these trips with her son Valeriano, and Maximo was in the field, Reynaldo, barely seven years old, accidentally burned their house down while he was watching the food cooking in the kitchen. It was common for young children to learn how to cook because help was needed to keep the household running. The fire immediately spread to the main house. Frightened, Reynaldo ran to find his little sister, Iraida, who was in the main room of the house, crying and surrounded by flames. Not knowing what to do, Reynaldo grabbed a blanket, wrapped himself and his sister in it, and fell to the floor, hiding from the flames and praying they would disappear. They were not rescued for quite a while. They were found laying on the

floor of the burning house, suffocating by the smoke filling the room. It is very likely that they suffered severe oxygen deprivation caused by smoke inhalation and heat stroke, both which may lead to forms of brain damage.

35. Petitioner's family lost everything in this disaster. Less than a year later, Grandmother Julia died at the age of forty-five while giving birth to twins in her partially rebuilt home. The twins died also. Shortly thereafter, devastated by his wife's death, Maximo became deathly ill and had to be taken to the nearest medical center, which could only be reached by horse. The last time his children saw him, he was being carried on the back of a horse to Barranca, the nearest town on the coast, which was a full day of travel. He apparently died in the hospital at the age of forty-eight of tuberculosis. Petitioner's mother was left an orphan at the tender age of four.

36. Their uncle, Amador Cucufate, took custody of them and farmed them out as workers. Iraida, petitioner's mother, never lived with her brothers again for any significant period of time. Her brothers were sent to live with their uncle to work for him. A violent, abusive man, Amador enslaved the boys and forced them to work as his personal servants. He beat them mercilessly until the older boy, Valeriano managed to escape. Valeriano was never able to attend school. Valeriano worked as a servant

and other low level jobs in Lima for his entire life. In his older years, he returned to their home town, Chasquitambo. There, at the age of seventy-five, he still works chopping wood for food, and living in a one room straw hut. Overcome by depression and the inability to adjust to his family's tragedies, he is still trying to recover the small plot of land his family lost when they left Chasquitambo over sixty years ago.

37. Iraida's other brother, Reynaldo, stayed in his uncle's house and suffered brutal abuse that to this day he cannot describe without crying. Amador regularly kicked and beat him with machetes, sickles and wooden rods. Additionally, Amador neglected him by depriving him of food and locking him in his room when he went out. He suffered several head injuries and was unable to cope with adult life. As adults, both of petitioner's maternal uncles became overly depressed and melancholy, and eventually lived lives of isolation from others.

38. Petitioner's mother, Iraida, found herself in a situation just as tragic. She was initially sent to live and work for a woman in Lima. At this young age, she sold limes and other produce at the central market. She was then sent to an orphanage in Lima. Though she accepted her situation quietly, her terror and loneliness manifested itself in a problem of chronic bed wetting. Once she was old enough to work for wages, her uncle sent

her to work as a servant for a woman unknown to her. Iraida took care of the farm animals and did housework for the woman. Her uncle Amador charged the woman for Iraida's services and kept the earnings, as he did with her brothers, as well. This woman was very cruel to Iraida, barely feeding or taking care of her and beating Iraida when she fell short of her expectations. Iraida was not given any new clothes, so she wore what she came with and did not own a decent pair of shoes until years later.

39. Not only had Iraida lost her entire family and the support and safety they provided, but at a very young age, she was forced to work as a servant. Without anyone to guide or teach her, Iraida spent her childhood learning how to cook, feed and clean up after farm animals and live on as little as possible. She was forced to endure the humiliation of being sent to beg for leftover food to feed the animals. At the age of seven, she walked long distances by herself, carrying heavy buckets of slop. She attended school sporadically, only when she did not have to work.

40. Finally, when she was a teenager, her brother Valeriano came to take her to their Aunt Domitila's house, in Lima. Although Iraida was finally able to live with family again, her life was still very harsh. Her aunt was extremely poor. Her husband had abandoned her and her daughter Haydee, and they were forced to survive on very little. They lived in a tiny

room, with no windows and straw beds. Their urban tenement had no running water, bathrooms, or heat. Many people lived together in single rooms and everyone shared a common area outside for washing. They cooked with firewood and slept crammed together on straw mattresses. Though Domitila worked from early morning until late at night sewing men's pants, they were not able to eat regularly. They went for entire days without eating and Iraida was forced to beg the neighbors to give her leftovers they were going to throw away. Iraida also worked in the market selling vegetables but it was still not enough to survive. When she was not working, she was allowed to attend the first few years of primary school. After a few years, Domitila realized she could no longer support Iraida and Haydee. She started to make plans to send them to an orphanage where at least they would have shelter and food.

41. Soon after, Iraida became pregnant with her first child. She had met Luis Bacigalupo in their tenement building where he lived with his family. Iraida was barely fifteen at the time. Iraida had never received any training about sexual relationships and their consequences. Luis, threatened with being accused of statutory rape, consented grudgingly to marry Iraida, but he made her pay for his sacrifice for many years. Devastated and

exhausted, Iraida's Aunt Domitila died of tuberculosis shortly after Iraida was married, leaving Iraida without a family once again.

42. Iraida gave birth to her first child Julia and moved in with her new husband and her mother-in-law. Juana, already supporting her children and their families, took on the care of Iraida and her child. Iraida became pregnant shortly after with her second child, Yolanda. While she was giving birth to her second child, baby Julia became very ill with meningitis. Luis, lacking any patience or interest in his children, could not stand Julia's crying so he slapped the two year old and soaked her in water to stop her crying. She died right before Iraida came home with her new baby. Iraida was so depressed and saddened, that she cried for days, unable to take care of her newborn.

43. In her marriage to Luis, Iraida experienced a different kind of servitude than any she had known, the one to her husband. Luis, who fervently believed that he was her Master and that she was his servant and property, inflicted inconceivable amounts of brutal abuse on Iraida. He was overly jealous and possessive to the point that Iraida was not allowed to visit family or attend church. They moved out of his mother's house into their own one room to complete the isolation. If Iraida made eye contact with any man, Luis accused her of flirting with them. She reached a point

where she could only look down at the sidewalk to avoid his accusations. At home, he accused her of being an incompetent mother and a prostitute. When he became angry, he beat her relentlessly. She often had to stay in the house, to wait for the bruises on her face to fade. After he beat her, he would brag to others about how he had taught his wife a lesson.

44. Small of frame and accustomed to being abused, Iraida cowered from Luis. Her second child, Luis Jr., was born a few years later and Iraida concerned herself with trying to care for her children. Luis, a compulsive gambler and drinker, could not retain steady employment. He expected Iraida to cook for him, despite the lack of food, and he became angry with her when he felt that she was falling short of her duties as a wife. The children had to learn to take care of themselves because their parents were too busy. Iraida worked without rest in the market selling vegetables, washing people's clothes and cooking, while their father drank and gambled away all of their money.

45. Though Iraida did what she could, she was not able to give her children even basic necessities. Around 1953, little Yolanda developed purpura, or hemorrhaging of the skin, which can be associated with iron deficiency anemia caused by malnutrition. Iraida carried her bleeding

daughter, wrapped in a blanket to the nearest road and begged a ride to a hospital. She eventually received a blood transfusion and luckily recovered.

46. Luis' violence reached such a height, that Iraida finally found the courage to leave him. It was after an episode during which Luis threatened to kill her with a kitchen knife, that Iraida decided she had to protect her children, who were also being beaten by him. He had accused her of sleeping with another man and had been so angry that he had beat her, knocked her over and continued kicking her as she lay on the ground. Once she had recovered, she moved into a small room near her brother Reynaldo and began to work as best she could to support her children. Unfortunately, Luis continued to come by and harass and follow her. Initially, he begged her to come back with him, promising her things would be different. When she still resisted, he began to threaten her. He told her that she was still his property and that he would take her children away from her. Finally he waited one day for her after work and threatened her so aggressively that she finally agreed. He then took her to a nearby room and raped her. Petitioner was conceived from this event.

47. Luis continued to harass Iraida, convinced that she was with other men when he was not around. On one occasion he followed her to a place where he believed she was meeting another man. Angered at the

possibility of her infidelity, when he found her, he beat her severely. He told her she should be thankful he was not going to kill her. After this incident, Iraida had to stay in her house to wait for her bruises to heal. At this time she was unknowingly pregnant with petitioner.

48. A short time later, Iraida was devastated to learn she was pregnant. She had not wanted any more children because she knew she could not support them. The thought that she would have a child from this terrible experience horrified her. Determined not to be reminded of that night for the rest of her life with this child, she sought an abortion. Unfortunately, she was told that she could not have an abortion without her husband's consent. Iraida knew she would never receive his consent, so, seeing no other option, she went to Luis and told him that she was pregnant with his child. In a violent and angry state, Luis became convinced it was not his child, but the child of another man Iraida had allegedly been with. He was outraged that she expected him to forgive her and care for another man's child. Only when his mother protested, did Luis finally agree to take Iraida back.

49. The years that followed superseded all the past episodes of abuse. Luis beat her repeatedly, angered by his belief in her infidelity. Iraida lived with her mother-in-law, Juana, while pregnant, sleeping on the

floor and eating whatever scraps were given to her. There were many people living in Juana's house and there simply was not enough food for everyone. Juana's children tried to find food in other places, but Iraida, confined to the house because of her pregnancy and Luis' jealousy, had to live on what little she was given. She tried to take care of herself the best she could, nourishing herself everyday at least with tea, even if she no other food was available.

50. After petitioner was born, they moved out to another room. Luis was even more convinced that petitioner was not his child because of his dark skin color. His treatment of him was in the best moments, indifference and in the worst moments, hatred. Petitioner was rejected by both parents, because he reminded his mother of being raped and being forced back with an abusive husband, and his father of his mother's alleged and unforgivable betrayal.

51. During this time, they were the poorest they had ever been. Luis began again to drink heavily and gamble compulsively. Iraida was emotionally and physically exhausted by Luis' years of constant abuse. All she could manage was to struggle to feed her three children. Her house was poor and filthy and she suffered from profound hopelessness and despair. Iraida and her children all slept together on a urine stained mattress, with

fraying seams from which straw was coming out. When she was able to feed her children, it was usually soup made with parts of the animals usually thrown away, such as tripe. Luis came home from time to time, drunk and angry, and beat Iraida and the children. The children cried and begged their father to stop. Some of petitioner's first childhood memories consist of hiding under the kitchen table, frightened and crying, while Luis beat his mother and siblings over and over again. Each time petitioner and his siblings were relieved that their father had not killed their mother. Luis often stole the money that Iraida had saved to buy her children clothing or food. Neighbors saw petitioner locked out of the house late at night. At the age of five or six, he sometimes fell asleep on the doorstep because his mother was working and his father was out drinking. As a toddler, petitioner was seen with black bruises on his cheeks. Petitioner's first experiences of the world were filled with violence, poverty and fear. These frightful early childhood experiences were traumatic enough to have significantly compromised his ability to formulate relationships with others without distrust and fear. Unfortunately, petitioner continued to experience abandonment and abuse, despite his mother's ability to finally escape his father.

52. At a young age, petitioner was involved in a serious automobile accident with his sister, Yolanda. This head-on collision with another car, seriously injured petitioner, and caused a gash in his sister's face. Petitioner's forehead struck the dashboard and the windshield shattered upon him. Petitioner was blinded for weeks and received inadequate treatment for his head injury, and most likely suffered permanent cognitive impairments from this accident.

53. Each child learned to cope with the horrors of their childhood in their own way. Yolanda, the oldest, developed a similar temperament to her father. As a young girl, she was very sensitive and she cried a great deal. As she matured though, she began acting demanding and impatient, often treating petitioner harshly. She was light-skinned like her father Luis, and she also developed a feeling of superiority over darker-skinned family members, like petitioner. She became enraged easily and beat her younger brothers, especially petitioner. Sadly, she was sorry about these episodes and was aware of her temper. She told her mother that she would never have children because she feared she might kill them.

54. On the other hand, petitioner retained his gentle temperament. Early in his childhood, he learned to live in fear of others. Realizing quickly that if one drew the attention of others, they would be abused, he

developed into a lonely child and learned to pass unseen. He played by himself for hours and did not look for others to play with him. He was a peaceful child who loved animals. Petitioner cried when his cousins suggested they hurt his pet turtle or when his father wanted him to watch a martial arts competition. Petitioner developed into a very neat and orderly person and learned to do his chores perfectly so that no one would become angry with him.

55. Petitioner experienced extreme humiliation early in life. His father openly rejected paternity of petitioner and physically and emotionally abused him for supposedly being another man's child. He was sometimes left locked out of the house at night, publicly abandoned. Petitioner was also forced to watch his father beat his mother and siblings, and being the youngest, was unable to protect them. These experiences caused great psychological stress for him in his developing years.

56. As petitioner's sister Yolanda grew older, possibilities for escaping Luis' abusive control emerged. Being unusually light skinned, she was considered to be very attractive. She won a beauty contest when she was a young adult and subsequently started dating a man who was old enough to be her father or grandfather. This elderly man was wealthy and was reportedly involved in an illegal export business in Lima. He helped

her seek employment and assisted her financially so that her family could move out of the slums that they were living in. Due to Yolanda's relationship with this man, the family started to feel some relief from the continual grinding poverty they had been exposed to.

57. Although for the first time petitioner's family were able to eat and live in some amount of comfort, their problems were not resolved. Luis continued to bother them, harassing Iraida with the excuse that he wanted to see his children. He continued to beat Iraida and threaten her that he would take the children away forever. He constantly asked Yolanda for money and demanded that he be included in the family. Though Yolanda and Iraida repeatedly told Luis to leave them alone, he was not deterred. Yolanda bought a pistol to protect her mother from Luis.

58. Iraida feared that Luis would finally kill her or take the children, as he threatened. At Yolanda's urging, and with the financial help of her wealthy boyfriend, they decided to flee to Mexico, where Luis could not find them. First, they sent Luis Jr. to New York where a friend of theirs from Lima was living. There he could hopefully learn a trade and get a good job. In 1970, when petitioner was around eight years old, Iraida, Yolanda, and petitioner moved to Mexico City to start life over without Luis.

59. Although desperate to leave Luis and the constant battering and threats, Iraida's escape to Mexico left behind all family support and connections to Peru. Petitioner started life as an unwanted child in an unhappy and abusive household. The rest of his childhood consisted of moving from one foreign city to the next without much assistance or ability to adapt to the new culture or environments.

60. Once in Mexico City, Yolanda decided that she and her mother should not have the burden of worrying about petitioner all the time, so she placed petitioner in a boarding school. Although he was already nine years old, petitioner was placed back in second grade. He received very little schooling in Peru, and was academically behind his other classmates. Petitioner was afraid to be in a strange country and school, and pleaded with his mother to let him come home, but Yolanda was now in control of the decisions.

61. Yolanda continued to be very harsh and demanding with petitioner. She beat him and yelled at him when she was angry with him. She also started to reprimand her mother and treated her sometimes like a child. Iraida soon came to feel that living with Yolanda was not much of an improvement. At her son Luis Jr.'s request, she decided to move to New York.

62. In 1972, Iraida and petitioner moved to New York City to join petitioner's brother Luis Jr. Petitioner's family was further fragmented when Yolanda moved to Spain to join her elderly boyfriend. It was a rough transition for petitioner to move to the United States. He was enrolled in a public school in the Bronx, New York. Since he was ten years old, he was placed in the fourth grade, even though he did not speak English and had never attended third grade. He was the only student in his class who was unable to speak or understand any English.

63. Throughout school petitioner suffered from a combination of language and acculturation difficulties, below average academic development, and learning disabilities. He was immediately placed in the class of "low level learners," which included many students that had been held back grades. He was a troubled child. He was hyperactive and could not focus or pay attention for long periods of time. He had difficulty sitting in his seat and became frustrated easily, especially since he could not understand what anyone was saying. No bilingual education or English as a second language classes were available to him. Since petitioner was unable to communicate in English, the school failed to properly test him academically and psychologically and evaluate his need for special education.

64. The New York school system did not have any programs for non-English speaking students at the time, so immigrant children, like petitioner, found themselves unable to communicate in a foreign environment. Teachers either ignored him or misunderstood his reactions and he simply sat all day in class unable to understand what was happening or what was being asked of him. Other children were less then understanding, and when petitioner could not understand him, they yelled and beat him up. The educational system failed to provide any help to petitioner, and his introduction to life in the United States was less than sympathetic.

65. Iraida was not able to watch over petitioner, because she was also trying hard to survive in the new environment. Petitioner often came home from school crying, with his clothes torn and his books damaged. Barely being able to speak English, Iraida went to the school and tried to speak to the teachers, but was unable to properly communicate petitioner's problems. She worried about her son constantly but she did not know what else to do.

66. Iraida worked all day commuting to people's houses to work as a maid to make ends meet. Petitioner grew up as a latch key kid in New York. Iraida moved constantly, from the Bronx, to Brooklyn, Manhattan, to

New Jersey, trying to find work, pay the rent and support her child. Iraida, struggling to learn a new language and survive as a single parent in New York, sought training as a beautician to improve her and petitioner's situation. At one point, Iraida left petitioner at his brother Luis Jr.'s house while she lived and worked in New Jersey. Petitioner was left to socialize with other Spanish speaking children on the streets in his neighborhoods.

67. Petitioner's chaotic life continued throughout his childhood and adolescence, and had a serious impact on his ability to learn at school. Petitioner never had the opportunity to complete one school year with the same class. Parts of the school year he was not enrolled, other times he was transferred to another school district. His mother tried to put him in a private school for a short time, but she could not afford the tuition, so petitioner was forced to return to public school.

68. Petitioner received very little supervision or direction during these crucial periods of his adolescence. He was lost in a foreign culture with very little, if any, assistance. Petitioner had limited abilities and needed guidance, but family and teachers were not available. Left on his own, he was introduced to drugs by the street kids in his neighborhood. As a young adolescent, he was introduced to marijuana, barbiturates, speed, acid, PCP and cocaine.

69. Twice while he was growing up, petitioner's mother sent him to Madrid, Spain to live with his sister. Half way through petitioner's fifth grade school year, Iraida sent petitioner to Spain. His sister enrolled him for the second half of the school year in Madrid. While in Madrid, petitioner's overall grade average was in the failing category. By sixth grade, petitioner was sent back to New York where he attended two schools before he completed the school year. In seventh grade he started the year in a New York school and then was transferred to New Jersey. In eighth grade he was not enrolled again. Half way through the school year, at the age of fourteen, Iraida sent him to Madrid again.

70. Petitioner's sister was abusive and difficult to live with. Yolanda insisted on changing petitioner's name to Michel Cohen. She wanted him to change his identity and forget he ever came from Peru. She quickly became physically abusive and regularly beat petitioner. Several times she held petitioner's hands over a hot stove to burn them. She left for extended periods of time and left petitioner locked out of the apartment. Petitioner remembers falling asleep on the doorstep of the apartment, as he used to in Peru.

71. Frightened and confused by his sister's behavior, petitioner attempted to return to the United States. He was not allowed entrance

because his visa had expired, so he was forced to return to Spain. He went to his sister, hoping she would help him, but she turned him away. She told him that she did not want him to live with her any more and that he had to solve his problems on his own. Frightened, with no money and no place to go, petitioner went to the Madrid police station at 2:30 in the morning to ask for help. He had complained of his sister's abuse to the police before. The police in Madrid attempted to locate his sister, but were not able to find her because she had left town. The police determined that Yolanda's home posed a danger for petitioner. The Madrid authorities then decided to place petitioner in an orphanage for abandoned and neglected children.

72. Abandoned again by his family, petitioner lived at the orphanage with children who were either from abusive families or were juvenile delinquents. Petitioner was placed in vocational classes and received no academic education because he was beyond the mandatory age for school attendance. He was, however, placed in remedial spelling and arithmetic classes because he tested way below his grade level.

73. The orphanage was a terrible place for young boys. Since most of the boys were from dysfunctional families, they had difficulty interacting constructively. There were often fights and other kinds of altercations and every boy had to learn quickly to defend themselves. Some

boys who had lived in the orphanage most of their lives reported being sexually abused and beaten by the older boys. Boys in the orphanage also remember enduring physical abuse from teachers and other authorities in the orphanage. They were completely at the mercy of these authorities and had no one to turn to when they were abused.

74. Petitioner found himself alone again, thrown into a group of emotionally disturbed, neglected and abused boys. There were little or no psychological services for the boys, and harsh punishment if they were caught misbehaving. Petitioner was known as a quiet shy boy, who had a certain sadness about him. He liked to draw and tell stories. He felt lost in a foreign culture with no family or friends to even visit him. Most of the other boys had visitors on weekends. He cried often for his mother and wondered when she would come for him. There was very little protection from abuse, and bigger boys often preyed upon the weaker ones. Petitioner tried to protect another young boy who was being attacked by an older bully. Petitioner himself suffered an attack from one of the larger boys. This beating was severe because the older boy knocked petitioner to the ground and petitioner complained of headaches for a while after.

75. After over a year at the orphanage, petitioner's mother finally managed to travel to Madrid in May of 1977 and take petitioner out of the

orphanage and back to New York. Upon his re-entry to the United States, petitioner turned sixteen years old. Since his academic training had stopped in Spain, and he was hopelessly behind, his mother did not re-enroll him in school. He was lost, confused, depressed and disturbed. He received no guidance or assistance to plan for his future, to cope with his psychological problems, or to adjust as an adolescent in a foreign country and culture. He was introduced to drugs and criminal activities by other teenagers and young adults in the neighborhood. While being under the influence of drugs, petitioner had his first contacts with United States law enforcement. Within several months in 1978, petitioner was arrested for possession and sale of a controlled substance and attempted possession of a weapon, and robbery. At the time of both offenses, petitioner was under the influence of alcohol and drugs, and heavily influenced into getting involved by older co-defendants. During both arrests, Petitioner was severely beaten in the head by New York police officers. After the second beating, he was taken to the hospital after suffering severe head trauma and a brain concussion. He spent five days in the hospital and underwent surgery for the repair of occipital and parietal lacerations, before being transferred and treated at the jail. Petitioner suffers to this day from severe headaches and impaired cognitive abilities, most likely due to this severe head injury.

76. At the age of sixteen, petitioner was convicted of the above offenses and denied youthful offender status. He was sentenced to indeterminate concurrent sentences of five to fifteen years and zero to eight years in state prison as an adult. The trial court specifically requested that he receive psychiatric help and counseling in prison. Instead, he was sent to notoriously dangerous New York prisons, and was left essentially unprotected and untreated. There he suffered extreme headaches, confusion and trauma from his brain injury. No appropriate medical or psychiatric services were available.

77. Petitioner was extremely vulnerable as a young boy entering an adult prison. He was transferred to numerous adult prisons within the New York correctional system. He was continually harassed by adult predators and was forced to ask the prison for protection. He suffered from depression and repeatedly engaged in acts of self-mutilation by burning his arms with cigarettes or cutting them with a razor. Both of his forearms are still marked with dozens of scars from this time period. The depression and self-mutilation were strong indicators that he was victimized while in prison. With no hope in sight, he tried to commit suicide by setting fire to his prison cell.

78. Petitioner grew up between the ages of sixteen and twenty-one in the New York prisons. He was essentially abandoned to the prison system. When petitioner was still sixteen, his mother moved to California to obtain employment as a housekeeper. Two years later, petitioner's older brother Luis Jr. was murdered by organized crime members in the streets of New York. Petitioner had no one left.

79. Despite these difficult circumstances, petitioner made an effort to adjust in prison and improve himself. Petitioner had received positive reviews from prison authorities regarding progress in educational, social and vocational areas. He was assigned to academic and vocational training, and was noted to be a good worker who was interested and making progress in his program.

80. Petitioner was involved in an educational program and achieved his high school equivalency diploma. He completed the Tutors' Literacy Volunteers of America Workshop in Basic Reading, Writing and Math, and gained tutorial experience. Petitioner was described as "'an excellent student who works very hard.'" Prison staff reported that he "responded favorably to counseling and guidance efforts." Petitioner "seems to function best in a Maximum Security Facility benefitting from the more structured setting."

81. Petitioner's mother made great efforts to maintain legal immigration status for herself and her son while in the United States. For the years that Iraida and petitioner lived in New York, Iraida continued to apply for extensions for their visas until she could establish permanent residency. Once Iraida established her permanent residency status, petitioner was able to re-enter the United States as a child of a permanent resident. Iraida maintained her legal immigrant status until she became a naturalized United States citizen in 1986. Due to petitioner's convictions he was unable to maintain his immigrant status, even though his mother remained in the United States. In the summer of 1983, at the age of twenty-one, petitioner finished serving his prison sentence and was deported to Peru.

82. Once in Peru, Petitioner tried unsuccessfully to gain legal entry to the United States to rejoin his mother, the only family he really knew. He had not been to Peru since he was eight years old, and he felt out of place in his own country. His relatives were all still suffering from extreme poverty. He stayed for a while with his aunt and his cousins. However, they were very poor, and his aunt, who was a single mother at that point, was trying to support her six children. The eight of them lived in a crowded, tiny apartment. Very few jobs were available. Petitioner

became very agitated and depressed. He would call his mother frequently and cry, begging her to send him a ticket to return to the United States.

83. Petitioner's return to Peru was very traumatic for him. Though he had grown up in Lima, he was very upset by the poverty his family suffered and everyday life there. Terrorist attacks, car bombs, water shortages and energy blackouts were everyday occurrences. Having just been released from prison, this environment caused him severe stress and confusion. He searched for his father and when he found him he was met with coldness and rejection. At their first meeting, petitioner's father denied that petitioner was his son. His son was a better looking boy, he told petitioner. Finally Luis accepted his relation to petitioner but did not receive him warmly. Luis had remarried, was extremely poor, and trying to support a wife and four children. Devastated and desperate, petitioner searched for ways to return home to live with his mother.

84. Petitioner, now suffering from mental illness, trauma related disorders, and cognitive impairments related to brain damage, did not know how to care for himself. In desperation, petitioner depended upon help from some Colombians he knew in New York who promised him they would help him travel to his mother's home in California. In the Fall of 1983, petitioner re-entered the United States and returned to his mother's

house in Palo Alto. Once he returned to the United States, these same people demanded that he return the favor and ordered him to kill the Guerrero brothers. He was told that if he did not follow these orders by January 1, 1984, or if he went to the police, his mother, stepfather and he would be killed. On December 29, 1983, petitioner was arrested for the murders of the Guerrero brothers in San Jose. He was under the influence of drugs and alcohol at the time of the offenses. Upon arrest, petitioner told the police he was involved in the murders because he and his family were under threat of death by members of the Columbian mafia, and he did not know what else to do.

85. These omissions of trial counsel, taken individually and/or collectively, failed to meet the standards of competence reasonably to be expected from defense counsel in a capital case. Trial counsel's conduct was not the result of sound strategic decision-making.

86. If this evidence had been presented, it is reasonably probable that the jury would have reached a more favorable outcome at the penalty phase. See juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab.

C. Ineffective Assistance /Conflicts of Interest of State-Provided Counsel -- The Public Defender's Office

1. Petitioner's convictions and sentence of death were unlawfully and unconstitutionally imposed in violation of his constitutional rights by the Santa Clara County Public Defender Office's and the assigned counsel's undisclosed multiple conflicts of interest and failure to provide effective assistance of counsel, depriving petitioner of his right to counsel, the effective assistance of non-conflicted counsel, a fair trial, due process, right to confront and cross-examine witnesses, right to present a defense, a speedy trial, and reliable guilt and penalty determinations guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

2. Petitioner hereby incorporates by reference as if set forth fully herein Claims A, B, D, E, F, G, H and I, Arguments I and II from Appellant's Opening Brief on direct appeal in this case before this Court and Claims VI, VII, XI, XII, XIII, XIV, XV, from In re Bacigalupo, No. S032738, the Declaration of Dr. Renato Alarcon and all supporting exhibits,

the Declaration of Russell Kuebel and the juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab.

3. To establish a Sixth Amendment violation based on conflict of interest, petitioner must show his attorney had an actual conflict of interest which adversely affected the attorney's performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Unlike other claims of ineffective assistance of counsel, no separate showing of prejudice need be made where an actual conflict affects counsel's performance. Id. at 349-50. Defense counsel have an ethical and legal obligation to avoid conflicting interests and to advise the court promptly when a conflict arises. Cuyler v. Sullivan, 446 U.S. 335, 346 (1980); Holloway v. Arkansas, 435 U.S. 475, 485, 486 (1978); Maxwell v. Superior Court, 30 Cal.3d 606, 619-620, fn. 11 (1982). Petitioner's assigned counsel and the Office of the Public Defender completely ignored this obligation, thus effectively abrogating petitioner's fundamental right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution as well as under Article I, section 15, of the California Constitution. Petitioner was not informed of and had no knowledge of the multiple conflicts of interest that his counsel and the

Public Defender Office were laboring under and made no knowing, intelligent and voluntary waiver of any such conflicts.

4. The multiple conflicts of interest, individually or cumulatively, created an actual conflict of interest which inherently prejudiced petitioner's Sixth Amendment right to effective assistance of counsel.

a. A defendant in a criminal case "has the right to expect during trial that his attorney will, at all times, support him, never desert him, and will perform with reasonable competence and diligence." Smith v. Anderson, 689 F.2d 59, 63 (6th Cir. 1982).

b. Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, an attorney violates one of the basic duties owed his client when his loyalty to that client is divided. Glasser v. United States, 315 U.S. 60, 70 (1942); Maxwell v. Superior Court, 30 Cal.3d 606, 612 (1982).

c. Any conflict of interest analysis rests on one basic premise: "No man can serve two masters." Matthew 6: 24. In legal terms, this is translated to mean simply that every defendant is owed the undivided

loyalty of his attorney. A conflict of interest arises thus when the attorney's duty of loyalty to his client is subject to competing interests.

d. Rule 5-102 of this Court's Rules of Professional Conduct provides that a member of the California State Bar shall not represent conflicting interests:

> "(A) A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment. A member of the State Bar who accepts employment under this rule shall first obtain the client's written consent to such employment.
>
> "(B) A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned."

e. Rule 3-310 of this Court's Rules of Professional Conduct provides in pertinent part:

> "(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:
>
> > "(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
> > "(2) The member knows or reasonably should know that:
> > "(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

"(b) the previous relationship would substantially affect the member's representation; or

"(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter . . . .

"(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment . . . ."

This rule applies to both actual and potential conflicts. Comment to Rule 3-310, Rules of Professional Conduct.

f. The American Bar Association has adopted similar rules. American Bar Association Ethical Consideration 5-1 provides:

"The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

g. Violations of any of these rules of professional conduct may establish an actual conflict of interest. United States v. Iorizzo, 786 F.2d 52, 57 (2d Cir. 1986); United States v. McKeon, 738 F.2d 26, 34-35 (2d Cir. 1984); United States v. Dolan, 570 F.2d 1177, 1184 (3rd Cir. 1978).

5. When a court knows or reasonably should know that a potential conflict of interest exists between an attorney and his client, the court must make an inquiry into the nature of the conflict. The mere possibility of a conflict triggers the necessity of an inquiry in every case. Wood v. Georgia, 450 U.S. 261, 272 (1981); Cuyler v. Sullivan, 446 U.S. 335, 346-47 (1980); Holloway v. Arkansas, 435 U.S. 475, 484, 485 (1978); Maxwell v. Superior Court, 30 Cal.3d 606, 619 (1982).

a. As explained by the Seventh Circuit Court of Appeals:

> "The trial court clearly does have an obligation, whether counsel is appointed or retained, to be alert for indicia of conflict at all stages of the proceeding, including during trial. (Citation omitted.) When the possibility of a conflict appears during trial, the court must investigate the relevant facts, advise the defendant, and determine whether continued representation, absent waiver, would violate the Sixth Amendment." United States v. Gaines, 529 F.2d 1038, 1043 (7th Cir. 1976).

b. In People v. Mroczko, a case involving multiple representation, this Court described the necessary inquiry as follows:

> "At a minimum, the trial court must assure itself that (1) the defendant has discussed the potential drawbacks of joint representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of joint representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right." People v. Mroczko, 35 Cal.3d 86, 110 (1983).

6. Moreover, as described below, one or more of the multiple conflicts of interest did, in fact, constitute an actual conflict of counsel, violating petitioner's Sixth Amendment right to effective assistance of counsel. As such, a per se standard of prejudice applies, and this conflict therefore requires reversal of petitioner's convictions and judgment of death and the granting of habeas corpus relief. United States v. Cancilla, 725 F.2d 867, 871 (2d Cir. 1984); Solina v. United States, 709 F.2d 160, 168-169 (2d Cir. 1983); United States v. White, 706 F.2d 506, 510 (5th Cir. 1983). As concluded by the Fifth Circuit in White:

> "Our inquiry need not proceed further since this Court has consistently held that a criminal defendant represented by an attorney with an actual conflict of interest has received ineffective assistance of counsel as a matter of law; in such a situation, a reversal is automatic regardless of a showing of prejudice unless the defendant has knowingly and intelligently waived his constitutional right to conflict free representation. Since no waiver was present in this case, we reverse." United States v. White, 706 F.2d 506, 510 (5th Cir. 1983).

7. Even if the denial of petitioner's Sixth Amendment right to conflict-free counsel is not reversible error per se, habeas relief must be provided because one or more of the multiple conflicts of interest constituted an actual conflict which adversely affected his performance in petitioner's case. In such a situation, presumption is presumed. Cuyler v.

Sullivan, 446 U.S. 335, 349-350 (1980) ["a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief"]; Strickland v. Washington, 446 U.S. 668, 692 (1984) [holding that Cuyler establishes "that prejudice is presumed when counsel is burdened by an actual conflict of interest"]. Petitioner's right to effective representation was prejudicially affected thereby, in the following respects among others to be presented after full investigation and discovery.

8. The Santa Clara County Public Defender's Office failed to notify the trial court that they suffered from multiple conflicts of interest and were unable to provide effective assistance of counsel for petitioner, including: 1) deputy public defender Michelle Forbes' casework overload which prevented her from providing effective assistance by adequately investigating and preparing petitioner's case for trial; 2) deputy public defender Michelle Forbes' romantic relationship and engagement to a San Jose police officer investigating petitioner's case; 3) the Santa Clara County Public Defender's Office simultaneous representation of at least two and possibly other witnesses who had information that supported petitioner's duress defense; and 4) the Public Defender's Office's inability to assign a qualified attorney to provide effective assistance to petitioner's capital case

due to casework overload, management and budgetary problems within the Office.

9. In 1984, the Santa Clara County superior court appointed the Santa Clara Public Defender's Office to represent petitioner throughout his capital trial proceedings. During the next four years, petitioner's case was transferred to three different deputy public defenders within the office: James Thompson, Michelle Forbes and John Aaron. The first Deputy Public Defender, James Thompson, represented petitioner through the preliminary hearing and arraignment in superior court, approximately January to August of 1984. Attorney Thompson then left the Public Defender's Office to go into private practice.

Conflict of Interest: Casework Overload

10. Some time on or before August 13, 1984, the second Deputy Public Defender, Michelle Forbes, was assigned to petitioner's case. CT 192. Attorney Forbes represented petitioner at least until the Spring of 1986. The last day Forbes appeared in court on petitioner's behalf was February 19, 1986. CT 268. On April 22, 1986 John Aaron made his first appearance in court for petitioner. CT 273. While representing petitioner, Attorney Forbes suffered from more than one conflict of interest, including a casework overload conflict and a personal conflict.

11. After Attorney Thompson left the Public Defender's Office, some or all of his cases were transferred to Attorney Michelle Forbes. The Office failed to hire a qualified attorney to replace Thompson and to assume responsibility for petitioner's capital trial. Instead, the Office transferred petitioner's case to Attorney Forbes who was already overburdened with an existing caseload. Since Forbes had numerous other felony cases going to trial, Attorney Forbes placed petitioner's case on the "back burner." Petitioner's case languished in the office for a couple of years while Attorney Forbes filed numerous motions to continue the trial mis-representing to the court that she needed the time to properly investigate the case. In fact, she needed the extra time for her other cases in her pre-existing caseload, as well as to resolve her other conflicts of interest.

12. On August 13, 1984 Forbes filed a motion for a continuance in petitioner's case because additional time was required "to complete investigation" and because she was involved "in an extended preliminary hearing on another case." CT 191. The court granted the motion and set the pre-trial hearing for October 29, 1984 and trial for November 6, 1984. CT196. On October 29, 1984 petitioner appeared without counsel, and the court keep the trial date of November 6th on calendar. CT 197. On November 6, 14, 20, 27, 1984 and December 11, 18, 1984, other attorneys

appeared on behalf of petitioner and the court placed the case on standby for trial. CT 198 - 203.

13. On December 20, 1984, Attorney Forbes filed a second motion for a continuance in petitioner's case because she needed "additional time to prepare in this matter" and because she had "recently completed an extended preliminary hearing in another homicide case." CT 205. The court granted the motion and set the pre-trial hearing for February 19, 1985 and trial for February 26, 1985. CT 207. On February 26, and March 5, 12, 19, 26, other attorneys appeared on behalf of petitioner and the court placed the case on standby. CT 209-216, 219-220.

14. On March 28, 1985, Attorney Forbes filed a third motion for a continuance in petitioner's case because she needed additional time "to file pre-trial motions." CT 218. The court granted the motion and set the pre-trial hearing for May 21, 1985 and trial for May 29, 1985. CT 221.

15. On May 23, 1985, Attorney Forbes filed a fourth motion for a continuance in petitioner's case because she needed additional time "to file pre-trial motions." CT 224. The court granted the motion and set the pre-trial hearing for July 15, 1985 and trial for July 23, 1985. CT 221. On July 23, 30 and August 20, 27, 1985, other attorneys appeared on behalf of petitioner. CT 227, 239, 247, 248. On August 26, 1986, Attorney Forbes

appeared for a hearing on petitioner's motions for discovery and disclosure of a confidential informant. The court granted the discovery motion and later denied the disclosure motion. CT 249-252.

16. On August 29, 1985, Attorney Forbes requested a fifth continuance in petitioner's case, which the court granted, extending the trial date to October 1, 1985. CT 257. On October 1, 8, 16, 22 and 29, other attorneys appeared on behalf of petitioner and the court placed the case on standby. CT. 258-262.

17. On October 31, 1985, Attorney Forbes filed a sixth motion for a continuance in petitioner's case because she "felt ethically obligated to thoroughly investigate defendant's past in order to prepare for the penalty phase. Defendant has resided in South America and the state of New York. . . . This is a lengthy process, and we are making every effort to expedite matters." CT 261. The court granted the motion and set the trial for February 19, 1986. CT 267. On February 19, 1986, Attorney Forbes appeared for the last time on behalf of petitioner, and the court set the case on standby for trial. Other attorneys appeared on behalf of petitioner while the case continued on standby. CT 268-272. On April 22, 1987, John Aaron appeared on behalf of petitioner. CT 273. The court then reset the

trial numerous times until petitioner's case finally went to trial in February 1987.

18. While Attorney Forbes represented petitioner, his trial was continued from August 1984 to February 1986 for the stated purpose of properly investigating and preparing the case for trial. However, petitioner's case was never adequately investigated or properly prepared for trial by Attorney Forbes or any other attorney.

Conflict of Interest: Romantic Relationship with Sgt. Ronco

19. While representing petitioner, Deputy Public Defender Forbes was romantically involved with a San Jose police officer, Stephen Ronco, who had worked on the investigation of petitioner's capital case. In 1984, Attorney Forbes started dating Sergeant Ronco, and in August of 1985, they became engaged. Attorney Forbes married Sergeant Ronco on May 24, 1986, just a month or two after petitioner's case was reassigned to another deputy public defender. The Public Defender's Office failed to notify petitioner or the trial court of the conflict of interest, and reassigned the case to an inexperienced Deputy Public Defender, John Aaron.

20. Attorney Forbes and Sgt. Ronco's relationship was a matter of public knowledge in the legal community. They attended the opera in October of 1984 with a group that was sponsored by a member of the

district attorney's office. The prosecutor in petitioner's case was aware at least by February 1985 that Attorney Forbes and Sergeant Ronco had a dating relationship, but failed to inform the trial court of this conflict of interest. As stated above, from 1984 to 1986 Attorney Forbes repeatedly filed motions to continue, claiming she needed more time to complete the investigation and prepare for trial. However, she failed to adequately investigate the case, including a guilt phase defense or penalty phase evidence for petitioner. Without ever disclosing her relationship to Sgt. Ronco to petitioner or the court, Attorney Forbes failed to properly prepare petitioner's case during her representation and then was removed from his case right before her marriage to Sgt. Ronco. On May 24, 1986, Ms. Forbes married San Jose Police Sergeant Stephen Edward Ronco.

21. Police reports reveal that Sgt. Ronco was an investigating officer on petitioner's case. For instance, records show that in April 1984, Sgt. Ronco along with another officer, interviewed the victim's widow, Maria Guerrero. The interview was extensive and resulted in a seven page report by Sgt. Ronco. San Jose Police Dept. Supp. Report , 4/20/84. Sgt. Ronco's name also appeared on a report with Sgt. Kracht, in which numerous witnesses were interviewed involving petitioner's claim of being under duress at the time of the offences. San Jose Police Dept. Supp.

Report, 5/4/84. Attorney Forbes and the district attorney's office failed to disclose this personal conflict of interest to petitioner or to the trial court.

22. Attorney Forbes' romantic relationship and engagement to Sgt. Ronco influenced her conduct and prevented her from adequately identifying, investigating and developing a defense for petitioner. Her boyfriend-fiancé-husband was a member of the prosecution team and a possible important witness with information that was potentially crucial to the case. Forbes failed to adequately investigate and pursue a guilt and penalty phase defense for petitioner, failed to interview numerous witnesses who could have supported petitioner's duress defense, and failed to expand her guilt investigation past a few interviews. She relied mainly on a few interviews with the investigators for the district attorney. Furthermore, her husband potentially had access to material exculpatory (Brady) information that the district attorney failed to disclose to Attorney Forbes. It is more than likely that Forbes obtained confidential information material to petitioner's defense. As a result of obtaining such information, Forbes not only was prejudiced against petitioner but also, for fear of misusing such information, failed to conduct a vigorous defense as required to defend against petitioner's capital charges. Attorney Forbes' duties were divided between her loyalty to her husband-to-be and his career and her loyalty to

petitioner. This conflict of interest caused counsel to violate her duty of loyalty to petitioner and adversely affected her ability to provide adequate assistance of counsel. Forbes' relationship with Sgt. Ronco substantially affected the representation of petitioner during his capital trial.

Conflict of Interest: Simultaneous Representation of Witnesses for the Defense

23. Petitioner told the police shortly after his arrest that he had been acting under duress because members of a Columbian mafia had ordered him to commit the offenses. He stated if he did not commit the offenses before January 1, 1984, members of the mafia threatened to kill him and his parents. Trial counsel presented no evidence at guilt or penalty to support this defense, and the prosecutor argued at trial that it was a lie. At least two, and possibly other witnesses who had information supporting petitioner's duress defense, were also represented by the Public Defenders' Office at the same time they were representing petitioner.

24. Ronnie Nance, a witness who had information that the capital offenses were ordered by a reported major Columbian drug trafficker in the San Jose area was represented by the Santa Clara County Public Defender's Office. See San Jose Police Dept. Supp. Report , 4/20/84. A note in trial counsel's file indicates that they were aware Mr. Nance was their "client,"

but there is no record of any independent interview. Mr. Nance was represented by the Santa Clara County Public Defender's Office in 1984 for numerous charges, including robbery, shooting an occupied building, ex-felon in possession of a firearm and burglary. The witness pled guilty to two charges and was sentenced to prison five months after petitioner was arrested. People v. Nance, Santa Clara County Superior Court No. 92657 (1984).

25. Another witness, Steven Price, was arrested in March 1987 for possession of cocaine, at the same time petitioner's trial was ongoing. This witness also had information supporting petitioner's duress defense and was interviewed by the district attorney's office. He was represented by the Santa Clara County Public Defender's Office as well. There is no evidence that petitioner's counsel ever interviewed Mr. Price as a potential witness for his duress defense. Mr. Price's charge was dismissed in December of 1987 on the district attorney's motion, six months after petitioner was sentenced to death. People v. Price, Santa Clara County Superior Court No. 117427 (1987).

26. The Public Defender's Office suffered multiple conflicts of interest due to their simultaneous representation of these witnesses. Petitioner was unaware of his attorney's conflicts of interest and did not

knowingly and voluntarily waive any conflict of interest. Petitioner was not aware and did not understand the adverse impact that trial counsel's representation of one or more potential witnesses would have on his defense. Trial counsel did not explain the importance of seeking counsel who was not representing any potential witnesses in the action. Defense counsel knew that petitioner would not be able to understand the complex constitutional issues and the implication of having a conflicted attorney. Petitioner did not waive counsel's conflicts of interest and did not understand the necessity of seeking new non-conflicted counsel.

27. The Office of the Public Defender, as a result of their representation of these potential witnesses, suffered from a conflict of interest that prejudiced them against petitioner and undermined trial counsel’s responsibility to be a zealous advocate for petitioner. Petitioner's case was adversely affected because counsel was unable to thoroughly investigate and present a guilt phase defense and cross-examine supporting witnesses due to the conflicts of interest. Without appropriate guidance from appointed counsel, petitioner acquiesced in proceeding to trial without any witnesses supporting his defense and without understanding the implications of his attorney’s conflict. Immediate disclosure to the court

and appointment of non-conflicted counsel would have been the appropriate action to remedy this conflict.

Conflict of Interest/IAC: Management and Budgetary Problems at the Public Defender's Office

28. Petitioner was deprived of effective assistance of non-conflicted counsel by the Public Defender's office due to the agency's inability to resolve its own significant management and budgetary internal problems at the time. During the pendency of petitioner's case, the Santa Clara Public Defender's Office was riddled with budgetary, case overload and staffing problems that eventually led to a political crisis resulting in the termination of Public Defender Sheldon Portman's job.

29. Portman was the Public Defender from 1968 to 1986. In 1984, the Santa Clara County Board of Supervisors implemented a "pay for performance" policy and asked Public Defender Portman to submit a list of his standards and goals. Public Defender Portman was concerned about statements Board members had made in the past about him keeping costs down, not requesting additional staff, and avoiding declaring conflicts of interest due to case overload. At the time the Public Defender Office was experiencing an excessive caseload, which the Public Defender had been warning the Board about since March 1985. This prompted him to submit

an augmented budget request. Before the Public Defender's budget hearing in June 1985, Public Defender Portman told the Board that "the situation had gotten much worse, and that 'to avoid malpractice and professional disciplinary action,' unless the additional staff was provided, he would have to declare 'caseload conflicts' and ask the courts to be relieved."[5] He publicly stated at the budget session, on June 21, 1985, that "'the County, our Department and our lawyers are threatened or face malpractice . . . [and the] possible threat of professional disciplinary action . . . for taking too many cases.'"[6] He reiterated that he would have to ask the courts to be relieved if the additions were not provided. A month later the Board criticized Public Defender Portman for his comments about malpractice and for exposing the county to liability. A contentious relationship continued resulting in the Board firing Public Defender Portman in December of 1986.

30. Public Defender Portman sued the County for wrongful termination and First and Sixth Amendment violations. Portman argued in his lawsuit that the statutory scheme was unconstitutional because it gave the Board the power to direct the manner in which the Public Defender

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5 Sheldon Portman v. County of Santa Clara, et al., U.S. Court of Appeals for the Ninth Circuit No. 91-16743, Appellant's Opening Brief, Statement of the Facts, at 5.

6 Ibid.

discharges his duties, which interferes with the Office's ability to provide effective assistance of counsel. In addition he argued that the statutory scheme violated the Sixth Amendment rights of his clients in receiving effective assistance. The Court of Appeals for the Ninth Circuit ruled that Portman's Sixth Amendments claims were not ripe because he did not assert which clients were suffering ineffective assistance due to the Board's actions or inactions. Portman v. County of Santa Clara, 995 F.2d 898, 903 (9th Cir. 1993). However, the court did state that pressure by the Board could give rise to a violation of an indigent defendant's Sixth Amendment right to counsel. Ibid. Petitioner was one client that suffered these violations.

31. Petitioner's case went to trial two months after Public Defender Portman was fired. Although an acting Public Defender was appointed in the interim, the new Public Defender took no action to ensure petitioner's case was properly staffed. On the contrary, the case was kept on a strict budget with very few expenses incurred. An inexperienced and unlicenced staff member was assigned to the case, by himself.

32. On April, 22, 1986 Deputy Public Defender John Aaron appeared in court for petitioner. Aaron was not on the homicide unit at the Public Defender's Office and had never tried a murder trial before. Deputy

Public Defender Aaron was not even a licensed attorney at the time he was assigned to petitioner's case. On July 21, 1980, Aaron's California bar license was suspended due to the failure to pay state bar dues. Calif. State Bar Record of John Aaron. From April 1986 to January 1987, Aaron represented petitioner in his capital trial without a license to practice law. On January 26, 1987, right before petitioner's case went to trial in February of 1987, Aaron's bar dues for six and one half years were paid and he proceeded to trial with very little preparation.

33. Aaron had insufficient time to prepare for trial and provided ineffective assistance of counsel during the preparation and trial proceedings. He labored under the same conflicts of interest and relied on the inadequate investigation conducted by conflicted-attorney Forbes. Aaron also failed to interview any witnesses to support a duress defense, and failed to present any witnesses to support a duress defense at the guilt or penalty phase trials.

34. Not one member of petitioner's defense team traveled out of Santa Clara County to investigate the case, despite Attorney Forbes' numerous motions for continuances, and the fact that petitioner was a Peruvian national and lived in Peru, Mexico, Spain, and New York before coming to California a couple months before the crime. Only one mental

health expert was hired to evaluate petitioner. This expert was not qualified to properly evaluate petitioner's mental state, including his neurological condition and cultural social history background, even though petitioner grew up in several other countries and there were significant indicators of serious mental health illness, including organic brain damage. Petitioner's defense team failed to interview any or very few witnesses concerning a guilt phase defense for petitioner, and instead agreed to "hold off" and allow the prosecutor to conduct the duress defense investigation and establish a confidential informant. Minimal case preparation was done. It was petitioner's capital case which suffered from the Public Defender Office's political budgetary crisis, violating his Sixth Amendment right to effective assistance of non-conflicted counsel.

35. The Public Defender Office's failure to provide petitioner with counsel to adequately investigate and present evidence at the guilt and penalty phases of his trial fell below the standard of competence reasonably to be expected of a Public Defender office in a capital case. There is a reasonable probability that in the absence of the Public Defender Office's errors and omissions a result more favorable to petitioner would have occurred at either the guilt phase or the penalty phase of trial. Additionally, due to the multiple conflicts of interest the Public Defender's Office

suffered, petitioner's case was adversely affected and he was deprived of effective representation.

D. Ineffective Assistance of Counsel – Additional Allegations

1. Petitioner's conviction and sentence of death were obtained in violation of his constitutional rights to due process, to a fair trial, right to counsel, to effective assistance of counsel, equal protection, to present a defense, and to a reliable determination of guilt and penalty verdicts as guaranteed by the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution because trial counsel failed to render effective assistance of counsel at the guilt and penalty phases of trial. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

2. Petitioner incorporates by reference as if fully set forth herein the Claims A, B, C, E, F, G, H and I, the Declaration of Dr. Renato Alarcon and all supporting exhibits, Declaration of Russell Kuebel, and the declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Jean Marshall, Vera O'Haver, Sandra Petro and Alison Staab.

3. Petitioner's rights to counsel and effective assistance of counsel were violated by the Public Defender's Office's failure to assign a competent licensed attorney to petitioner's case. Petitioner's case went to trial two months after Santa Clara County Public Defender Sheldon Portman was fired. Although an acting Public Defender was appointed in the interim, the new Public Defender took no action to ensure petitioner's case was properly staffed. On the contrary, the case was kept on a strict budget with very few expenses incurred. An inexperienced and unlicenced staff member was assigned to petitioner's case, by himself.

a. Due to an undisclosed conflict of interest, petitioner's case was transferred from Attorney Forbes' caseload to John Aaron's. On April, 22, 1986 Deputy Public Defender John Aaron appeared in court for petitioner. Aaron was not on the homicide unit at the Public Defender's Office and had never tried a murder trial before. Deputy Public Defender Aaron was not even a licensed attorney at the time he was assigned to petitioner's case. On July 21, 1980, Aaron's California bar license was suspended due to the failure to pay state bar dues. Calif. State Bar Record of John Aaron. From April 1986 to January 1987, Aaron represented petitioner in his capital trial without a license to practice law. On January 26, 1987, right before petitioner's case went to trial in February of 1987,

Aaron's bar dues for six and one half years were finally paid and he proceeded to trial with very little preparation. Aaron had insufficient time to prepare for trial and provided ineffective assistance of counsel during the preparation and trial proceedings.

4. Trial counsel also failed to ask for a continuance to adequately investigate and present mitigating evidence concerning the aggravating evidence presented by the prosecution.

a. Penal Code section 190.3 provides in part: "Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial."

b. Section 190.3 is construed as requiring pretrial notice of the actual evidence on which the prosecution intends to rely to establish aggravating circumstances at the penalty phase. Matthews v. Superior Court, 209 Cal. App. 3d 155, 157 (1989). The purpose of the notice provision is to afford capital defendants notice of the evidence actually be used at the penalty phase without the need to utilize the discovery procedures. People v. Jennings, 46 Cal.3d 963, 987 (1988).

c. In petitioner's case, the prosecutor's notice of aggravation was filed late -- on February 25, 1987, the first day of trial. RT 9. The trial court admitted it was late and invited counsel to request a continuance to rectify any harm caused by the prosecutor's delay: "Let me ask you this, Mr. Aaron, because I believe it is clear that the people have the burden to file the written notice of intention to introduce evidence in aggravation prior to trial, within a reasonable time prior to trial: Do you have any objection that we go forward, or do you feel you need any additional time to consider what's been filed this morning?" RT 10., Trial counsel raised no objection. Id.

d. Trial counsel provided ineffective assistance of counsel because even at the urging of the court, he did not request a continuance to adequately investigate and prepare mitigating evidence for the evidence to be presented in aggravation. Trial counsel presented no evidence in mitigation for aggravating evidence admitted in accordance with Penal Code sections 190.3(b) [prior criminal violent activity] and 190.3(c) [prior felony convictions]. Substantial mitigating evidence existed that counsel could have obtained and presented to the jury. See Declaration of Dr. Renato Alarcon and all supporting exhibits. Reasonably competent counsel acting as a diligent advocate on behalf of his client would have requested a

continuance after the prosecutor gave late notice of aggravating evidence and adequately prepared for the penalty phase of the trial and presented the substantial mitigating evidence that was available to the jury.

5. Trial counsel failed to make an opening statement at the guilt or penalty phases of the trial. RT 3077, 3467, 3719, 3753.

a. Trial counsel was unable to present an opening statement in the guilt or penalty phases of the trial because he had not adequately prepared for either stage of the case. He did very little or no preparation for the guilt phase of the case, presented no evidence during this phase of the case, and was not sufficiently prepared to go forward. Since petitioner's statements admitting involvement in the offenses were presented to the jury, this was not a case where it would have been a reasonable tactical decision to rely on the prosecutor to prove his case. Trial counsel also failed to adequately prepare for the penalty phase, and presented only three witnesses during this phase of the case.

b. These were not considered tactical decisions, but the result of a lack of preparation. Trial counsel did not know how to present petitioner's defense at either phase of the trial, and therefore waived opening statements so as not disclose this lack of preparation and knowledge of the case.

c. Reasonably competent counsel acting as a diligent advocate on behalf of his client would have adequately prepared for both phases of the trial and presented opening statements to the jury to provide them with the defense's theory of the case.

6. Trial counsel failed to adequately investigate and prepare for trial resulting in a failure to properly cross-examine the prosecution witnesses, including Carlos Valdiviezo (RT 3164-76), Maria Guerrero (RT 3199) and Officer Di Gregorio (3741-47). Trial counsel failed to adequately cross-examine Valdiviezo, the prosecution's key eye witness to the capital offences, about critical points, such as exactly what he saw at the crime scene when he returned to the jewelry store and why he had inconsistent testimony, including about petitioner pointing the gun at his legs and then to his head. He failed to point out critical omissions and prior inconsistent statements and testimony. Additionally, while questioning Di Greegorio, trial counsel failed to lay a proper foundation for the relevancy of the extent of petitioner's head injuries that he sustained while being arrested by the New York police for a prior offense. RT 3745. Finally, trial counsel failed to cross examine Maria Guerrero during guilt phase. Reasonably competent counsel acting as a diligent advocate on behalf of his

client would have adequately prepared for cross-examination of the prosecutor's witnesses.

7. Trial counsel failed to investigate, develop and present evidence, including expert testimony, about petitioner's intoxication due to drug and alcohol usage around the time of the capital offenses, the time he gave statements to the police and prior offense in New York. RT 3316-24. He unreasonably tried to limit petitioner's evidence of intoxication and tried to rely on a state witness for the effects of intoxication, instead of calling his own expert witness. Trial counsel later argued to the jury that petitioner was intoxicated at the time of the offenses and when he gave the statements to the police, but failed to present any evidence to the jury to support his argument. RT 3513. Reasonably competent counsel acting as a diligent advocate on behalf of his client would have adequately prepared for presentation of evidence regarding petitioner's intoxication at the time of the offences, while giving statements to the police, and during prior offenses in New York.

8. Trial counsel's individual and cumulative failures to adequately investigate and present evidence at the guilt and penalty phases of trial and others described above, fell below the standard of competence reasonably to be expected of defense counsel in a capital case.

9. There is a reasonable probability that in the absence of trial counsel's errors and omissions, individually and cumulatively, a result more favorable to petitioner would have occurred at either the guilt phase or the penalty phase of trial.

E. Trial Court Error in Refusing to Grant Petitioner's Motion to Suppress His Statements and Other Inadmissible Evidence/ State Misconduct/Inadequate Hearing/ Ineffective Assistance of Counsel

1. Petitioner's convictions of capital murder and robbery, the jury's true findings on the special circumstance allegations and other enhancements, and the death sentence imposed on petitioner are each unlawful and unconstitutional, and/or each was arrived at and/or imposed, in violation of petitioner's right to counsel, to the effective assistance of counsel, to due process of law, to trial by jury, and to freedom from cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution, because of the trial court's failure to provide an adequate hearing and suppress petitioner's statements to the police and other inadmissible evidence, ineffective assistance of counsel, and state misconduct. The following facts, among

others to be presented after full investigation and discovery and at an evidentiary hearing, support this claim:

2. Petitioner incorporates by reference Claims A, B, C, D, F, G, H, I and K, the Declaration of Dr. Renato Alarcon and the supporting exhibits, Declaration of Russell Kuebel, and Argument IV from Appellant's Opening Brief on direct appeal before this Court as if fully set forth herein.

3. The capital offenses took place sometime around 1:00 in the afternoon on December 29, 1983, in San Jose. According to the trial testimony, the following events took place. At around 8:00 p.m., four San Jose officers, six Palo Alto officers, and a dog proceeded to petitioner's parents' house in Palo Alto. RT 105, 110. The four San Jose officers and a uniformed Palo Alto officer went to the door, while the others surrounded the house. RT 107-110. Officer Reyes, who was at the door, had his gun in his hand. RT 114. Sergeant Smith looked in the window and saw a man, a woman, and a younger man who fit Mr. Bacigalupo's description. RT 151. One of the officers knocked on the door, and Mrs. Golden, Mr. Bacigalupo's mother, answered it.

4. Sergeant Smith, who is at least six feet tall, identified himself and asked her if her son was home. RT 130, 151, 177, 185. She said yes and stepped back. RT 177. Sergeant Smith entered the house, although she

never said anything to indicate that he could come in. RT 177-178. If she had shut the door, he would have forced his way in. RT 170. When Mrs. Golden stepped back, Sergeant Smith entered the house and began to explain why he was there. RT 152.

5. Officer Reyes entered immediately after Sergeant Smith. When Mrs. Golden opened the door, he had heard a noise at the back of the house that sounded like a door closing. RT 43. He went in quickly, with his gun in his hand, and followed the noise to the back of the house. RT 43, 114. He observed that the noise he had heard came from the bathroom door. RT 44. He ordered Mr. Bacigalupo to come out, and he did. RT 45. Officer Reyes immediately arrested him and took him out to one of the patrol cars. RT 46.

6. In the meantime, Sergeant Smith obtained the Goldens' consent to search their house, and the officers conducted a search. RT 153-155. The Goldens also gave the officers Mr. Bacigalupo's suitcases, which were in their car. RT 158-159. Sergeant Smith placed the suitcases in the driveway near the patrol car in which Mr. Bacigalupo was sitting. RT 151.

7. While the search was going on, Mr. Bacigalupo remained handcuffed in the patrol car. According to his testimony, Reyes read the Miranda card he carried to petitioner in English. RT 47. Any Miranda

rights that were read to petitioner, or his purported waiver of those rights, were not tape recorded. RT 60. Officer Reyes had three separate conversations with Mr. Bacigalupo in the patrol car. In the first two, he denied involvement in the offense. After the second conversation, Officer Reyes went to the backyard, where he saw that some empty jewelry boxes had been discovered in the garbage. RT 89. Another officer told him that Mr. Bacigalupo wanted to talk to him. Id. Officer Reyes returned to the car, and Mr. Bacigalupo admitted that he was involved in the robbery and murder of the Guerrero brothers. Petitioner was emotional and cried, particularly during the third interview. RT 129.

8. After making this statement, petitioner told Officer Reyes where he had left the gun, and directed the officers to that location. RT 81, 160. The officers retrieved the gun and took Mr. Bacigalupo back to the police station. RT 160. There, he signed a consent form allowing the police to search his suitcases. RT 162. Sergeant Smith then questioned him, and he again admitted his involvement in the crimes. RT 3306-07.

9. Petitioner's Miranda advisement was invalid and his waiver not knowing, intelligent and voluntary because petitioner's impaired mental state made him incapable of understanding his Miranda rights and effecting a proper waiver. Petitioner was suffering from extremely impaired

cognitive functioning due to a combination of factors, including intoxication, organic brain damage, and serious mental illness. Additionally, due to the advisement being read only in English, and his unfamiliarity with this country's legal system, he was unable to adequately comprehend his Miranda rights. Furthermore, the police failed to advise Mr. Bacigalupo his right under Article 36 of the Vienna Convention that he had a right to speak to and seek advise from Peruvian consulate officials, making it even more difficult for him to understand his legal rights in this country.

10. Petitioner's cultural background and personal experiences led him to believe that the police could harm or kill him upon arrest. In Peru, petitioner's family commonly believe that poor citizens such as themselves must fear police and other people with power and authority, or possibly risk serious bodily harm. They also believe that you can be detained without charges, without the right to speak with counsel, and possibly be killed by the police. Petitioner himself suffered two serious beatings at the hands of the police when he was apprehended for his previous offenses in New York. He believed that the New York police were going to kill him on those days. He also suffered the murder of his brother on the streets of New York, without the police ever arresting or prosecuting a suspect.

11. Additionally, petitioner's impaired mental state made him incapable of understanding his Miranda rights. Petitioner suffers from serious mental illness and brain damage, in the frontal lobe and left hemisphere, making it very difficult for him to comprehend information, especially under stressful situations. Additionally his cognitive deficits were exacerbated by alcohol and drug intoxication on the day of his arrest. Petitioner was also overly emotional, crying, vulnerable, fearful and remorseful at the time of the arrest.

12. Petitioner's statements were involuntary because he believed that the police were threatening him and his parents with harm if he did not talk. Petitioner believed that the police were going to kill him and take his parents as prisoners. RT 202. The police told him "Look this can be made more difficult or easier." RT 68. Petitioner told the police "If you wish, you can kill me" and "I don't care if they kill me or not." RT 68, 72. The police also told him he was a liar. Petitioner also believed that the police made promises that they would go easier on him and not kill or execute him if he cooperated and gave statements. The police said that nobody was going to kill him, that the killing was over. The police also said that they would protect petitioner from the mafia. RT 82.

13. The police or its agents committed misconduct by intentionally destroying portions of the tape recording and/or intentionally failing to record crucial portions of the interrogation of petitioner by the police.

14. Without the benefit of the full tape recording, trial counsel was precluded from presenting adequate evidence that petitioner's Miranda advisement was invalid and that petitioner's waiver of his rights were not knowing, intelligent and voluntary. Had the full tape recording of the police's interviews with petitioner been available, it was reasonably likely that the trial court would have granted petitioner's motion to suppress his statements and other evidence.

15. Additionally, the warrantless entry into the house and the arrest of Mr. Bacigalupo were not justified by exigent circumstances or by consent. Both the state and federal constitutions require that police obtain a warrant before intruding into the privacy of the home to effect an arrest. People v. Ramey, 16 Cal. 3d 263 (1976), cert. denied, 429 U.S. 929; Payton v. New York, 445 U.S. 573 (1980). This rule is based on the recognition that "entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection." Payton v.

New York, supra, 445 U.S. at 588. This portion of the claim was already presented to the state Supreme Court on direct appeal.

16. When the police enter a suspect's home without a warrant, the prosecution bears the burden of proving by a preponderance of the evidence either exigent circumstances or consent to enter. People v. Ramey, supra, 16 Cal. 3d at 75; People v. James, 19 Cal. 3d 99, 106 at n.4 (1977). Neither was proven in this case. The warrantless entry was not justified by exigent circumstances or consent.

17. All fruits of the illegally obtained statements and entry and arrest should have been suppressed. All products of an illegally obtained statement or search or seizure, whether direct or indirect, must be suppressed. In this case, the items found in the house, Mr. Bacigalupo's statements, the gun and jewelry and the testimony about the abrasion on Mr. Bacigalupo's hand should all have been suppressed.

18. The improper admission of petitioner's statements confessing to the crime is prejudicial per se, and mandates reversal. Furthermore, the physical evidence obtained as a result of the illegality was also prejudicial. The murder weapon, of course, directly linked appellant to the offense. The jewelry boxes, jewelry, and other items that came from the jewelry provided strong corroboration of the eyewitness's identification of Mr.

Bacigalupo, and Officer Rimer's testimony corroborated the eyewitness's testimony that Mr. Bacigalupo had tried to shoot him. There is a reasonable probability that Mr. Bacigalupo would not have been convicted had this evidence not been admitted.

19. The trial court failed to provide an adequate suppression hearing to determine the voluntariness of petitioner's statements, the legality of the search and seizure of evidence and whether the police intentionally destroyed or failed to preserve tape recorded evidence.

20. Trial counsel provided ineffective assistance of counsel for failing to adequately investigate petitioner's serious mental impairments, including organic brain damage, cultural background, and personal experiences to: 1) properly examine petitioner, 2) properly cross-examine the state witnesses, and 3) to present experts to testify in support of the motion to suppress his statements to the police. There was no reasonable tactical basis for failing to properly investigate and present this evidence at the suppression hearing. Reasonably competent counsel acting as a diligent advocate on behalf of his client would have investigated and presented this evidence at the suppression hearing. The admission of this evidence severely prejudiced petitioner's case.

21. After the court denied the motion to suppress, trial counsel also failed to challenge the admissibility of portions of petitioner's statements to Officer Reyes as unduly prejudicial and a violation of petitioner's constitutional rights. Trial counsel also failed to object to Officer Reyes, the People's witness, translating from Spanish to English one of the tape recordings of petitioner's statements for the jury. Additionally, trial counsel failed to ensure that the tape recordings played for the jury were recorded by the court reporter.

a. At the guilt phase of the trial, the prosecutor played for the jury two tape recordings of petitioner's statements to the police. See People's exhibits ## 34 and 47. Trial counsel objected to the admission of these statements, and filed a motion to suppress, which the court denied. Afterwards, trial counsel failed to request that certain portions of the tape which were unduly prejudicial be redacted. After the court's ruling denying the motion to suppress, trial counsel requested that the entire statements be admitted. RT 3049.

b. Portions of the tape were unduly prejudicial and their admission violated petitioner's constitutional rights. The unredacted statements admitted evidence that, inter alia, (1) should not have been admissible in either phase of the trial, (2) would only be admissible in the

penalty phase, (3) the police officer's opinion was that petitioner's defense was false, (4) the police officer's opinion was that petitioner was lying, (5) the police officer's legal opinion was that a duress defense was not available to petitioner, and (6) the police officer's opinion was that petitioner's mental state was that he was intelligent and knew what he was doing. The tape recordings of petitioner's statements introduced evidence that:

(1) Petitioner had tattoos on his arm, one saying "Chino," suggesting that he was a prison gang member.

(2) Petitioner had been previously arrested in New York for narcotics in July.

(3) Petitioner just recently was released from prison in New York, for being involved with the Columbian mafia.

(4) Petitioner had been in jail since he was 16 years old, and he had always worked for the Colombians.

(5) Petitioner had just been released from jail in July 1983, six months before the capital offense.

(6) In September 1983, petitioner re-entered the United States from Peru, via Mexico, with the help of the mafia, suggesting that he was a recent illegal immigrant.

(7) Petitioner was arrested with half a pound of cocaine and some other guns when he was sixteen and he served five years in prison.

(8) The police officer's opinion was that petitioner was not threatened or under duress during the offenses.

(9) The police officer's opinion was that petitioner lied to them about the threats from the mafia.

(10) The police officer's opinion was that petitioner was not being honest with them and was just trying to blame other people.

(11) The police officer's opinion was that petitioner's circumstances cannot be mitigated by putting the blame on someone else or by claiming he was under duress at the time of the offenses.

(12) The police officer's opinion was that petitioner is making up a big story and no body told him to do the offenses, but rather he did these offenses alone.

(13) The police officer's opinion was that Carlos Tijiboy did not tell him to kill two people and steal the jewelry and go to New York.

(14) Petitioner does not have a green card, and is not a U.S. citizen.

(15) The police officer's opinion was that petitioner is intelligent and knew what he was doing.

(16) The police officer's opinion was that petitioner did the offenses himself because he wanted the money, wanted to be a big man, wanted to go back to New York where his cocaine connection was, and wanted to be a big time criminal; and petitioner wanted to make millions of dollars selling cocaine and have big Cadillacs, wear fur coats, dress in fancy clothes, have fancy rings, and have good women with him.

(17) The police officers have talked to hundreds and thousands of people like him and have 25-27 years of experience, and it is their opinion that petitioner was lying and a bad guy, and the officers do not have to prove it.

(18) The police officer's opinion was that if petitioner did not want to be a criminal in the U.S. he would have stayed in Peru where it was safe.

(19) Petitioner was deported back to Peru and illegally entered the U.S. before the offenses.

c. Through the admission of petitioner's unredacted statements, the prosecutor was able to illegally admit evidence of the police officer's opinions that petitioner was lying and that any duress and/or mental state defenses were false.

d. Trial counsel's failure to object to the admissibility of these portions of petitioner's statements was not a considered tactical decision.

e. Reasonably competent counsel acting as a diligent advocate on behalf of his client would have objected and moved to redact these portions of petitioner's statements. Their admission severely prejudiced petitioner's case.

22. But for counsel's errors and omissions, petitioner's statements to the police and other inadmissable evidence would have been suppressed, or at least the prejudicial portions of his statements redacted, and there is a reasonable probability that Mr. Bacigalupo would not have been convicted or sentenced to death.

F. **Competency to Stand Trial / to Waive Constitutional Rights/ and to be Executed.**

1. Petitioner's convictions of capital murder and robbery, the true findings on the special-circumstance allegations and other enhancements, and the death sentence is unlawful and unconstitutional, and arrived at and imposed in violation of petitioner's rights to due process of law, right to counsel, an impartial jury, effective assistance of counsel, and freedom from cruel and unusual punishment as guaranteed by the United States Constitution and the amendments thereto, including the Fifth, Sixth, Eighth, and Fourteenth Amendments because of petitioner being incompetent to stand trial and to waive Constitutional rights and to be executed, and trial counsel's failure to investigate these issues, and the trial court's failure to conduct a proper inquiry into these issues. The following facts, among others to be presented after full investigation and discovery and at an evidentiary hearing, support this claim:

2. Petitioner refers to and incorporates herein the factual allegations and evidentiary support of Claims A, B, C, D, E, G, H, I and K, Declaration of Russell Kuebel, and the Declaration of Dr. Renato Alarcon and all of the supporting exhibits.

3. The trial court failed to observe procedures adequate to protect petitioner's right not to be tried or convicted while incompetent to stand trial by failing to institute formal proceedings pursuant to California Penal Code sections 1367-1370, to determine petitioner's mental competency to stand trial, including the appointment of a mental health expert to examine petitioner and the convening of a competency hearing, despite substantial evidence that petitioner was not capable of assisting counsel in the conduct of a defense in a rational manner. Drope v. Missouri, 420 U.S. 162, 172 (1975); Pate v. Robinson, 383 U.S. 375, 386-87 (1966); Hernandez v. Ylst, 930 F.2d 714 (9th Cir. 1991); People v. Hale, 44 Cal. 3d 531, 539 (1988).

4. Petitioner's trial counsel provided constitutionally ineffective assistance by unreasonably failing to inform the trial court of petitioner's inability to communicate and assist counsel in a rational manner, unreasonably failing to follow the procedures set forth in California Penal Code sections 1367-1370, and unreasonably failing to discharge his responsibilities as counsel by not fully informing the trial court of the substantial doubts as to petitioner's mental state which he had or should have had during the course of the proceedings. Strickland v. Washington, 466 U.S. 668 (1984).

5. As a result of a mental illness, disorder or disability, petitioner did not possess sufficient ability to consult or communicate with trial counsel with a reasonable degree of rational understanding or to assist counsel in the conduct of a defense in a rational manner. Throughout the trial, petitioner did not have sufficient ability to work in a collaborative and cooperative effort with counsel. Petitioner did not have the capacity to discuss the facts of his case with counsel, to advise or accept advice of counsel or to approve the legal strategy of the trial. Petitioner was therefore not mentally competent to stand trial. Duskey v. United States, 362 U.S. 402 (1960); Hernandez v. Ylst, 930 F.2d 714, 716 n.2 (9th Cir. 1991); Cal. Penal Code § 1367. In addition, trial counsel was deprived of the ability to present an adequate defense in violation of the Sixth Amendment. United States v. Walker, 915 F.2d 480, 484 (9th Cir. 1990); Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970).

6. As a result of a mental illness, disorder or disability, petitioner did not possess sufficient ability to consult or communicate with appellate counsel with a reasonable degree of rational understanding or to assist counsel in the conduct of the direct appeal in a rational manner. Throughout the pendency of the appeal, petitioner did not have sufficient ability to work in a collaborative and cooperative effort with appellate

counsel which impeded appellate counsel's ability to investigate and present potentially meritorious claims in a state habeas corpus petition. Petitioner did not have the capacity to discuss the facts of his case with counsel, or to advise or accept advice of counsel or to approve the legal strategy of the appeal or any related habeas corpus proceedings. Petitioner was therefore not mentally competent to proceed on direct appeal or with respect to related habeas proceedings. In addition, appellate counsel was deprived of the ability to present an adequate appeal or related habeas corpus petition, in violation of due process. Evitts v. Lucey, 469 U.S. 387 (1985); Hicks v. Oklahoma, 447 U.S. 343 (1980).

7. As a result of a mental illness, disorder or disability, petitioner did not possess sufficient ability to consult or communicate with trial counsel with a reasonable degree of rational understanding about the waiver of important constitutional rights, including the right to be present, right to a jury trial on his prior convictions, right to a speedy trial, and the right not to incriminate himself. Petitioner was therefore not mentally competent to waive any of these rights.

8. As a result of a mental illness, disorder or disability, petitioner lacks the ability to convey to his counsel any fact which might exist which would make imposition of the death penalty unjust or unlawful and is not

mentally competent to be executed. American Bar Association Criminal Justice Mental Health Standards, § 7-5.6; see Ford v. Wainwright, 477 U.S. 399 (1986).

9. Petitioner's life history and family background were not adequately investigated by appointed counsel at the time of trial. Necessary facts were therefore not provided to mental health experts who may have evaluated petitioner during or prior to that time, were not considered by trial counsel in determining petitioner's competency or the viability of any mental health defenses at the guilt phase of trial, and were not considered or presented to the jury at the penalty phase of trial as mitigating evidence.

10. Petitioner's family history of mental disorders, the series of critical mental health problems petitioner suffered from childhood into early adulthood, including organic brain damage, combined to cause multiple mental impairments, which prevented petitioner from being able to assist his trial counsel rationally in the conduct of a defense.

11. During the course of trial, petitioner displayed behavior which should have been recognized by reasonably competent counsel or by a reasonable trial judge as substantial evidence of mental disorders which significantly interfered with the ability to assist counsel meaningfully and rationally in the conduct of a defense.

12. Petitioner was denied effective assistance of counsel based on counsel's failure to conduct proper mental health investigations and analyses of petitioner with the appropriate standard of care. Had counsel caused an adequate mental health investigation to be done, he would have obtained evidence to substantiate petitioner's multiple mental disorders, including organic brain damage, thereby establishing petitioner's incompetency to stand trial. Trial counsel's failure to undertake such an investigation in a reasonably competent manner and his failure to inform the court of the doubts as to petitioner's competency that he had or reasonably should have had resulted in severe prejudice to petitioner in that petitioner was tried, convicted and sentenced to death when he was unable to cooperate with counsel in a rational manner.

13. After his arrest and while he was incarcerated in the county jail, the jail records note that he suffered from headaches, seizures, pains in his chest, sleeping difficulties, depression, nightmares, visualizing events that had not occurred, suicidal tendencies, weight loss, and self-mutilation.

14. The record in this case contains no indication that counsel requested the appointment of a neurologist, neuropsychologist or psychiatrist prior to or during trial, and in fact he did not do so.

15. Petitioner's counsel were aware that head injuries, headaches, memory lapses, and blackouts were possible symptoms of organic brain damage and that there was a reasonable possibility and/or likelihood that the blackouts and other symptoms were caused by organic brain damage.

16. A reasonably competent attorney acting as a conscientious diligent advocate for a capital defendant would, under prevailing professional norms, have sought to obtain an appropriate neuropsychiatric evaluation to determine whether organic brain damage and/or other serious mental illnesses existed and adversely affected petitioner's competency to stand trial.

17. Trial counsel failed to declare a doubt and move for an inquiry into petitioner's competency and to determine whether petitioner was being medicated to make him appear capable of standing trial.

18. The trial and conviction of a person who is unable to rationally assist counsel and to rationally understand the nature of the charges and proceedings violate the above mentioned Amendments to the United States Constitution. See Pate v. Robinson, 383 U.S. 375 (1966); Drope v. Missouri, 420 U.S. 162 (1975).

G. Prosecutorial Misconduct: Failure To Disclose The Names of a Confidential Informant and Other Witnesses and Their Statements Which Supported a Duress Defense at The Guilt Phase or Helped to Prove The Mitigating Factor of Duress at The Penalty Phase; Presentation of False and Misleading Testimony/Argument

1. Petitioner's conviction and sentence of death were obtained in violation of his rights to due process, fair trial, unbiased jury, effective assistance of trial and appellate counsel, to present a defense, to confront and cross-examine, to a reliable determination of guilt and penalty, and to meaningful appellate review as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution, because the prosecution failed to disclose the names of a confidential informant and other witnesses and their statements which supported a duress defense at the guilt phase and/or helped to prove the mitigating factor of duress at the penalty phase, and the prosecutor and/or her agents also knowingly presented false and misleading testimony/argument. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

2. Petitioner hereby incorporates by reference as if set forth fully herein Claims A, B, C, D, E, F, H, I and K, Arguments I and II from Appellant's Opening Brief on direct appeal in this case before this Court, Claims IX, X, XI, XII, XIII, XIV, XV from In re Bacigalupo, No. S032738, Declaration of Russell Kuebel, the Declaration of Dr. Renato Alarcon and all supporting exhibits, the declarations of Jane Doe I and II and Luis Alberto Albarran-Arnal and the juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab. This claim has already been presented to this Court in In re Bacigalupo, No. S032738, Claims IX, X, and XI. Petitioner is presenting this claim again to this Court in order to add additional factual support and exhibits which were the product of recent investigative funding authorized by the United States District Court.

3. A confidential informant and other witnesses told the government that the homicides in this case were most likely "drug hits" ordered by a Columbian drug dealer, Jose Angarita and his associates, and that Angarita was most likely motivated by revenge based on an incident that had happened connected to his illegal drug trafficking business. The confidential informant obtained this information from Jose Angarita, who the government suspected was involved with illegal drug trafficking. On

the basis of this information, the government interviewed the informant on April 18, 1984, and tape recorded the interview. The government talked to several other witnesses who had information concerning the drug dealer's orders to kill the Guerrero brothers, as well.

4. The informant was a close associate of Angarita's and she had detailed information about Angarita's extensive cocaine trafficking operation in San Jose. The informant remembered Angarita picking up petitioner around December 1983 in San Francisco and introducing petitioner as someone from New York who was going to work for him. Soon after the capital offences occurred, the informant suspected that Angarita had ordered the murders. Angarita started acting very nervous. The Guerrero brothers had worked at Angarita's store and Angarita complained about them being a burden. She also remembered that Angarita sometimes suggested that problems be resolved in a violent way, such as having people killed. The informant told all of this information to the prosecutor's investigator, and agreed to cooperate with the authorities. She also knew that other witnesses, such as Ronnie Nance and Steve Price had given similar information to the prosecutor's office. She assisted in the prosecution of Angarita's associates, including Albarran-Arnal, in the cocaine business and testified in camera in a federal court drug conspiracy

case. The government financially compensated her for her efforts. She also testified in camera as a confidential informant in petitioner's case. However, the prosecutor presented false and misleading testimony because the informant was told by the prosecutor and/or her agent that she should not mention to the court "the possibility that the Guerrero brothers' murders were contract hits ordered by Jose [Angarita]." Decl. Of Jane Doe I. Had the informant's identity been disclosed to petitioner's defense counsel, the informant would have provided him with this information.

5. The information provided by the confidential informant and other witnesses corroborated petitioner's statement to the police that he committed the homicides under duress. Shortly after his arrest, petitioner told police that he had committed the crimes on the order of members of the "Columbian Mafia," who had threatened to kill him and his family before January 1, 1984, if he did not kill the Guerrero brothers. RT 3230, 3232, 3234-3235. Petitioner was told that the Guerrero brothers "were already sealed," and that they were on "the list." RT 3232.

6. Petitioner told police he had worked for "the Colombians" as a teenager. He stated that when his brother Luis, Jr. refused to cooperate with them in New York, he was murdered. Luis Jr.'s murderers escaped,

undetected by the police. The New York police never apprehended or charged anyone with Luis Jr.'s murder.

7. Petitioner's trial counsel moved for disclosure of the name and whereabouts of the confidential informant. CT 240-245. An in camera hearing was held on August 29, 1985; the motion was denied. CT 249-251. The hearing was reported, transcribed, and ordered sealed. CT 251.[7]

8. Petitioner's statements were presented to the jury, but defense counsel provided no corroboration for this theory of the crime. The prosecutor committed misconduct by presenting a false and misleading argument to the jury that petitioner's statements-- that he was acting under duress-- were lies. RT 3075; 3485-89. The prosecutor also presented the testimony of Karlos Tijiboy, who denied any involvement with Angarita's drug operation or the capital offenses. This was misconduct as well, because the prosecutor knew that this testimony was false and misleading.

9. The trial court erred in refusing to allow defense counsel to present evidence that the Guerrero brothers were involved in criminal activity, which also would have corroborated petitioner's statements. RT

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[7] On May 13, 1988, petitioner moved the trial court for an order unsealing the record of the August 29, 1985 hearing concerning the confidential informant. On August 30, 1988, petitioner moved the California Supreme Court for an order unsealing that part of the record. Both courts denied the requests.

3312-15. The prosecution failed to disclose all information concerning the Guerrero brothers criminal activities and association with Angarita.

10. Duress was a defense to the charges of robbery, first degree murder, and the special circumstance finding. It was also a statutory factor in mitigation of sentence.

11. Petitioner was prejudiced by the prosecution's failure to disclose the identity and testimony of the informant and statements of the other witnesses. The prosecutor and/or her agents also knowingly presented false and misleading testimony of the informant. Had petitioner been able to present evidence corroborating that he acted under duress, as he told the police, it is reasonably likely that a more favorable outcome would have resulted. See juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab.

12. The decision of the California Supreme Court on this issue additionally deprived petitioner of the effective assistance of counsel, due process of law, and meaningful appellate review. This Court reviewed in camera the transcripts withheld from petitioner's counsel, and concluded there was no error. The Court's decision was made without benefit of informed briefing or argument from counsel, because counsel was denied access to the information upon which the court based its decision.

13. The conduct of the government in this case was deliberate and egregious and part of a pattern of prosecutorial misconduct and thus warrants the granting of this petition without any determination whether it substantially influenced the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619 (1993). Furthermore, the government's conduct so infected the integrity of the proceeding against petitioner that the error cannot be deemed harmless. In any event, this violation of petitioner's rights had a substantial and injurious effect or influence on the verdict, rendered the trial and the guilt and penalty judgments fundamentally unfair and resulted in a miscarriage of justice.

H. The Trial Court and California Supreme Court Erred in Failing to Release a Transcript of a Hearing Regarding a Confidential Informant

1. Petitioner's conviction and sentence of death were obtained in violation of his rights to due process, fair trial, unbiased jury, effective assistance of trial and appellate counsel, to present a defense, to confront and cross-examine, to a reliable determination of guilt and penalty, and to meaningful appellate review as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution, because the trial

court and California Supreme Court erred in failing to release a transcript of a hearing regarding a confidential informant. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

2. Petitioner hereby incorporates by reference as if set forth fully herein Claims A, B, C, D, E, F, G, I and K, Arguments I and II from Appellant's Opening Brief on direct appeal in this case before this Court, Claims IX, X, XI, XII, XIII, XIV, XV from In re Bacigalupo, No. S032738, Declaration of Russell Kuebel, the Declaration of Dr. Renato Alarcon and all supporting exhibits, the declarations of Jane Doe I and II and Luis Alberto Albarran-Arnal and the juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab. This claim has already been presented to this Court in In re Bacigalupo, No. S032738, Claims IX, X, and XI. Petitioner is presenting this claim again to this Court in order to add additional factual support and exhibits which were the product of recent investigative funding authorized by the United States District Court.

3. Prior to trial, petitioner moved for disclosure of the name of a confidential informant. The trial court held a hearing and denied the request.

4. This hearing was transcribed but a transcript was never provided to petitioner's counsel.

5. Petitioner requested that this Court provide his counsel with a transcript of this hearing so he could brief the propriety of the trial court's ruling. This Court denied the motion.

6. Petitioner now provides the Court with a declaration from the confidential informant Jane Doe authorizing the release of the transcripts of her in camera testimony before petitioner's trial court. Decl. of Jane Doe II. This Court has no legitimate reason to keep these transcripts confidential, and should release them to petitioner's counsel forthwith.

7. The failure of the trial court and this Court to release a transcript of the hearing regarding the informant deprived petitioner of his constitutional rights, including but not limited to his rights to the effective assistance of counsel, the right to present a defense, meaningful appellate review, the effective assistance of appellate counsel, and a reliable appellate determination of the propriety of the trial court's acts and omissions and the egregious prosecutorial misconduct concerning the confidential informant.

8. But for the errors of the trial court and this Court, there is a reasonable probability that a result more favorable to petitioner would have occurred.

I. **The Prosecution Improperly Withheld Exculpatory Information**

1. Petitioner's conviction and sentence of death were obtained in violation of his rights to due process, fair trial, unbiased jury, effective assistance of trial and appellate counsel, to present a defense, to confront and cross-examine, to a reliable determination of guilt and penalty, and to meaningful appellate review as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution, because the prosecution and its agents improperly withheld potentially exculpatory information from the defense. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

2. Petitioner hereby incorporates by reference as if set forth fully herein Claims A, B, C, D, E, F, G, H and K, Arguments I and II from Appellant's Opening Brief on direct appeal in this case before this Court,

Claims IX, X, XI, XII, XIII, XIV, XV from In re Bacigalupo, No. S032738, Declaration of Russell Kuebel, the Declaration of Dr. Renato Alarcon and all supporting exhibits, the declarations of Jane Doe I and II and Luis Alberto Albarran-Arnal and the juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab. This claim has already been presented to this Court in In re Bacigalupo, No. S032738, Claims IX, X, and XI. Petitioner is presenting this claim again to this Court in order to add additional factual support and exhibits which were the product of recent investigative funding authorized by the United States District Court.

3. At trial, petitioner's defense to the charges was that he committed the robbery and homicides under duress.

4. Other than petitioner's own statements to police, the defense of duress was not corroborated at either the guilt phase or the penalty phase.

5. Information furnished to the state by the confidential informant, and other witnesses, and never disclosed to petitioner, supported his defense of duress. The prosecutor and/or her agents also knowingly presented false and misleading argument and testimony of the confidential informant. The jury was never advised of this information.

6. Potential witnesses Ronnie Nance, Steve Price and Luis Alberto Albarran-Arnal all had information supporting petitioner's duress defense that a Columbian drug dealer had ordered the Guerrero brothers killed or petitioner's family would be executed. Decls. Of Jane Doe and Luis Alberto Albarran-Arnal. The prosecutor's office interviewed Nance and Price and assisted in the prosecution of Albarran-Arnal, and obtained material exculpatory information from these witnesses. The prosecutor failed to turn over this information to the defense. Additionally, the prosecutor requested that defense counsel "hold off" from investigating Angarita and the duress defense until after they conducted their initial investigation. The prosecutor then established the confidential informant and refused to disclose any of the material exculpatory information to petitioner's counsel.

7. Additionally, information regarding benefits provided to key prosecution witness, Carlos Valdiviezo, were not disclosed to the defense. Valdiviezo was an illegal immigrant in the United States at the time of the capital offenses. RT 3068. Initially, Valdiviezo was afraid to cooperate with the police for fear of being subjected to deportation proceedings. RT 3154. On information and belief, Valdiviezo was provided with benefits or

promises of benefits, including benefits relating to his immigration status in the United States, on or around the time he testified for the prosecution. The government holds, and refuses to disclose, the information to prove these allegations. As of yet, petitioner is not permitted to discover this information in state court, until this Court issues an order to show cause. People v. Gonzales, 51 Cal. 3d 1179 (1990). At an evidentiary hearing, petitioner will present evidence proving that the prosecution provided undisclosed benefits to witness Valdiviezo.

8. Had the prosecution properly disclosed to the defense the above- described potentially exculpatory information, and had that information been presented to the jury, there is a reasonable probability that a result more favorable to petitioner would have occurred at either the guilt phase or the penalty phase of trial. See declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab.

9. The conduct of the government in this case was deliberate and egregious and part of a pattern of prosecutorial misconduct and thus warrants the granting of this petition without any determination whether it substantially influenced the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619 (1993). Furthermore, the government's conduct so infected the

integrity of the proceeding against petitioner that the error cannot be deemed harmless. In any event, this violation of petitioner's rights had a substantial and injurious effect or influence on the verdict, rendered the trial and the guilt and penalty judgments fundamentally unfair and resulted in a miscarriage of justice.

10. Additionally, petitioner's trial counsel provided ineffective assistance by: 1) making a pre-trial agreement with the prosecutor and/or her agents that he would "hold off" on the duress defense investigation without petitioner's consent or knowledge and without disclosing this agreement to the court; 2) failing to adequately investigate petitioner's duress defense, including interviewing and presenting the testimony of witnesses Ronnie Nance, Steven Price, Luis Alberto Albarran-Arnal and the informant Jane Doe; 3) failing to effectively cross-examine witness Karlos Tijboy; and 4) failing to object to the prosecutor's egregious misconduct relating to the duress defense in this case. There was no reasonable tactical basis for failing to properly investigate and present this evidence at trial. Reasonably competent counsel acting as a diligent advocate on behalf of his client would have investigated and presented this evidence at trial. Counsel's above-mentioned failures severely prejudiced petitioner's case.

J. **Juror Bias/Juror Misconduct**

1. Petitioner's convictions and sentence of death were unlawfully and unconstitutionally imposed in violation of his federal constitutional rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution by jurors who were biased and committed misconduct by the consideration of extrinsic evidence and because of coercion and misapplication of the law infecting the penalty phase jury deliberation process, and by the trial court's failure to correct such errors and the ineffective assistance of counsel. The jurors' bias against Petitioner, coercion, misapplication of the law, and misconduct and the trial court errors individually and cumulatively seriously prejudiced petitioner in both phases of the trial court proceedings by depriving him of his rights to a fair trial, an unbiased and impartial jury, due process, cross-examination and confrontation of witnesses, present a defense, effective assistance of counsel, and a fair and reliable determination of guilt and the appropriateness of sentencing him to death. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

2. Petitioner incorporates by reference as if fully set forth herein Claims A, B, C, D, E, F, G, H, I and K, and the Declaration of Dr. Renato Alarcon and all supporting exhibits, and the declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Jean Marshall, Vera O'Haver, Sandra Petro and Alison Staab.

3. A juror commits misconduct if they converse amongst themselves on any subject connected with the trial, or if they form or express any opinion thereon until the cause is finally submitted to them. Cal. Penal Code §1122(b); In re Hitchings, 6 Cal.4th 97 (1993). Juror misconduct also occurs when jurors consider extrinsic evidence that was not submitted into evidence during the court proceedings. When juror misconduct is shown, prejudice is presumed, unless the contrary appears. People v. Holloway, 50 Cal.3d 1098 (1990). There is a substantial likelihood that the vote of one or more jurors was influenced by exposure to these prejudicial matters relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury. People v. Marshall, 50 Cal.3d 907 (1990). Additionally, the consideration of this evidence so infected the deliberations with unfairness as to render the imposition of guilt and penalty a denial of due process. See Romano v. Oklahoma, 512 U.S. 1 (1994).

4. At least one or more jurors were biased against petitioner and committed misconduct by improperly discussing and considering extrinsic, inaccurate and non-statutory aggravating evidence, including but not limited to: (1) improperly considering scriptures in the Bible that were (allegedly) in support of the death penalty; (2) not disclosing to the court or the defense that they were relying on Christian scriptures and beliefs supporting the death sentence; (3) bringing to the court during deliberations and discussing with the other jurors specific Christian scriptures and beliefs supporting the death sentence; (3) discussing and relying on Christian scriptures and beliefs supporting the death sentence for disregarding mitigating evidence, such as petitioner's own religious beliefs; (4) discussing and relying on Christian scriptures and beliefs supporting the death sentence for imposing the penalty phase verdict. Decls. of Norma Delaplaine and Vera O'Haver.

a. One juror remembered:

> "We deliberated for a short time and then were dismissed early because it was Easter weekend. We were told to return on Monday after the holiday weekend. I thought and prayed a great deal over the weekend and looked toward my faith for help in making this decision. I searched through the scriptures and found some passages I thought addressed our dilemma in deciding whether to give the death penalty. When we deliberated again on Monday, I brought in these scriptures and told the jurors what I had thought about. I told them that

my faith taught me that although God forgave, one still had to accept responsibility for their actions and accept the punishment that followed. It seemed to me that although Mr. Bacigalupo appeared to have found his faith, he still had to accept the severe punishment that came from taking two other lives in the way that he did. I think the scriptures were very helpful to me in making my decision. In fact, after the trial I spoke to one of the jurors and she thanked me for what I had said because she said it had helped her a lot in making her decision. ¶ I felt at peace when I finally made the decision. I felt that God had assisted me in this difficult decision. . . . ¶ The scriptures I found relevant were the lines from Romans, 6:23 "for the wages of sin is death; but the gift of God is eternal life through Jesus Christ." Decl. Of Vera O'Haver, ¶¶ 4, 5.

b. A second juror stated:

"I thought very hard about the decision to give [Mr. Bacigalupo] the death penalty. Since we began deliberations before Easter weekend, I was able to give it a great deal of thought. As I struggled with it, I remember that I found a passage in my Bible that stated that murderers should be punished by death. This relieved me because I felt that giving him the death penalty was morally the best decision." Decl. Of Norma Delaplaine, ¶ 6.

5. One or more jurors were biased and committed misconduct by improperly considering petitioner's right to not incriminate himself or testify. Decls. of Norma Delaplaine, ¶ 4, Carole Lusebrink, ¶ 3. Additionally one juror committed misconduct and was biased against petitioner because she did not report that she overheard, and did consider as damaging to petitioner's defense, an ex parte conversation between defense

counsel and the court regarding whether petitioner was going to testify on his own behalf:

> "I was also surprised and concerned that Mr. Bacigalupo was not testifying on his own behalf. I was interested in considering his side of the story for guilt and penalty. I soon came to understand why he did not testify, however, from a conversation I overheard between the judge and the defense attorney. At one point the judge called the defense attorney over to the podium to engage in conversation. Because I was sitting closest to the judge in the jury box, I overheard part of their discussion. The judge asked the attorney if he was going to let Mr. Bacigalupo take the stand. The defense attorney answered that he would not because he could not have Mr. Bacigalupo up on the stand acting like 'John Wayne.' I did not tell the other jurors but I assumed the defense attorney knew that if Mr. Bacigalupo testified, he would only damage his defense." Decl. of Carole Lusebrink, ¶ 3.

6. One or more jurors were biased and committed misconduct by improperly discussing and considering extrinsic, inaccurate and non-statutory aggravating evidence of petitioner's demeanor during trial and his alleged lack of remorse. Decls. of Norma Delaplaine,¶ 4, Carol Lusebrink, ¶ 4, Irene Hevener,¶ 5, Jean Marshall,¶ 3, Sandra Petro, ¶¶ 3, 4. One juror remembered:

> "We discussed Mr. Bacigalupo's appearance in the court room at length. Some jurors commented that from his appearance it was clear he felt no remorse, and that he simply sat there stone faced and showed no signs of emotion during his proceedings. It was mentioned that if he had expressed any sign of remorse in the court room we would have

> considered his case in a more sympathetic light." Decl. Of Irene Hevener, ¶ 5.

Another juror stated:

> "I voted for the death penalty because I could see from observing Mr. Bacigalupo during the trial that he felt no remorse or regret. During our deliberations, we discussed our impressions of him and the evidence that had been presented against him. I expressed that his unfeeling stone faced demeanor in court was a deciding factor for me in my belief that we should give him the death penalty. We expressed that we were appalled that he showed no signs of emotion and acted as if he was indifferent to what was happening around him. Though we discussed the possibility of both penalties, we expressed that we felt pretty strongly that his demeanor in the courtroom made it clear that he felt no remorse for his terrible crimes. From our observations of him, we decided that death was the only possible judgement. I remember thinking that it seemed like he was dead already. If he had shown any evidence at all that he felt badly about what he had done, it would have made a difference to me and probably would have affected my verdict." Decl. Of Jean Marshall, ¶ 3.

7. One or more jurors were biased and committed misconduct by improperly discussing and considering extrinsic, inaccurate and non-statutory aggravating evidence that the sentence of life without possibility of parole does not really mean that petitioner would not be considered for parole, and that he would possibly be released. Decls. of Norma Delaplaine ¶ 5, Carol Larter, ¶ 5, Carole Lusebrink, ¶ 5, Sandra Petro, ¶ 4.

a. Juror statements about the availability of appellate review and the "fact" that a sentence of life without possibility of parole would not preclude parole affected the ultimate issue at the penalty phase and the manner in which the jury was to resolve that issue. See Simmons v. South Carolina, 512 U.S. 154, 161-62 (1994) (jury's erroneous belief that defendant could be released on parole if not executed is a "grievous misperception.") This information "judged objectively, is inherently and substantially likely to have influenced the juror" who made the statements, as well as those who heard the statements, and was prejudicial. In re Carpenter, 9 Cal.4th 634, 653 (1995).

b. The jurors discussed during deliberations that a Life Without Possibility of Parole (LWOP) sentence would not necessarily preclude petitioner's release on parole at some future date:

> "During deliberations we discussed that we should not give him life without possibility of parole because since the laws changed so quickly, we could not be sure that he would actually stay his whole life in prison. We also discussed that we did not really believe that the death penalty would in fact be carried out because of all the appeals we knew were to come. But, some jurors expressed that at least if we gave him the death penalty, it would be more difficult for the law later to decide that he should be released. After the trial, one juror expressed that we had probably done the kindest thing, in that at least his mother would not have to suffer through having her son in prison for life." Decl. of Carol Larter, ¶ 5.

8. Additionally, The trial court committed error and trial counsel provided ineffective assistance of counsel by failing to adequately instruct the jurors regarding the meaning of LWOPP, resulting in an excessive punishment, an unreliable pro-death biased jury decision, and a reliance on inaccurate, inappropriate and non-statutory aggravating sentencing information. A recent national study conducted of capital jurors' perceptions of death penalty sentencing alternatives (such as LWOP) and how it relates to their punishment decisions, interviewed 916 jurors from 257 capital trials in 11 states, including California. The study found that "[a]lthough the assumption that jurors disregard parole in their decision-making has undergirded the thinking of courts about how jurors should make capital sentencing decisions, the empirical data shows it is a false description of what jurors actually do -- a legal fiction." W. Bowers & B. Steiner, Death By Default: An Empirical Demonstration of False And Forced Choices in Capital Sentencing, 77 Tex. L. Review 605, 609 (Feb. 1999). The study also found that fewer than one in five California jurors actually believe such defendants will usually spend the rest of their lives in prison. Most jurors in the cases examined above--both jurors who voted for death and for life--complained that LWOP should have been a real option

and claimed they would have voted for it if it had been available." Id. at 697. The study concluded, inter alia:

> "In addition to unreliability in sentencing, there is also a tilt toward death, or a pro-death bias in capital sentencing. The false impressions jurors have of the death penalty alternative are not simply random mistakes of the kind pure ignorance or chance would be likely to yield; rather, they are systematic mistakes of the kind bias would produce--they are overwhelming underestimates. In other words, jurors' mistakes, whatever their sources, are raising defendants' chances of being sentenced to death. In effect, capital defendants under the circumstances are deprived of an impartial jury. Defendants do not simply face the unreliability of a crap shoot, they are confronting the bias of dice loaded for death. . . . ¶ Jurors explained that they voted for the death penalty because the available alternative did not rule out parole; they chose the death penalty not because they thought it was the most appropriate punishment, but because it was preferable to what they believed the alternative would be. The jurors imposed death not as the appropriate, but as the least inappropriate of the available punishment options. In such cases, defendants are sentenced to death and executed because their jurors believe they cannot impose the punishment they deem most appropriate. . . . Indeed, the reasons jurors gave for imposing the death penalty in many of the cases examined here may be said to stand retributive principles on their head. Conventional mitigating considerations become the reason for imposing death not life. The defendant's youthfulness, for example, is sometimes seen as a reason for death rather than life. . . . ¶ The imposition of the death penalty because the state does not provide the less severe alternative that many jurors would prefer is manifestly "excessive" punishment. . . . This research demonstrates, moreover, that LWOP was the punishment that would have been chosen by many jurors who imposed the death penalty precisely because LWOP was not, or they thought it was not, available to them. There is a growing number of states that

> do provide a sentence of LWOP as the alternative to capital punishment. This would appear to reflect an increasing recognition that it is unacceptable to impose death as punishment without giving those who bear responsibility for the decision the punishment option many of them believe is most appropriate. Not doing so subjects the defendant to death as an expedient rather than a just desert, as the less inappropriate of two wrong punishments rather than the right one, and as a punishment they would be less likely to suffer if their jurors were accurately informed about the alternative."
> Id. at 705-10 [footnotes omitted].

9. One or more jurors were biased and committed misconduct by discussing and considering inaccurate, misleading, nonstatutory, aggravating evidence and extrinsic evidence which mislead them as to the court's and their proper roles in the sentencing process in a way to likely diminish their sense of responsibility for the sentencing verdict. Decls. Of Norma Delaplaine, ¶ 5 and Carol Larter, ¶ 5. Additionally, one or more jurors were biased and committed misconduct by discussing and considering with other jurors extrinsic evidence and non-statutory aggravating evidence that "if [they] gave the death sentence at least [Mr. Bacigalupo] would have time to think about what he had done and perhaps [they] could teach him a lesson by giving him this severe sentence even if he was not actually executed." Decl. of Norma Delaplaine, ¶ 5. Petitioner also incorporates by reference as if fully set forth fully herein Argument XI from the direct appeal in People v. Bacigalupo, No. S004764 (Trial court

refused to instruct the jury that it could not consider the monetary cost or the deterrent or non-deterrent effect of the death penalty).

10. Petitioner offers as additional support for Argument VI in Appellant's Supplemental Reply and Opening Brief at 93-95 (Petitioner's Constitutional Rights Were Violated by the Exclusion of Testimony About How Imposition of a Death Sentence Would Affect Petitioner's Mother, Mrs. Golden) in Petitioner's direct appeal before this Court, People v. Bacigalupo, No. S004764 the declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Vera O'Haver, and Sandra Petro.

11. During the penalty phase deliberations, the majority jurors improperly coerced at least one holdout juror to vote for death by badgering and threatening her and by misinterpreting and misstating the Court's instructions regarding the appropriate mitigating evidence to be considered, the right of each individual juror to decide the appropriate punishment, and that a hung jury was not an acceptable alternative. These jurors violated statutory and decisional law as well as the trial court's instructions by expressing the view that petitioner's young age, ability to rehabilitate himself, that more horrendous crimes exist, that serving the remainder of his life in prison is a severe sentence in itself, and that his background history, immigrant status, and struggles of his family to adjust and succeed

in the United States were not valid mitigating factors to consider for a life sentence for petitioner. One or more jurors threatened the hold-out juror with replacement with an alternate juror if she would not vote for death, and they misinterpreted her consideration of mitigating factors as inappropriate because she had what they viewed as personal problems with a son who had been in trouble with the law. Decl. of Irene Hevener, ¶ ¶ 2, 4, 6, 7, 8, 9, 10, 11.

a. The hold-out juror remembered, inter alia:

> "Some of the jurors were very outspoken and aggressive and insisted that there were no real reasons to vote for life. They questioned me relentlessly and demanded that I change my position and vote for the death penalty. At one point, because of the situation and the pressure that was placed on me, I broke down and started to cry. I was very upset because I felt in my heart that voting for life was the right thing to do. I thought we were all entitled to our own consideration of the right sentence, but several jurors adamantly attacked my position, and told me my stated reasons for a life sentence were just a reflection of my own personal problems. Based on the other jurors' comments, it became clear that they were intent on reaching a death verdict as soon as possible and that a hung jury was not acceptable. At one point some jurors even said that if I was not able to give Mr. Bacigalupo the death penalty, then perhaps they should replace me with one of the alternates. It was clear that they believed that if I could not vote for death, then it must mean I was not thinking clearly. Through our conversation and their statements to me, it became clear that the others believed I was not properly deliberating because I did not agree with their decision. Because I had found the instructions given to us confusing, I began to think that I was mistaken about the kinds of

> information we were allowed to take under consideration. I had stated that considering his youth, his disadvantaged social situation and his ability to learn from his mistakes were valid reasons for a life sentence. The other jurors, though, expressed that these were not valid reasons and that I was letting my personal feelings get in the way of a reasonable verdict. Unfortunately, I could not think of reasons that they would consider valid." Id. at ¶ 9.

b. During the penalty phase deliberations, the majority jurors disregarded and failed to follow the instructions and then forced their erroneous interpretation of the law upon the holdout juror. These statements of the jurors were contrary to and violated the court's instructions, deprived petitioner of his statutory right to the individual opinion of each of the twelve jurors, and were highly prejudicial. By disregarding the court's instructions and acting upon their incorrect interpretation of California's mitigating factors and the deliberation process, the jurors were biased and committed misconduct and denied Petitioner due process of law. Their conduct rendered the sentencing proceeding in Petitioner's case fundamentally unfair and denied him his rights to notice of the evidence being considered against him, confrontation, effective assistance of counsel, due process, trial by a fair and impartial jury, and a fair and reliable penalty determination. See, Romano v. Oklahoma, 512 U.S. 1, 129 L. Ed. 2d 1, 29, 114 S. Ct. 2004 (1994); Johnson v. Mississippi,

486 U.S. 578, 100 L. Ed. 2d 575, 108 S. Ct. 1981 (1988); Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

12. The jurors' misconduct also violated Petitioner's statutory right to a trial by jurors who follow the court's instructions, as guaranteed by Penal Code sections 1126 and 1127, in violation of Fourteenth Amendment due process. Hicks v. Oklahoma, 447 U.S. 343 (1980). The jury's misconduct requires the granting of this petition without analysis by harmless-error standards, because it amounted to a structural defect in the constitution of the trial mechanism which vitiated the jury's findings at both guilt and penalty phases. Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Alternatively, the State will be unable to meet its burden of proving this violation harmless. The violation rendered the trial and the penalty judgment fundamentally unfair and resulted in a miscarriage of justice.

K. Violation of The Right to Consular Access

1. Petitioner's convictions of capital murder and robbery, the jury's true findings on the special circumstance allegations and other enhancements, and the death sentence imposed on petitioner are each

unlawful and unconstitutional, and/or each was arrived at and/or imposed, in violation of petitioner's rights to effective assistance of counsel, due process of law, trial by jury, trial by impartial jury, and freedom from cruel and unusual punishment as guaranteed by Article VI and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, sections 1, 7, 15 and 16 of the California Constitution, the Vienna Convention on Consular Relations, and other international laws and treaties, because of the State's and the trial court's failure to inform petitioner of his right to seek assistance of Peruvian consular officers and their failure to notify Peruvian consular officers directly that a Peruvian citizen had been arrested, and their failure to provide petitioner a meaningful opportunity to obtain consular assistance during the capital proceedings against him, thus prejudicing petitioner at the guilt and penalty phases of trial. The following facts, among others to be presented after full investigation and discovery and at an evidentiary hearing, support this claim:

2. Petitioner hereby incorporates by reference as if fully set forth herein the factual allegations and evidentiary support of Claims A, B, C, D, E, F, G, H, I, L and M.

3. Petitioner was born in Lima, Peru on September 23, 1961 and is a Peruvian citizen. Peru and the United States of America are signatories

of the Vienna Convention on Consular Relations (the "Vienna Convention"). April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The Vienna Convention is part of the "Supreme Law of the Land" under the United States Constitution. U.S. Const. art. VI.

4. In violation of treaty obligations binding on the State as the law of the United States and owed directly to Peru, its citizens and its consular officers, the State, the prosecutor and her agents and the trial court failed to: (1) inform petitioner, a Peruvian citizen, after he was arrested of his right to seek the assistance of Peruvian consular officers, as required by Article 36 of the Vienna Convention; (2) notify Peruvian consular officers directly that a Peruvian citizen had been arrested; and (3) provide petitioner a meaningful opportunity to obtain consular assistance, during the capital proceedings against him, as required by the Vienna Convention and other international laws and treaties.

5. The Vienna Convention is a self-executing treaty. No legislation is required to implement its provisions.

6. The Vienna Convention recognizes that sovereign states, such as Peru, have an interest in protecting the life, liberty and property of their citizens abroad, and that that interest can only be safeguarded by protecting the functions of consular officers.

7. Among the consular functions protected by the Vienna Convention are:

> "(a) protecting in the receiving state the interests of the sending state and its nationals, both individuals and bodies corporate, within the limits permitted by international law; . . .
> "(e) helping and assisting nationals, both individuals and bodies corporate, of the sending state; . . .
> "(i) representing or arranging appropriate representation for nationals of the sending state before the tribunals and other authorities of the receiving state, for the purpose of obtaining, in accordance with the laws and regulations of the receiving state, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defense of their rights and interests; . . ."

Vienna Convention, art. 5.

8. In the context of the arrest or detention of foreigners, the Vienna Convention defines the functions of the foreign prisoner's consulate. If an arrested foreigner so requests:

> "[T]he competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay."

Vienna Convention, art. 36, § 1(b).

9. It is the express obligation of the authorities to "inform the person concerned without delay of his rights under this subparagraph [Article 36, section 1 of the Vienna Convention]." Id.

10. The obligation imposed by Article 36, section 1 of the Vienna Convention, and the attendant right granted thereby, is owed separately and independently to the arrested foreigner and to the consular officers of the relevant state party to the Vienna Convention.

11. The United States Department of State informs state officials of the duties of arresting authorities under the Vienna Convention and bilateral treaties through periodic printed notices. These notices place state officials on notice of the requirement that any detained citizen of a nation that has signed the Vienna Convention must be informed without delay of the right to have his/her government notified and provide them with the addresses and telephone numbers of the embassies and consulates of nations to which the duties are owed.

12. On information and belief, the state had received such notices from the United States Department of State before the arrest of Mr. Bacigalupo in 1983.

13. Nevertheless, for an extended period of time, and, in the very least, since 1983, the State and the prosecutor and her agents have adhered

to a pattern and practice of disregarding their obligations to notify consular officers under the Vienna Convention and bilateral treaties. The U.S. State Department now has a model statement for law enforcement agents to use when advising foreign nationals of their right to consul under the Vienna Convention:

> "As a Non-U.S. citizen who is arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel, and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular officials?"

At no time did petitioner ever receive this or any similar notice of his rights.

14. On December 29, 1983, Mr. Bacigalupo was arrested by the San Jose police department for the murders of Orestes and Jose Guerrero.

15. The prosecutor and her agents were aware at his arrest and prior to Mr. Bacigalupo's trial that he was a Peruvian citizen.

16. Neither the State, the prosecutor, her predecessors, employees, officers or agents, the trial court nor any agent of the United States ever informed Mr. Bacigalupo of his rights under Article 36 of the Vienna Convention.

17. Mr. Bacigalupo was unaware of the Vienna Convention at the time of his arrest and during his trial. He had no knowledge of the rights accorded him pursuant to the Vienna Convention.

18. Had the State or the trial court informed Mr. Bacigalupo of his rights under Article 36, he would have exercised his right to contact the Peruvian consulate for legal advice and assistance with his arrest and defense.

19. Neither the prosecutor, her predecessors, employees, officers or agents, the trial court nor any agent of the United States has ever informed Peru or its consular officers at any time that they arrested Mr. Bacigalupo.

20. Had Peruvian consular officers been notified of Mr. Bacigalupo's arrest, they would have provided Mr. Bacigalupo assistance, and he would have accepted, including consular visits to Mr. Bacigalupo; advice on cultural and legal differences between Mr. Bacigalupo's country and the United States; an interpreter; additional or other legal counsel; the location of family members in Peru for assistance and information; supplying Peruvian records, documents, and other evidence helpful to Mr. Bacigalupo's defense; transport of Peruvian family members and other witnesses to California to provide testimony; attendance by consular

officers at court or other proceedings; and other forms of assistance both legal and non-legal.

21. As a result of the State's and the trial court's failure to respect the consular communication rights provided by the Vienna Convention, Peruvian consular officers were unable to assist Mr. Bacigalupo in: (1) advising him of his rights when arrested, especially his right to remain silent and to speak to an attorney, and the incriminating nature of his post-arrest statements; (2) advising him of the U.S. justice system, the laws in California, including that he could be charged with capital felony-murder and sentenced to death, and the potential defenses to those charges; (3) advising him of the applicability and non-applicability of a duress defense for capital murder in California; (4) providing competent attorneys and investigators to represent him; (5) providing competent mental health experts to evaluate his mental state during the offenses and at trial; (6) investigating and preparing for presentation evidence of the existence of organized crime members involved in the offenses; (7) appropriate courtroom interpreters for petitioner and witnesses; and (8) investigating and preparing for presentation the penalty phase mitigating evidence and testimony that could have been offered in support of a sentence of life imprisonment rather than death.

22. Petitioner's case was seriously prejudiced by these violations. But for the State's misconduct and the trial court's error, there is a reasonable probability that a result more favorable to petitioner would have occurred.

23. These violations of petitioner's rights had a substantial and injurious effect or influence on the verdict, rendered the guilt and penalty trials and judgment fundamentally unfair and resulted in a miscarriage of justice.

24. Additionally, petitioner's defense counsel in the capital trial provided ineffective assistance of counsel by failing to advise petitioner of his right to assistance by the Peruvian consular officials and by failing to object to the prosecutor's and her agent's failure to provide such rights to petitioner upon his arrest. Trial counsel failed to challenge the admissibility of petitioner's post-arrest statements to the police based on the State's violation of petitioner's rights under the Vienna Convention and other international laws and treaties. Trial counsel also failed to obtain assistance, on behalf of petitioner, from the Peruvian consulate in investigating and preparing evidence and testimony for presentation at the capital proceedings as described in paragraphs 20 and 21 above. Trial

counsel's errors and omissions fell below the standard of care to be expected from reasonably competent capital defense counsel.

25. But for trial counsel's errors and omissions, there is a reasonable probability that a result more favorable to petitioner would have occurred.

L. Violations of International Law Require That Petitioner's Convictions And Penalty Be Set Aside.

1. Petitioner's convictions and sentence of death were unlawfully imposed in violation of international law and treaties to which the United States is a signatory and which obligate the United States to comply with international law, in that petitioner, a citizen of Peru, may not be executed by the United States consistent with the provisions of international law. Petitioner was denied his right to a fair trial by an independent tribunal, and his right to the minimum guarantees for the defense under customary international law as informed by the Universal Declaration of Human Right, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). Additionally, petitioner suffered racial discrimination during his guilt and penalty phase trials which also constitutes violations of customary international law as evidenced by the

equal protection provisions of the above-mentioned instruments and of the International Convention Against All Forms of Racial Discrimination. These violations of petitioner's international rights had a substantial and injurious effect or influence on the verdicts, rendered the trial and sentence fundamentally unfair and resulted in a miscarriage of justice.

2. Petitioner hereby incorporates by reference as if fully set forth herein the factual allegations and evidentiary support of Claims A, B, C, D, E, F, G, H, I, J, K, M, N, O, P, Q, R, S, T and U.

3. While petitioner's rights under state and federal constitutions have been violated, these violations are being tried under international law as well, as the first step in exhausting remedies in order to bring petitioner's claim in front of the Inter-American Commission on Human Rights or some other international forum. Should all appeals within the United States justice system fail, petitioner intends to bring his claim to an international forum on the basis that the violations petitioner has suffered are violations of International Law.

Background

4. The two principle sources of international human rights law are treaties and customary international law. The United States

Constitution accords treaties equal rank with federal statutes.[8] Customary international law is equated with federal common law.[9] International law must be considered and administered in United States courts whenever questions of right depending on it are presented for determination. The Paquete Habana, 175 U.S. 677, 700, 44 L. Ed. 320, 20 S. Ct. 290 (1900). To the extent possible, courts must construe American law so as to avoid violating principles of international law. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 102, 118, 2 L.Ed. 208 (1804). When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of the nations, if any possible construction remains . . . ." Weinberger v. Rossi, 456 U.S. 25, 33, 71 L.Ed.2d 715, 102 S.Ct. 1510 (1982). The United States Constitution also authorizes Congress to "define and punish . . . offenses against the law of nations," thus recognizing the existence and force of international law. U.S. Const.

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[8] Article VI, § 1, clause 2 of the United States Constitution provides "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

[9] Restatement Third of the Foreign Relations Law of the United States (1987), at 145, 158. See also Eyde v. Robertson, 112 U.S. 580 (1884).

Article I, § 8. Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. Trans World Airlines, Inc. v. Franklin Mint. Corp., 466 U.S. 243, 252, 80 L.Ed.2d 273, 104 S.Ct. 1776 (1984).[10]

5. International Human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations

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[10] See also Oyama v. California, 332 U.S. 633, 92 L.Ed. 249, 68 S.Ct. 269 (1948), which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a U.S. citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the U.N. Charter was a federal law that outlawed racial discrimination, noted "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." (Id. at 673.) See also Namba v. McCourt, 185 Or. 579, 204 P.2d 569 (1949), invalidating an Oregon Alien Land Law, "The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed . . . . When our nation signed the Charter of the United Nations we thereby became bound to the following princ9ples (Article 55, subd. c, and Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' (59 Stat. 1031, 1046.)" Oyama, at 604.

between nations and did not govern rights of individuals within those nations.[11] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal maltreatment of its nationals, and as such was the first expression of a limit on the freedoms of action states enjoyed with respect to their own nationals.[12]

6. This expression was furthered in 1920 by the Covenant of the League of Nations. The Covenant contained a provision relating to "fair and human conditions of labor for men, women and children." The League of Nations was also instrumental in developing an international system for the protection of minorities.[13] Additionally, early in the development of international law, countries recognized the obligation to treat foreign nationals in a manner that conformed with minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violation of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect individual human rights as well.[14]

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11 See generally, Sohn and Buergenthal, International Protection of Human Rights (1973) at 137.

12 Buergenthal, International Human Rights (1988) at 3.

13 Id., at 7-9.

14 Restatement Third of the Foreign Relations Law of the United (continued...)

7. It soon became an established principle of international law that a country, by committing a certain subject-matter to a treaty, internationalized that subject matter, even if the subject matter dealt with individual rights, such that each party could no longer assert that such subject matter fell exclusively within domestic jurisdictions.[15]

Treaty Development

8. The monstrous violations of human rights during World War II furthered the internationalization of human rights protections. The first modern international human rights provisions are seen in the United Nations Charter, which entered into force on October 24, 1945. The U.N. Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[16]

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[14](...continued)
States, (1987) Note to Part VII, Vol. 2 at 1058.

[15] Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco (1923) P.C.I.J., Ser. B, No. 4.

[16] Article 1(3) of the U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, entered into force October 24, 1945. In his closing speech to the San Francisco United Nations conference, President Truman emphasized that: "The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere – without regard to race, language or religion – we (continued...)

By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

9. In 1948, the U.N. drafted and adopted both the Universal Declaration of Human Rights [17] and the Convention on the Prevention and Punishment of the Crime of Genocide.[18] The Universal Declaration is part of the International Bill of Human Rights,[19] which also includes the International Covenant on Civil and Political Rights, the Optional Protocol to the ICCPR,[20] the International Covenant on Economic, Social and

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[16](...continued)
cannot have permanent peace and security in the world." Robertson, Human Rights in Europe, (1985) 22, n.. 22 (quoting President Truman).

[17] Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter Universal Declaration).

[18] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951 (hereinafter Genocide Convention). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. See generally, Buergenthal, International Human Rights, supra, at 48.

[19] See generally, Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills," (1991) 40 Emory L.J. 731.

[20] Optional Protocol to the International Covenant on Civil and
(continued...)

Cultural Rights,[21] and the human rights provisions of the U.N. Charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations. Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations.

10. The Organization of American States, which consists of thirty-two member states, including the United States and Peru, was established to promote and protect human rights. The OAS charter, a multilateral treaty which serves as the Constitution of the OAS, entered into force in 1951. It was amended by the Protocol of Buenos Aires which came into effect in 1970. Article 5(j) of the OAS Charter provides "[t]he American States proclaim the fundamental rights of the individual without

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[20](...continued)
Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, entered into force March 23, 1976.

[21] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.

distinction as to race, nationality, creed or sex."[22] In 1948, the Ninth International Conference of American States proclaimed the American Declaration of the Rights and Duties of Man, a resolution adopted by the OAS, and thus, its member states. The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[23]

11. The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting human rights in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation to member States of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member states with violations of any rights set out in the American Declaration.[24] Because the Inter-American Commission, which

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[22] OAS Charter, 119 U.N.T.S. 3, entered into force December 13, 1951, amended 721 U.N.T.S. 324, entered into force February 27, 1970.

[23] Buergenthal, International Human Rights, supra, at 127-31.

[24] Buergenthal, International Human Rights, supra.

relies on the American Declaration, is recognized as an OAS Charter organ charged with protecting human rights, the necessary implication is to reinforce the normative effect of the American Declaration.[25]

12. The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As an important player in the drafting of the UN Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[26] Though the 1950s was a period of isolationism, the United States renewed its commitment in the late 1960s and throughout the 1970s by becoming a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[27]

13. The United States has stepped up its commitment to international human rights by ratifying three comprehensive multilateral

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[25] Buergenthal, International Human Rights, supra.

[26] Sohn & Burgenthal, International Protection of Human Rights (1973) at 506-9.

[27] Buergenthal, International Human Rights, supra, at 230.

human rights treaties. The Senate gave its advice and consent to the International Covenant on Civil and Political Rights; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination,[28] and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[29] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[30]

14. United States courts generally do not give retroactive ratification to a treaty; the specific provisions of a treaty are therefore

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[28] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force January 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. ___ U.N.T.S. ___ (1994). More than 100 countries are parties to the Race Convention.

[29] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res.39/46, 39 UN GAOR Supp. (No. 51) at 197, entered into force on June 26,1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong., 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. U.N.T.S. ___ (1994).

[30] Buergenthal, International Human Rights, supra, at 4.

enforceable from the date of ratification onward.[31] However, Article 18 of the Vienna Convention on the Laws of Treaties provides that a signatory to a treaty must refrain from acts which would defeat the object and purpose of the treaty until the signatory either makes its intention clear not to become a party, or ratifies the treaty.[32] Though the United States courts have not strictly applied Article 18, they have looked to signed, unratified treaties as evidence of customary international law.[33]

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[31] Newman & Weisbrodt, International Human Rights: Law, Policy and Process, (1990) at 579.

[32] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), entered into force January 27, 1980 (hereinafter Vienna Convention). The Vienna Convention was signed by the United States on April 24, 1970. Though it has not yet been ratified by the United States, the Department of State, in submitting the Convention to the Senate, stated that the convention "is already recognized as the authoritative guide to the current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st Sess. (1971) at 1. Also, the Restatement Third of the Foreign Relations Law of the United States cites the Vienna Convention extensively.

[33] See for example Inupiat Community of the Arctic Slope v. United States, 746 F.2d 570 (9th Cir. 1984) (citing the International Covenant on Civil and Political Rights); Crow v. Gullet, 706 F.2d 774 (8th Cir. 1983) (citing the International Covenant on Civil and Political Rights); Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980) (citing the International Covenant on Civil and Political Rights).

See also Charme, The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma, __25 Geo. Wash. J. Int'l. L. & Econ. 71 (1992). Ms. Charme argues that Article 18 codified the existing interim (pre-ratification) obligations of parties who are (continued...)

Customary International Law

15. Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[34] The United States, through signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the United States has signed or ratified treaty, it cannot ignore this codification

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[33](...continued)
signatories to treaties: "Express provisions in treaties, judicial and arbitral decisions, diplomatic statements, and the conduct of the International Law Commission compel, in the aggregate, the conclusion that Article 18 constitutes the codification of the interim obligation. These instances indicate as well that this norm continues as a rule of customary international law. thus all states, with the exception of those with a recognized persistent objection, are bound to respect the obligation of Article 18.

[34] Restatement Third of the Foreign Relations Law of the United States, § 102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary law rule is observed.

of customary international and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution.[35]

16. Customary international law is "part of our law." The Paquete Habana, supra, at 700. According to 22 U.S. C. § 2304(a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[36] Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[37] These sources confirm the validity of custom as a source of international law.

17. The provisions of the Universal Declaration are accepted by Untied States courts as customary international law. In Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), the court held that the right to be free from torture "has become part of customary international law as evidence and defined by the Universal Declaration of Human Rights . . . ." Id. at

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[35] Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills," (1991) 40 Emory L.J. 731 at 737.

[36] 22 U.S.C. § 2304(a)(1).

[37] Statute of the International Court of Justice, art. 38, 147 I.C.J. Acts & Docs 46. This statute is generally considered to be an authoritative list of the sources of international law.

882. The United States, as a member of the OAS, has international obligations under the OAS Charter and the American Declaration. The American Declaration, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized human rights which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law.[38] Although the American Declaration is not a treaty, the United States voted its approval of this normative instrument and as a member of the OAS, is bound to recognize its authority over human rights issues.[39]

18. The United States has acknowledged the force of international human rights law on other countries. Indeed, in 1991 and 1992 Congress passed legislation that would have ended China's Most Favored Nation trade status with the United States unless China improved its record on

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[38] American Declaration of Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50, doc. 6 (1980).

[39] Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser. L/V/II.52, doc. 17, para. 48 (1987).

human rights. Though President Bush vetoed this legislation,[40] in May 1993 President Clinton tied renewal of China's MFN status to progress on specific human rights issues in compliance with the Universal Declaration.[41]

19. The International Covenant on Civil and Political Rights, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the

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[40] See Michael Wines, Bush, This Time in Election Year, Vetoes Trade Curbs Against China, N.Y. Times, September 29, 1992 at A1.

[41] President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to extend China's MFN status for another year. The order imposed several conditions upon the extension including a showing by China of adherence to the Universal Declaration of Human Rights, an acceptable accounting of those imprisoned or detained for non-violent expression of political and religious beliefs, humane treatment of prisoners including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the U.S. memorandum of understanding on prison labor. See Orentlicher and Gellatt, Public Law, Private Actors: The Impact of Human Rights on Business Investors in China (1993) 14 Nw. J. Int'l L. & Bus. 66, 79. Though President Clinton decided on May 26, 1994 to sever human rights conditions from China's MFN status, it cannot be ignored that the principal practice of the United States for several years was to use MFN status to influence China's compliance with recognized international human rights. See Kent, China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-1994 (1995) 17 H.R. Quarterly, 1.

United States may not say: "Your government is bound by certain clauses of the Covenant though we in the United States are not bound.[42]

Due Process Violations

20. The factual and legal issues presented to this Court demonstrate that petitioner was denied his right to a fair and impartial trial in violation of customary international law as evidenced by Articles 6 and 14 of the International Covenant on Civil and Political Rights[43] as well as Articles 1 and 26 of the American Declaration.

21. The Untied States deposited its instruments of ratification of the ICCPR on June 8, 1992 with five reservations, five understandings, four declarations, and one proviso.[44] Article 19(c) of the Vienna Convention on the Law of Treaties declares that a party to a treaty may not formulate a reservation that is "incompatible with the object and purpose of the

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[42] Newman, United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures (1993) 42 DePaul L. Rev. 1241, 1242. Newman discusses the United States' resistance to treatment of human rights treaties as U.S. law.

[43] The substantive provisions of the Universal Declaration have been incorporated into the ICCPR, so these are incorporated by reference in the discussion above. Moreover, as was noted above, the Universal Declaration is accepted as customary international law.

[44] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess.

treaty."[45] The Restatement Third of the Foreign Relations Law of the United States echoes this provision.[46]

22. The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to those rights. United States courts, however, will generally enforce treaties only if they are self-executing or have been implemented by legislation.[47] The United States declared that the articles of the ICCPR are not self-executing.[48] The Bush Administration, in explanation of proposed reservations, understandings, and declarations to the ICCPR, stated: "For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-

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45 Vienna Convention, supra, 1155 U.N.T.S. 331, entered into force January 27, 1980.

46 Restatement Third of the Foreign Relations Law of the United States, § 313 cmt. b (1987). With respect to reservations, the Restatement lists "the requirement . . . that a reservation must be compatible with the object and purpose of the agreement."

47 Newman and Weissbrodt, International Human Rights Laws: Law, Policy and Process (1990) at 579. See also Sei Fuji v. California, 38 Cal.2d 718, 242 P.2d 617 (1952), where the California Supreme Court held that Articles 559c) and 56 of the UN Charter are not self-executing

48 Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 102d Cong., 2d Sess (1992).

executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated."[49]

23. But under the Constitution, a treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. Asakura v. Seattle, 265 U.S. 332, 341, 68 L.Ed. 1041, 44 S.Ct. 515 (1924).[50] Moreover, treaties designed to protect individual rights should be construed as self-executing. United States v. Noriega, 808 F.Supp. 791 (1992). In Noriega, the court noted,

> "It is inconsistent with both the language of the [Geneva III] treaty and with our professed support of is purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs – not to

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[49] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S.Exec.Rep. No. 23, 102d Cong., 2d Sess. at 19 (1992).

[50] Some legal scholars argue that the distinction between self-executing and non self-executing treaties is patently inconsistent with express language in Article 6, § 2 of the United States Constitution that all treaties shall be the supreme law of the land. See generally Jordan L. Paust, Self-Executing Treaties (1988) 82 Am. J. Int's L. 760.

> create some amorphous, unenforceable code of honor among the signatory nations. "It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not self-executing, the United States is still obligated to honor its international commitment." (Id. at 798.)

24. Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary international law and as such is binding upon the United States.

25. Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life . . . . [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court."[51] Likewise, these protections are found in the American Declaration: Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law.[52]

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[51] International Covenant on Civil and Political Rights, supra, 999 U.N.T.S. 717.

[52] American Declaration of the Rights and Duties of Man, supra.

26. In cases where the UN Human Rights Committee has found that a State party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal, the Committee has held that the imposition of the sentence of death also was a violation of Article 6 of the ICCPR.[53] The Committee further observed, "the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal.'"[54]

27. Further, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life") is allowed.[55] An advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore

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[53] Report of the Human Rights Committee, at 72, 49 UN GAOR Supp. (No. 40) at 72, UN Doc. A/49/40 (1994).

[54] Id.

[55] International Covenant on Civil and Political Rights, supra, 999 U.N.T.S. 717.

that a reservation which was designed to enable the state to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[56] Implicit in the court's opinion linking nonderogability and incompatibility is the view that the compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.[57]

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[56] Restrictions to the Death Penalty (Arts. 4(2) and 4)4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer. Ct. H.R., ser. A: Judgments and Opinions, No. 3 (1983), reprinted in 23 I.L.M. 320, 341 (1984).

[57] Edward F. Sherman, Jr., The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation (1994) 29 Tex. Int'l L.J. 69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of modern human rights treaties is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting states. In concluding these human rights treaties, the states can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other states, but towards all individuals within their jurisdiction." Advisory Opinion No. OC-2/82 of September 24, 1982, Inter-Am.Ct.H.R., ser. A: Judgments and Opinions, No. 2, para. 29 (1982), reprinted in 22 I.L.M. 37, 47 (1983). These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the Untied States death penalty reservation is impermissible because it is incompatible.

28. Petitioner's rights under customary international law, as codified in the above-mentioned provisions of the ICCPR and the American Declaration, were violated throughout his trial and sentencing phase.

Race Discrimination

29. Petitioner suffered racial discrimination which denied him the right to a fair trial and sentencing phase. Such discrimination, and the imposition of the death penalty, violate customary international law, as evidenced by Articles 2, 6, and 26 of the International Covenant of Civil and Political Rights, Article 2 of the American Declaration, and the Convention Against All Forms of Racial Discrimination.[58] The Race Convention requires that two-thirds of the state parties object to a reservation in order to determine that it is incompatible or inhibitive." This practice however, known as the majority system, is seldom relied on in determining incompatibility of reservations within conventions. (Theodore Meron, The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination (1985) 79 Am. J. Int'l L.

[58] Race Convention, supra, 660 U.N.T.S. 195, entered into force January 4, 1969. The United States reservation to the Race Convention provides that "nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America."

283, 315,[59] and the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.)[60]

30. Article 26 of the ICCPR provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex. . . ."[61] Again, this protection is found in Article 2 of the American Declaration which guarantees the right of equality before the law.[62]

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[59] But Article 20 of the Race Convention states, "A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by the Convention be allowed."

The Committee on the Elimination of Racial Discrimination (CERD), established under the Race Convention, disassociated itself from the idea that, if the constitution of a state party condemns racial discrimination, no further action by that state is required. A/Conf. 92/8, par. 95, Natan Lerner, U.N. Convention on Race Convention (1980) at 116.

[60] United Nations Economic and Social Council (ECOSOC) Resolution 1984/50 of May 1984.

[61] International Covenant on Civil and Political Rights, supra, 999 U.N.T.S. 717.

[62] American Declaration of the Rights and Duties of Man, supra.

31. The Race Convention, a signed and recently ratified treaty, contains extensive protections against racial discrimination. Article 5 of the Convention provides:

> "[S]tates Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution. . . ."[63]

Furthermore, States Parties shall assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other State institutions against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention. . . ."[64]

32. Safeguards adopted by international organizations are also indicative of customary international law. The Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty adopted by the

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[63] International Convention Against All Forms of Racial Discrimination, supra, 660 U.N.T.S. 195.

[64] International Convention Against All Forms of Racial Discrimination, supra, 660 U.N.T.S. 195.

United Nations Economic and Social Council provides, "[c]apital punishment may only be carried out pursuant to a final judgment by a competent court after legal process which gives all possible safeguards to ensure a fair trial . . . including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings." [Emphasis added.][65] The Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders endorsed the safeguards in 1988, strengthening them as a source of customary international law.

33. The facts as delineated above indicate that petitioner's race was used as a grounds for skewing the decision-makers and the community at large against him; and that he was deprived of fundamental constitutional rights.

34. These incidents of racial discrimination in petitioner's trial and penalty phase violated his human rights under binding international law. Section 702 of the Restatement Third of the Foreign Relations Law of the United States recognizes that a state violates international law if, as a matter of state policy, it practices, encourages or condones systematic racial

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[65] United Nations Economic and Social Counsel (ECOSOC) Resolution 1984/50 of May 1984. See also, General Assembly Resolution 2200A (XXI), annex.

discrimination on the basis of race is so universally accepted by nations that it constitutes a peremptory norm of international law.[66] As such, the courts ought to consider and weigh jus cogens quality of international instrument norms if they are at odds with state law. If of jus cogens quality, these norms should have a stronger influence against, and increase the burden of justification for, contrary state actions.[67]

35. Statistical information of various studies shows that the death penalty is imposed in a racially discriminatory manner. The 1990 report of the United States General Accounting Office synthesized twenty-eight studies and concluded that there is a "pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision.[68] The GAO report noted that racism was "found

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[66] A peremptory norm of international law, jus cogens, is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, supra, and Restatement Third of the Foreign Relations Law, supra.

[67] Gordon Christenson, Jus Cogens: Guarding Interests Fundamental to International Society, 28 Va. J. Int'l L. at 627-28 (1988).

[68] United States General Accounting Office, Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing (1990) GAO/GGD-90-57. (In Furman v. Georgia, 408 U.S. 238, 33 L.Ed. 346, 92 S.Ct. 2726 (1972), the United States Supreme Court held that Georgia and
(continued...)

at all stages of the criminal justice system process."[69] The Baldus study, an empirical analysis accounting for 230 non-racial variables, also found strong evidence of racial bias. [70]

36. In McCleskey v. Kemp, 481 U.S. 279, 95 L.Ed.2d 262, 107 S.Ct. 1756 (1987), the Supreme Court rejected the use of statistical evidence to show racial discrimination in capital cases.[71] Because discriminatory intent in individual cases is generally undocumented, the Supreme Court's categorical exclusion of statistical evidence in its review of capital cases and its "exceptionally clear proof [of racially discriminatory

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[68](...continued)
Texas state statutes governing the imposition and carrying out of the death penalty violated the Eighth and Fourteenth Amendments of the Constitution.)

[69] United States General Accounting Office, Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing (1990) supra, at 6.

[70] David C. Baldus, George Woodworth & Charles A. Pulanski, Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (unpublished, September 1988).

[71] In McCleskey, Justice Powell concluded that 1) studies indicating racial discrimination failed to establish that any decision makers in the defendant's case acted with discriminatory purpose in violation of the equal protection clause, and 2) the Baldus study at most indicated a discrepancy that appeared to correlate with race, not a constitutionally significant risk of racial basis in Georgia's capital sentencing process. (Id.)

purpose]" places an intolerable burden on those who have suffered discrimination in criminal justice institutions.

37. The protections of Race Convention, ICCPR and American Declaration establish an affirmative obligation of the United States to do away with racial discrimination and to proceed with vigor and deliberation to ensure that race is not a prejudicial factor in criminal prosecutions. It is incumbent upon the court to view the facts of this case in light of the recent international commitments the United States has made in the protection of individuals against racial discrimination.

Conclusion

38. The due process violations and racial discrimination that petitioner suffered throughout his trial and sentencing phase are prohibited by customary international law. The United States is bound by customary international law, as informed by such instruments as the ICCPR and the Race Convention. The purpose of these treaties is to bind nations to an international commitment to further protections of human rights. The United States must honor its role in the international community by recognizing the human rights standards in our own country to which we hold other countries accountable.

M. Petitioner Was Deprived of His Constitutional Rights On the Arbitrary Basis of Race, Nationality, Immigration Status and Socioeconomic Status.

1. Mr. Bacigalupo's judgment of conviction and sentence were unlawfully and unconstitutionally obtained in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution, because petitioner was deprived of his right to equal protection of the laws, due process, fair trial, trial by impartial jury, effective assistance of counsel, and fair, reliable and nonarbitrary determinations of guilt and penalty on the basis of race, nationality, immigration status and/or socioeconomic status. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

2. Petitioner incorporates by reference Claims A, B, C, D, E, F, G, H, I, J, K, L, O, P, S and T and the Declaration of Dr. Renato Alarcon and the supporting exhibits, and the juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab. as if fully set forth herein.

3. Mr. Bacigalupo was born in Peru and is a citizen of that country. At the time of his arrest, he did not have legal immigration status in the United States. Law enforcement authorities investigating the crime knew immediately that they were looking for a suspect with an Hispanic background.

4. Arbitrary factors, including the race, nationality, immigration status and socioeconomic status of petitioner influenced the prosecution's decision to seek and obtain a sentence of death in this case.

5. The prosecutor's office in Santa Clara County opted against seeking the death penalty in other cases of multiple murder and robbery-murder with similar levels of aggravation. The race, immigration status, nationality and socioeconomic status of petitioner played a role in the prosecution's decision to seek the death penalty in this case.

6. Law enforcement officials and the prosecuting agency failed to inform petitioner of his right to consult with Peruvian consular officials upon arrest and during the proceedings against him in violation of Article 36 of the Vienna Convention. The state's actions prevented petitioner from seeking advice and assistance from his consulate, including information on the United States justice system, and the death penalty in California, and assistance in juror selection, courtroom demeanor, evidentiary challenges,

investigation and presentation of a defense in guilt and penalty, and negotiations for a different charging decision than seeking the death penalty in his case.

7. Instead of offering a plea bargain that would result in a sentence less than death, the prosecutor was determined to secure a conviction and death sentence. On information and belief, the prosecutor's office in Santa Clara County have offered plea bargains to defendants in other cases of multiple murder and robbery-murder with similar levels of aggravation.

8. At petitioner's trial, the judge, the defense lawyer, the prosecutor and 11 out of 12 jurors were Caucasian. The one Hispanic juror who served on petitioner's jury was the lone hold-out for a life sentence and was threatened and coerced by the majority to vote for the death sentence. See Decl. of Irene Hevener and Claim J.

9. Petitioner was denied his right to a jury drawn from a fair cross-section of the community due to the systematic underrepresentation of minorities in the venire and by trial counsel's failure to challenge the trial court's jury empanelment procedures. Spanish-surnamed individuals and African Americans are distinctive and cognizable groups for purposes of the Sixth Amendment's fair cross-section requirement.

10. Additionally, the prosecutor deliberately excluded Hispanics and the only African American prospective juror left from the jury. RT 3020, 3031, 3032, 3033. The prosecutor's intentional use of peremptory challenges on the basis of race is evidence that additional discretionary decisions were made on the basis of race.

11. The prosecutor's intentional exclusion of prospective jurors on the basis of race constitutes a violation of the constitutional rights of petitioner and the excluded jurors. In addition, the exclusion of Hispanics and African Americans from petitioner's jury -- whether deliberate or not -- had the effect of denying petitioner a fair trial, reliable determinations of guilt and penalty, and denying petitioner the full and fair consideration of the particular facts that were presented or should have been presented had petitioner's counsel been effective.

12. Petitioner was deprived of the effective assistance of counsel in both the guilt and penalty phases of the trial. Race, nationality, immigration status and socioeconomic status played a role in depriving petitioner of his Sixth Amendment right to the effective assistance of counsel.

a. Petitioner was indigent and was represented by the public defender.

b. Petitioner was deprived of his right to effective assistance of counsel by the conflicts of interest and budgetary and resource problems occurring in the Public Defender's Office at the time. Petitioner was prejudiced by defense counsel's failure to adequately prepare and investigate the case in both the guilt and penalty phases of the trial.

c. On information and belief, there were no members of petitioner's race available to be appointed as petitioner's counsel within the Public Defender's Office. As a result of defense counsel's unfamiliarity with Latin American culture and customs, petitioner was deprived of the effective assistance of counsel.

d. Competent trial counsel would have objected to the prosecutor's deliberate exclusion of Hispanics and African Americans from the jury and would also have consulted with and presented the testimony of a cultural expert. As a result of counsel's incompetence and insensitivity to the issues raised by petitioner's race, nationality and cultural background, the jury never heard any expert testimony about this mitigating evidence.

e. Counsel's acts and omissions constitute ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). Counsel's failures were without a legitimate strategic reason. Had counsel performed competently, it is reasonably probable that petitioner would

have obtained a more favorable result in both the guilt and penalty phases of the trial. Trial counsel's incompetence thus prejudiced petitioner and requires reversal of both his conviction and death judgment. Strickland v. Washington, 466 U.S. 668 (1984). Counsel's incompetence also had a substantial and injurious effect in determining the jury's guilt and penalty phase verdicts and requires that petitioner's conviction and sentence of death be reversed. Brecht v. Abrahamson, 507 U.S. 619 (1993).

13. Race and cultural factors played a role in the breakdown of the relationship between petitioner and his attorney. Race and cultural factors played a role in petitioner's inability to rationally assist his counsel in the defense of the case. Race and cultural factors played a role in causing petitioner to appear unconcerned and uninvolved in the proceedings, a demeanor that was misinterpreted by trial counsel, the court, and the jury. Competent trial counsel would have presented expert testimony to explain the effect of race and cultural factors on petitioner's background and mental state at the time of the offenses and at trial.

14. Race and cultural factors played a role in trial counsel's failure to recognize that petitioner was incompetent to stand trial. Race and cultural factors also played a role in depriving petitioner of a competent and reliable mental state assessment.

15. These arbitrary and capricious factors of race, nationality, immigration status and socioeconomic status permeated petitioner's entire prosecution and conviction -- from prosecutorial charging decisions, through jury selection and the jury's consideration and evaluation of evidence, to the representation afforded petitioner at his capital trial. The injection of these improper and arbitrary factors into petitioner's capital trial was deliberate and egregious and part of a pattern of prosecutorial misconduct and thus warrants the granting of this petition without any determination whether it substantially influenced the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619 (1993). Furthermore, the injection of these impermissible factors so infected the integrity of the proceedings against petitioner that the error cannot be deemed harmless. In any event, this egregious violation of petitioner's federal constitutional rights to due process, equal protection, fair trial, trial by impartial jury, and reliable determinations of guilt and penalty, had a substantial and injurious effect on the guilty and penalty verdicts, rendered the trial and the guilt and penalty judgments fundamentally unfair, and resulted in a miscarriage of justice, requiring reversal of petitioner's convictions and his judgment of death. Brecht v. Abrahamson, 507 U.S. 619 (1993).

N. **<u>Claims That State Appellate Counsel Unreasonably Failed To Raise</u>**

1. The affirmances, on direct appeal, by the California Supreme Court of the judgment against petitioner, the Court's denial of petitioner's petitions for writ of habeas corpus, petitioner's convictions of capital murder and robbery, the jury's true findings on the special circumstance allegations and other enhancements, and the death sentence imposed on petitioner are each unlawful and unconstitutional, and/or each was arrived at and/or imposed, in violation of petitioner's rights to the effective assistance of counsel on appeal, to the equal protection of the law, to due process of law, to trial by jury, and to freedom from cruel and unusual punishment as guaranteed by the United States Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments thereto, because of the unreasonable and prejudicial inactions of appellate counsel appointed to handle petitioner's automatic appeal and habeas corpus proceedings in the California courts and/or because of constitutionally defective jury instructions. The following facts, among others to be presented after full investigation and discovery and at an evidentiary hearing, support this claim:

2. Appellate counsel in a criminal case have a duty under state and federal law to raise all arguably meritorious claims appearing in the appellate record, and appellate counsel for petitioner had such a duty during the time they represented petitioner in connection with his automatic appeals to the California Supreme Court.

3. Petitioner was allowed by the California Supreme Court to proceed in forma pauperis throughout the proceedings before it, because at all times petitioner was indigent and unable to afford counsel.

4. Appointed appellate counsel for petitioner filed two Appellant's Opening Briefs in petitioner's automatic appeal to the California Supreme Court, and they filed two Appellant's Reply Briefs.

5. In the briefing for petitioner in connection with the automatic appeal, appellate counsel for petitioner failed to raise the following claims arising from the jury instructions at the guilt phase of petitioner's trial:

a. The jury instructions on the prosecution's burden of proof were constitutionally defective and inadequate, in violation of the due process, trial by jury, and to freedom from cruel and unusual punishment as guaranteed by the California Constitution and the United States Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments thereto.

(1) At petitioner's trial, the court delivered CALJIC No. 2.90 (1979 Revision), which purported to define the concept of the prosection's burden of proof beyond a reasonable doubt. RT 3532-33. That instruction stated in relevant part as follows:

> "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." RT 3533; see also RT 4026.

(2) CALJIC No. 2.90 was not the only instruction to which a reasonable juror would have looked to determine the meaning of proof beyond a reasonable doubt. To the contrary, given the arcane language and the complicated structure of the instruction, a reasonable juror would have desired a simpler, more comprehensible, and more practical explanation of that concept. Such an explanation was readily available. In fact, it was repeatedly given to the jury before and after CALJIC No. 2.90, in language contained in CALJIC Nos. 2.01, 2.02, and 8.83.1.

(3) The jury at petitioner's trial was instructed, in accordance with CALJIC No. 2.01, that

> "[I]f the circumstantial evidence, as to any particular count, is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence and reject that which points to his guilt. [¶] If on the other hand one interpretation of such evidence appears to you to be reasonable and the other to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable." RT 3526-27.

(4) The jury at petitioner's trial was instructed, in accordance with CALJIC No. 2.02, that

> "[I]f the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, it is your duty to adopt that interpretation which points to the absence of the specific intent or mental state. If, on the other hand, one interpretation of the evidence as to such specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable." RT 3540-41.

(5) The jury at petitioner's trial was instructed, in accordance with CALJIC No. 8.83.1, that

> "[I]f the evidence as to the required mental state is susceptible of two reasonable interpretations, one of which points to the existence thereof and the other to the absence thereof, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the required mental state appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable." RT 3544-45.

(6) Each of these instructions required the jury to return a guilty verdict, or a true finding as to the special circumstance, on the basis of inferences that merely "appear" to the jury to be reasonable, if other inferences appeared to be unreasonable. This language, upon which the jury assuredly relied in determining the meaning of CALJIC No. 2.90, was plainly inconsistent with, and unconstitutionally diluted, the requirement of proof beyond a reasonable doubt. Even if there are no reasonable appearing alternative inferences, an inference of guilt that merely "appears" to be reasonable is not tantamount to proof beyond a reasonable doubt. A reasonable juror may concede that only a guilty inference "appears" to be reasonable, but the juror may still harbor a reasonable doubt as to the defendant's guilt.

(7) The deficiencies in the instructions' portrayal of the prosecution's burden of proof were further reinforced by another instruction that invited the jury to base its verdict simply upon "evidence which appeals to your mind with more convincing force." RT 3529 [CALJIC 2.22].

(8) Individually and cumulatively, these instructions not only diluted the concept of proof beyond a reasonable

doubt, but they treated the prosecution's burdens of proof as if they were equivalent to the defense's burden.

(9) Given the arcane language of CALJIC No. 2.90 and the much more comprehensible but misleading language of the other instructions referred to above, it is at least reasonably likely that the jury applied the instructions in an unconstitutional manner.

6. In the briefing for petitioner in connection with the automatic appeal, appellate counsel for petitioner failed to raise the following claims arising from the jury instructions at the penalty phase of petitioner's trial:

a. The trial court misled the jury and failed to properly instruct regarding the consideration of mitigating and aggravating evidence, in violation of petitioner's rights to due process of law, a fair trial, an impartial jury, effective assistance of counsel, and freedom from cruel and unusual punishment as guaranteed by the United States Constitution and the amendments thereto, including the Fifth, Sixth, Eighth, and Fourteenth Amendments, and Article I, sections 1, 7, 15 and 16 of the California Constitution because the trial court failed to properly instruct the jury regarding the consideration of mitigating and aggravating evidence.

(1) Petitioner incorporates by reference as if fully set forth herein Claim J, and Arguments IX, X, XI from Appellant's Opening Brief on direct appeal before this Court.

(2) Petitioner's counsel requested that the jury be instructed that when they are considering the appropriate punishment, the jury may only consider the aggravating evidence that is specified, that consideration of mitigating evidence is unlimited, that any mitigating factor can be sufficient to impose life, that even if the aggravating evidence substantially outweighs the mitigation they can impose life, and that each party is entitled to an individual determination by the jurors. The proposed instruction, in relevant part, stated:

> "You are not permitted to consider any factor as aggravating unless it is specified on the list of factors you have been given previously. There is, however, no limitation on what you may consider as mitigating.
>
> "If any mitigating circumstance or any aspect of Mr. Bacigalupo's background or character persuades you that death is not the appropriate penalty, you shall impose a punishment of life without parole on that basis.
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> . . .
>
> "Rather, you must be persuaded that the unfavorable evidence is so substantial in comparison with the favorable that it warrants death instead of life imprisonment without the possibility of parole. You are permitted to return a verdict for death only if you conclude that the aggravating factors outweigh the mitigating so substantially that a death sentence is justified and appropriate under all the circumstances. In such a case, you are permitted to return a verdict for death,

but you are not required to do so. But if you conclude that the aggravating factors are not so substantial as to outweigh the mitigating factors, you must return a verdict for confinement in the state prison for life without possibility of parole.

"Both the People and the defendant are entitled to the individual opinion of each juror. Each of you must decide the matter for yourself after a full discussion of the evidence and instructions with the other members of the jury as to each defendant just as if each were being tried alone." CT 424-25.

(3) The court refused to give the instruction. CT 425.

(4) The defense instruction's description of the penalty phase consideration process was a correct statement of the law. Under state law, a jury is not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of that determination, but rather it is to determine, after consideration of the relevant factors, whether under all the circumstances "'death is the appropriate penalty' for the defendant before it." People v. Meyers, 43 Cal. 3d 250, 276 (1987). Thus a jury is entitled to render a verdict of life without the possibility of parole instead of the death penalty even where the aggravating circumstances are weightier than the mitigating circumstances and even where there is no mitigation whatsoever. People v. Duncan, 53 Cal. 3d 955, 979 (1991). Additionally petitioner is permitted to introduce and have the jury rely on unlimited mitigating evidence, and petitioner is

entitled to an individualized determination. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

(5) Because the trial court refused the defense instruction and misled the jury about the penalty phase consideration process, this error established an impermissible conclusive presumption of the appropriateness of death upon a finding that aggravating circumstances outweighed mitigating circumstances, and thereby violated petitioner's rights to due process under the Fourteenth Amendment. Carella v. California, 491 U.S. 263, 265-66 (1989). This error also prevented the jury from ever addressing the ultimate state law sentencing criterion, i.e. the appropriateness of the death penalty, and therefore precluded a fair, reliable and impartial penalty determination required by the Eighth Amendment. Beck v. Alabama, 447 U.S. 625, 638 (1980). Additionally, this error also violated petitioner's right to due process by arbitrarily depriving him of an important state law procedural safeguard, the right not to be sentenced to death unless the sentencing jury both understands its ultimate responsibility to determine the appropriate sentence and in fact determines that death is appropriate. Hicks v. Oklahoma, 447 U.S. 343 (1980); Fetterly v. Paskett, 997 F.2d 1295, 1300 (9th Cir. 1993); Campbell v. Blodgett, 997 F.2d 512, 522 (9th Cir. 1993).

(6) The trial court's refusal to give a defense-requested instruction to correct the misconceptions about the penalty phase consideration of evidence had a substantial prejudicial effect on the penalty phase proceedings in this case, and resulted in an arbitrary and inaccurate sentencing determination. These violations of petitioner's rights had a substantial and injurious effect or influence on the verdict, rendered the trial and penalty judgment fundamentally unfair and resulted in a miscarriage of justice.

O. California's Death Penalty Statute Is Unconstitutional Because It Fails to Meaningfully Narrow The Class of Offenders Eligible For The Death Penalty, Particularly Those Charged With Felony-Murder, And Permits The Imposition of Death in a Capricious And Arbitrary Manner.

1. Petitioner's capital murder conviction, judgment of death, and confinement are unlawful and unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments, because the California death penalty statute fails to narrow the class of offenders eligible for the death penalty and permits the imposition of death in an arbitrary and capricious manner. In particular, petitioner's conviction of capital murder was violative of the Eighth and Fourteenth Amendments' requirements that the provisions of a state's death penalty statute must genuinely narrow the class of persons

eligible for the death penalty and must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder, and thereby resulted in the imposition of a freakish, wanton, arbitrary and capricious judgment of death. The failure to narrow the class of persons eligible for capital punishment deprived petitioner of his due process rights; it permitted arbitrary selection for the death penalty without consistent guidelines to ensure reliability; and it violated the Eighth Amendment prohibition of cruel and unusual punishment. In addition, trial counsel's failure to object deprived petitioner of his right to the effective assistance of counsel.

2. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

3. Petitioner was convicted of first-degree murder and sentenced to death under California Penal Code sections 187, 189, 190.2(a)(17)(i), 190.2(a)(3) and 190.1-190.4. The special circumstances rendering petitioner eligible for a sentence of death were the felony-murder special circumstance, as alleged and found true under Penal Code section 190.2(a)(17)(i), and the multiple murder special circumstance, section 190.2(a)(3).

4. Under the Eighth and Fourteenth Amendments, a death penalty statute must, by rational and objective criteria, genuinely narrow the group of murderers who may be subject to the death penalty. Sawyer v. Whitley, 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992); McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); Zant v. Stephens, 462 U.S. 862, 877-78, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). California's death penalty statute as written fails to perform this narrowing, and the California Supreme Court's interpretations of the statute have actually expanded the statute's reach.

5. As written and applied, the death penalty statute potentially sweeps the great majority of murders into its grasp, and allows any conceivable circumstance of a crime -- even circumstances squarely opposed to each other (e.g., the fact that a decedent was young as well as the fact that a decedent was old, the fact that a decedent was killed at home as well as the fact that a decedent was killed outside the home) -- to justify the imposition of the death penalty.

6. Interpretations of California's death penalty statute by the supreme courts of California and the United States have placed the entire burden of narrowing the class of murderers to those most deserving of death

on Penal Code section 190.2, the "special circumstances" section of the statute.

7. That statute contained twenty-six different crimes punishable by death at the time of petitioner's crime and, according to the voter's pamphlet, was specifically enacted for the purpose of making every murderer eligible for the death penalty.[72] Empirical evidence shows that this goal has largely been achieved.

8. Safeguards employed by most other states to ensure a fair jury verdict are not a part of California law, and the review of death judgments by the California Supreme Court has been strictly an exercise in stamping these verdicts with the approval of a higher court. During the time period in which petitioner's case was decided, California's high court approved 94% of the death verdicts before it, higher than any other court in the country -- much higher than the affirmance rate in states such as Florida, Georgia, or Texas.

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[72] Section 190.2's all-embracing special circumstances were created with an intent to make the death penalty apply to nearly every murderer. Such intent directly violates the constitutional requirement that capital sentencing legislation define <u>and</u> <u>circumscribe</u> the class of persons eligible for the death penalty. Section 190.2 neither defines nor circumscribes, thereby catching within its net almost every person who has committed a first-degree murder.

9. In 1977, the California legislature enacted a new death penalty law. Under the law, one of twelve special circumstances had to be proved beyond a reasonable doubt to make a murderer death-eligible. Stats. 1977, ch. 316, at 1255-66. Under the statute, first-degree murder was "punishable by life imprisonment except for extraordinary cases in which special circumstances are present." Owen v. Superior Court, 88 Cal. App. 3d 757, 760, 152 Cal. Rptr. 88 (1979), quoted with approval in People v. Green, 27 Cal. 3d 1, 48, 164 Cal. Rptr. 1 (1980). Thus, special circumstances were intended to define death eligibility in California. Id. at 61.

10. The 1977 law was superseded in 1978 by the enactment of Proposition 7, known as the "Briggs Initiative." Petitioner was tried and convicted under this 1978 death penalty law. The Briggs Initiative was to give Californians the "toughest" death-penalty law in the country. California Journal Ballot Proposition Analysis, 9 Calif. J. (Special Section, November 1978) at 5. The intent of the voters, as expressed in the ballot proposition arguments, was to make the death penalty applicable to all murders:

> "And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty.

> Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would."

Cal. Voter's Pamphlet, Gen. Elec. (Nov. 7, 1978) at 34.[73]

11. The Briggs Initiative sought to achieve this result principally by greatly expanding the number of special circumstances. Many of these special circumstances, including but not limited to robbery felony-murder, burglary felony-murder, and lying in wait, have been given a broad judicial interpretation.

12. First-degree murder in California is defined by Penal Code section 189. At the time of petitioner's conviction, section 189 created three categories of first-degree murders: murders committed by listed means, killings committed during the perpetration of listed felonies, and willful murders committed with premeditation and deliberation.

13. As a result of the number of special circumstances, the legislative definition of first-degree murder, and judicial rulings on the scope of the first-degree murder, the special circumstances, and several common felonies, a substantial majority of murders in California have been

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[73] This goal of the voters, though unconstitutional, is directly pertinent to the construction of the statute: the California Supreme Court has repeatedly held that election ballot arguments are entitled to great weight in interpreting statutes. Lungren v. Deukmejian, 45 Cal. 3d 727, 740, n.14, 248 Cal. Rptr. 723 (1988); Long Beach City Employees Assn. v. City of Long Beach, 41 Cal. 3d 937, 943, n.5, 227 Cal. Rptr. 90 (1986).

first-degree murder and, in virtually all of them, at least one special circumstance could be applied.

14. At the time of petitioner's trial, there was substantial overlap between the intentional murders committed by the means listed in section 189 and the special circumstances set forth in section 190.2. Four of the five "means" listed in section 189 (murders by destructive device or explosive, poison, torture and lying in wait) were also special circumstances in intentional killings. See Cal. Pen. Code §§ 190.2(a)(4), (a)(6), (a)(15), (a)(18), and (a)(19).

15. There also was substantial overlap between the felony murders listed in section 189 and the special circumstances listed in section 190.2(a)(17). Five of the six felonies listed in section 189 (arson, rape, robbery, burglary and violations of Pen. Code § 288(a)) also were special circumstances. See Cal. Pen. Code §§ 190.2(a)(17)(i), (a)(17)(iii), (a)(17)(v), (a)(17)(vii), and (a)(17)(viii). Only mayhem could have been the basis for a first-degree felony-murder conviction without at the same time making the murderer death eligible, but petitioner is not aware of any reported mayhem felony-murder conviction occurring since the passage of the Briggs Initiative.

16. Theoretically, the only intentional first-degree murders not expressly qualifying for the death penalty were those where the first-degree murder could be established solely by proof of premeditation and deliberation. Even then, many such murders would have been capital murders, as, for example, where the defendant committed another first- or second-degree murder (Cal. Pen. Code §§ 190.2(a)(2), (a)(3)), the defendant acted with a particular motive (Cal. Pen. Code §§ 190.2(a)(1), (a)(5), (a)(16)), or the defendant killed a particular type of victim (Cal. Pen. Code §§ 190.2(a)(7) - (a)(13)).

17. Virtually all the remaining premeditated murders also would have been capital murders because, by definition, most premeditated murders are committed while the defendant is lying in wait (which is a special circumstance). Cal. Pen. Code § 190.2(a)(15); see People v. Morales, 48 Cal. 3d 527, 557, 257 Cal. Rptr. 64 (1989) (defining elements of lying-in-wait special circumstance) and id. at 575 (Most, J. dissenting)(lying-in-wait special circumstance "is so broad in scope as to embrace virtually all intentional killings."); see also People v. Ceja, 4 Cal. 4th 1134, 1147, 17 Cal. Rptr. 375 (1993) (conc. opn. of Kennard, J.).

18. The situation was similar with regard to unintentional first-degree murders. Unintentional murders would be first-degree murders by

virtue of the felony-murder rule. Cal. Pen. Code § 189. An unintentional killing during one of the listed felonies (except mayhem) made the actual killer death eligible.

19. At the time of petitioner's trial and in the years following, the broad reach of the felony-murder rule resulted from three factors. First, the felony-murder rule applied to the most common felonies resulting in death, particularly robbery and burglary, crimes which are defined very broadly by statute and court decision. See, e.g., People v. Webster, 54 Cal. 3d 411, 285 Cal. Rptr. 31 (1991) (property taken was one quarter mile away from victim meets "immediate presence" element of robbery); People v. Mungia, 234 Cal. App. 3d 1703, 286 Cal. Rptr. 394 (1991) (forceful purse-snatch meets "force or fear" element of robbery); People v. Ravenscroft, 198 Cal. App. 3d 639, 243 Cal. Rptr. 827 (1988) (use of ATM card is entry into bank for burglary); People v. McCormack, 234 Cal. App. 3d 253, 285 Cal. Rptr. 504 (1991) (going from one room to another within a house in an entry for burglary).

20. Second, the felony-murder rule applied to killings occurring even after completion of the felony, if the killing occurs during an escape or as a "natural and probable consequence" of the felony. See People v.

Cooper, 53 Cal. 3d 1158, 281 Cal. Rptr. 90 (1991); People v. Birden, 179 Cal. App. 3d 1020, 225 Cal. Rptr. 105 (1986).

21. Third, the felony-murder rule was not limited in its application by normal rules of causation and applied to altogether accidental and unforeseeable deaths. People v. Dillon, 34 Cal. 3d 441, 447, 194 Cal. Rptr. 390 (1983).

22. The breadth of Cal. Penal Code section 190.2 is more than just theoretical. Empirical evidence compiled by Professor Steven F. Shatz of the University of San Francisco and Nina Rivkind, attorney and Lecturer in Law at the University of California, Berkeley, confirms what is evident from the face of the statute. Their study of the 300 published decisions on appeals from murder convictions in California, from 1988 through 1992, demonstrates that Penal Code section 190.2 fails to perform the narrowing function required under the Eighth and Fourteenth Amendments. Steven F. Shatz & Nina Rivkind, The California Death Penalty Scheme: Requiem for Furman?, 72 N.Y.U.L. Rev. 1283 (1997), which is attached as an exhibit, and all of the information in which is incorporated by reference as if fully set forth herein.

23. The study examined 153 decisions in capital cases by the California Supreme Court, 84 decisions in other first-degree murder cases,

and 63 decisions in second-degree murder cases by the California Supreme Court and the California Courts of Appeal.

24. According to this study, the California Supreme Court reversed only once because of insufficient evidence to support the finding of special circumstances in a capital case. See People v. Morris, 46 Cal. 3d 1, 249 Cal. Rptr. 119 (1988).

25. The distribution of the special circumstances found in these capital cases is set forth below:[74]

Special Circumstances Found:	152
Felony-murder robbery	69
Felony-murder burglary	33
Felony-murder rape	21
Felony-murder kidnaping	21
Other felony-murder	21
Multiple murder	63
Lying in wait	5
Other	27

[74] The sum of the special circumstances found exceeds the number of cases because some cases involved more than one special circumstance finding. The numbers include only special circumstances found, rather than special circumstances which could have been found on the evidence adduced.

No special circumstances:	1

26. In the 84 non-capital first-degree murder cases, the distribution of special circumstances actually found or proved from the facts is as follows:

Special circumstances Found or Proved:	69
Felony-murder robbery	27
Felony-murder burglary	14
Other felony-murder	9
Multiple murder	11
Lying in wait	20
Other	11
No special circumstances:	9
Insufficient facts:	6

27. In 35 of the 69 cases identified as "special circumstances cases," the trial court actually found special circumstances. In the other 34 cases, the murders were committed in the commission of robberies[75] or

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[75] See, e.g., People v. Frye, 7 Cal. App. 4th 1148, 10 Cal. Rptr. 2d 217 (1992); People v. Bivens, 231 Cal. App. 3d 653, 282 Cal. Rptr. 438 (1991); People v. Hankey, 215 Cal. App. 3d 510, 263 Cal. Rptr. 615 (1989); People v. Williams, 202 Cal. App. 3d 835, 248 Cal. Rptr. 793 (1988).

burglaries,[76] while the defendant was lying in wait,[77] the defendant was convicted of multiple murders,[78] or one of the less common special circumstances was proved.[79]

28. In the 63 second-degree murder cases, the distribution of cases where first-degree murder and special circumstances were actually proved are as follows:

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[76] See, e.g., People v. Perez, 2 Cal. 4th 1117, 9 Cal. Rptr. 2d 577 (1992); People v. Weddle, 1 Cal. App. 4th 1190, 2 Cal. Rptr. 2d 714 (1991); People v. Berberena, 209 Cal. App. 3d 1099, 257 Cal. Rptr. 672 (1989); People v. Prince, 203 Cal. App. 3d 848, 250 Cal. Rptr. 154 (1988).

[77] See, e.g., People v. Wallace, 9 Cal. App. 4th 1515, 12 Cal.Rptr.2d 230 (1992); People v. Fitzpatrick, 2 Cal. App. 4th 1285, 3 Cal. Rptr. 2d 808 (1992); People v. Harper, 228 Cal. App. 3d 843, 279 Cal. Rptr. 204 (1991); People v. Smith, 214 Cal. App. 3d 904, 263 Cal. Rptr. 155 (1989), cert. den. 507 U.S. 1020 (1993) [123 L.Ed.2d 450, 113 S. Ct. 1820]; People v. Garcia, 201 Cal. App. 3d 324, 247 Cal. Rptr. 94 (1988).

[78] See, e.g., People v. King, 1 Cal. App. 4th 288, 2 Cal. Rptr. 2d 197 (1991); People v. Anderson, 233 Cal. App. 3d 1646, 285 Cal. Rptr. 523 (1991); People v. Corona, 211 Cal. App. 3d 529, 259 Cal. Rptr. 524 (1989).

[79] See, e.g., People v. St. Joseph, 226 Cal. App. 3d 289, 276 Cal. Rptr. 498 (1990) [torture]; People v. Aguilar, 218 Cal. App. 3d 1556, 267 Cal. Rptr. 879 (1990) [witness killing]; People v. Morgan, 207 Cal. App. 3d 1384, 255 Cal. Rptr. 680 (1989) [killing because of race].

First-degree Murder With Special Circumstances Proved:	17[80]
Felony-murder robbery	3
Felony-murder burglary	3
Other felony-murder	2
Multiple murder	2
Lying in wait	11
Other	1
No First-degree Murder:	39
Insufficient facts:	7

29. In the 17 cases where first-degree murder and special circumstances were shown on the facts, the proof was that the murders were committed during the commission of robberies[81] or burglaries,[82] while the

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[80] Not included in this count is any case where, even though there was substantial evidence of a first-degree murder, the factfinder arguably decided that some element of first-degree murder was not proved.

[81] See, e.g., People v. Coleman, 5 Cal. App. 4th 646, 7 Cal. Rptr. 2d 40 (1992); People v. Manriquez, 235 Cal. App. 3d 1614, 1 Cal. Rptr. 2d 600 (1991); People v. Douglas, 234 Cal. App. 3d 273, 285 Cal. Rptr. 609 (1991).

[82] See, e.g., People v. Pearch, 229 Cal. App. 3d 1282, 280 Cal. Rptr. 584 (1991).

defendant was lying in wait,[83] or, in one case, the defendant was convicted of multiple murders.[84]

30. Again, without consideration of the capital cases, in 64% of all murder cases, first-degree murder with special circumstances was, or could have been, proved.[85]

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[83] See, e.g., People v. Blanco, 10 Cal. App. 4th 1167, 13 Cal. Rptr. 2d 176 (1992); People v. DeLeon, 10 Cal. App. 4th 815, 12 Cal. Rptr. 2d 825 (1992); People v. Aris, 215 Cal. App. 3d 1178, 264 Cal. Rptr. 167 (1989).

[84] See People v. Klvana, 11 Cal. App. 4th 1679, 15 Cal. Rptr. 2d 512 (1992). Klvana was actually convicted of nine counts of second-degree murder resulting from medical malpractice in his obstetrics practice. However, because of the elasticity of the felony-murder doctrine in general and the crime of burglary in particular, Klvana could have been convicted of first-degree murder with special circumstances in one of the cases. In the case of the death of one of the fetuses, Klvana's assistant (who was convicted of practicing medicine without a license) went to the expectant mother's house to treat her during labor. Since the assistant entered the house to commit a felony (practicing medicine without a license), she committed a burglary, and Klvana could have been convicted of burglary on a theory of vicarious liability. Since the subsequent death of the fetus (which occurred after the mother was brought to Klvana's office for treatment by him) flowed from the burglary as one continuous transaction, Klvana could have been prosecuted for first-degree murder on a felony-murder theory. (Id. at 1694-96.) Since Klvana was convicted of other (second-degree) murders in the same prosecution, he would have been death eligible under the multiple murder special circumstance. (Pen. Code § 190.2(a)(iii).)

[85] If anything, these figures for the non-capital murder cases understate the number of cases of first-degree murder with special circumstance. Where the prosecution did not charge first-degree murder or

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31. The Shatz-Rivkind study also confirms that section 190.2 does not address the risk of arbitrariness. The section sweeps so broadly that only 9%-13% of those first-degree murderers who could be death-eligible, and only 5%-8% of all murderers who could be death-eligible, are in fact sentenced to death. These percentages are well below the assumed percentage of death judgments at the time of Furman, a percentage impliedly found by the majority of the Court to create enough risk of arbitrariness to violate the Eighth Amendment.

32. Because almost all first-degree murders in California fall within the special circumstances enumerated in Penal Code § 190.2, the death penalty statute fails to genuinely narrow the class of death eligible murderers in violation of the Eighth and Fourteenth Amendments.

33. Penal Code section 190.2's failure to genuinely narrow the class of death-eligible murderers is not corrected nor ameliorated by Penal Code § 190.3, the statute which sets forth the circumstances in aggravation

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did not charge special circumstances, it had no incentive to offer proof which might have been available and adequate to prove the higher charge. Further, juries which refused to find special circumstances (see, e.g., People v. Boyd, 222 Cal. App. 3d 541, 271 Cal. Rptr. 738 (1990)) or which rejected a first-degree murder charge in favor of second-degree murder (see, e.g., People v. Rhodes, 215 Cal. App. 3d 470, 263 Cal. Rptr. 603 (1989)) may have simply been exercising the very unchecked discretion challenged here.

and mitigation which the jury is to consider in determining whether to impose a sentence of death upon a defendant convicted of special circumstance murder. The purpose of this statute, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in determining the appropriate penalty. In actual practice, it has been used in ways so arbitrary and contradictory as to violate due process of law.

34. Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." The state Supreme Court has never applied any limiting construction to this factor, even to eliminate blatant capriciousness. Instead, the state court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor because the defendant had a "hatred of religion,"[86] or because three weeks after the crime defendant sought to

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[86] People v. Nicolaus, 54 Cal. 3d 551, 581-582, 286 Cal. Rptr. 628 (1991), cert. denied, 112 S. Ct. 3040 (1992).

conceal evidence,[87] or threatened witnesses after his arrest,[88] or disposed of the decedent's body in a manner that precluded its recovery.[89]

35. Prosecutors throughout California have been allowed to argue that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" are aggravating and should be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds,[90] or because the defendant killed with a single execution-style wound.[91]

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[87] People v. Walker, 47 Cal. 3d 605, 639, fn. 10, 253 Cal. Rptr. 863 (1988), cert. denied, 494 U.S. 1038 (1990).

[88] People v. Hardy, 2 Cal. 4th 86, 204, 5 Cal. Rptr. 796 (1992), cert. denied, 113 S. Ct. 498 (1992).

[89] People v. Bittaker, 48 Cal. 3d 1046, 1110, n.35, 259 Cal. Rptr. 630 (1989), cert. denied, 496 U.S. 931 (1990).

[90] See, e.g., People v. Morales, Cal. Sup. Ct. No. S004552, RT 3094-95 (defendant inflicted many blows); People v. Zapien, No. S004762, RT 36-38 (same); People v. Lucas, No. S004788, RT 2997-98 (same); People v. Carrera, No. S004569, RT 160-61 (same).

[91] See, e.g., People v. Freeman, No. S004787, RT 3674, 3709 (defendant killed with single wound); People v. Frierson, No. S004761, RT 3026-27 (same).

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[92] or because the defendant killed the victim without any motive at all.[93]

c. Because the defendant killed the victim in cold blood[94] or because the defendant killed the victim during a savage frenzy.[95]

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[92] See, e.g., People v. Howard, No. S004452, RT 6772 (money); People v. Allison, No. S004649, RT 968-69 (same); People v. Belmontes, No. S004467, RT 2466 (eliminate a witness); People v. Coddington, No. S008840, RT 6759-60 (sexual gratification); People v. Ghent, No. S004309, RT 2553-55 (same); People v. Brown, No. S004451, RT 3543-44 (avoid arrest); People v. McLain, No. S004379, RT 31 (revenge).

[93] See e.g., People v. Edwards, No. S004755, RT 10544 (defendant killed for no reason); People v. Osband, No. S005233, RT 3650 (same); People v. Hawkins, No. S014199, RT 6801 (same).

[94] See, e.g., People v. Visciotti, No. S004597, RT 3296-97 (defendant killed in cold blood).

[95] See, e.g., People v. Jennings, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

d. Because the defendant engaged in a cover-up to conceal his crime,[96] or because the defendant did not engage in a cover-up and so must have been proud of it.[97]

e. Because the defendant made the victim endure the terror of anticipating a violent death[98] or because the defendant killed instantly without any warning.[99]

f. Because the victim had children,[100] or because the victim had not yet had a chance to have children.[101]

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[96] See, e.g., People v. Stewart, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); People v. Benson, No. S004763, RT 1141 (defendant lied to police); People v. Miranda, No. S004464, RT 4192 (defendant did not seek aid for victim).

[97] See, e.g., People v. Adcox, No. S004558, RT 4607 (defendant freely informs others about crime); People v. Williams, No. S004365, RT 3030-31 (same); People v. Morales, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[98] See, e.g., People v. Webb, No. S006938, RT 5302; People v. Davis, No. S014636, RT 11125; People v. Hamilton, No. S004363, RT 4623.

[99] See, e.g., People v. Freeman, No. S004787, RT 3674 (defendant killed victim instantly); People v. Livaditis, No. S004767, RT 2959 (same).

[100] See, e.g., People v. Zapien, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[101] See, e.g., People v. Carpenter, No. S004654, RT 16752 (victim had not yet had children).

g. Because the victim struggled prior to death,[102] or because the victim did not struggle.[103]

h. Because the defendant had a prior relationship with the victim,[104] or because the victim was a complete stranger to the defendant.[105]

36. Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of factors inevitably present in every homicide:

a. The age of the victim. Prosecutors have bee permitted to argue, and juries were free to find, that factor (a) was an aggravating

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[102] See, e.g., People v. Dunkle, No. S014200, RT 3812 (victim struggled); People v. Webb, No. S006938, RT 5302 (same); People v. Lucas, No. S004788, RT 2998 (same).

[103] See, e.g., People v. Fauber, No. S005868, RT 5546-47 (no evidence of struggle); People v. Carrera, No. S004569, RT 160 (same).

[104] See, e.g., People v. Padilla, No. S014496, RT 4604 (prior relationship); People v. Waidla, No. S020161, RT 3066-67 (same); People v. Kaurish, 52 Cal. 3d at 648, at 717 (1990).

[105] See, e.g., People v. Anderson, No. S004385, RT 3168-69 (no prior relationship); People v. McPeters, No. S004712, RT 4264 (same).

circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[106]

b. The method of killing. Prosecutors have been allowed to argue, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[107]

c. The motive of the killing. Prosecutors have been allowed to argue, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to

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[106] See, e.g., People v. Deere, No. S004722, RT 155-56 (victims were young, ages 2 and 6); People v. Bonin, No. S004565, RT 10075 (victims were adolescents, ages 14, 15, and 17); People v. Carpenter, No. S004654, RT 16752 (victim was 20); People v. Phillips, 41 Cal. 3d 29, 63, 222 Cal. Rptr. 127 (1985) (26-year-old victim was "in the prime of life"); People v. Samayoa, No. S006284, XL RT 49 (victim was an adult "in her prime"); People v. Kimble, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); People v. Melton, No. S004518, RT 4376 (victim was 77); People v. Bean, No. S004387, RT 4715-16 (victim was elderly").

[107] See, e.g., People v. Clair, No. S004789, RT 2474-45 (strangulation); People v. Kipp, No. S004784, RT 2246 (same); People v. Fauber, No. S005868, RT 5546 (use of an ax); People v. Benson, No. S004763, RT 1149 (use of a hammer); People v. Cain, No. S006544, RT 6786-87 (use of a club); People v. Jackson, No. S01723, RT 8075-76 (use of a gun); People v. Reilly, No. S004607, RT 14040 (stabbing); People v. Scott, No. S010334, RT 847 (fire).

eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[108]

d. The time of the killing. Prosecutors have been allowed to argue, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[109]

e. The location of the killing. Prosecutors have been allowed to argue, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[110]

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108 See, e.g., People v. Howard, No. S004452, RT 6772 (money); People v. Allison, No. S004649, RT 969-70 (same); People v. Belmontes, No. S004467, RT 2466 (eliminate a witness); People v. Coddington, No. S008840, RT 6759-61 (sexual gratification); People v. Ghent, No. S004309, RT 2553-55 (same); People v. Brown, No. S004451, RT 3544 (avoid arrest); People v. McLain, No S004370, RT 31 (revenge); People v. Edwards, No. S004755, RT 10544 (no motive at all).

109 See, e.g., People v. Fauber, No. S005868, RT 5777 (early morning); People v. Bean, No. S004387, RT 4715 (middle of the night); People v. Avena, No. S004422, RT 2603-04 (late at night); People v. Lucero, No. S012568, RT 4125-26 (middle of the day).

110 See, e.g., People v. Anderson, No. S004385, RT 3167-68 (victim's home); People v. Cain, No. S006544, RT 6787 (same); People v. Freeman, No. S004787, RT 3674, 3710-11 (public bar); People v. Ashmus, No. S004723, RT 7340-41 (city park); People v. Carpenter, No. S004654, RT 16749-50 (forested area); People v. Comtois, No S017116, RT 29760

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37. The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it can be relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts -- or facts that are inevitable variations of every homicide -- into aggravating factors to be weighed on death's side of the scale.

38. Additionally, pursuant to Penal Code section 190.3(a), a California penalty phase jury is instructed to weigh in aggravation of sentence any special circumstance which it found true at the guilt phase. Pen. Code § 190.3(a); CALJIC No. 8.84.1 A defendant convicted of first-degree murder under a felony-murder theory is therefore automatically eligible for a special circumstance (Pen. Code § 190.2(a)(17) et seq.) and a duplicating penalty-phase aggravating factor (Pen. Code § 190.3(a)), by the nature of the charge.

39. By contrast, a defendant accused of a premeditated killing does not automatically have a built-in special circumstance. Something more must be found to make that defendant eligible for death, and to

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(...continued)
(remote, isolated location).

support a sentencer's decision to impose death. This disparity between premeditated and felony-murder is highly incongruous, and violates the due process guarantees of the Eighth and Fourteenth Amendments, as well as the Fourteenth Amendment's equal protection clause.

40. California's effort to comply with the Eighth Amendment's narrowing requirement by means of findings of special circumstances does nothing meaningfully to narrow the class of murderers eligible for death, because the felony-murder special circumstance duplicates exactly the elements of the crime itself. The error is then emphasized by having the jury consider the special circumstance finding as a penalty-phase aggravating factor. Pen. Code § 190.3(a). This is a process biased in favor of death that does not genuinely narrow the pool of murderers to those most deserving of death.

41. The California murder and death penalty statutory scheme, contained in Penal Code sections 187-190.5, affords the individual prosecutor complete discretion to determine whether special circumstances will be charged and whether a penalty hearing will be held, in violation of the Eighth and Fourteenth Amendments, thereby creating a substantial risk of county-by-county arbitrariness. There are no statewide standards to guide the prosecutor's discretion.

42. Some offenders, under the California statutory scheme, are chosen as candidates for the death penalty by one prosecutor, while others with similar factors in different counties are not. This arbitrary determination can be made at the charging stage, prior to trial, after the guilt phase, and during or even after the penalty phase has begun. This range of opportunity, coupled with the absence of any standards to guide the prosecutor's discretion, permits reliance on constitutionally irrelevant and impermissible considerations, including race, ethnicity, sexual orientation, or economic status. Additionally, the prosecutor is free to seek death in virtually every first-degree murder case on either a lying-in-wait theory or a felony-murder theory, and to argue that death should be imposed based on nothing more than the same facts that substantiated a conviction for first-degree murder.

43. Petitioner would not have been charged with the death penalty had he been charged with the same crimes in many other counties in California. The California statutory scheme, by design and in effect, improperly produced and still produces arbitrary and capricious prosecutorial decision-making throughout the capital case process, in charging, prosecuting, submitting the case to the jury, and opposing the automatic motion to modify the sentence.

44. In addition to its failure to genuinely narrow the class of death-eligible defendants and its provision of unfettered charging discretion to individual prosecutors, the California murder/death penalty statutory scheme, as written and applied, contains none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances outweigh the mitigating circumstances and that death is the appropriate penalty. Not only is inter-case proportionality review not required; it is not permitted.

45. Other jurisdictions that allow the death penalty to be imposed have at least one of these safeguards, in order to avoid the imposition of random or vindictive death sentences. None is a part of California's death penalty law.

46. Twenty-five states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[111] Only

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[111] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d) (1) (a) (1992); Ga. Code Ann. § 17-10-3-(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat., ch. 38,
(continued...)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to address the matter by statute.

47. California does not require that a reasonable doubt standard be used to determine whether a death sentence should be imposed. However, this heightened standard is employed for matters of much less importance to an individual than life or death, i.e., being committed to a mental hospital, or having a conservator appointed to manage his or her affairs.

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para. 9-1(f) § (Smith-Hurd 1992); Ind. Code Ann. § 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, § 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); State v. Stewart, 250 N.W.2d 849, 863 (Neb. 1977); State v. Simants, 250 N.W.2d 881, 888-890 (Neb. 1977); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1993); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. § 16-3-20(A), (C) (Law Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); State v. Pierre, 572 P.2d 1338, 1348 (Utah 1977); Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (West 1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

48. Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[112] A fourth state, Utah, has reversed a death judgment, because that judgment was based on the same standard of proof as applied in California, i.e., less than proof beyond a reasonable doubt.

49. Of the thirty-four post-Furman state capital sentencing systems, twenty-five require some form of written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[113]

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[112] See Ark. Code. Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and State v. Goodman, 257 S.E.2d 569, 577 (1979).

[113] See Ala. Code § 12A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703 (D) (1989); Ark. Code Ann. § 5-4-603 (a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); State v. White, 395 A.2d 1082, 1090 (Del. 1978); Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (Michie 1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code, art. 27, section 413(i) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175-554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5 (IV) (1992); N.M.
(continued...)

50. Of the twenty-two states like California that vest the responsibility for death penalty sentencing on the jury, however, fourteen require that the jury unanimously agree on the aggravating factors proven, and unanimously agree that death is the appropriate sentence.[114] California does not have such a requirement.

51. Petitioner's jurors were never told that they were required to agree on which factors in aggravation had been proven. They could have made their decision to impose death using any of the improper considerations described ante, or still other similar, improper matters.[115]

(...continued)
Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

[114] See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann., art. 905.6 (West 1993); Md. Ann. Code, art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).

[115] For example, in the present case, juror declarations indicate that a major factor in swaying the jurors toward a death verdict was their
(continued...)

Absent a requirement of unanimous jury agreement as to the existence of any aggravating factors, and written findings thereon, the propriety of the judgment herein cannot be reviewed in a constitutional manner. Moreover, each juror could have relied on a factor which could potentially constitute proper aggravation, but was different from such factors relied on by the other jurors; i.e., there was no actual agreement on why petitioner should be condemned.

52. Thirty-one of the thirty-four states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the state Supreme Court determine whether "the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann., § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards "further against a situation comparable to that presented in Furman v. Georgia . . . ." Gregg v. Georgia, supra, 428 U.S. at 198. Toward the same end, Florida has judicially "adopted the type of proportionality review

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(...continued)
discussion and consideration of petitioner's possible release from prison if they imposed a sentence of life without possibility of parole rather than death, as well as the erroneous consideration that even if they imposed a death sentence, petitioner would never be executed. As set forth in Claim J, supra, which is incorporated by reference, the jurors erroneously believed that there was no such thing as a life without possibility of parole sentence.

mandated by the Georgia statute." Profitt v. Florida, 428 U.S. 242, 259, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[116]

53. Penal Code section 190 does not require that either the trial court or the California Supreme Court undertake a comparison between petitioner's case and other factually similar cases to examine the proportionality of the sentence imposed, i.e., inter-case proportionality review. The statute also does not forbid such review. The California Supreme Court has made it clear, however, that neither trial courts nor

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[116] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46(b)(3) (West 1993); Del. Code Ann., tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann., art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(30(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. § 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988). Also see State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973); Alford v. State, 307 So. 2d 433, 444 (Fla. 1975); People v. Brownell, 404 N.E. 2d 181, 197 (Ill. 1980); Brewer v. State, 417 N.E. 2d 889, 899 (Ind. 1981); State v. Pierre, 572 P.2d 1338, 1345 (Utah 1977); State v. Simants, 250 N.W. 2d 881, 890 (Neb. 1977) [comparison with other capital prosecutions where death has and has not been imposed]; State v. Richmond, 560 P.2d 41, 51 (Ariz. 1976); Collins v. State, 548 S.W. 2d 106, 121 (Ark. 1977).

reviewing courts are permitted in California to perform inter-case proportionality review. This blanket prohibition on the consideration of evidence showing that death sentences are not being sought by California prosecutors or imposed by California juries on similarly situated defendants violates the Eighth and Fourteenth Amendments of the United States Constitution.

54. Because virtually all first-degree murders in California fall within the special circumstances enumerated in Penal Code section 190.2, an individual prosecutor in California is afforded complete discretion to determine whether to charge special circumstances and seek death, and the California statutory scheme contains none of the safeguards common in other death penalty sentencing schemes to guard against the arbitrary imposition of death, California's death penalty statute fails to genuinely narrow the class of death eligible murderers in violation of the Eighth and Fourteenth Amendments and permits the imposition of death sentences in an arbitrary and capricious manner.

55. Because petitioner was prosecuted under this overly-inclusive and unconstitutional statute, the special-circumstance finding and death sentence are invalid and a writ of habeas corpus should issue.

56. The failure of petitioner's counsel to object to prosecution of petitioner under the California capital sentencing law for the reasons set forth above was unreasonable, fell below the prevailing professional standard of competence, was not justified, and could not have been justified, by any legitimate tactical objective, denied petitioner his right to a reliable penalty determination, precluded review of this issue on appeal, and prejudiced petitioner's chances of obtaining a more favorable sentence.

P. Petitioner Was Denied a Fair And Constitutionally Adequate Review of His Death Judgment in The California Supreme Court.

1. Petitioner was denied a meaningful, non-arbitrary and non-capricious appellate and habeas review by the California Supreme Court, and was thereby denied his fundamental procedural and substantive due process rights, equal protection guarantees, and his right to be free from cruel and unusual punishment under the state and federal Constitutions and International Law.

2. Both the Court's reasoning and its ultimate conclusions in People v. Bacigalupo I, 1 Cal. 4th 103 (1995) and People v. Bacigalupo II, 6 Cal. 4th 457 (1993) were fundamentally unfair and arbitrary and capricious.

3. Petitioner was caught in a whiplash of constitutional violations at the hands of the State. Nevertheless, the Court disposed of each of petitioner's claims by resort to intellectual sleight of hand based on an analysis that ignored prejudicial violations of law and which denied petitioner his right to meaningful appellate review.

4. This invalid and cursory treatment of petitioner's appellate issues does not satisfy the constitutional obligations confirmed by the United States Supreme Court in Hicks v. Oklahoma, 447 U.S. 343, 100 S. Ct. 2227 (1980); Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990); Parker v. Dugger, 498 U.S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991); Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992) ("[T]he State must afford the petitioner a full and fair hearing on his federal claim[s]"); Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), and their related cases.

5. In 1989, Professor Gerald Uelman, former dean of Santa Clara University School of Law, reviewed the capital sentencing record of the California Supreme Court for the prior decade. Uelman, Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts, 23 Loyola L.A. L. Rev. 237 (1989).

6. Professor Uelman contrasted the California Supreme Court's death judgment review from 1979 through 1986 with its record from 1987 through 1989. He found the disparity to be so dramatic as to suggest the existence of "two courts." Id. at 237-38.

a. "From 1979 through 1986, the Supreme Court of California reviewed sixty-four judgments of death. Five of them, or 7.8 percent, were affirmed." Id.

b. "From 1987 through March of 1989, the Supreme Court of California reviewed seventy-one judgments of death. Fifty-one of them, or 71.8 percent, were affirmed." Id.

c. "In two short years, the California affirmance rate for state Supreme Court review of death judgments moved from the third lowest in the United States to the eighth highest." Id.

d. "The revolution which demarcates this dramatic shift was the retention election of November, 1986, in which the voters of California removed Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso." Id.

7. In 1984, George Deukmejian, then Governor of California, appointed the Honorable Malcolm Lucas as an Associate Justice of the California Supreme Court.

8. For the next two years, Governor Deukmejian mounted one of the most strident pro death penalty campaigns in the country's history.

a. In 1986, he "announced his opposition to Chief Justice Rose Bird because of her votes in capital cases." Bright & Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 Boston Univ. L. Rev. 759, 760 (1995).

b. Governor Deukmejian then publicly threatened Associate Justices Cruz Reynoso and Joseph Grodin "that he would oppose them in their retention elections unless they voted to uphold more death sentences." Id.

c. Governor Deukmejian "carried out his threat [,and] opposed the retention of all three justices and all lost their seats after a campaign dominated by the death penalty." Id. at 760-61.

9. Following the defeat of Chief Justice Bird and Associate Justices Reynoso and Grodin, Governor Deukmejian named Associate Justice Lucas as Chief Justice of California.

10. The California Supreme Court's 71.8 percent affirmance rate for the period 1986-89 ranked slightly lower than Georgia (73.1 percent affirmance rate based on 245 decisions), slightly above Texas (67.1 affirmance rate, based on 319 decisions), and considerably above Florida

(53.7 percent based on 443 decisions). Nationwide, capital appellate review was bounded by affirmance rates from 50 to 75 percent during this time period.

11. In an overnight move, this Court catapulted itself up to -- and then beyond -- a capital affirmance rate within the range staked out by the Supreme Courts of Georgia, Texas, and Florida, the states with the most capital decisions and with the longest prevailing capital sentencing statutes.

12. The striking turnabout in the Court's affirmance rate is indicative of a qualitative political change in the state's capital decision-making process.

13. From 1990 to 1992, during which it decided 84 cases (affirming 81 and reversing 3) the California Supreme Court underwent a second and equally instantaneous transformation, escalating its affirmance rate from the relatively high 71.8 percent to an astronomical 96 percent affirmance rate for the years 1990 through 1992.

14. The Court's 96 percent affirmance rate outstripped that of every other capital sentencing jurisdiction in the country. The capital affirmance rates in Georgia, Florida, and Texas remained virtually unchanged during this same time period. Indeed, for the years 1990-92

cumulatively, the affirmance rate for the Supreme Court of Georgia was 70.3 percent; for Florida, 62.6 percent; and for Texas, 76.9 percent.[117]

15. More shocking is the fact that the California Supreme Court's affirmance rate rose yet again. From 1992 to through 1996, the Court's affirmance rate rose even nearer to 100 percent.

16. Between 1992 and the end of 1996, the Court rendered decisions on direct appeals in 81 death penalty cases. The Court affirmed 79 of those 81 cases, conducting no more than a rubber stamp review of these death judgments.

17. Overall, between 1987 and 1996, the California Supreme Court disposed of nearly 300 capital cases (including petitioner's) and denied relief in toto in 97 percent of these cases. The breakdown of these figures is as follows:

18. The Court decided approximately 121 direct appeals during the period in question, affirming the judgments in 117 (97%) of the cases.

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[117] The affirmance rates for the Supreme Courts of Missouri and Virginia, the courts with the highest affirmance rates outside California, are: (1) Missouri: 80 percent for the years 1990-1992 and (2) Virginia: 89 percent for the same period. The volume of cases in these two jurisdictions is comparatively small such that one or two cases can cause a large fluctuation in analysis of the affirmance rate or other statistical comparison. The comparisons among the larger jurisdictions -- California, Georgia, Florida, and Texas -- do not share this statistical impediment.

(One of the "non-affirmances" involved a case where the California Supreme Court affirmed the guilt-phase and penalty-phase verdicts but remanded solely for a new hearing before the judge on the statutorily required motion to reduce the death sentence. People v. Lewis, 50 Cal. 3d 262, 266 Cal. Rptr. 834 (1990). Of the other reversals, one was in a case where the attorney for the appellant was a recent law clerk for the then-Chief Justice of the Court. People v. Fuentes, 54 Cal. 3d 707, 286 Cal. Rptr. 792 (1991).

19. During the same period, the Court decided approximately 163 habeas corpus cases, denying relief in 159 (98%) of them. Most of the habeas petitions (150) were denied in a "postcard" order of denial, that is, without an evidentiary hearing, oral argument, or written decision.

20. Adding these categories together yields a total of 284 capital cases decided, with relief denied in toto in 276 of them (97%).

21. The rate of affirmance on direct appeal far exceeds any other capital case jurisdiction in the country. In fact, the rate is over 21 percent higher than Texas.

22. The California Supreme Court has not been presented with error-free death judgments from 1987 through 1996. It is simply not the case that the trial courts of California have somehow eradicated error from

their proceedings to attain an unparalleled level of perfection unknown throughout the rest of the country, if not the world. In fact, the evidence is clearly to the contrary. The Court's own decisions show a steady rate of error.

23. From 1990 to 1992, in only one of the Court's death penalty affirmances was there found to be an error-free trial based on the Court's own analysis. People v. Deere, 53 Cal. 3d 705, 280 Cal. Rptr. 424 (1991) [affirmance after retrial in which defendant did not contest guilt or penalty]. The Court noted a total of more than 300 errors, distributed among the remaining eighty affirmances, but found each of these errors to be individually and cumulatively harmless. Indeed, many of the cases are remarkable for the sheer volume of errors recognized by the Court.

24. Furthermore, the likelihood that the observed disparities in capital sentencing rates among states might be simply the result of random factors is nil. Application of the well-accepted chi-square test of statistical probability reveals the following:[118]

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[118] See, e.g., Powers v. Ala. Dept. of Educ., 854 F.2d 1285, 1295-98 (11th Cir. 1991); Lindsey v. Baxter Healthcare Corp., 757 F. Supp. 888 (N.D. Ill. 1991); Bridgeport Guardian Inc. v. County of Bridgeport, 735 F. Supp. 1126 (D. Conn. 1990).

a. There is less than a one-in-a-thousand chance that California's capital affirmance rate since 1990 diverges from that of Georgia because of random factors.[119]

b. There is less than a one-in-a-thousand chance that California's affirmance rate since 1990 diverges from that of Florida because of random factors.[120]

c. There is less than a five-in-one-thousand chance that California's capital affirmance rate since 1990 diverges from that of Texas because of random factors.

25. The disparity in affirmance rates is entirely due to the internal decision making of the California Supreme Court, rather than to extrinsic jurisprudential or penological factors, or to chance.

26. Meaningful appellate review and non-arbitrary and non-capricious decision making is a constitutional cornerstone for every capital sentencing scheme. Zant v. Stephens, 462 U.S. 862, 876 (1983); Pulley v. Harris, 465 U.S. 37, 53, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

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[119] The comparison with Georgia yields a chi-square figure of 11.54; $p < .001$.

[120] The comparison with Florida yields a chi-square figure of 30.09; $p < .001$.

27. A state supreme court's review of capital cases must meet federal constitutional standards in order to sustain a death sentence. Clemons v. Mississippi, 494 U.S. 738 (1990); Parker v. Dugger, 498 U.S. 308 (1991).

28. A state's affirmance rate is and has been an important consideration in whether a state is providing meaningful review of death judgments. As United States District Judge Lourdes Baird held in her Order entered June 13, 1996, re: the state's Motion to Dismiss in Fierro v. Calderon, U.S.D.C. No. CV-94-3198 at 33-34:

> "In each of the cases affirming that meaningful appellate review was being provided by the state courts, the Supreme Court has regularly looked at the affirmance rates of the state court. In the first opinions assessing the meaningfulness of the appellate scrutiny -- the 1976 capital decisions -- the Supreme Court emphasized the frequency with which death judgements had been reversed. In Gregg, the lead opinion noted '[i]t is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously' and recited various principles that the state court regularly relied upon as a basis for scrutinizing, and occasionally invalidating, death sentences. Gregg, 428 U.S. at 205-06 (opinion of Stewart, Powell, and Stevens, JJ.). In Profitt, the lead opinion observed that the Florida Supreme Court 'like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated 8 of the 21 death sentences that it has reviewed to date.' Profitt v. Florida, 428 U.S. 242, 253 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). And in Jurek, the lead opinion observed that Texas 'has thus far affirmed only two judgments imposing death sentences under its post-

Furman law.' Jurek, 428 U.S. at 270 (opinion of Stewart, Powell and Stevens, JJ.).

"The concerns for the states' affirmance rates has not abated. When the Supreme Court was last confronted with California's appellate review process, the Court held that intercase proportionality review -- an appellate Court's comparison of the sentence in the case before it with the sentence imposed for others convicted of the same crime -- is not constitutionally required. Pulley, 465 U.S. at 43, 45. The Supreme Court did not overlook, however, that the California Supreme Court's opinions included 'many reversals in capital cases.' Pulley, 465 U.S. at 42 n. 5. In fact, the Court observed that it was 'aware of only one case beside this one in which the [state] Court affirmed a death sentence.

"And in Barclay [v. Florida, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983)], Justices Stevens and Powell expressly cast their concurring votes because the Florida Supreme Court's reversal record refuted the petitioner's contention that the state court failed to provide meaningful appellate review. Justice Stevens explained:

> '[T]he question is whether, in its regular practice, the Florida Supreme Court has become a rubber stamp for lower Court death-penalty determinations. It has not. On 212 occasions since 1972 the Florida Supreme Court has reviewed death sentences; it has affirmed only 120 of them. The remainder have been set aside, with instructions either to hold a new sentencing proceeding or to impose a life sentence.' Barclay v. Florida, 463 U.S. 939, at 973 (1983) (Stevens, J., concurring).

"The Supreme Court's history of scrutinizing appellate review provided by the state courts is inconsistent with the Attorney General's contention that the California Supreme Court's affirmance rate is irrelevant. In contrast to the pattern of reversals noted in Gregg, Profitt, Jurek, Pulley and Barclay,

California's recent history of affirmances raises some concerns."

29. The abdication by the California Supreme Court of its judicial responsibilities and duties renders the death sentence in this case invalid. In petitioner's direct appeal, for example, the California Supreme Court failed to conduct an adequate harmless error analysis.

30. In order to achieve its political goals, the Court has manipulated, distorted and even jettisoned prior precedent to affirm death judgments, thereby creating a system where capital defendants cannot know in advance the rules that will be applied in the appellate review process.

a. In People v. Thomas, 2 Cal. 4th 489, 7 Cal. Rptr. 2d 199 (1992), the Court, without warning, discarded the established method of analyzing the sufficiency of evidence to support findings of premeditation and deliberation.

b. Justice Kennard dissented and noted that reversal was required if the evidence was "measured against the guidelines this Court has followed for the last quarter-century in distinguishing premeditated murder from all other murders." Id. at 554.

c. Without proper notice of the rules that will be applied, meaningful appellate review thus becomes an impossibility.

31. The Court has also created and imposed double standards on the admissibility of evidence in order to affirm capital cases. For example:

a. In People v. Edwards, 54 Cal. 3d 787, 1 Cal. Rptr. 2d 696 (1991), the Court found that the defendant's Eighth Amendment right to present all relevant mitigating evidence does not entitle him to present hearsay.

b. In People v. (Noel) Jackson, 13 Cal. 4th 1164, 56 Cal. Rptr. 2d 49 (1996), the Court allowed the prosecution to introduce a hearsay record of the defendant's prior conviction to establish violent criminal conduct under Penal Code section 190.3(b).

32. The Court has even transformed normal indicia of prejudice in non-capital cases into evidence of harmlessness in capital cases.

a. In People v. Sandoval, 4 Cal. 4th 155, 14 Cal. Rptr. 2d 342 (1992), the Court recited several factors concerning the course of jury deliberations, which from time immemorial have weighed heavily in favor of a finding of prejudice, such as the length of jury deliberations and the closeness of the jury's split, as evidence that the defendant suffered no harm.

b. In the non-capital arena, such factors clearly support a finding of prejudice rather than harmless error. See, e.g., In re Martin, 44

Cal. 3d 1, 51, 241 Cal. Rptr. 263 (1987); People v. Cardenas, 31 Cal. 3d 897, 907, 184 Cal. Rptr. 165 (1982); People v. Rucker, 26 Cal. 3d 368, 391, 162 Cal. Rptr. 13 (1980); People v. Woodard, 23 Cal. 3d 329, 341, 152 Cal. Rptr. 536 (1979); People v. Collins, 68 Cal. 2d 319, 332, 66 Cal. Rptr. 497 (1968); see also Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir. 1985); Newlon v. Armontrout, 885 F.2d 1328, 1337-1338 (8th Cir. 1989); United States v. Duncan, 850 F.2d 1104, 1113-14 (6th Cir. 1988).

33. The California Supreme Court routinely manipulates the facts and law in order to support an affirmance. For example:

a. In People v. Webster, 54 Cal. 3d 411, 285 Cal. Rptr. 31 (1991), the Court ruled that a car located "a mere quarter of a mile" from the victim was in the victim's immediate presence; thus, the robbery special circumstance could be upheld.

b. In People v. Edwards, 54 Cal. 3d 787 (1991), the Court found a "substantial period of watching and waiting" since "more than a quarter of a mile" separated the spot where Edwards first saw the victims and where they were shot; thus upholding the lying-in-wait special circumstance.

34. The Court fails to recognize and act upon federal constitutional errors in the first instance. For example:

a. People v. Cudjo, 6 Cal. 4th 585, 641, 25 Cal. Rptr. 2d 390 (1993) (dis. opn. of Kennard, J.) [majority's finding of no violation of right to compulsory process "amounts to an odd distortion of the nature and purpose of the constitutional guarantee"].

b. People v. Haskett, 52 Cal. 3d 210, 264, 276 Cal. Rptr. 80 (1990) (dis. opn. of Kennard, J.) [contrary to finding of majority, the "conclusion is inescapable that a majority of the jurors believed the Court had instructed them not to consider defendant's mental state as a mitigating circumstance"].

c. People v. Wash, 6 Cal. 4th 215, 285, 24 Cal. Rptr. 2d 421 (1993) (dis. opn. of Kennard, J.) ["If, as the majority holds, prosecutors can urge juries to impose sentences of death on defendants based on the perceived failings of the criminal justice system in unrelated cases, the individualized determination the United States Supreme Court has stated is required in capital cases is effectively a nullity"].

d. Moore v. Calderon, CV 91-5976 (U.S.D.C., C.D. Cal. 1995) [in granting habeas relief for trial Court error under Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the district Court concluded that the California Supreme Court's ruling that self-

representation request was delayed even though it could not have been made at an earlier time was "perverse"].

35. The California Supreme Court regularly turns a blind eye to the existence of constitutional error. For example:

a. In People v. Payton, 3 Cal. 4th 1050, 13 Cal. Rptr. 2d 526 (1992), the Court refused to find that the prosecutor's argument misled the jury as to the proper scope of mitigating evidence even where the California Attorney General had previously conceded the point during oral argument to the United States Supreme Court in Boyde v. California, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990).

36. Even the California Supreme Court's ever-so-rare grant of habeas corpus demonstrates serious defects in the Court's harmless error review. In In re Marquez, 1 Cal. 4th 584, 610, 3 Cal. Rptr. 2d 727 (1992) (habeas reversal, direct appeal moot), Justice Kennard dissented as to the affirmance of guilt, stating "the majority stretches [harmless error] past the breaking point."

37. The California Supreme Court repeatedly misapplies the harmless error rule. For example:

a. People v. Sims, 5 Cal. 4th 405, 476-477, 20 Cal. Rptr. 2d 537 (1993) (dis. opn. of Mosk, J.) [majority relies on what it deems

"overwhelming" evidence of guilt, thereby violating the federal constitutional prohibition against an appellate Court "indulging in its own views as to the weight of the properly admitted evidence."]

b. Where, as in Sims, the Court imposes its own view of the proper outcome based on a review of the cold record, "'the wrong entity judges the defendant guilty'" in violation of the United States Constitution. Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 2082, 124 L. Ed. 2d 182 (1993), quoting Rose v. Clark, 478 U.S. 570, 578, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).

c. The Court has consistently failed to reach the ultimate harmless error inquiry, which "is not whether in a trial that occurred without error, a guilty verdict would have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan, 113 S. Ct. at 2081.

d. People v. Cudjo, 6 Cal. 4th 585 (1993) [majority relies on what it finds to be overwhelming evidence of intent to kill to find harmless the trial Court's failure to instruct on intent as an element of the special circumstance]; People v. Johnson, 6 Cal. 4th 1, 23 Cal. Rptr. 2d 593 (1993) [same]; People v. Osband, 13 Cal. 4th 622, 55 Cal. Rptr. 2d 26 (1996) [same].

38. The California Supreme Court abstains from engaging in a meaningful analysis of how a constitutional sentencing error would have affected the jury's determination by failing to "put aside any personal beliefs as to the propriety of the penalty of death and allow the jury to make its own decision based on all the evidence." People v. Mayfield, 5 Cal. 4th 142, 219, 19 Cal. Rptr. 2d 836 (1993) (dis. opn. of Kennard, J.); People v. Fudge, 7 Cal. 4th 1075, 1135, 31 Cal. Rptr. 2d 321 (1994) (dis. opn. of Kennard, J.).

39. The Court routinely dismisses violations of law in summary fashion with citation to past findings of harmless error, thus refraining from a meaningful analysis of the harm in the case at hand. For example:

a. People v. Wright, 52 Cal. 3d 367, 399, 276 Cal. Rptr. 731 (1990) ["We have never held Boyd error alone constituted reversible error"].

b. People v. Hayes, 49 Cal. 3d 1260, 1282, 265 Cal. Rptr. 152 (1989) [Instruction that jurors should not consider the consequences of their verdict "will seldom be prejudicial"].

c. People v. Turner, 50 Cal. 3d 668, 680, 268 Cal. Rptr. 706 (1990) ["[W]e have consistently declined to deem such improper argument [under Davenport] a basis for reversal of a death judgment"].

d. People v. Beardslee, 53 Cal. 3d 68, 82, 279 Cal. Rptr. 276 (1991) ["We have consistently found such double counting [of evidence under factor (b)] harmless"].

e. People v. Miller, 50 Cal. 3d 954, 969, 269 Cal. Rptr. 492 (1990) [Excessive charging of special circumstances has never been held to be prejudicial].

40. This cursory treatment of errors and their effects falls far short of the meaningful, non-arbitrary and non-capricious appellate review mandated by the state and federal Constitutions and international law.

41. The California Supreme Court has distorted the harmless error analysis in denying relief where the record is silent as to prejudice, even when it was trial Court error itself that precluded the development of the appropriate record. For instance:

a. People v. Beeler, 9 Cal. 4th 953, 1017 (1995) (dis. opn. of Kennard, J.) ["majority's reliance on the record's silence erroneously imposes on defendant the consequences of the trial Court's error and the burden of proving it harmless"].

b. People v. Whitt, 51 Cal. 3d 620, 668, 274 Cal. Rptr. 252 (1990) (dis. opn. of Mosk, J.) [majority requires actual testimony of

defendant to prove prejudice from trial Court's unconstitutional ruling barring defendant's actual testimony].

c. People v. Whitt, 51 Cal. 3d 620, 671-72 (1990) (dis. opn. of Kennard, J.) ["To condition an evaluation of federal constitutional error on a defendant's offer of proof, as the majority does, relieves the beneficiary of the error (the prosecution) of the obligation to demonstrate that the error did not affect the verdict, and impermissibly shifts to the defendant the burden of proving prejudice."]

d. People v. Zapien, 4 Cal. 4th 929, 17 Cal. Rptr. 2d 122 (1993) [relief denied where the State itself had destroyed defense materials].

e. In People v. Wash, 6 Cal. 4th 215 (1993), the Court summarily denied a due process claim regarding the admission of gruesome photographs. In a footnote, the Court revealed that the actual photographs had been lost and so its resolution of the claim was based on the Court's speculation as to what the photographs depicted.

f. In People v. Marshall, 13 Cal. 4th 799, 55 Cal. Rptr. 2d 347 (1996), the Court found denial of a discovery motion harmless by speculating as to the contents of a file which was not part of the appellate record.

42. The Court's actions have not escaped notice by the federal courts.

a. In Williams v. Calderon, 52 F.3d 1465, 1477 (9th Cir. 1995), the Ninth Circuit concluded that the state court's "analysis mistakenly focuse[d] on a hypothetical jury, when the role of the reviewing Court in conducting harmless error analysis is 'to consider . . . not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the verdict in the case at hand,'" quoting Sullivan v. Louisiana, 113 S. Ct. at 2081.

b. In Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir. 1994), the Ninth Circuit concluded that the state Court "inadequately considered the effect of [inadmissible] letters at the penalty phase."

c. In Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994), the Ninth Circuit concluded that the California Supreme Court applied an incorrect standard when analyzing jury instructions.

43. Petitioner also alleges that the California Supreme Court fails to conduct a fair and constitutionally adequate review of capital habeas corpus petitions and has denied and will deny petitioner a fair consideration of this state habeas corpus petition.

44. Accompanying the Court's decision affirming the death judgment in In re Jackson, 3 Cal. 4th 578, 11 Cal. Rptr. 531 (1992), is the lengthy, exacting and pointed dissent of Justice Mosk, former Attorney General of California (1959-1964), who candidly states that he is writing "for [his] federal colleagues," "regret[ting] that petitioner must turn to another forum to vindicate his federal constitutional rights." Id. at 617.

45. Justice Mosk's dissenting opinion in In re Avena, 12 Cal. 4th 694, 741, 49 Cal. Rptr. 2d 413 (1996), is a striking condemnation of the Court's ability to find no prejudice "in the face of shockingly ineffective assistance."

> "The majority appear to be embarrassed -- and with good reason -- to deny this petitioner relief in the face of the shockingly ineffective assistance he received from his Court-appointed trial counsel, Martin Part. Although managing to find that petitioner suffered no prejudice from any of his counsel's numerous professional errors, the majority frankly state that 'we are admittedly less than sanguine about Part's apparently minimal representation in this case and concede that "we are disturbed by how little Part appears to have done at trial." . . . That is putting it mildly. In fact Part did nothing of substance to prepare for this capital trial, and what little he did during the trial itself was probably detrimental to his client's cause. The majority cite a few of Part's deficient acts and omissions; I shall cite all of them, with references to the record. When Part's consistently inadequate performance is seen in its entirety, it will be apparent that petitioner's constitutional right to the assistance of counsel for his defense has been violated and that he is entitled to the relief he seeks." 12 Cal. 4th at 741.

46. In her dissenting opinion in Avena, Justice Kennard wrote: "trial counsel's representation at both the guilt and penalty phases of petitioner's capital trial was seriously deficient, thus requiring that his convictions and death sentence be vacated." In re Avena, 12 Cal. 4th at 782.

47. On May 10, 1993, petitioner filed a Petition for Writ of Habeas Corpus with this Court. The petition contained 10 claims, and was supported by exhibits.

48. On May 12, 1994, this Court summarily denied, in a one-page order, this petition without ever issuing an order to show cause. In re Miguel Angel Bacigalupo, CSC No. S032738.

49. Petitioner's state habeas petition alleged, and its attached exhibits documented, numerous reasons why petitioner's convictions and sentence were unconstitutionally obtained. The petition challenged the very facts relied upon by the jury in convicting and sentencing petitioner to death and by this Court in affirming the judgment and sentence imposed, and in denying the petition for writ of habeas corpus. Indeed, the factual assumptions underlying those decisions have now been proved to be seriously flawed and wholly undermined.

50. The substantive nature of the claims demonstrated that petitioner's conviction and death sentence constitute a fundamental miscarriage of justice in that several errors of constitutional magnitude led to a trial so fundamentally unfair that absent the error, no reasonable judge or jury would have convicted petitioner or sentenced him to death.

51. Here, the guilt and penalty verdicts are not constitutionally reliable because the prosecution did not discharge its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the verdicts were not returned under proper instructions and procedures, the jury in the penalty phase was not able to and did not duly consider the relevant mitigating evidence that petitioner presented nor was the jury presented with the available mitigating evidence necessary to produce a just and accurate picture of petitioner's culpability.

52. Thus, petitioner's trial, sentencing proceedings, appeal and habeas proceedings cannot be relied on as having produced a just result.

53. On habeas review in this case, this Court should have in the past and in the present, issue an order to show cause why the claims did not warrant habeas relief, grant discovery, provide adequate funding, and conduct an evidentiary hearing. Instead, so far this Court has summarily

denied petitioner's petitions without even conducting any of these procedures.

54. When a petition alleges a prima facie case, as in this petition and the past petition, this Court is required to issue either an alternative or peremptory writ. A petitioner's right to obtain an order to show cause is based solely on his factual allegations and the record.

55. Issuance of the writ and order to show cause is sufficient to create a cause of action, entitling respondent and petitioner to file additional pleadings as a matter of right, and vesting the petitioner with numerous other rights.

a. The return is the equivalent of a civil complaint and its purpose is to admit or deny the facts alleged in the petition.

b. The purpose of the traverse is to deny or controvert the material facts or matters in the return, or to allege any fact to show that the imprisonment or detention is unlawful, or that the petitioner is entitled to discharge.

c. The traverse is the equivalent of an answer in civil pleading.

56. This Court did not provide even the illusion of a full and fair review of this case on state habeas.

57. This Court's treatment of petitioner's case is not out of the ordinary; rather it reflects the Court's approach to all death penalty habeas cases.

58. This Court denies petitions for writs of habeas corpus in capital cases at the rate of 98%. This astronomical percentage coupled with an automatic appeal affirmance rate of nearly 96% makes the court's rulings denying petitioner's claims a true miscarriage of justice. As United States Supreme Court Justice Stephen Breyer stated recently, California had the lowest rate of granting review of criminal petitions in a comparison of ten states for 1997:

> "In 1997, the latest year for which statistics are available, the Illinois Supreme Court granted review in only 33 of the 1,072 criminal petitions filed (3.1%). See National Center for State Courts, unpublished data (June 1999) (available in file of Clerk of this Court). Nor is Illinois unique among state courts of last resort employing discretionary review. See ibid. (in 1997, Virginia's Supreme Court granted 30 of 1,160 criminal petitions for review (2.6%); **California granted 39 of 3,265 (1.2%);** Georgia granted 11 of 189 (5.8%); Ohio granted 16 of 595 (2.7%); Connecticut granted 24 of 113 (21.2%); Louisiana granted 127 of 1,410 (9.0%); Minnesota granted 38 of 222 (17.1%); North Carolina granted 23 of 237 (9.7%); Tennessee granted 41 of 549 (7.5%); Texas granted 111 of 1,677 (6.6%))."

O'Sullivan v. Boerckel, ___ U.S. ___, 1999 WL 358962, *15 (dis opn. J. Breyer) [emphasis added].

59. In sum, habeas petitions have either fallen into the abyss of the California Rules of Court, Rule 60 informal briefing process, or, as here, received no testing or evaluation of the claims whatsoever, and meaningful review has gone by the wayside.

a. The number of orders to show cause issued is minuscule.

b. Referee determinations recommending the granting of a writ are overturned regularly. See e.g., In re Jackson (1992) 3 Cal.4th 578, 617-618 and fn. 1 (dis opn. J. Mosk); In re Ross, 10 Cal.4th 184 (1995). In Jackson, Justice Mosk noted that the majority "reach [a] result by distorting the meaning of the standard and misstating the record."

c. The number of state court ordered evidentiary hearings is virtually nil despite the fact that the vast majority of cases warrant a full state court hearing.

d. Funding requests for investigation and experts are routinely denied, and counsel's fees or expenses often are cut, as they were for the most part in petitioner's case.

e. This Court has wrongly held that there is no discovery or subpoena power unless an order to show case has issued. People v. Gonzalez (1990) 51 Cal.3d 1179, 1255-61.

60. Between January 1987 and April 1994, condemned inmates filed 187 state habeas petitions. Only five, or two percent of those petitions were granted. In re Sixto (1989) 48 Cal.3d 1247; In re Marquez (1992) 1 Cal.4th 584; In re Wilson (1992) 3 Cal.4th 945; In re Hitchings (1993) 6 Cal.4th 97; In re Neely (1993) 6 Cal.4th 901.

61. This Court has rarely if ever granted relief in a post-Furman post-appeal habeas corpus case, and has denied at least 124 habeas petitions filed after affirmance on appeal.

a. Three percent had orders to show cause issue.

b. Two percent had orders to show cause issue, then the orders were vacated and the petitions subsequently denied by this Court.

c. This patent injustice is not lost on Justices Mosk and Kennard.

d. "In this opinion, therefore, I write primarily for the benefit of my federal colleagues. I deeply regret that petitioner must turn to another forum to vindicate his federal constitutional rights. When those rights are violated in California state court, as they were here, the primary responsibility to redress the violation falls on the California judiciary. A majority of the court have twice had the opportunity to shoulder that responsibility in the case at bar, but have twice failed in the task.

Fortunately for petitioner, on the questions in issue this Supreme Court is neither infallible nor final." Jackson, supra, 3 Cal.4th at 617-618 (dis opn. J. Mosk).

e. "The majority does not dispute defense counsel's incompetence at trial; it finds his inadequacy harmless because of the strong evidence of guilt. But the doctrine of harmless error can only be taken so far. By holding that seventeen alibi witnesses are insufficient to cast doubt on the legitimacy of the verdict, the majority stretches it past the breaking point." In re Marquez, supra, 1 Cal.4th at 610 (Kennard, J. and Mosk, J. concurring and dissenting).

f. Justice Mosk's first paragraph of his dissent in In re Carpenter makes this point strikingly clear: "This is the easy case that makes bad law. In their efforts to find undisputed and serious juror misconduct harmless, the majority conduct an analysis that is specious and fabricate a disposition that is wrong. I refuse to follow." In re Carpenter (1995) 9 Cal.4th 634, 659.

62. In an extremely rare instance, this Court issued an order to show cause in In re Ross ,10 Cal. 4th 184 (1995). The hearing was assigned to a superior court judge to determine whether trial counsel had failed to present available mitigating evidence. The judge found that trial counsel

had rendered ineffective assistance and that prejudice existed. Thus, the referee's recommendation to this Court was that the petition should be granted.

63. In yet another classic tale, the Court upheld "most, although not all, of the referee's factual findings, but disagree[d] with his legal conclusions." In re Ross, 10 Cal.4th 184,188.

64. In Ross, trial counsel presented no penalty phase witnesses.

a. The referee "found that 15 witnesses were available to testify about petitioner's childhood and family life." Id. at 190.

b. These witnesses included the defendant's grandmother, four sisters, three aunts, two cousins, three brothers, an uncle, and his mother.

c. These fifteen witnesses were described by the court as follows. One sister was a psychiatric technician at the Veterans Administration Hospital. An aunt was a Chief Legislative Analyst for the City of Los Angeles. Another aunt was an analyst in the worker's compensation department of a law firm. Another sister worked for the Los Angeles Unified School District. A brother was employed as a truck driver. Yet another aunt was an optician. An uncle was a detective with the Los Angeles Police Department. Another brother was a paramedic with the Los

Angeles Fire Department. A cousin was student body president of Fairfax High School, had received an award from the Mayor of Los Angeles as a outstanding youth, and now was a law clerk for a federal district court judge. Defendant's mother was employed by the Los Angeles Department of Social Services. In re Ross, 10 Cal.4th 184, 195.

d. Justice Arabian's "summary" of the witnesses' testimony covers over five pages in the official opinion. Id. at 190-95.

e. Justice Mosk dissented in Ross as follows: "It is now plain from proof dehors the record what was formerly only suggested -- albeit unmistakably -- by the record itself. In contravention of the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, petitioner suffered constructive denial of counsel bearing on the sentence of death. Various assertions by their apologists among the majority notwithstanding, trial counsel cannot easily be absolved. Their performance in preparation for, and during the course of, the penalty phase was not merely deficient; it was virtually nonexistent. Their failings 'resulted in a breakdown of the adversarial process at trial; that breakdown establishes a violation of [petitioner's] federal and state constitutional right to the effective assistance of counsel; and that violation

mandates [vacation] of [his death sentence] even in the absence of a showing of specific prejudice.'" In re Ross, 10 Cal.4th 184, 215.

f. Associate Justice Kennard too expressed her concern about the majority opinion in Ross:

> "Here, by contrast, trial counsel did not call a single witness to testify on petitioner's behalf at the penalty phase. As a consequence, the jury was given no information to assist in its penalty determination. To borrow a phrase from Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985): 'The death penalty that resulted in this case was thus robbed of the reliability essential to ensure confidence in that decision."

In re Ross, 10 Cal.4th 184, 232.

65. Likewise, the federal courts have noted and disagreed with the California Supreme Court's lack of adequate judicial review of death judgments. Since the execution of Robert Alton Harris, the federal courts have overturned over a dozen convictions or death sentences or have remanded the case for further review. In short, the federal courts have, by deed, condemned the California Supreme Court for failing to conduct a meaningful review of capital habeas corpus petitions.

66. In petitioner's case, despite the substantial and numerous errors of constitutional magnitude raised in the state habeas petitions, this Court has and most likely will fail to issue an order to show cause or grant an evidentiary hearing. Moreover, this Court has and most likely will deny

petitioner a full and fair determination of the issues raised in his petitions by summarily denying habeas corpus relief.

67. The Ninth Circuit has acknowledged this Court's lack of meaningful review of collateral challenges to death sentences. See Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996), where the circuit acknowledged that the mechanism by which the Court renders its opinions on petitions for habeas corpus is obscure and meaningless.

68. The denial of meaningful state habeas corpus review by this Court undermines the reliability of petitioner's conviction and sentence, and challenges the fact, length and conditions of his confinement and delays his release.

a. The United States Supreme Court has held, "the State must afford the petitioner a full and fair hearing on his federal claim[s]. . . ." Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1720 (1992).

b. "Any deficiency in the state procedure would affect the presumption of correctness accorded the state court's findings." Hopkinson v. Shillinger, 866 F.2d 1185, 1220 (10th Cir. 1989); see also Liebman & Hertz, Federal Habeas Corpus Practice and Procedure, section 7.1.b, at 157-66 (1995).

69. The meaningful appellate review necessary in a capital case extends beyond the direct appellate process.

a. The opportunity to rectify defaults in the prior record in collateral proceedings, and the fact that certain issues cannot be raised on direct review, such as ineffective assistance of counsel, make post-conviction proceedings key to a meaningful appellate review of capital cases.

b. Since California provides a post-conviction means of challenging the constitutionality of a death judgment, the means chosen must be full and fair under Ford v. Wainwright, 477 U.S. 399, 428-31, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); Evitts v. Lucy, 469 U.S. 387, 401, 105 S.Ct. 830, 83 L.Ed.2d 821 (1983); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); and Case v. Nebraska, 381 U.S. 336, 85 S.Ct. 1486, 14 L.Ed.2d 422 (1965).

c. "It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." Murray v. Giarratano, 492 U.S. 1, 14,109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (Kennedy, J., concurring.).

d. The federal courts use the habeas corpus exhaustion requirement to reinforce that federal and state courts are equally bound to

guard and protect the rights secured by the constitution. Rose v. Lundy (1982) 455 U.S. 509, 515-518, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (quoting Ex Parte Royall (1886) 117 U.S. 241, 251.

70. In the present case, this Court has and most likely will, deny petitioner meaningful, non-arbitrary and non-capricious review of his state habeas corpus petitions, resulting in a repudiation of each of petitioner's fundamental rights.

71. In addition, the role of the death penalty in the election/re-election of judges in California has created a situation in which justice takes a back-seat to the furious political whirlwinds against whom indigent defendants stand little chance.

72. Whereas the Constitution requires that judges perform their judicial duties in a non-arbitrary and non-capricious manner and that death judgments receive meaningful appellate review, the California Supreme Court has instead abdicated its judicial role and cowered at the feet of political interests.

73. As demonstrated in the 1986 judicial elections, which resulted in the drastic change in the California Supreme Court's death penalty jurisprudence, the death penalty is a highly politicized election issue for judges who face re-election or votes of confidence.

74. Following the judicial elections of 1986, the Court has failed to meet its state and federal constitutional obligations to provide meaningful review in capital cases. These justices have exhibited a bias and disregard for judicial independence, which is reflected in the extraordinarily high affirmance rate of death penalty cases.

75. United States Supreme Court Justice John Paul Stevens, speaking at the American Bar Association Convention in 1996, called for an end to the election of judges precisely because currying favor with voters and financing campaigns calls into question a judge's ability to be impartial and seek justice. Justice Stevens further said: "A campaign promise to be 'tough on crime' or to 'enforce the death penalty' is evidence of bias that should disqualify a candidate from sitting in criminal cases." Richard Carelli, Supreme Court Justice Wants Election of Judges Abolished, The Fresno Bee, Aug. 4, 1996, at A10.

76. In a similar vein, Ninth Circuit Judge Stephen Reinhardt recently wrote as follows on the issue of the unwillingness of state court judges to make difficult and unpopular decisions: "I have spoken with [state court] judges who must stand for election and have heard them say that they cannot afford to reverse capital convictions in cases that engender heated community passions. It is the fate of judges who enforce the federal

Constitution to take positions that may be extremely unpopular with the electorate."

77. The respected International Commission of Jurists (ICJ) recently found that death sentences in the United States were arbitrary and weighted against persons of color. The ICJ said obligations taken on by the United States under international human rights and anti-discrimination accords were largely unfulfilled. The ICJ declared that, at present, the administration of death sentences was "arbitrary, and racially discriminatory, and prospects of a fair hearing for capital offenders cannot . . . be assured." International Commission of Jurists: Administration of the Death Penalty in the United States, June, 1996. ICJ Secretary-General Adama Dieng said the report "provides a disturbing account of the difficulties involved -- even for a country which is regarded by many as the world's leading democracy and protector of basic individual rights and freedoms -- in ensuring the implementation of the death penalty is in accordance with accepted international norms . . . ."

78. The ICJ was particularly disturbed by the influence of electoral politics on judges. The ICJ found that "among elected judges, those who covet higher office -- or those who merely wish to retain their status as judges -- must constantly proclaim their fealty to the death

penalty." In most states with capital punishment, both trial and appeals judges faced "periodic and in most cases partisan elections." The ICJ found that "the prospect of elected judges bending to political pressures in capital punishment cases is both real as well as dangerous to the principle of fair and impartial tribunals." Many judges did remain fair and impartial, but the fact that they were often required to answer to the vagaries of public opinion "places their independence and impartiality at risk."

79. The California Supreme Court's failure to engage in meaningful, non-arbitrary and non-capricious review of death judgments, including petitioner's judgment of death, as prescribed by both the state and federal Constitutions, as well as International Law, renders petitioner's conviction and death sentence invalid, requiring issuance of the Writ.

Q. The Method of Execution Contemplated by The Sentencing Jury Is Unconstitutional.

1. Petitioner's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, because the method of execution contemplated by the sentencing jury is unconstitutional, and violates the prohibition of cruel and unusual punishment. Petitioner alleges the following facts, to be

supplemented following further investigation, discovery and an evidentiary hearing in support of this claim:

2. Petitioner hereby incorporates by reference as if fully set forth herein Claim R.

3. Petitioner was sentenced to death by a Santa Clara County jury on April 20, 1987. Petitioner's judgment of death was imposed on June 12, 1987. The only method of execution authorized in the State of California in 1987 was "the administration of a lethal gas." 1941 Cal. Stat. ch. 106, § 15, at 1117. Petitioner's sentencing jury clearly informed that petitioner's execution would take place in the California gas chamber.

4. In 1992, California Penal Code section 3604 was amended to add as an alternative means of execution "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death . . . ." As amended, Penal Code section 3604 provides that "[p]ersons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection." As amended, section 3604 further provides that "if either manner of execution . . . is held invalid, the punishment of death shall be imposed by the alternate means . . . ."

5. In 1996, the California Legislature amended Penal Code section 3604 to provide that "if a person under sentence of death does not choose either lethal gas or lethal injection . . . , the penalty of death shall be imposed by lethal injection."

6. In 1994, California's use of lethal gas was held unconstitutional when District Court Judge Marilyn Hall Patel concluded:

> "The evidence presented concerning California's method of execution by administration of lethal gas strongly suggests that the pain experienced by those executed is unconstitutionally cruel and unusual. This evidence, when coupled with the overwhelming evidence of societal rejection of this method of execution, is sufficient to render California's method of execution by lethal gas unconstitutional under the Eighth Amendment."

Fierro v. Gomez, 865 F. Supp. 1387, 1415 (N.D. Cal. 1994). The Court found that administration of lethal gas violates the Eighth and Fourteenth Amendments of the United States Constitution. Ibid. In 1996, the Ninth Circuit affirmed the district court, holding that "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments." Fierro v. Gomez, 77 F.3d 301, 309 (9th Cir. 1996). The Ninth Circuit also permanently enjoined the state of California from administering lethal gas. Ibid. In 1996, the United States Supreme Court vacated the Judgment in Fierro, and remanded

the case to the Ninth Circuit for further consideration in light of the amended Cal. Penal Code § 3604. Gomez v. Fierro, 519 U.S. 918, 117 S.Ct. 285, 136 L.Ed.2d 204 (1996). The Ninth Circuit then vacated the district court's judgment subject to reinstatement on the motion of a death row inmate who has standing and presents a ripe claim. Fierro v. Terhune, 147 F.3d 1158 (9th Cir. 1998).

7. A jury in a capital trial is asked to determine who should live and who should die. This is necessarily a subjective task, and one of the factors that the jury must surely contemplate is the method of execution.

8. Post-Furman death sentences have been carried out by firing squad, hanging, electrocution, lethal gas, and lethal injection. The means of execution selected by a state reflects more than the fact that the individual must forfeit his or her life; the manner in which life is taken is integral to the process.

9. The prevailing justification for modern capital punishment systems is retribution. Consequently, a juror's assessment of the harshness of a particular punishment becomes one of the sentencing factors.

10. Petitioner incorporates by reference as if fully set forth herein the Claim J, supra, and the declarations of Jurors Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Jean Marshall, Vera O'Haver,

Sandra Petro and Alison Staab. Petitioner further alleges that, inter alia, one or more jurors had difficulty determining the appropriate penalty, did discuss and rely on what LWOP meant, and whether the death penalty would be carried out, and which penalty was more severe. At least one juror was holding out for LWOP, one or more jurors discussed and relied on their belief that they were not the ultimate decision-makers, and one or more jurors questioned whether the death penalty was consistent with religious beliefs. By the jury relying on the wrong method of execution and an unconstitutional form of punishment, petitioner's convictions and death sentence are unreliable and invalid under the Eighth and Fourteenth Amendments to the U.S. Constitution.

11. Petitioner is entitled to a new sentencing hearing because the method of execution anticipated by petitioner's sentencing jury is unconstitutional. The sentence is no longer reliable under the Eighth Amendment because a circumstance relied upon by the sentencing jury in reaching its sentence has changed post-verdict. Petitioner is therefore entitled to reversal of his sentence.

R. The Use of Lethal Injection to Execute Petitioner Is Cruel And Unusual Punishment.

1. Petitioner's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and the State Constitution, because execution by lethal injection, the method by which the State of California plans to execute him, violates the prohibition against cruel and unusual punishment. Petitioner alleges the following facts in support of this claim, among others to be developed following further investigation and a hearing on the merits of this claim:

2. Petitioner hereby incorporates by reference as if fully set forth herein Claim Q.

3. The state of California plans to execute petitioner by means of lethal injection. In 1992, California added an alternative means of execution, i.e., "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." Cal. Penal Code § 3604(a). Now, "[p]ersons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection."

4. Section 3604(b). Section 3604 further provides that "if either manner of execution . . . is held invalid, the punishment of death shall be imposed by the alternate means. . . ." Section 3604(d).

5. In 1996, the California Legislature amended Penal Code section 3604 to provide that "if a person under sentence of death does not choose either lethal gas or lethal injection . . . , the penalty of death shall be imposed by lethal injection."

6. On October 4, 1994, the United States District Court for the Northern District of California ruled in Fierro v. Gomez, 865 F.Supp. 1387 (N.D. Cal. 1994), that the use of lethal gas is cruel and unusual punishment and thus violates the Constitution. In 1996, the Ninth Circuit affirmed the district court's decision, holding that "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments." Fierro v. Gomez, 77 F.3d 301, 309 (9th Cir. 1996). The Ninth Circuit also permanently enjoined the state of California from administering lethal gas. Id. In 1996, the United States Supreme Court vacated the judgment in Fierro, and remanded the case to the Ninth Circuit for further consideration in light of Cal. Penal Code § 3604. Gomez v. Fierro, 519 U.S. 918, 117 S.Ct. 285, 136 L.Ed.2d 204 (1996). The Ninth Circuit then vacated the district court's judgment subject

to reinstatement on the motion of a death row inmate who has standing and presents a ripe claim. Fierro v. Terhune, 147 F.3d 1158 (9th Cir. 1998). Both lethal gas and lethal injection are unconstitutional methods of execution.

7. The lethal injection method of execution is authorized in 31 states in addition to California. Between 1976 and January 1996, there were 179 executions by lethal injection. Of the 56 people executed in the United States in 1995, only seven died by other means. Lethal injection executions have been carried out in at least the following other states: Arizona, Arkansas, Delaware, Idaho, Illinois, Louisiana, Maryland, Missouri, Montana, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia and Wyoming.

8. Consequently, there is a growing body of evidence, both scientific and anecdotal, concerning this method of execution, the effects of lethal injection on the inmates who are executed by this procedure, and the many instances in which the procedures fail, causing botched, painful, prolonged and torturous deaths for these condemned men.

9. Both scientific evidence and eyewitness accounts show that death by lethal injection can be an extraordinarily painful death, and that it is therefore in violation of the prohibition against cruel and unusual

punishment set forth in the Eighth Amendment of the United States Constitution. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

10. The drugs authorized to be used in California's lethal injection procedure are extremely unpredictable and can cause complications even when administered correctly. The procedure exposes the inmate to substantial and grave risks of prolonged and extreme infliction of pain if these drugs are not administered correctly.

a. Medical doctors are prohibited from participating in executions on ethical grounds. The Code of Medical Ethics was set forth in the Hippocratic Oath in the fifth century B.C. and requires the preservation of life and the cessation of pain above all other values.[121] Medical doctors

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[121] The Oath provides: "I will follow the method of treatment which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked, nor suggest any such counsel."

may not help the state kill an inmate.[122] The American Nurses Association also forbids members from participating in executions.

b. The first lethal injection execution in the United States took place in 1982 and was plagued by mishaps from the outset. Because of several botched executions, the New Jersey Department of Corrections contacted an expert in execution machinery and asked him to invent a machine to minimize the risk of human error. Fred Leuchter's lethal injection machine, designed to eliminate "execution glitches," was first used on January 6, 1989 for an execution in Missouri.

c. The dosages to be administered are not specified by statute, but rather "by standards established under the direction of the Department of Corrections." Cal. Penal Code § 3604(a). The three drugs commonly used in lethal injections are Sodium Pentothal, Pancuronium Bromide and Potassium Chloride.

d. The Sodium Pentothal renders the inmate unconscious. The Pancuronium Bromide then paralyzes the chest wall muscles and

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[122] During the American Medical Association's annual meeting in July 1980, their House of Delegates adopted the following resolution: "A physician, as a member of a profession dedicated to the preservation of life when there is hope of doing so, should not be a participant in a legally authorized execution. [However, a] physician may make a determination or certification of death as currently provided by law in any situation."

diaphragm so that the subject can no longer breathe. Finally, the Potassium Chloride causes a cardiac arrhythmia which results in ineffective pumping of blood by the heart and, ultimately, a cardiac arrest.

11. The procedures by which the State of California plans to inject chemicals into the body are so flawed that the inmate may not be executed humanely, so as to avoid cruel and unusual punishment.

12. Death by lethal injection involves the selection of chemical dosages and combinations of drugs by untrained or improperly skilled persons. Consequently, non-physicians are making medication dosing decisions and prescriptions that, legally in the medical community, must be made by physicians.

a. Since medical doctors may not participate or aid in the execution of a human being on ethical grounds, untrained or improperly skilled, non-medical personnel are making what would ordinarily be informed medical decisions concerning dosages and combinations of drugs to achieve the desired result. The effects of the lethal injection chemicals on the human body at various dosages are medical and scientific matters, and properly the subject of medical decision-making. Moreover, the efficacy of the drugs will vary on different individuals depending on many

factors and variables, which would ordinarily be monitored by medical personnel.

b. There is an unacceptable risk that the dosages selected by untrained persons will be inadequate to the purposes for which they were selected, will result in unanticipated or inappropriate effects in a particular individual for medical or other reasons, and will inflict unnecessary and extreme pain and suffering.

c. The order and timing of the administration of the chemicals greatly increase the risk of unnecessary and severe physical pain and/or mental suffering.

13. The desired effects of the chemical agents to be used for execution by lethal injection in California may be altered by inappropriate selection, storage, and handling of the chemical agents.

a. Improperly selected, stored and/or handled chemicals may lose potency, and thus fail to achieve the intended results or inflict unnecessary and extreme pain and suffering in the process.

b. Improperly selected, stored, and/or handled chemicals may be or become contaminated, altering the desired effects and resulting in the infliction of unnecessary and extreme pain and suffering. California

provides inadequate controls to ensure that the chemical agents are properly selected, stored and handled.

14. Since medical doctors do not participate in the execution process, non-medical personnel will necessarily be relied upon to carry out some of the physical procedures required to execute petitioner.

a. These non-medical technicians may lack the training, skill and experience to effectively, efficiently and properly prepare the apparatus necessary to execute petitioner, prepare petitioner physically for execution, ensure that he is restrained in a manner that will not impede the flow of chemicals and that will avoid a prolonged and painful death, insert the intravenous catheter properly in a healthy vein so that chemicals enter the blood stream and not infiltrate surrounding tissues, and administer the intravenous drip properly so that unconsciousness and death follow quickly and painlessly.

b. Moreover, inadequately skilled and trained personnel are unequipped to deal effectively with problems that arise during the procedure. They may fail to recognize problems concerning the administration of the lethal injection. Once problems are recognized, these untrained personnel may not know how to correct the problems or mistakes.

Their lack of adequate skill and training may unnecessarily prolong the pain and suffering inherent in an execution that goes awry.

15. The use of unskilled and improperly trained technicians to conduct execution by lethal injection and the lack of adequate procedures to ensure that such executions are humanely carried out have resulted in the unwarranted infliction of extreme pain, resulting in a cruel, unusual, and inhumane death for inmates in California as well as in numerous cases across the United States in recent years.

a. In 1982, Charles Brooks of Texas was the first person executed by lethal injection in the United States. The Warden of the Texas prison reportedly mixed all three chemicals into a single syringe. The chemicals had precipitated by the time the injection was to be carried out, and thus, the Warden's initial attempt to inject the deadly mixture into Brooks had to be aborted.

b. March 13, 1985 – Stephen Peter Morin. On March 13, 1985, Steven Peter Morin lay on a gurney for 45 minutes while his Texas executioners repeatedly pricked his arms and legs with a needle in search of a vein suitable for the lethal injection. Michael Graczyk, Convicted Killer in Texas Waits 45 Minutes Before Injection is Given, Gainesville Sun, March 14, 1985; Murderer of Three Women is Executed in Texas, New

York Times, March 14, 1985. Problems with the execution prompted Texas officials to review their lethal injection procedures for inmates with a history of drug abuse. Id.

c. August 20, 1986 – Randy Wools. Over a year later, on August 20, 1986, Texas officials experienced such difficulty with the procedure that Randy Wools had to help his executioners find a good vein for the execution. Texas Executes Murderer, Las Vegas Sun, August 20, 1986.

d. June 24, 1987 – Elliot Johnson. Similarly, on June 24, 1987, in Texas, Elliot Johnson lay awake and fully conscious for 35 minutes while Texas executioners searched for a place to insert the needle.

e. December 13, 1988 – Raymond Landry. On December 13, 1988, in Texas, Raymond Landry was pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the execution, the syringe came out of Landry's vein, spraying the deadly chemicals across the room towards witnesses. The execution team had to reinsert the catheter into the vein. The curtain was pulled for 14 minutes so witnesses could not observe the intermission. Michael Graczyk, Landry Executed for '82 Robbery Slaying, Dallas Morning News, December 13, 1988; and Michael

Graczyk, Drawn-Out Execution Dismays Texas Inmates, Dallas Morning News, December 15, 1988.

f. May 24, 1989 – Stephen McCoy. On May 24, 1989, in Huntsville, Texas, Stephen McCoy had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses fainted, crashing into and knocking over another witness. Karen Zellars, Houston attorney who represented McCoy and witnessed the execution, thought the fainting would catalyze a chain reaction among the witnesses. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding, "The drugs might have been administered in a heavier dose or more rapidly." Man Put to Death for Texas Murder, The New York Times, May 25, 1989; Witnesses to an Execution, Houston Chronicle, May 27, 1989.

g. January 24, 1992 – Rickey Ray Rector. On January 24, 1992, in Varner, Arkansas, it took the medical staff more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal Rector, who suffered serious brain damage from a lobotomy, tried to help the medical personnel find a usable vein. As paraphrased by a newspaper reporter, the administrator of

the State's Department of Corrections Medical Programs said, "the moans came as a team of two medical people, increased to five, worked on both sides of Rector's body to find a suitable vein." The administrator said that may have contributed to his occasional outbursts. Joe Farmer, Rector, 40, Executed for Officer's Slaying, Arkansas Democrat-Gazette, January 25, 1995; Sonja Clinesmith, Moans Pierced Silence During Wait, Arkansas Democrat-Gazette, January 26, 1992.

h. March 10, 1992 – Robyn Lee Parks. On March 10, 1992, in McAlester, Oklahoma, Robyn Lee Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck and abdomen began to react spasmodically, and this reaction continued for approximately 45 seconds. Parks continued to gasp and violently gag. Death came 11 minutes after the drugs were administered. Tulsa World reporter Wayne Greene said, "The death looked scary and ugly." Witnesses Comment on Parks' Execution, Durant Democrat, March 10, 1992; Dying Parks Gasped for Life, The Daily Oklahoman, March 11, 1992; Another U.S. Execution Amid Criticism Abroad, New York Times, April 24, 1992.

i. April 23, 1992 – Billy Wayne White. On April 23, 1992, Billy Wayne White died 47 minutes after his executioners strapped

him to the gurney in Huntsville, Texas. White tried to help prison officials as they struggled to find a vein suitable to inject the killing drugs. Man Executed in '76 Slaying After Last Appeals Rejected, Austin (Tex) American-Statesman, April 23, 1992; Killer Executed by Lethal Injection, Gainesville Sun, April 24, 1992; Michael Graczyk, Veins Delay Execution 40 Minutes, Austin American Statesman, April 24, 1992; Kathy Fair, White Was Helpful at Execution, Houston Chronicle, April 24, 1992.

j. May 7, 1992 – Justin Lee May. On May 7, 1992, in Texas, Justin Lee May had a violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the Item in Huntsville, Texas, May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze. . . ." Associated Press reporter Michael Graczyk wrote, "He went into a coughing spasm, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back, if he had not been belted down. After he stopped breathing, his eyes and mouth remained open." Michael Graczyk, Convicted Texas Killer Receives Lethal Injection,(Plainview, Texas) Herald, May 7, 1992; Convicted Killer May Dies,(Huntsville, Texas) Item, May 7, 1992; Convicted Killer Dies Gasping, San Antonio Light, May 8, 1992; Michael Graczyk Convicted Killer Gets Lethal Injection,(Denison, Texas) Herald, May 8, 1992.

k. May 10, 1994 – John Wayne Gacy. On May 10, 1994, in Illinois, after the execution had begun, one of the three lethal drugs used to execute John Wayne Gacy clogged the tube, preventing the flow of the drugs. Blinds were drawn to block the scene from witnesses' view. The clogged tube was replaced with a new one, the blinds were reopened, and the execution resumed. Anesthesiologists blamed the problem on the inexperience of prison officials who conducted the execution. Doctors stated that the proper procedure taught in "IV 101" would have prevented this error. Rob Karwath and Susan Kuczka Gacy Execution Delay Blamed on Clogged T.B. Tube, Chicago Tribune, Page 1, May 11, 1994.

l. May 3, 1995 – Emmitt Foster. On May 3, 1995, Emmitt Foster was executed by the State of Missouri. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit the witnesses' view. Twenty minutes after the execution began, the coroner entered the death chamber that the tightness of the leather straps that bound Foster to the execution gurney were stopping the flow of chemicals into the veins. The coroner told the officials to loosen the straps. Several minutes after the straps were loosened and 29 minutes after the executioners had begun sending lethal chemicals into Foster's arm, death was pronounced. Executioners finally reopened the blinds three minutes thereafter.

16. The Constitution prohibits deliberate indifference to the known risks associated with a particular method of execution. Cf. Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). As illustrated in the above accounts and will be demonstrated in detail at an evidentiary hearing, following discovery, investigation, and other opportunities for full development of the factual basis for this claim, there are a number of known risks associated with the lethal injection method of execution, and the State of California has failed to take adequate measures to ensure against those risks.

17. The Eighth Amendment safeguards "nothing less than the dignity of man," Trop v. Dulles, 356 U.S. 86, 100, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958), and prohibits methods of execution that involve the unnecessary and wanton infliction of pain, Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463-64, 67 S. Ct. 374, 91 L. Ed. 422 (1947); In re Kimmler, 136 U.S. 436, 447, 10 S. Ct. 930, 34 L. Ed. 519 (1890) (punishment is cruel when it involves "torture or a lingering death").

18. To comply with constitutional requirements, the State must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of

capital punishment. Glass v. Louisiana, 471 U.S. 1080, 1086, 105 S. Ct. 2159, 85 L. Ed. 2d 514 (1985) (Brennan, J., dissenting from denial of certiorari); Campbell v. Wood, 18 F.3d 662, 709-711 (9th Cir. 1994) (Reinhardt, J., dissenting); see also, Zant v. Stephens, 462 U.S. 862, 884-85 (1985) [state must minimize risks of mistakes in administering capital punishment]; Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) [same].

19. It is impossible to develop a method of execution by lethal injection that will work flawlessly in all persons given the various and varying individual factors in each case. Petitioner should not be subjected to experimentation by the State in its attempt to figure out how best to kill a human being.

20. California's use of lethal injection to execute prisoners sentenced to death unnecessarily risks extreme pain and inhumane suffering. Such use constitutes cruel and unusual punishment, offends contemporary standards of human decency, and violates the Eighth Amendment of the United States Constitution.

21. The State holds, and refuses to disclose, the documents outlining the exact procedures and the names of the medical personnel who develop, administer and carry out lethal injections in California and how

lethal injection procedures have been carried out on the last six or more inmates who have been executed. As of yet, petitioner is not permitted to discover this information in state court, until this Court issues an order to show cause. People v. Gonzales, 51 Cal. 3d 1179 (1990). Petitioner has alleged as much information as he has on the method and has proffered testimony that is available from other states. At an evidentiary hearing, petitioner will present expert testimony proving that lethal injection is a cruel and unusual form of punishment in California.

S. Execution of Petitioner After Prolonged Confinement Under Sentence of Death Would Constitute Cruel and Unusual Punishment In Violation of The Eighth and Fourteenth Amendments.

1. Petitioner's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, because the execution of petitioner after his prolonged confinement under a sentence of death would constitute cruel and unusual punishment. Petitioner alleges the following facts, to be supplemented following further investigation, discovery and an evidentiary hearing in support of this claim:

2. Petitioner hereby incorporates by reference as if fully set forth herein Claims A, B, F, L and M.

3. Petitioner was arrested on December 29, 1983, and sentenced to death on June 12, 1987. He has been continuously confined since his arrest for over fifteen years and under his sentence of death for almost exactly twelve years.

4. Petitioner's automatic appeal was decided on December 9, 1991, People v. Bacigalupo I, 1 Cal.4th 103 (1991); and December 7, 1993, People v. Bacigalupo II, 6 Cal.4th 457 (1993) and certiorari was denied on June 30, 1994. Bacigalupo v. California, 512 U.S. 1253 (1994).

5. On May 10, 1993, petitioner filed with this Court a Petition for Writ of Habeas Corpus. In re Bacigalupo, CSC No. S032738. On May 12, 1994, this Court denied the petition without an issuance of an order to show cause.

6. Petitioner was continuously confined under his sentence of death for almost seven years during the pendency of the automatic appeal and state habeas corpus proceedings.

7. In June 1987, at age 25, petitioner arrived on California's death row at San Quentin State Prison. There he lives with over 500 condemned men. Petitioner is housed in East Block, which consists of two giant cell blocks, each containing five tiers of cells stacked on top of each other. Many of his neighbors on death row are profoundly disturbed men.

8. Petitioner lives in a solitary cell, a 6' by 10' concrete box, consisting of three concrete walls and a fourth wall of bars. Petitioner cannot see other prisoners through the barred wall; he can, however, hear the incessant din of prisoners yelling and guards using loudspeakers. Both in and out of his cell, he is under surveillance by one or more guards armed with loaded weapons. Petitioner eats his meals in his cell and is restricted in the amount and type of personal property that he is permitted to possess. His time outside his cell is restricted and, whenever he is transported to another location, he is handcuffed.

9. As a Grade A condemned prisoner living in East Block, petitioner is unable to work despite his desire to do. Grade A condemned prisoners generally have no access to prison jobs. In only rare and isolated situations, have they been permitted to work.

10. For twelve years, petitioner has suffered the anxiety of impending death and the restricted activity allowed death row inmates. During that time, he has had an execution date set at least once.

11. When he arrived on death row in 1987, petitioner was suffering from years of mental illness and isolation. He has strived to remain drug free despite San Quentin's failure to provide adequate mental health treatment.

12. During his twelve years on death row, petitioner has also strived to maintain close contact with his mother, especially since he is Peruvian and most of his family is unable to travel from Peru and visit him during his lengthy incarceration.

13. Execution of petitioner following such confinement under his sentence of death for this lengthy a period of time would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Lackey v. Texas, 514 U.S. 1045 (1995) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari); Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998) (Fletcher, J., dissenting from order denying stay of execution). If petitioner is executed, his sentence will be more than twelve years of solitary confinement in a tiny cell in the most horrible portion of prison -- death row -- followed by execution.

14. Carrying out petitioner's death sentence after this extraordinary delay is violative of the Eighth Amendment's Punishments Clause in two respects:

a. It constitutes cruel and unusual punishment to confine an individual, such as petitioner, on death row for this extremely prolonged period of time. See, e.g., McKenzie v. Day, 57 F.3d 1461 (9th Cir. 1995);

Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998) (Fletcher, J., dissenting from order denying stay of execution).

b. After the passing of such a period of time since his conviction and judgment of death, the imposition of a sentence of death upon petitioner would violate the Eighth Amendment, because the State's ability to exact retribution and to deter other serious offenses by actually carrying out such a sentence is drastically diminished. Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998) (Fletcher, J., dissenting from order denying stay of execution).

15. As for the first basis supporting this claim, confinement under a sentence of death subjects a condemned inmate to extraordinary psychological duress, as well as the extreme physical and social restrictions that inhere in life on death row; accordingly, such confinement, in and of itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

a. Over a century ago, the United States Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the

uncertainty during the whole of it." In re Medley, 134 U.S. 160, 172 (1890).

b. In Medley, the period of uncertainty was just four weeks. As recognized by Justice Stevens, Medley's description should apply with even greater force in a case such as this, involving a delay that has lasted twelve years. Lackey v. Texas, 514 U.S. 1045 (1995) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari).

c. This Court reached a similar conclusion in People v. Anderson:

> "The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 649 (1972).

16. As for the second basis supporting this claim, the penological justification for carrying out an execution disappears when an extraordinary period of time has elapsed between the conviction and the proposed execution date, and actually executing a defendant under such circumstances is an inherently excessive punishment that no longer serves any legitimate purpose. Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998)

(Fletcher, J., dissenting from order denying stay of execution); see also Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring).

17. The imposition of a sentence of death must serve legitimate and substantial penological goals in order to survive Eighth Amendment scrutiny. When the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring); see also Gregg v. Georgia, 428 U.S. 153, 183 (1976) ["The sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."].

18. In order to survive Eighth Amendment scrutiny, "the imposition of the death penalty must serve some legitimate penological end that could not otherwise be accomplished. If 'the punishment serves no penal purpose more effectively than a less severe punishment,' Furman v. Georgia, 408 U.S. 238, 280 (1972) (Brennan, J., concurring), then it is unnecessarily excessive within the meaning of the Punishments Clause."

Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998) (Fletcher, J., dissenting from order denying stay of execution).

19. The penological justifications that can support a legitimate application of the death penalty are twofold: "retribution and deterrence of capital crimes by prospective offenders." Gregg v. Georgia, 428 U.S. 153, 183 (1976). Retribution, as defined by the United States Supreme Court, means the "expression of society's moral outrage at particularly offensive behavior." Ibid.

20. The ability of the State of California to further the ends of retribution and deterrence has been drastically diminished here as a result of the extraordinary period of time that has elapsed since the date of petitioner's conviction and judgment of death.

a. "It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. . . . [A]fter such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. . . . [T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal." Lackey v.

Texas, 514 U.S. 1045 (1995) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari).

b. See also Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (Stevens, J., respecting denial of certiorari) ["the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself."].

21. It would thus serve no legitimate penological interest to execute petitioner under the following circumstances:

a. Twelve years have passed since petitioner's convictions and judgment of death occurred.

b. Petitioner is no longer the same man who arrived on death row twelve years ago.

c. Killing petitioner will no longer serve as an effective expression of the community's moral outrage.

d. After this passage of time and the changes in petitioner's character and behavior, killing petitioner will no longer provide moral and emotional closure to a shocked community.

22. Because it would serve no legitimate penological interest to execute petitioner after this passage of time and because petitioner's confinement on death row for twelve years, in and of itself, constitutes cruel

and unusual punishment, execution of petitioner is prohibited by the Eighth Amendment's Punishments Clause.

T. Cumulative Effect of Guilt And Penalty Phase Errors.

1. Petitioner's convictions and sentence of death were unlawfully and unconstitutionally imposed in violation of his constitutional rights, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and by Article I, §§ 1, 7, 15, and 16 of the State Constitution because of the cumulative effect of all of the claims presented in this petition and in In re Bacigalupo, Nos. S032738 and S007168 and the pleadings filed in the direct appeal in People v. Bacigalupo, No. S004764.

2. Petitioner incorporates, as if fully set forth herein, all of the claims in this petition, including exhibits, arguments in his Appellant's Opening Brief (AOB), his Appellant's Reply Brief (ARB), and his Appellant's Supplemental Brief (ASB) and other pleadings filed in the automatic appeals in People v. Bacigalupo I and II, and similarly incorporates, as if fully set forth herein, all of the allegations in his original habeas corpus petitions in In re Bacigalupo, Case Nos. S032738 and S007168, including all of the exhibits attached thereto.

3. To the extent that none of the claims is deemed sufficient by itself to warrant vacating the verdicts convicting petitioner of murder and burglary, finding the enhancements to be true, and/or imposing the death penalty, the claims should be considered cumulatively. The cumulative impact of the claims requires this Court to vacate the convictions, the enhancements, and/or the death sentence.

U. Inadequate Assistance of State Appellate Counsel

1. If the Court concludes that one or more of the aforementioned prejudicially deficient performances by trial counsel, or the other claims based on evidence outside the record on direct appeal, do not warrant granting of the petition for writ of habeas corpus because the claim or claims are not timely, then petitioner was denied his rights to the effective assistance of counsel, to due process of law, to the equal protection of law, and to freedom from cruel and unusual punishment, as guaranteed by the California Constitution and the United States Constitution, including the Fifth, Sixth, Eighth, and Fourteenth Amendments thereto, by the prejudicially deficient performance of counsel appointed to handle the automatic appeal in the California Supreme Court, who unreasonably and to petitioner's prejudice failed to conduct an adequate investigation or consult

with numerous experts concerning these claims, and otherwise failed to discover and present these claims to the California Supreme Court in a timely manner. The following facts, among others to be presented after full investigation and discovery and at an evidentiary hearing, support this claim:

2. Under Standard 1-1 of Policy 3 of the California Supreme Court's Policies Regarding Cases Arising from Judgments of Death, counsel appointed to handle an automatic appeal in a capital case in that Court have a "limited" "duty to investigate" potential habeas corpus claims. That duty is "limited to investigating potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal." Id. Counsel has no obligation to conduct, and has no authorization to spend public funds for, "an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on a judgment." Id. Counsel has a duty to investigate only if counsel actually has information that might lead to a claim. Id.

3. Many of these above-referenced claims are claims that did not appear on the face of the appellate record, nor are they claims that came to counsel's attention in the course of preparing the appeal. Decl. of Cliff Gardner. Rather, the facts necessary to justify most of the claims have

come to light only with the availability of federal investigative funds, and have been diligently pursued and presented thereafter, the basic essential facts have only emerged recently and were not able to be completed until all the declarations were signed.

4. The California Supreme Court significantly cut the claims for reimbursement of funds submitted by appellate counsel and denied counsel's applications for funds for habeas corpus investigation, except for $3,350. Decl. of Cliff Gardner.

5. As for the allegations and claims that rely exclusively on the record in this petition, previous state appellate counsel were unaware at the time of the existence of these allegations and claims, and had no tactical reason for omitting them from the briefs on appeal. As for the other additional allegations and claims that rely on evidence outside the record, they were unable to investigate and present these additional allegations and claims to the Court at that time due to the lack of investigative funds. Previous state appellate had no tactical reason for not investigating or presenting these allegations and claims. Decl. of Cliff Gardner.

6. If appellate counsel unreasonably failed to investigate and develop the facts necessary to make out the instant claims, and/or if appellate counsel unreasonably failed to request the proper investigative

funding to enable counsel to develop the necessary facts, then counsel provided constitutionally deficient representation, under the aforementioned constitutional provisions, and that deficient performance was prejudicial to petitioner for the reasons set forth in the preceding paragraphs of this section of the petition.

PRAYER FOR RELIEF

WHEREFORE, petitioner prays that this Court:

1. Take judicial notice of the records on appeal and all pleadings filed with the Court in petitioner's automatic appeal and habeas petitions, Case Nos. S032738 and S007168;

2. Order respondent to show cause why petitioner is not entitled to the relief sought;

3. Grant petitioner funds to secure investigative and expert assistance as necessary to prove the facts alleged in this petition;

4. Grant petitioner the authority to obtain subpoenas for witnesses and documents which are not obtainable by other means;

5. Grant petitioner the right to conduct discovery, including the rights to take depositions, request admissions, and propound interrogatories, and the means to preserve the testimony of witnesses;

7. Release to petitioner's counsel a copy of the reporter's and clerk's transcripts of the confidential informant's in camera testimony at petitioner's trial;

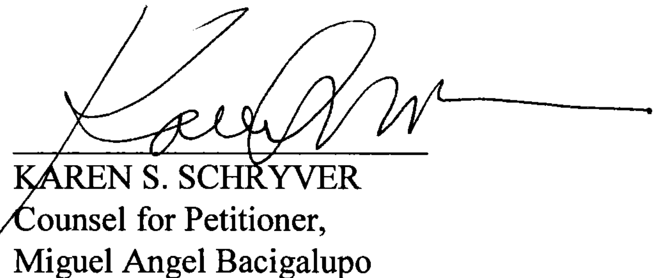
8. Permit petitioner to supplement the Petition to include exhibits and allegations which become available and known as the result of further investigation and information which may hereafter come to light;

9. Order an evidentiary hearing at which proof may be offered concerning the allegations in this petition;

10. After full consideration of the issues raised in this petition, vacate the judgment and sentence imposed upon petitioner in Santa Clara County Superior Court case number 93351; and

11. Grant such other and further relief as may be just and proper.

DATED: June 10, 1999.



KAREN S. SCHRYVER
Counsel for Petitioner,
Miguel Angel Bacigalupo

VERIFICATION

I, Karen S. Schryver, declare:

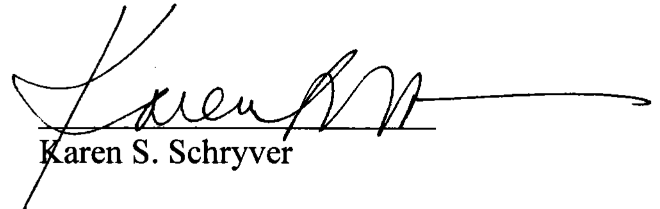
I am an attorney admitted to practice in the State of California.

I am one of the attorneys for petitioner herein, who is confined and restrained of his liberty in San Quentin Prison, Tamal, Marin County, California, which is a county other than that in which my office is located.

I am authorized by petitioner to file this Petition for Writ of Habeas Corpus ("Petition") on his behalf. I am making this verification on petitioner's behalf because many matters contained in the Petition are more within my knowledge than his or are otherwise disclosed by the record or statements made under penalty of perjury. I have read the allegations in the foregoing Petition and declare that I believe they are true.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed this 10th day of June, 1999 at San Francisco, California.



Karen S. Schryver

PROOF OF SERVICE BY MAIL

RE: In re Miguel Angel Bacigalupo

I, Madelyn Morton, declare that I am over 18 years of age, I am not a party to the within cause; my business address is One Ecker Place, Suite 400, San Francisco, CA 94105. I served a copy of the attached:

PETITION FOR WRIT OF HABEAS CORPUS

and

VOLUMES 1 - 6 OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

on the following, by placing same in a box addressed as follows:

Christopher Wei
Deputy Attorney General
50 Fremont Street, Suite 300
San Francisco, CA 94105

Said package was then on June 11, 1999, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 10, 1999, at San Francisco, California.

Madelyn Morton