#10.

No. S107782

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	)	Related to Automatic Appeal Case No. S011323
DAVID ESCO WELCH,	)	
On Habeas Corpus	)	Alameda County Superior Court No. 90396 (Hon. Stanley Golde Presiding)

PETITION FOR WRIT OF HABEAS CORPUS

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DEATH PENALTY

No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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In re	)	**Automatic Appeal**
	)	**Case No. S011323**
DAVID ESCO WELCH,	)	
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DAVID ESCO WELCH

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Case Number 90936, rendered on July 29, 1989.[1] Petitioner is indigent and has been incarcerated since his conviction, and consequently has had no ability to investigate fully the factual bases for the claims raised in this petition.

2. Petitioner's imprisonment and death sentence are the result of a fundamentally unfair trial. A number of errors and other factors combined to deprive petitioner of safeguards to which he was constitutionally entitled and distorted the truth-seeking function of his trial. These errors and other factors include, but are not limited to, the presentation of false evidence, governmental interference with the attorney-client relationship, ineffective assistance of counsel, the withholding of materials exculpatory and impeachment evidence favorable to the defense, deprivation of the right to trial only while competent, deprivation of the right to competent expert assistance, egregious prosecutorial misconduct, juror misconduct, deprivation of the right to an unbiased tribunal and extraordinarily prejudicial trial court error. These errors violated petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the California Constitution. In addition, petitioner's claims merit consideration because of the harsh and irrevocable nature of a capital sentence. Any limitation or restriction on consideration of the merits of these claims would violate article I, section 11 and article VI, section 10 of the California Constitution, Penal Code section 1473 et seq., and article I, section 9, paragraph 2 of the United States Constitution.

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[1] Although the judgment and sentencing proceedings occurred on July 25, 1989, judgment was not signed until July 29, 1989.

3. No prior application for a writ of habeas corpus has been filed in this court on petitioner's behalf in regard to the detention or restraint complained of in this petition.

4. Petitioner seeks relief in this court because this petition is related to the automatic appeal filed in petitioner's case, and because this court's appointment of appellate counsel contemplated the filing of this petition directly in this court. Petitioner's related automatic appeal was before this court as Case Number S011323. The opinion was issued on June 1, 1999. This court has original jurisdiction over this petition pursuant to article VI, section 10 of the California Constitution.

5. Petitioner has no other plain, speedy, or adequate remedy at law because the claims in this petition are based in whole or in part upon facts outside the certified record on direct appeal. Petitioner is a layman who has not knowingly, voluntarily, or intelligently waived or failed to raise these claims at an earlier time, nor has he deliberately foregone any available state proceeding.

6. Petitioner hereby incorporates into each of the claims set forth below all exhibits appended to this petition and the facts set forth therein. In connection with any expert declaration, the matters relied upon by such expert are incorporated into each of the claims set forth below as if fully set forth therein. Petitioner also hereby requests that the court take judicial notice of the contents of the entire certified record on appeal in petitioner's automatic appeal, including any exhibits admitted or marked for identification at trial, and the briefs, motions, pleadings and orders filed in petitioner's automatic appeal.

PROCEDURAL HISTORY

7. On December 16, 1987, the prosecution filed an information charging petitioner with nine felony counts based upon a single incident alleged to have occurred in the early morning hours of December 8, 1986. (CT 1787-1797.)[2]

8. Count One charged petitioner with the murder of Sean Orlando Mabrey in violation of Penal Code section 187, with a special circumstance that the murder was committed to prevent his testimony in a criminal proceeding, pursuant to Penal Code section 190.2 subdivision (a)(10).

9. Count Two charged petitioner with the murder of Dwayne Miller in violation of Penal Code section 187, with a special circumstance that the murder was committed to prevent his testimony in a criminal proceeding, pursuant to Penal Code section 190.2 subdivision (a)(10).

10. Count Three charged petitioner with the murder of Kathy Walker in violation of Penal Code section 187, with a special circumstance that the murder was committed to prevent her testimony in a criminal proceeding, pursuant to Penal Code section 190.2 subdivision (a)(10).

11. Count four charged petitioner with the murder of Darnell Mabrey in violation of Penal Code section 187, with a special circumstance that the

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[2] The following abbreviations are used to refer to the record on appeal: Clerk's Transcript (CT): The Clerk's Transcript consists of eleven volumes and is consecutively numbered. Citations refer to the page number. Reporter's Transcript (RT): The Reporter's Transcript for the trial consists of twenty-six volumes of consecutively numbered transcripts. (A Master Witness and Exhibit List accompanies these transcripts.) Citation to the trial transcripts refer to the page number. Other transcripts are not consecutively numbered; any citation refer to the date of the proceeding and the page number.

murder was committed to prevent his testimony in a criminal proceeding, pursuant to Penal Code section 190.2 subdivision (a)(10).

12. Count Five charged petitioner with the murder of Dellane Mabrey in violation of Penal Code section 187, with a special circumstance that the murder was committed to prevent her testimony in a criminal proceeding, pursuant to Penal Code section 190.2 subdivision (a)(10).

13. Count Six charged petitioner with the murder of Valencia Morgan in violation of Penal Code section 187, with a special circumstance that the murder was committed to prevent her testimony in a criminal proceeding, as set forth in Penal Code section 190.2 subdivision (a)(10). In addition, a multiple-murder special circumstance was charged in this count, pursuant to Penal Code section 190.2 subdivision (a)(3).

14. Count Seven charged petitioner with the attempted murder of Dexter Mabrey in violation of Penal Code sections 187 and 664.

15. Count Eight charged petitioner with the attempted murder of Leslie Morgan in violation of Penal Code sections 187 and 664.

16. Count Nine charged petitioner with the possession of a concealable firearm by an ex-felon in violation of Penal Code section 12021.

17. In addition, in Counts One through Eight, inclusive, petitioner was charged with being armed during the commission of the offense in violation of Penal Code section 12022 subdivision (a), using a firearm during the offense in violation of Penal Code sections 12022.5 and 1203.06 subdivision (a), and committing great bodily injury during the offense in violation of Penal Code sections 12022.7 and 1203.075.

18. Defendant was further charged with four prior felony convictions for which he was alleged to have served prior prison terms within the meaning of Penal Code sections 667.5 subdivision (b). These convictions were alleged to have included: a March 1, 1983 felony battery with serious bodily

injury in violation of Penal Code section 243 subdivision (c); an August 5, 1981 felony receiving stolen property in violation of Penal Code section 496; a May 8, 1981 felony assault with a deadly weapon in violation of Penal Code section 245 subdivision (a); and a May 29, 1981 felony residential burglary in violation of Penal Code section 459.

19. On April 7, 1988, petitioner was arraigned on the information. (CT 1832; April 7, 1988, RT 4-5.) He entered a not guilty plea to all counts and denied the special circumstance allegations, arming clauses, firearm use clauses, great bodily injury clauses, and four prior convictions. (CT 1832.)[3] The People were represented in the trial court by Deputy District Attorney James Anderson; the defendant was represented by private counsel Spencer Strellis and Alexander Selvin.

20. On November 2, 1987, counsel moved to refer petitioner for a Penal Code 1368 proceeding. (CT 778-783.) The motion was denied (CT 783.) Prior to trial, defendant moved to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806. (CT 2117, 2120-2123).[4] The case was transferred to the trial department on November 9, 1988, before the Honorable Stanley P. Golde. (CT 2124.) On November 21, 1988 the court denied petitioner's *Faretta* motion. (CT 2144.)

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[3] The witness special circumstance, Penal Code section 190.2 subdivision (a)(10), and great bodily injury enhancement allegations for the murdered victims in Counts 1-6 were dismissed prior to trial. (CT 2117; November 8, 1988 RT 58-59.)

[4] Defendant made known his intentions to represent himself at a trial setting conference on October 3, 1998 before the Honorable Michael E. Ballachey. (October 3, 1988 RT 39.) The motion was formally transferred to the trial court by the Honorable Martin N. Pulich on November 8, 1989 (CT 2117; November 8, 1989, RT 57.)

21. Pre-trial motions occurred over 31 court days from November 9, 1988 to January 19, 1989.[5] (CT 2124-2266; RT 1-981.) Jury selection occurred over 50 court days beginning on January 19, 1989 (RT 1059),[6] and ending with the jury and alternates being sworn on May 16, 1989.[7] (CT 2423; RT 3856-3857.)

22. On June 19, 1989, the jury found defendant guilty of all counts and found the multiple-murder special circumstance to be true. (CT 2473-2492; RT 5648-5656.)

23. The penalty phase began before the same jury on June 26, 1989. (CT 2493; RT 5668.) On July 12, 1989, after slightly more than four hours of deliberation, the jury returned a verdict that defendant's penalty should be death. (CT 2513-2514, 2523; RT 6227.)

24. On July 25, 1989, the trial court denied defendant's motion for new trial and motions for probation and reduction of the verdict of death to life without possibility of parole. (CT 2524; RT 6255.) The trial court

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[5]Morning sessions generally started between 10:30 and 11:00 a.m. and continue to noon. Afternoon sessions began approximately 2 o'clock. (CT 2124, 2127, 2135, 2143, 2144-2148, 2154, 2163, 2186, 2208-2209, 2232-2247, 2265.)

[6]The court typically conducted voir dire two prospective jurors in the morning and four prospective jurors in the afternoon. The morning session typically began around 11:00 o'clock and continued until the jurors were excused or voir dire was complete. The afternoon session typically began about 2:00 o'clock. (CT 2249, 2266, 2278-2279, 2281 2291-2301, 2311, 2320-2323, 2329-2330, 2334, 2343, 2345-2347, 2350-2351, 2354, 2356, 2358-2360, 2362-2364, 2367-2371, 2374-2378, 2380, 2382, 2395-2396, 2358, 2400, 2418.)

[7]Final selection began on May 15, 1989 at 10:30 in the morning and was completed by 11:45 in the morning. (CT 2421.)

struck the arming, firearm use and great bodily injury clauses in Counts Seven and Eight, as well as the prior convictions sua sponte. (CT 2524.)

25. The trial court imposed the sentence of death as to Counts One through Six. (CT 2524; RT 6268.) The trial court also sentenced defendant to imprisonment of one year on the arming clauses and two years as to the firearm use clauses in Counts One through Six, seven years as to Counts Seven and Eight, and two years as to Count Nine. (CT 2524.) The trial court ordered the imprisonment terms were to run concurrently with each other and to the punishment of death, to be stayed permanently upon the completion of the death sentence. (CT 2524.)

26. The death judgment was signed by the trial court on July 29, 1989. (CT 2526-2530.) An automatic appeal to this Court followed pursuant to Penal Code section 1239 subdivision (b). Petitioner was represented on that appeal and in related habeas corpus proceedings by George C. Boisseau. This court affirmed the judgment in an opinion issued on June 1, 1999. Mr. Boisseau, however, did not complete a habeas corpus investigation or file a habeas corpus petition in this Court.

27. Petitioner's petition for writ of certiorari following direct appeal was denied by the United States Supreme Court on February 22, 2000. Petitioner filed a request for the appointment of federal habeas counsel on February 28, 2000. On April 16, 2001, the United States District Court for the Northern District of California appointed Stephanie Ross and Darlene Ricker as federal habeas counsel. On January 28, 2002, Ms. Ricker filed a motion to withdraw, and on March 21, 2002, the federal court appointed Wesley A. Van Winkle as co-counsel to Ms. Ross. On March 28, 2002, the federal court granted equitable tolling of the statutory deadline for filing the federal habeas corpus petition until June 24, 2002.

TIMELINESS FACTS AND RELEVANT HISTORY

28. The present petition is timely pursuant to the timeliness standards set forth in Policy Statement 3 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, hereinafter "the Policies", and must therefore be considered on its merits. The petition is timely under the Policies, as explained in *In re Robbins* (1998) 18 Cal.4th 770, *In re Clark* (1993) 5 Cal.4th 750, and *In re Sanders* (1999) 21 Cal.4th 697, because it was filed without substantial delay and, as to any claim the presentation of which has been substantially delayed, good cause exists for such delay and/or the matter falls within one or more of the exceptions to the timeliness standards.

29. Unless this Court is prepared to find on the basis of the pleadings that this petition is timely filed or that petitioner has established good cause for any delay or an exception to the timeliness standards, petitioner respectfully requests an evidentiary hearing to establish the asserted facts concerning the timeliness of the petition. Petitioner's state and federal constitutional rights, including his rights to due process of law, counsel, and meaningful post-conviction review in capital cases, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments, require that he be given an opportunity to be fully heard regarding the timeliness of this petition.

30. Under the Policies, Timeliness Standard 1-1.1, a petition for writ of habeas corpus will be deemed presumptively timely if filed within 90 days of the final due date for the reply brief in the direct appeal or within 24 months of the appointment of habeas corpus counsel, whichever is later. Petitioner's appellate counsel, George C. Boisseau, was appointed to represent petitioner on both his direct appeal and habeas corpus proceedings

on May 1, 1992, and the final due date for the reply brief fell on May 18, 1998. This petition is being filed on June 24, 2002. Accordingly, the petition is not presumptively timely under Timeliness Standard 1-1.1.

31. Under the Policies, Timeliness Standard 1-1.2, a petitioner whose petition is not presumptively timely under Timeliness Standard 1-1.1 may establish that the petition is nevertheless timely by establishing the absence of substantial delay. A petitioner carries this burden by alleging with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim and (b) became aware, or should have become aware, of the legal basis for the claim. Substantial delay is measured from the time petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. (*In re Robbins*, *supra*, 18 Cal.4th, at p. 780.) To establish the absence of substantial delay, petitioner may support the allegations with relevant exhibits. (*Ibid.*) Accordingly by, petitioner has done so here.

32. A petition which is substantially delayed may nevertheless be deemed timely filed if a petitioner demonstrates good cause for the delay. (Policies, *supra*, Timeliness Standard 1-2.) Good cause is established by a showing particular circumstances sufficient to justify the delay. (*Ibid.*) Good cause can be established, for example, if the petitioner can demonstrate that because he or she was conducting an ongoing investigation into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other known claims in order to avoid the piecemeal presentation of claims. (*In re Robbins*, *supra*, 18 Cal.4th at p. 780.) Good cause is also demonstrated where petitioner's counsel abandons him during the post-conviction period, failing to conduct a reasonable investigation and file a petition if so warranted. (*In re Sanders, supra,* 21 Cal.4th at p. 720.)

33. There are two ways to establish abandonment. First, abandonment is shown if counsel did absolutely nothing to commence a habeas corpus investigation or otherwise failed to even acknowledge his or her habeas corpus responsibilities. (*Id.*, at p. 708.) Second, abandonment is shown "when counsel ceases representation before he or she should have done so (i.e., before investigation is complete, and/or before counsel has a reasonable basis upon which to conclude that no potentially meritorious habeas corpus issue exists)." (*Id.*, at pp. 708-709.) Under either form of abandonment, counsel's inaction places a habeas corpus petitioner in the same position as he or she would have been in had he or she been unrepresented. (*Id.*, at p. 709.) A showing of either form of abandonment establishes good cause for delay and renders the petition timely.

34. A claim that is substantially delayed without good cause, and hence is untimely, nevertheless will be entertained on the merits if the petitioner demonstrates (i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute. Determination of the applicability of the first three of these exceptions is made exclusively by reference to state law, whereas application of the fourth exception is made by reference to federal law. (*In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781.)

35. This petition is not substantially delayed, and is therefore timely, because it is being filed within a reasonable time after petitioner's counsel

became aware of the factual and legal bases of claims that petitioner is actually innocent of murder, was not competent to stand trial, was not guilty by reason of insanity, was deprived of the effective assistance of counsel, and/or is undeserving of the death penalty. Petitioner's counsel became aware of the factual and legal bases of these claims when they learned that petitioner suffers from profound brain damage affecting the frontal and temporal lobes of his brain. Specifically, petitioner asserts that claims rely in whole or in part upon the recent discovery of petitioner's substantial organic impairments. Petitioner discovered this information as a result of neuropsychological testing which took place between March and June 2002. (Exhibit 10, Declaration of Karen L. Froming, Ph.D.) This information presented petitioner's counsel with triggering facts requiring further investigation, and counsel have diligently investigated these facts to discover the source and date of origin of the damage for inclusion of the relevant claims in this petition.

36. Triggering facts pertaining to petitioner's brain damage could not reasonably have been discovered earlier because the discovery of the damage required the administration, analysis, and scoring of extensive neuropsychological testing. Funding made available by this court to state appellate/habeas counsel was inadequate to permit this testing to take place. Petitioner did not receive adequate funding for the requisite expert assistance until his case reached the federal district court, which provided authorization for the funds required for neuropsychological testing in an order of March 29, 2002. Petitioner's counsel promptly arranged for neuropsychological testing at that time, and extensive organic brain damage was discovered. This petition is being filed less than one week after the date petitioner's neuropsychological expert completed scoring of the tests and preparing her declaration. (Exhibit 10, Declaration of Karen L. Froming, Ph.D.)

Accordingly, petitioner has demonstrated an absence of substantial delay in the development of the claims listed in the preceding paragraphs.

37. As to those claims of which petitioner was aware substantially before the filing of the petition, good cause is demonstrated because presentation of the claims was delayed while counsel conducted ongoing investigation into the claims listed in the foregoing paragraphs so as to join all the claims in a single petition in order to avoid piecemeal litigation of claims. (*McClesky v. Zant* (1991) 499 U.S. 467; *In re Clark* (1993) 5 Cal.4th 750, 797.)

38. In the event that this Court should deem any claim or claims to have been substantially delayed, good cause for such delay is established by state habeas counsel's abandonment of petitioner during the post-conviction period before the investigation was complete, and/or before counsel had a reasonable basis upon which to conclude that no potentially meritorious habeas corpus issue existed. (*In re Sanders*, *supra*, 21 Cal.4th at p. 720.) This court's records show that George C. Boisseau was appointed as counsel to petitioner on May 1, 1992, and that his appointment required representation of petitioner with respect to both his automatic appeal and any related habeas corpus proceedings. However, Mr. Boisseau never filed a habeas corpus petition in this court and also failed to conduct any substantial investigation of triggering facts which appeared in the record on appeal, in trial counsel's files, or in any other source. (Exhibit 5, Declaration of George C. Boisseau.)

39. By Mr. Boisseau's own admission, he failed to undertake any of the most basic, fundamental tasks required even to begin a habeas corpus investigation. For example, Mr. Boisseau failed to obtain any social history documents other than those which had already been obtained by trial counsel. Neither Mr. Boisseau nor an investigator working on his behalf ever conducted interviews with such critical social history witnesses as health care

providers, teachers or school personnel, caretakers, persons related to institutions at which petitioner was placed, juvenile and adult probation and/or parole officers, peers, or court personnel. Mr. Boisseau also failed to interview any of petitioner's prior counsel or obtain all of their files. He retained no experts and, failed to consult any mental health experts at all, either for the purpose of diagnosing petitioner or assisting Mr. Boisseau himself in communicating with petitioner in a meaningful way. This failing was particularly egregious in light of the fact that Mr. Boisseau admittedly recognized that petitioner was severely mentally ill. He also did not draft or obtain any declarations or other documents for use as exhibits to the petition, nor did he ever draft a claim. (Exhibit 5, Declaration of George C. Boisseau, and Exhibit 1, Declaration of Daniel Abrahamson.)

40. Although substantial triggering facts appeared on the record or in trial counsel's files, Mr. Boisseau failed to investigate these facts. For example, despite the fact the transcript of the preliminary hearing shows prosecution witness Stacey Mabrey was given favorable treatment in connection with a pending assault charge in part to secure his testimony at trial, Mr. Boisseau failed to conduct basic court searches of this witness or other prosecution witnesses. He therefore failed to discover: (1) Mabrey had a number of other arrests and convictions for other crimes committed between the preliminary hearing and trial; (2) Mabrey received favorable treatment in these cases to secure his testimony in this case; (3) trial counsel failed to discover this information or use it to impeach Mabrey's testimony at trial; and (4) the prosecution failed to disclose this essential information to the defense as it was required to do under *Brady v. Maryland* (1963) 373 U.S. 83. (Exhibit 5, Declaration of George Boisseau.)

41. Mr. Boisseau also failed to investigate a host of other triggering facts which appear in the record or in trial counsel's files. For example,

triggering facts showed that critical forensic evidence in the possession of the police was lost or intentionally destroyed before it could be tested by the defense. The evidence showed petitioner had a combination of alcohol, cocaine, and morphine in his system immediately after the offenses, but did not show the quantity of these drugs. Mr. Boisseau failed to investigate to determine what happened to the evidence and whether it was negligently or intentionally destroyed. In addition, although petitioner complained repeatedly on the record about violations of the gag order, Boisseau did not conduct newspaper or other media searches which would have revealed that the prosecutor did in fact flagrantly violate the gag order, that he was extensively quoted in prejudicial newspaper articles which appeared during the break between the guilt and penalty phases, and that the jury by exposure to these improper comments. (Exhibit 5, Declaration of George Boisseau.)

42. The record also reflects that petitioner sought to be examined by three psychiatrists, that trial counsel thought the issues of petitioner's competence and a possible plea of not guilty by reason of insanity should be explored, and that the judge ruled petitioner incompetent to represent himself because petitioner did not comprehend the scope of his mental disabilities. (RT 67-71, 84-85.) In addition, the facts surrounding the crimes themselves suggested no comprehensible motive for the killings, and numerous witnesses had described petitioner as "crazy." (RT 4488, 4555, 5300-5301, 5719.) Furthermore, two mental health professionals testified that petitioner had serious mental problems, and a possible organic brain syndrome. (RT 5936-5939, 6011-6048.) In spite of his awareness of these triggering facts, Mr. Boisseau did not retain or consult a psychologist, neuropsychologist, psychiatrist, or other mental health expert to review transcripts or documents and advise him with respect to what petitioner's mental impairment or illness might have been, how best to investigate this impairment or illness, or how

best to interact with petitioner to secure his trust and cooperation. Mr. Boisseau admits he had no strategic or tactical reason for these failures. (Exhibit 5, Declaration of George C. Boisseau.)

43. This Court's records further establish that Mr. Boisseau has done no investigation for at least the last five years and has failed to expend or seek the funds necessary to conduct a competent habeas corpus investigation. This court's records show that Boisseau sought and received reimbursement for only $4,600 and received his final payment on June 25, 1997. Under this Court's Policies Regarding Cases Arising from Judgments of Death, Policy Statement 3, Compensations Standards, Standard 2-2.1, Boisseau was entitled to reimbursement for up to a total of $25,000 for habeas corpus investigation expenses. The expenditure of less than 20% of this amount is strongly indicative of the inadequacy of Mr. Boisseau's investigation.

44. Other information obtained by petitioner's counsel further demonstrates Mr. Boisseau's abandonment of his client. As an attorney with no experience representing capital clients in post-conviction proceedings, Mr. Boisseau was under a professional obligation to seek the advice of and cooperate with the assisting entity on the case, the California Appellate Project (hereinafter "CAP"). (See e.g., Rules of Professional Conduct, Rule 3-110.) However, it is clear that he repeatedly failed to do so, and in fact consistently resisted every effort CAP made to assist him in pursuing a habeas investigation and filing a petition.

45. Although Mr. Boisseau accepted this court's dual appointment in May, 1992, it required nearly two years of repeated requests before Boisseau provided CAP with transcripts to enable CAP to copy the record. (Exhibit 1, Declaration of Daniel Abrahamson.) As of January, 1994, Mr. Boisseau had not yet obtained trial counsel's files, the first essential step

required in order to commence a habeas corpus investigation. (*Ibid.*) Also in that month, Mr. Boisseau informed CAP that although he had read the record, he had made no transcript notes of his review of the record, making it impossible for CAP to assist him in identifying issues requiring further investigation. (*Ibid.*)

46. In January, 1994, Mr. Boisseau informed his CAP advisor, Daniel Abrahamson, that he planned to do substantial work on the case during the next four months. Mr. Boisseau did not contact CAP again during that period, however, in May Mr. Abrahamson decided to remind Mr. Boisseau of the availability of CAP's assistance by sending him relevant sections of the opening and reply brief in a case Mr. Abrahamson thought was similar to petitioner's case. In early June, Mr. Abrahamson sent Mr. Boisseau a legal memorandum updating him on ineffective assistance of counsel issues and suggested Mr. Boisseau contact him about developments in the case. In mid-June, Mr. Abrahamson sent Mr. Boisseau relevant newspaper clippings and an excerpt from *People v. Wash*, a case tried by the same judge who tried petitioner's case. In July, Mr. Abrahamson sent Mr. Boisseau a sample release form for use in obtaining social history records and offered to provide him further assistance with his habeas corpus representation. Mr. Abrahamson received no response to any of these attempts to contact Mr. Boisseau. (Exhibit 5, Declaration of George Boisseau.)

47. Finally, in December, 1994, Mr. Abrahamson was able to arrange to have Mr. Boisseau come to a meeting at CAP's San Francisco office. At this meeting, CAP staff tried to assist Mr. Boisseau by discussing legal claims to be raised in the opening brief identified specific facts in the record which triggered a need for further investigation and the legal claims which CAP believed might be made if borne out by the investigation. (Exhibit 1, Declaration of Dan Abrahamson.)

48. By the conclusion of this meeting, Mr. Boisseau had agreed to undertake a series of tasks to further the habeas corpus investigation. Among other tasks, Mr. Boisseau agreed: to obtain trial counsel's files and make copies of these files for CAP; to create a family tree of petitioner's family; to interview petitioner's mother for family background information; to obtain releases from petitioner's family members; to begin gathering family vital and medical records; to locate hospital and jail records for petitioner; to investigate the missing blood which was obtained by Highland Hospital and then disappeared; to obtain police, court, and attorney files on petitioner's prior convictions; to investigate petitioner's father; to investigate conditions of confinement at the county jail; and to obtain jail records relating to petitioner's incarceration there. (Exhibit 1, Declaration of Dan Abrahamson.)

49. Following this meeting, Mr. Abrahamson sent Mr. Boisseau a letter advising him that Mr. Abrahamson was willing to drive to Santa Rosa, where Mr. Boisseau's office was located, to meet with Mr. Boisseau and his paralegal to map out a record gathering plan. Mr. Abrahamson received no response to his letter and did not hear from Mr. Boisseau again for two months. (Exhibit 1, Declaration of Dan Abrahamson.)

50. In late February, 1995, Mr. Abrahamson learned that the record in the case had been certified. He called Mr. Boisseau to strategize about the case. Mr. Boisseau informed Mr. Abrahamson that he was having difficulty finding large blocks of time to concentrate on the case. Mr. Abrahamson stressed that it was critical to do so without further delay and volunteered to make the time to assist mr. Boisseau as soon as he received the requested materials from Mr. Boisseau. (Exhibit 4, Declaration of Dan Abrahamson.)

51. During the call, Mr. Boisseau said he was in the process of making a working copy of the trial files and said he would make a copy for Mr. Abrahamson. Mr. Abrahamson never received this copy. Mr. Boisseau

also represented that he was "in the midst" of interviewing petitioner's mother. Mr. Abrahamson never received an update on this interview or any notes of Mr. Boisseau's interview with Minnie Welch. Mr. Boisseau also said he was compiling a life history of petitioner. In spite of repeated requests, no copies of this life history were ever received by CAP. Mr. Boisseau said he would check for mental health reports in petitioner's correctional file and elsewhere and would provide Mr. Abrahamson with copies. Mr. Abrahamson never received these reports or an update regarding the status of this effort. Finally, Mr. Boisseau promised to send Mr. Abrahamson a copy of the trial files, the opening brief issues list, and drafts of the opening brief issues as they were completed. Mr. Abrahamson never received this material. (Exhibit 1, Declaration of Dan Abrahamson.)

52. A few days later Mr. Abrahamson sent Mr. Boisseau a letter asking him to send a list of all potential interview subjects and other persons involved in the case as well as any issues lists or other notes Mr. Boisseau might have. Mr. Abrahamson never received documents pursuant to this letter. (Exhibit 1, Declaration of Dan Abrahamson.)

53. In mid-April, Mr. Abrahamson sent Mr. Boisseau a recently issued opinion in *Moore v. Calderon*, a federal capital habeas corpus case decided on *Faretta* grounds. Mr. Abrahamson felt this would be of interest because he knew Mr. Boisseau was working on a *Faretta* issue. Mr. Abrahamson did not hear back from Mr. Boisseau about this matter. (Exhibit 1, Declaration of Dan Abrahamson.)

54. In May, 1995, Mr.Boisseau filed an extension of time request in connection with the opening brief, informing this Court that he was also working on two complex federal narcotics cases but had been working on the opening brief and "potential habeas corpus issues." Every month thereafter Mr. Boisseau filed another extension request, each time citing the pressing

need of other identified business as the reason for requiring an additional extension of time. In June, Mr. Boisseau stated he had begun investigation into potential habeas issues, and had researched three of the potential legal issues revealed by investigation into the case. In July, Mr. Boisseau made the same representation regarding the habeas investigation. In August, this same representation was repeated. In September, Mr. Boisseau again made an identical representation. Mr. Abrahamson never received any reports or documentation from Mr. Boisseau to support the representation that any habeas investigation was being conducted. (Exhibit 5, Declaration of George Boisseau; Exhibit 1, Declaration of Dan Abrahamson.)

55. In October, 1995, petitioner filed two motions with this Court seeking to relieve Mr. Boisseau as appointed counsel. Later that month, Mr. Boisseau filed another extension request reciting the work he had done on the opening brief in the case. With respect to the habeas investigation, he again repeated the representation that he had researched three of the potential legal issues revealed by the investigation. (Exhibit 1, Declaration of Dan Abrahamson.)

56. In November, Mr. Abrahamson called Mr. Boisseau to discuss the lack of progress Mr. Boisseau was making in the case. Mr. Boisseau informed Mr. Abrahamson that Mr. Boisseau's wife had been clinically depressed for several months, and that the burdens of child care had fallen on him. Mr. Abrahamson urged Mr. Boisseau to consider speaking with someone at the court about this matter in confidence or raising the matter with the court in a confidential filing, but Mr. Boisseau declined on the grounds that he did not want to air his family problems with the court. Mr. Boisseau stated that he wanted to get the opening brief done for a variety of reasons and believed the *Faretta* issue would win the case. He stated that he had an investigator who "has been talking to people." Mr. Abrahamson renewed his

offer of assistance from and asked for copies of everything CAP had previously requested: the opening brief drafts, habeas investigation materials, a copy of the trial files, interview notes, copies of vital records, and any other documents he had gathered. Mr. Boisseau indicated that he had working copies of files and promised to send them to Mr. Abrahamson by November 10 so that Mr. Abrahamson could review them in advance of a meeting they scheduled at the CAP offices on November 15. (Exhibit 1, Declaration of Dan Abrahamson.)

57. On November 10, 1995, Mr. Boisseau called to cancel the November 15 meeting and stated that he was unable to get Mr. Abrahamson the materials he had requested. Mr. Boisseau cited ongoing family problems and other commitments. Mr. Abrahamson asked Mr.Boisseau to provide CAP with the materials as soon as possible and told Mr. Boisseau they could meet in December of 1995. (Exhibit 1, Declaration of Dan Abrahamson.)

58. Later that November, this Court denied petitioner's motion to relieve Mr. Boisseau as counsel. Subsequently, Mr. Boisseau filed his eighth extension of time request with the court. The request reported progress on the opening brief, but, with respect to the habeas corpus proceeding, again simply repeated Mr. Boisseau had researched three of the potential legal issues revealed by the investigation. Neither Mr. Abrahamson nor CAP had any ability to verify this purported progress, since Mr. Boisseau had never provided CAP with any of the materials they had repeatedly requested. (Exhibit 1, Declaration of Dan Abrahamson.)

59. On December 1, 1995, Robert Wandruff, this Court's clerk, wrote to Mr. Boisseau and asked him to advise the court by December 15 what progress had been completed, what remained to be completed on the opening brief, and the date by which the work was expected to be completed. Mr. Abrahamson received a copy of this notice and immediately called Mr.

Boisseau. Mr. Abrahamson again urged Mr. Boisseau to disclose the personal family problems to the court. A few days later, Mr. Boisseau called Mr. Abrahamson and stated that he had spoken to the court's automatic appeals monitor, Mary Jameson, regarding his family problems, and that Ms. Jameson had been somewhat sympathetic. Mr. Boisseau told Mr. Abrahamson he intended to file the opening brief by the end of February. Mr. Abrahamson told Mr. Boisseau he thought this plan was overly optimistic. Mr. Abrahamson had still received no transcript notes or trial files and again asked Mr. Boisseau for these materials. Mr. Boisseau promised to provide the materials to Abrahamson by the end of the year or by the first week in January. (Exhibit 1, Declaration of Daniel Abrahamson.)

60. A few days after that, Mr. Boisseau responded to the letter from this Court's clerk and reported on the appellate issues he had completed and issues which remained. Mr. Boisseau asked for leave to file the brief by March 31. Mr. Boisseau also filed a confidential status report with the California Supreme Court indicating that he had suffered "serious domestic problems" since July, 1995. Mr. Boisseau reported he had advised CAP of his marital problems and promised to complete and file the opening brief by March 31. Mr. Boisseau stated that he intended to continue to cooperate with CAP and to complete both the opening brief and the habeas corpus petition. (Exhibit 1, Declaration of Daniel Abrahamson.)

61. By February 1, 1996, Mr. Abrahamson had not received the requested materials from Mr. Boisseau, any drafts of any arguments for inclusion in the opening brief, or any indication of any progress on the habeas corpus investigation. On that date Mr. Boisseau filed a 10th extension of time request with the court. With respect to the opening brief, the request contained language that was substantially similar to all of the preceding requests filed during the previous eight months. With respect to the habeas

corpus investigation, the request simply restated the same language Mr. Boisseau had used previously representing that he was continuing the investigation and had researched three of the potential legal issues. Based on this request, Mr. Abrahamson concluded by his own account, that Mr. Boisseau had made no progress on the case since June of 1995, a matter of eight months. (Exhibit 1, Declaration of Dan Abrahamson.)

62. Mr. Abrahamson left CAP shortly thereafter to pursue employment elsewhere. During his entire tenure at CAP, Mr. Abrahamson saw no evidence Mr. Boisseau had engaged in any meaningful habeas corpus investigation. In spite of Mr. Boisseau's repeated promises to provide Mr. Abrahamson or CAP with requested materials, Mr. Abrahamson saw no evidence of any record gathering, no witness interview notes, no drafts of issues, issue outlines, witness lists, chronologies, or any other materials or working documents that would have been used by competent counsel in conducting the kind of habeas corpus investigation required by this Court. Based upon his discussions with Mr. Boisseau and Mr, Boisseau's own representations to the court, Mr. Abrahamson concluded that Mr. Boisseau's serious domestic problems may have been the reason Mr. Boisseau failed to make any progress on the habeas corpus investigation in this case. (Exhibit 1, Declaration of Dan Abrahamson.)

63. After Mr. Abrahamson left CAP, the task of advising and assisting Mr. Boisseau fell to Kathryn Andrews. Ms. Andrews had several communications with Mr. Boisseau attempting to obtain materials and urging Mr. Boisseau to prepare the basic documents required for a habeas corpus investigation. After these efforts met with repeated frustration, Ms. Andrews finally began compiling her own habeas corpus issues list and attempted to create a life history chronology from the materials in the record and in the few materials she was eventually able to obtain from Mr. Boisseau. Ms. Andrews

advised Mr. Boisseau that no petition could be prepared or filed until an investigation had been completed and urged Mr. Boisseau to begin the investigation by gathering releases, documents, and preparing the working materials the investigation required.

64. Subsequently, Ms. Andrews learned that Mr. Boisseau had retained an investigator, Harvey Yarborough, who apparently conducted a few preliminary witness interviews prior to 1997. Because little or no record gathering had been done and none of the working documents required for investigation had yet been prepared, these interviews were premature. No reports of these interviews were ever made or passed on to Mr. Boisseau or to CAP.

65. Finally, in 1997, Mr. Boisseau completely halted all further investigation of the case. According to this Court's staff, Mr. Boisseau submitted a confidential claim for reimbursement of habeas corpus expenses in the amount of $4,600 in 1997. Petitioner has no access to the claim and does not know how this money was spent, but is informed and believes that most of this money was spent for interviews by Mr. Yarborough. Petitioner requests that this court take judicial notice of this claim and any others Mr. Boisseau may have filed, including any materials submitted in substantiation of the claim, pursuant to Evidence Code section 452, subdivision (d).

66. Petitioner is also informed and believes that CAP was required to submit to this Court confidential reports regarding the progress of appointed counsel in capital cases. Petitioner has no access to these confidential reports, but requests that this court take judicial notice of the reports or portions of reports which pertain to Mr. Boisseau's handling of this case, pursuant to Evidence Code section 452, subdivision (d).

67. The foregoing facts, together with additional information to be presented following investigation, adequate funding, discovery, the use of this

Court's process, and evidentiary hearing, establish that petitioner's habeas corpus counsel abandoned him during the post-conviction stage of the representation and therefore establishes good cause for any substantial delay in the presentation of any claim or claims in this petition.

68. In addition, the petition alleges facts which "establish that a fundamental miscarriage of justice occurred as a result of the proceedings leading to the conviction and/or sentence." (*In re Clark, supra*, 5 Cal.. 4th at 797.) Furthermore, the petition alleges facts which establish that petitioner is actually innocent of the crime or crimes of which he or she was convicted, and that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death. (*Ibid.*) Accordingly, the petition falls within one or more exceptions to the timeliness requirements.

69. Finally, apart from the foregoing analysis, petitioner further submits that the claims in this petition may not be held to be prejudicially delayed because petitioner has not unreasonably delayed in filing this petition, the state has suffered no prejudice from any delay in filing, and even if there had been such delay or prejudice, the petition is premised on grounds of which petitioner could not have known by the exercise of reasonable diligence. (See, e.g., *Harris v. Pulley* (9th Cir. 1988) 885 F.2d 1354, 1365-1367.) As set forth in greater detail in this petition, including but not limited to Claims 1 and 8, the state suppressed material evidence favorable to the defense and introduced false evidence, and the existence of this evidence was not discoverable by reasonable diligence.

REQUEST FOR DISCOVERY AND EVIDENTIARY HEARING

70. The facts set forth in each claim listed hereafter establish a prima facie basis for relief.

71. If any of the facts set forth in this petition are disputed by respondent, petitioner requests an evidentiary hearing so that the factual disputes may be resolved. After petitioner has been afforded discovery and the disclosure of material evidence by the state, the use of this Court's subpoena power, and adequate funding for investigation and experts, petitioner requests an opportunity to supplement or amend this petition.

72. To the extent that the facts set forth in this petition could not reasonably have been known to petitioner's trial counsel or the prosecution, such facts constitute newly discovered evidence which casts fundamental doubt on the accuracy and reliability of the proceedings and undermines the prosecution's case against petitioner such that his rights to due process and a fair trial have been violated and collateral relief is required.

73. Petitioner has had no access to discovery or this Court's subpoena power and has been denied the funding needed to develop fully and present the facts supporting each claim. Accordingly, complete evidence in support of the claims may not be presently obtainable. Nevertheless, the evidence set out below adequately supports each claim and justifies the issuance of an order to show cause and the rights and protections which attend the issuance of an order to show cause.

74. Petitioner alleges the following facts, among others to be presented following a fair opportunity for further investigation, discovery, and an evidentiary hearing, in support of his claims for relief.

CLAIMS FOR RELIEF

75. **Summary of Facts.** At about 5:00 a..m. on the morning of December 8, 1986, six people were shot and killed in a dilapidated crack-house in an industrial neighborhood in East Oakland. The victims included four adults and two infant children. The owner and operator of the crack-house, Barbara Mabrey, escaped uninjured. She and her son, Stacey Mabrey, later testified at trial that they were in the house and witnessed or heard at least part of the shooting incident. (RT 4125-4127, 4270-4275, 4438.)

76. Petitioner and his developmentally disabled girlfriend, Rita Mae Lewis, were found a few blocks away at the home of petitioner's cousin, Beverly Jermany, and were arrested for the crimes later that morning. Petitioner, who was bleeding from a gunshot wound to the leg, and Lewis, who had minor injuries, were taken to Highland Hospital for treatment. Petitioner was held there for the next month under close police supervision. (RT 4624, 4644, 4676.)

77. In January, 1987, petitioner was taken to Alameda County jail and immediately placed in the administrative segregation unit reserved solely for inmates who had committed disciplinary infractions in the jail. Sheriff's deputies later claimed petitioner had been housed in the "ad seg" unit for his own protection. However, from the beginning of his incarceration petitioner was subjected to a panoply of disciplinary restrictions, including the denial of visitation rights, limited access to media, and illegal disciplinary diets. (See Claim 5.)

78. Sensational media coverage during the weeks and months following the killings described the incident as "the worst mass-murder in Oakland history." Reporters delved into petitioner's background and

discovered that he had a substantial criminal record and a record of disciplinary problems in juvenile and adult correctional facilities. Reports circulating in Sobrante Park, a dangerous, drug-infested neighborhood in East Oakland not far from the crack-house where the shootings took place, indicated that petitioner was mentally ill. One newspaper headline speculated, "Maybe He's Too Crazy to be Gassed." (See Claims 38 and 53.)

79. Under intense media pressure because of petitioner's record and the graphic circumstances of the crime, the Alameda County District Attorney's office opted to seek the death penalty for the killings. James Anderson, head of the office's special circumstances unit, was assigned to the case. Anderson, whose nickname was "Mad Dog," took such relish in obtaining death verdicts that he had devoted one wall of his office to photographs of all the men he had placed on Death Row. Anderson arranged for the case to be assigned to Judge Stanley Golde. (CT 1787-1797, 2124; see also, Exhibit 6, Declaration of Thomas Broome.)

80. Petitioner was initially represented by veteran defense attorney Thomas Broome and his associate, Robert Cross. Both men quickly came to the conclusion that petitioner was mentally ill and retained a clinical psychologist, Dr. William Pierce, to evaluate petitioner's mental health. However, Pierce was only able to meet with petitioner briefly on two occasions because petitioner became convinced the meeting room was being electronically monitored and guards were outside the door listening. This odd belief and other similar delusions convinced Pierce that petitioner was psychotic and suffered from a persecutory type of delusional disorder. Pierce also noted that petitioner exhibited signs of impulsivity, perseveration, and other symptoms that would later be identified as organic brain damage.

Pierce concluded that petitioner was not competent to stand trial. (Exhibit 22, Declaration of William Pierce, Ph.D.)

81. At a proceeding prior to the preliminary examination, Broome moved for a competency hearing, citing the stresses caused to petitioner by the harsh conditions of his confinement. The court denied the motion, and the two lawyers continued to represent petitioner as the case moved through the preliminary stage and into the Superior Court. (See Claims 2, 19, and 22.)

82. Throughout this pretrial phase, petitioner filed a large number of pro per motions and lawsuits. These filings, including motions to have all judges and lawyers in Alameda County disqualified from working on his case due to an alleged conspiracy against petitioner, further demonstrated petitioner's paranoia and delusions. Finally, in a Superior Court proceeding, petitioner came to believe that a small humorous doll on the clerk's desk bearing a sign reading "You're in Contempt of Clerk!" had been placed there specifically to humiliate and intimidate him. He insisted that his attorney object to the doll on due process grounds, and when Broome refused, petitioner filed a *Marsden* motion to have Broome removed from the case. To Broome's surprise, the court granted the motion. (See Claims 2 and 19; Exhibit 6, Declaration of Thomas Broome.)

83. Broome was replaced by Spencer Strellis, Judge Golde's former law partner, and Alexander Selvin, a former district attorney who had recently gone into private practice as a defense attorney. Strellis also quickly came to the conclusion that petitioner was mentally ill and retained a psychiatrist, Dr. Samuel Benson, to evaluate petitioner. Like Pierce before him, Benson also determined that petitioner was not competent to stand trial because of his

delusional beliefs. (Exhibit 30, Declaration of Spencer Strellis; Exhibit 3, Declaration of Samuel Benson, M.D.)

84. Petitioner, convinced his lawyers were working against him, filed a *Faretta* motion prior to trial seeking to fire his lawyers and represent himself at trial. Attorney Strellis tactfully commented that after the *Faretta* proceedings were concluded, the court might wish to "look into" competency proceedings or even consider a plea of not guilt by reason of insanity. The court was also concerned that petitioner might not be competent to represent himself and therefore appointed a psychiatrist, Dr. Joseph Satten, to evaluate petitioner. However, petitioner refused to see Dr. Satten, and the court therefore did not obtain a mental health evaluation before ruling on the motion. (See Claims 2, 4, and 19.)

85. However, although Judge Golde had no professional opinion before him, he determined that petitioner was too mentally ill to represent himself. Reciting from a long list of statements made by petitioner evidencing what the court described as petitioner's "paranoid distrust," the court ultimately concluded that petitioner "does not appreciate the extent of his disability." The court found that petitioner lacked the mental capacity to waive counsel. Remarkably, in spite of counsel's earlier recommendation and his own findings regarding petitioner's mental problems, Judge Golde never ordered a competency hearing. (See Claims 2 and 19.)

86. As the case moved into the jury selection phase, it quickly became evident that petitioner's paranoia and impulsivity would pose extraordinary problems at trial. Convinced his own attorneys were part of a conspiracy against him, petitioner repeatedly made his own objections, filed his own motions, and was unable to restrain himself, even in front of

prospective jurors. Instead of declaring a doubt regarding petitioner's competence and ordering competency proceedings, the court devised and unilaterally imposed an astonishing form of hybrid representation upon the defense. Over petitioner's objections, the court announced that henceforth and throughout the trial petitioner would be permitted to make any motions he wished on Fridays, but that his attorneys would represent him on the other four days of the week. (Se Claims 2, 3, 19, and 20.)

87. From the beginning, this plan, apparently devised in an attempt to placate petitioner, instead created chaos within the defense. Lacking trust in his attorneys, and believing the court had given him some measure of control over his case, petitioner continued to make motions and objections throughout the week. The court compounded the problem by ruling on these motions some of the time and refusing to rule at other times, without any apparent pattern and without regard to the day of the week. Inevitably, because of his paranoid delusions, petitioner began to have disputes with his counsel in open court about the best strategy to take. Although his attorneys had been putting on a defense that suggested petitioner was guilty of a lesser offense than first-degree murder, petitioner insisted on taking the stand and presenting an innocence defense. This tactical dispute, a predictable by-product of the court's hybrid representation order and petitioner's severe mental illness, doomed petitioner's defense. (See Claims 3 and 20.)

88. Counsel, who clearly had no enthusiasm for the case to begin with, lost any remaining interest in defending petitioner after the hybrid representation order removed what little ability they had to control petitioner's impulsive outbursts and objections. From the very beginning of the trial, they made it clear to the jurors that they were merely going through

the motions. Lead counsel even began his opening statement at the guilt phase by informing the jury, "I'm not very good at this." Then he proceeded to prove it. (RT 3885-3887; see Claim 29; Exhibit 8, Declaration of Joseph Cruz; Exhibit 35, Declaration of Bernard Wells.)

89. Having done little investigation or preparation, counsel attempted to put on what they apparently considered to be an intoxication defense. However, they were unable to produce any solid evidence of intoxication. A urine sample taken at the hospital at the time petitioner was admitted shortly after the shootings showed evidence of alcohol, cocaine, and morphine in petitioner's system, but no attempt had been made to determine the quantities of these drugs. Blood samples taken from petitioner on admission to the hospital were also not quantitatively tested, and the defense therefore had no proof of the degree to which petitioner was under the influence of these drugs at the time of the offenses. (See Claims 8 and 25.)

90. Although petitioner's intoxication and mental state were the central focus of their defense, petitioner's counsel did only a cursory attempt to discover what had happened to the sample of petitioner's blood which could have revealed the quantities of intoxicants in his system. Had they looked harder, they would have discovered that although police officers were aware that the blood would be crucial, potentially exculpatory evidence, and although they also knew that the hospital destroyed fluid samples after seven days, the Oakland police waited until eight days after the blood was collected to obtain a search warrant for it, and ten days before they collected the blood samples from the hospital. Moreover, the police also mishandled the blood. Although the samples were supposedly booked into the police property room on December 18, the property slip did not describe the evidence, and no

property officer ever signed for it. Moreover, one of the test-tubes of blood supposedly booked into the evidence on December 18 had a label on it which bore the date of December 19, the day *after* the property was supposedly seized. Although their own expert witnesses remarked on the peculiarity that no quantitative analysis had been done, defense counsel simply let the matter drop without any investigation. (See Claims 8 and 25.)

91. At the trial the prosecutor presented several witnesses who knew petitioner and had contact with him in the days or hours prior to the killings. Two of these witnesses, Barbara Mabrey and her son, Stacey Mabrey, testified that they had been sleeping in the back of the crack-house when petitioner and Rita Mae Lewis entered and began shooting the other occupants. Barbara Mabrey testified that she had escaped out the back door after the shooting started. Stacey Mabrey testified that he saw petitioner in the hallway with a gun heard him calling out the name of Stacey's brother, Chuckie, as he searched through the rooms. Stacey testified that he retreated to his room and hid in the closet until petitioner and Lewis left the house. (See Claim 1.)

92. However, the jury never heard the truth– that Stacey Mabrey perjured himself. At the time of the shootings, Stacey Mabrey was not actually in the house at all but was instead down the block. He decided to testify in an effort to please the district attorney's office and to avoid prosecution for a number of crimes he himself had committed. Despite his clear-cut obligations under *Brady v. Maryland* and its progeny to turn over exculpatory and impeachment evidence to the defense, the prosecutor suppressed evidence of the deal with Stacey Mabrey. Although Mabrey was arrested five times for 16 different offenses committed between the

preliminary hearing and the trial alone, and although the prosecution had dropped all charges or declined to file charges on all but one of these offenses, the prosecution hid this information from the defense. (See Claim 1.)

93. Indeed, on the morning Mabrey was to testify, the prosecutor was informed by one of the officers who was also testifying that day that Mabrey was "arrestable" for four bank robberies. The prosecutor instructed the officer not to arrest Mabrey until after he had finished testifying and did not inform the defense of this arrangement. The prosecutor also did not inform the defense that agents of the district attorney's officer had gone to the Mabrey residence, made cash payments to both Barbara and Stacey Mabrey at the time they came to prepare them to testify at trial, and drove the witnesses to and from the courthouse each day they were to appear. (See Claim 1.)

94. The overzealous prosecutor, eager for another pelt for his office wall, also coached five witnesses, including Stacey Mabrey, not to say or even suggest that petitioner was mentally ill, drunk, or on drugs at the time of the incident. Thus, although all five witnesses had either made statements to the police or testified in the preliminary hearing that petitioner was "crazy" or on drugs shortly before the shootings, all five witnesses denied having made such statements in their testimony at the guilt phase and even insisted that petitioner was not "crazy." (See Claims 1 and 21.)

95. Saddled with inept counsel and faced with a prosecutor and police force willing to destroy or manufacture evidence in order to obtain a conviction, petitioner had little chance for a favorable verdict. Moreover, throughout the trial spectators shouted at the already tense jurors to "kill

him." At the end of the guilt phase, the judge gave the jurors a host of incomprehensible, prejudicial, extemporaneous jury instructions, and the jury retired to begin their deliberations. After asking for read-backs of the testimony of the perjured witnesses, the jury returned with six counts of first degree murder and the special circumstance of multiple murder. (Exhibit 11, Declaration of Joanne Gonzales; Exhibit 33, Declaration of Minnie Welch; see Claims 35, 43, 49, 56, 57, 60.)

96. Defense counsel were, if possible, even more ineffectual in the penalty phase than they had been in the guilt phase. Although the prosecution presented a parade of witnesses in aggravation– primarily law enforcement officers who had altercations with petitioner in jail or prison– the defense failed to competently cross-examine these witnesses regarding petitioner's mental illness, presented no social history witnesses in mitigation, and relied solely on Dr. Pierce and Dr. Benson for their entire penalty phase defense. However, petitioner's paranoia and delusion that all communications were being monitored, coupled with counsel's ineffectiveness in failing to adequately investigate petitioner's mental impairments and social history, prevented these doctors from settling on a coherent explanation of petitioner's condition. (See Claims 2, 19, 29, 30, and 33.)

97. During his closing argument, the prosecutor ridiculed the defense and called for petitioner's blood. In an argument which far exceeded the boundaries of prosecutorial propriety, Anderson disparaged petitioner and his attorneys and experts and demanded petitioner's death so that the infant victims could confront him in the afterlife and ask him, "Why, Moochie, why?" With little defense effort made to save his life, petitioner once again had little hope for a life verdict. The jurors, who had privately heard

prejudicial information about petitioner from the bailiff throughout the case, quickly returned a verdict of death. (See Claim 9, 10, 11, and 13.)

98. Because his defense attorneys performed so ineptly, the jury never heard that petitioner's mental illness was the product of profound, debilitating brain damage which affects the orbitofrontal area of petitioner's brain and most of his frontal lobes. This brain damage is the product of a combination of horrifying abuse, inflicted by petitioner's father when petitioner was in utero and in infancy, and prenatal and childhood exposure to such neurotoxicants as lead, mercury, and other heavy metals. (Exhibit 10, Declaration of Karen B. Froming, Ph.D.; see Claim 18.)

99. The jury never heard that petitioner's brain damage was of long-standing, that he had been placed in classes for the emotionally disturbed as early as kindergarten. The jury also did not hear that petitioner's brain damage is so extreme that neuropsychological tests of memory place him in only the first percentile. Because he recalls so little of what he experiences and what he sees around him, he is unable to process information accurately and explains the "holes" in his memory with confabulations and conspiracy theories. He lacks the capacity to control his impulses, fixates on ideas or concepts and cannot shift off them, cannot discern important from unimportant details, and cannot comprehend the intricacies of normal human relationships. Because he cannot grasp or process the information he receives, he cannot think or act in a rational manner. (Exhibit 10, Declaration of Karen B. Froming, Ph.D.; see Claim 18.)

100. As occurs with distressing frequency in death penalty cases, where the stakes are the highest, petitioner's trial was a travesty in which the prosecution's falsehoods were never exposed or even challenged, and the

truth about petitioner was never presented. The writ should issue to correct this miscarriage of justice and permit petitioner to be tried fairly and defended by competent counsel.

Claim 1: Brady Error — Prosecution Misconduct — Withholding of Impeachment Evidence Regarding Payment and Other Favorable Treatment Given to Barbara and Stacey Mabrey

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because the prosecution suppressed impeachment evidence relating to key prosecution witnesses. It is reasonably probable that the outcome would have been different had the evidence been disclosed. Specifically, the prosecution withheld evidence that its star witnesses, Barbara and Stacey Mabrey, had received substantial benefits, including financial consideration and favorable treatment from the prosecution, in exchange for their testimony. Both these witnesses received cash payments delivered by employees of the district attorney's office to the Mabrey's residence at the time these two employees arrived to prepare these witnesses to testify in petitioner's case and to drive the Mabreys to the courthouse to testify. In addition to withholding this startling fact, the prosecution did not inform the defense that between the preliminary examination and the trial the prosecution had dropped charges or declined to press charges five times when Stacey Mabrey was arrested on a total of at least 16 separate felony charges. Moreover, the prosecutor, James Anderson, withheld information that on the morning of the day Stacey Mabrey was to testify in petitioner's case, the prosecutor had learned that a warrant had been issued for Stacey Mabreys'

arrest for a series of bank robberies. The prosecutor had himself instructed police officers not to arrest Stacey Mabrey for these offenses until he had finished testifying. The prosecution also coached witnesses to alter earlier statements or testimony regarding petitioner's mental state and concealed information that Stacey Maybrey, a purported eyewitness to the crimes, was in fact not present when the crimes occurred. The suppression of all this evidence deprived petitioner of his federal and state constitutional rights to due process, the right to confront and cross-examine adverse witnesses, the effective assistance of counsel, a fair and reliable determination of guilt and penalty, trial by an unbiased tribunal, trial by jury, and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Brady v. Maryland* (1963) 373 U.S. 83 (withholding of evidence favorable to accused violates due process); *Giglio v. United States* (1972) 405 U.S. 150 (*Brady* doctrine includes impeachment evidence as well as exculpatory evidence); *United States v. Bagley* (1985) 473 U.S. 667 (same); *United States v. Agurs* (1976) 427 U.S. 97 (*Brady* rules apply to evidence which would affect the outcome on penalty as well as guilt issues); *Mooney v. Holohan* (1935) 294 U.S. 103 (prosecutor's nondisclosure of knowingly perjured testimony violated due process); *Napue v. Illinois* (1959) 360 U.S. 264 (due process violated by false testimony regardless of whether prosecutor solicited it or merely allowed it to go uncorrected); *Miller v. Pate* (1967) 386 U.S. 1 (14th Amendment cannot tolerate prosecution's knowing presentation of false evidence) *Alcorta v. Texas* (1957) 355 U.S. 28 (due process violated when prosecutor failed to correct misleading impression left

by witness's testimony); *DeMarco v. United States* (1974) 415 U.S. 449 (if plea bargain made prior to testimony, reversal of conviction required under *Giglio* and *Napue*); *Donnelly v. DeChristoforo* (1974) 416 U.S. 637 (false evidence includes introduction of specific misleading evidence important to government's case); *Pyle v. Kansas* (1942) 317 U.S. 213 (knowing use of perjured testimony and deliberate suppression of favorable testimony requires reversal); *Imbler v. Pachtman* (1976) 424 U.S. 409 (obligation of prosecution to deal fairly in disclosing information and correcting misinformation continues after conviction); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Douglas v. Alabama* (1965) 380 U.S. 415 (right to confront includes right to cross-examine adverse witnesses); *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause guarantees right to impeach credibility of adverse witness with proof of his prior crimes); *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States*

v. Cronic (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. In support of this claim, petitioner incorporates by reference Claims 2, 4, 5, 19, 23, 24, 47, 48, 77, and 78.

2. On multiple occasions between the killings on December 8, 1986, and the trial in petitioner's case, Caucasian plainclothes detectives or employees of the district attorneys office made cash payments to Barbara and Stacey Mabrey at the Mabrey's residence on 82nd Avenue between Bancroft and MacArthur Boulevard in Oakland. These men also prepared Stacey Mabrey for his testimony at the time at least one of these payments was made. In addition, the men drove Barbara and Stacey Mabrey to and from court on the days they testified. (Exhibit 2, Declaration of Troy Barnes.)

3. On November 18, 1987, during the preliminary examination, the prosecution revealed that Stacey[8] had been arrested for a violent assault on

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[8]To avoid confusion, petitioner will occasionally refer to Stacey and Barbara Mabrey by their first names. No disrespect is intended.

Terry Savage, a friend of Rita Lewis, petitioner's codefendant. (CT 1345.) The prosecution revealed that Stacey had been arrested for the Savage battery on May 10, 1987, but was released and never prosecuted. The prosecution provided a copy of the police report to the defense attorney, Thomas Broome. (CT 1348-1349.) The court ruled that the defense was entitled on the basis of this information to inquire about bias during its cross-examination of Stacey Mabrey. (RT 1347.) Spencer Strellis, Broome's successor as petitioner's counsel, was aware of this information at the time of trial. (RT 4192.)

4. Trial counsel repeatedly requested and received assurance from the prosecutor that this was the only information the prosecution was required to disclose with regard to Mabrey. For example, the court asked lead counsel whether there was "Any discovery you don't have, Mr. Strellis?" Counsel replied, "I'm not aware of any *Brady* material. God knows if there is any I want it." (RT 1795.) The court stated that it would interrogate the district attorney again to see if any discovery requirements had not been complied with: "Because this is a continuing order." (RT 1798.) Subsequently, counsel again confirmed his understanding that he had "an ongoing *Brady* motion and that any *Brady* materials will be turned over . . ." (RT 3762.) Counsel indicated that he would be "outraged" if any such materials were not disclosed. (RT 3762.)

5. In spite of the court's unmistakable instructions to ensure than all *Brady* material was disclosed, the prosecutor proceeded to withhold material impeachment evidence favorable to the defense. Moreover, it is readily apparent that the suppression of this critical evidence was not merely inadvertent, but intentional and in bad faith. The prosecution did disclose

Stacey's single assault incident to the defense during the preliminary examination. However, the prosecution never disclosed that Stacey was arrested numerous times between the conclusion of the preliminary examination and the commencement of petitioner's trial, or that the prosecution had declined to prosecute him for any of these offenses in exchange for his testimony at petitioner's trial. During the period between the preliminary hearing and the trial in this case, Stacey Mabrey became a one-man crime wave, yet he suffered few, if any, consequences for his repeated involvement in drug, firearm, theft, and even bank robbery cases.

6. On October 13, 1988, Stacey Mabrey was arrested for burglary in San Leandro. However, no charges were ever filed for this offense, and discovery provided to the defense in the case of another defendant (though not in this case) revealed that no reason for the decision not to press charges was provided. (Exhibit 45 through 52.)

7. On November 21, 1988, slightly more than one month later, Stacey was arrested and charged for possession of a controlled substance in violation of Health and Safety Code section 11350 and possession with intent to sell a controlled substance in violation of Health and Safety Code section 11351. These charges included allegations that he had been armed with a firearm at the time of the offenses, in violation of Penal Code section 12025. The firearm with which Stacey was armed appears to have been an Uzi-style, Tech 9 machine pistol. Although bail was initially set at $25,000, Stacey was suddenly released and no formal complaint was ever filed. According to subsequent discovery provided in the case of another defendant, no reason was ever provided for the decision not to file on the possession with intent to

sell or the firearm charges. The simple possession charge was dismissed. (Exhibits 45 through 52; Exhibit 2, Declaration of Troy Barnes.)

8. On March 5, 1989, Stacey was again arrested and charged with between four and ten counts of forgery and one or two counts of grand theft.[9] Once again, no formal complaint was ever filed for these offenses. Instead, all counts were dismissed on July 14, 1989, about two months after Stacey testified for the prosecution in petitioner's trial. (Exhibits 45 through 52.)

9. On March 27, 1989, Stacey was again arrested, this time for three felonies: one count of burglary and two counts of forgery. On July 14, 1989, two months after testifying for the prosecution in petitioner's trial, he pleaded guilty to one misdemeanor forgery and the remaining counts were dismissed. (Exhibits 45 through 52.)

10. On May 18, 1989, the day he testified at petitioner's trial, Stacey was arrested and charged with four counts of robbery. Discovery provided to another defendant in a bank robbery case– though again not to the defense in this case– indicated that nearly a month and a half prior to Stacey's testimony in petitioner's case, local and federal law enforcement officials investigating a series of four bank robberies committed by masked men armed with shotguns and explosive devices had focused their investigation on Stacey Mabrey and another man, Troy Barnes. On April 4, 1989, Oakland police learned that a shotgun used in the robberies had been kept at Stacey's apartment. On May 17, the day before Stacey's trial testimony, police learned that Stacey's car matched the vehicle used in the robbery of one of the banks on March 2, 1989. Finally, at 10:30 p.m. on the evening of May 17, the night before Stacey's trial testimony, police obtained a search warrant

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[9]/ Two different documents provide different counts for this arrest.

for Stacey's home, served the warrant, searched the residence, and recovered evidence connecting Stacey to the bank robberies– including coin rolls taken by the robbers. (Exhibits 45 through 52.)

11. The following morning--Thursday, May 18, 1989--at 8:30 a.m., Oakland Police Sergeant Raphael Delgadillo, who was to testify in petitioner's case that morning, informed deputy district attorney James Anderson, the prosecutor in petitioner's case, that Stacey Mabrey was "arrestable" for the four bank robberies. Anderson instructed Delgadillo to wait to arrest Stacey until after he testified in petitioner's case later that day. (Exhibits 45 through 52.)

12. That afternoon at approximately 2:15 p.m., Stacey was sworn as a witness and testified in petitioner's case. Stacey provided critical testimony regarding the incidents leading up to the December 8, 1986 and eyewitness testimony to the killings themselves. Stacey testified that petitioner had been involved in a series of incidents with the Mabrey family in the months prior to the killings. Stacey testified that petitioner had been dating his sister, Dellane Mabrey, during this period. (RT 4111.) He testified that at 3:00 a.m. on the morning of October 29, 1986, he was awakened when Dellane screamed. He woke up and saw petitioner in the hallway carrying a .45 caliber pistol. (RT 4113.) He told Stacey "don't do anything." (RT 4114.) Stacey said petitioner then pointed the gun at Stacey's brother, Darnell Mabrey. (RT 4114.) Later, he slapped Dellane in the face. (RT 4115.) Petitioner was arrested for this incident.

13. Stacey testified that subsequently, on December 7, 1986, his car was hit by a car driven by Vanessa Walker.[10] (RT 4118-4119.) A car in which petitioner, Dolores Walker, and two males, "Billy the Kid" and William Henderson were riding drove up to the scene. (RT 4119.) Petitioner got out of the car with a pistol in his hand and pistol-whipped Stacey's friend Perry. (RT 4120.) Petitioner also punched William before leaving with "Billy the Kid" and Dolores. (RT 4121-4122.) As he left, petitioner kicked Dolores out of the moving car, saying "something about a dog." (RT 4122).

14. Stacey testified that he went to bed that night at 10:00 p.m.. He said he was awakened in the early morning hours by the sound of several gunshots being fired inside the house. (RT 4125.) He testified that he walked into the kitchen and saw petitioner leaving his sister's room and walking into the hallway. Stacey said petitioner was holding an Uzi semi-automatic machine gun. (RT 4126-4127.) Stacey also saw Rita Lewis holding a .38 revolver. (RT 4127-4128.)

15. Stacey said he stepped back into his bedroom and put on his shoes, intending to leave through the back door. (RT 4129.) Instead, he testified, petitioner came into his room, still holding the Uzi, and turned on the light. (RT 4129.) Stacey testified that he hid in the closet and overheard petitioner say "Where's Chuck," a reference to Stacey's 16-year-old brother. (RT 4130.) Stacey said petitioner then turned off the light and left the room, and he heard Lewis saying "Come on, Moochie. Let's go." (RT 4131-4132.) Stacey said he then left out the back door of the house and went to his car. (RT 4132.) He testified that he then heard five more gunshots coming from

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[10]Vanessa Walker and Dolores Walker were unrelated to Catherine Walker, one of the murder victims.

the house and saw petitioner and Lewis come out the front door. (RT 4132.) According to Stacey, petitioner was limping and fell down as he reached the front gate, so Rita Lewis and a third person helped him into a car, which then drove away. (RT 4133.)

16. On cross-examination, Stacey specifically denied having received anything in exchange for his testimony:

> DEFENSE COUNSEL: Have you been offered any benefits whatsoever from the District Attorney's Office in Alameda County, and I don't necessarily mean this gentleman here but any district attorney in Alameda County, that would have benefitted you after these events and before your testimony here today?
>
> MABREY: No.
>
> DEFENSE COUNSEL: So far as you know you have received no benefits whatsoever in exchange or as a result of your testifying here today?
>
> MABREY: No, I haven't.

(RT 4184.)

17. Stacey finished his testimony shortly after 4:00 p.m. As he left the courtroom, he was placed under arrest by Sergeant Delgadillo and Sergeant Brock, and was charged with four counts of robbery in connection with the four bank robberies. However, Stacey was released from custody almost immediately, pursuant to Penal Code section 849, subdivision (b)(1), on the supposed grounds that the arresting officer was convinced there was insufficient evidence to charge him for the robberies. (Exhibits 45 through 52.)

18. On Monday, May 22, 1989, only four days after his testimony, Stacey Mabrey was again arrested, this time for receiving stolen property. Once again, no complaint was filed, and once again the reason for the failure to prosecute was alleged to have been a lack of sufficient evidence. (Exhibits 45 through 52.)

19. Also on May 22, 1989, the next court day after her son, Stacey, had finished testifying, Barbara Mabrey was called as a prosecution witness. (RT 4194.) As her son had done, Barbara also testified that petitioner and her family had serious difficulties with each other during the months before the shooting. Barbara said she had met petitioner in early 1986 (RT 4196, 4197), but that her problems with petitioner intensified over the last few months before the murders. Barbara's daughter, Dellane, was dating petitioner (RT 4010) and claimed that petitioner was Dexter's father. (RT 4198.)

20. Barbara said that she and petitioner had an argument over Dellane in September, 1986. In this argument, Barbara told petitioner to stay away from Dellane. (RT 4199.) According to Barbara, petitioner then broke into the house at gunpoint and took Dexter away from Barbara on October 9, 1986, shortly after Dexter was born. (RT 4200.) Dellane and her infant daughter Valencia (the product of Dellane's relationship with another man, Leslie Morgan), went with petitioner and were gone for three days. (RT 4200, 4201.)

21. A few days later, when Barbara was going to the store, petitioner drove up to her and spat at her from the car window, yelling "bitch, you are dead." (RT 4203.) Petitioner followed her home, striking her in the knee with his car as she tried to flee into her home and laughing as he did it.

(RT 4204-4206) Barbara claimed that petitioner confronted her again at a neighborhood market on October 20, 1986, throwing a liquid into her face. (RT 4209-4210.) She said that petitioner cursed at her, knocked her down and kicked her several times as she lay on the ground. (RT 4210, 4211.) Barbara said petitioner then escaped from the police on his motorcycle. (RT 4211-4214.)

22. Barbara also confirmed many of the details of Stacey's testimony regarding the incident of October 29, 1986. She said that petitioner had entered the Mabrey house about 3:00 o'clock in the morning with a friend called Kenny and confronted Leslie Morgan and Dellane, slapping her in the face. (RT 4214-4216, 4217.) Petitioner pointed the pistol at Barbara, telling her not to get near him, and said that she "better not go to court and testify against him or his people" or else they were going to take care of her. Barbara said petitioner threatened to shoot her arms off first and then her legs and said "I'm going to make you die slow." (RT 4217.) He then pointed the gun at Leslie Morgan, who fled in his underwear. (RT 4218.) Petitioner pointed a .45 caliber pistol towards the floor as he left Dellane's room. (RT 4113.) He told Darnell Mabrey "don't do anything" as he pointed the gun in Darnell's direction. (RT 4219.)

23. Petitioner was arrested for the October 29th incident and wrote Barbara a letter from jail requesting that she drop the charges. (RT 4219, 4221.) He was eventually released on bail. Barbara testified that on December 6, 1986, petitioner came to her house and apologized. (RT 4222, 4341.) She said petitioner also brought his two puppies and played with Dexter. (RT 4223.) One of the puppies, which had been placed in the yard, was missing and petitioner angrily began accusing Darnell, Sean Mabrey, and

Steve Early of taking the dog. (RT 4223, 4224, 4225, 4342.) Denying petitioner's accusation, Early left in his car with petitioner close behind. (RT 4225.) Petitioner, carrying a gun in his waist band, shot through Early's back window as he drove off, all the while saying "you stole my dogs, you motherfucker." (RT 4226.) He also said, as he was leaving, that "You niggers better find my dog or you are all going to die." (RT 4226.)

24. Barbara testified that, on December 7, 1986, the day after the dog incident, petitioner defendant and Rita Lewis, defendant's girlfriend, went to the Mabrey house and asked Barbara Mabrey to not go to court on his cases involving her and talking about the dogs. (RT 4228, 4229, 4346.) Barbara also confirmed the details of the incident following the car accident later that evening when petitioner pistol-whipped Stacey's friend, Perry, and punched William Henderson before leaving with "Billy the Kid" and Dolores. (RT 4232.) Barbara said before petitioner drove off, he shouted that "you Stone City niggers better get my dog or somebody's going to die."[11] (RT 4233, 4357.)

25. Like her son, Stacey, Barbara testified that she too was an eyewitness to the killings. She said that in the early morning hours of December 8, 1986, she woke up to gunshots and heard Dellane screaming "no, Moochie, don't." (RT 4235.) Barbara saw Rita pointing a gun and telling defendant to get out of the way. (RT 4235.) Rita had a pistol in her hands and Barbara heard more gunfire before she escaped out of the house by the rear, running alongside the house onto Pearmain Street, jumping over a fence

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[11]"Stone City" refers to the Stonehurst District in Oakland, California. (RT 4233).

and knocking on her neighbor's door to call the police. (RT 4237, 4240, 4242, 4243.)

26. As noted previously, the prosecution was aware but did not disclose to the defense that Barbara and Stacey Mabrey were both been given cash payments by law enforcement officials at the time they were being prepared to testify in petitioner's case. (Exhibit 2, Declaration of Troy Barnes.) The prosecution was also aware, but did not inform the defense, that Stacey Mabrey had been given consistently favorable treatment in numerous cases in which the prosecution had failed to file charges against Stacey even though he had become a one-man crime wave. Under *Brady* and its progeny (see cases cited, *supra*), as well as venerable California case law, the fact that a witness has been given benefits or favorable treatment in another criminal case in exchange for his or her testimony is material, relevant and admissible at trial to show bias or motive to fabricate testimony. (*People v. Pantages* (1931) 212 Cal. 237, 258; *People v. Phillips* (1985) 41 Cal.3d 29, 45.) Evidence that a prosecution witness has received benefits in exchange for his testimony seriously undermines that witness's credibility. (*Singh v. Prunty* (9th Cir, 1998) 142 F.3d 1157.) Accordingly, the evidence of the assault on Savage, the payments and other considerations given to the Mabreys, and the numerous other pretrial felony arrests was all admissible on the subject of bias and motive to fabricate.

27. The suppressed evidence was material because it is reasonably probable that the result of the proceeding would have been different had the evidence been disclosed. (*United States v. Bagley* (1985) 473 U.S. 667.) A reasonable probability does not require a showing rising to the level of a preponderance of the evidence, but merely a probability

sufficient to undermine confidence in the outcome. (*Id.*, at pp. 682, 685.) Once the evidence has been shown to be material, the error is not subject to harmless error review. (*United States v. Agurs* (1976) 427 U.S. 97, 112; *Kyles v. Whitley* (1995) 514 U.S. 419.)

28. The suppressed evidence in this case was clearly material. It would have severely undercut the credibility of both Barbara and Stacey Mabrey– testimony which went to the very heart of the prosecution's case. Between them, Stacey and Barbara provided the most powerful evidence the prosecution presented tying petitioner to the crimes, and their testimony also provided the jury with virtually the entire prosecution story of the events which led up to the shootings. Indeed, this evidence was such a potent part of the prosecution's case that the prosecutor was willing to violate a standing court order, as well as petitioner's federal constitutional rights, in order to keep it secret from the defense.

29. The materiality of the evidence is underscored by the prosecutor's heavy reliance on the testimony of these two witnesses during his opening and closing arguments at the guilt phase, not only to prove the facts of the case but also to establish such critical elements of his case as intent, premeditation and deliberation, and motive. (RT 3877-3878, 5480, 5490-5491, 5494, 5512, 5520, 5522, 5557.) Prosecutor Anderson relied entirely upon the Mabrey's testimony for evidence he described as petitioner's statement of "intent" to kill the victims– the alleged threat that "you Stone City niggers better get my dog or somebody's going to die, you all dead, or something like that." (RT 5490-5491.) He relied at extraordinary length on the numerous incidents to which Barbara Mabrey had testified as "circumstances attending the act" which demonstrated petitioner's intent,

including the liquor store incident on October 20 and the pistol display in the Mabrey house on October 29. (RT 5494-5497.) He further relied on Barbara Mabrey's testimony to claim that the motive for the killings was petitioner's supposed desire for revenge against her. (RT 5522.) He also compared the credibility of Stacey's testimony favorably to that of the defense mental health experts. (RT 5520.) In addition, in his closing summation at the guilt phase, Anderson improperly sought to elicit sympathy for Barbara Mabrey, noting that she had no family left as a result of the killings. (RT 5557.)

30. The revelation that the Mabreys had essentially been bribed in exchange for providing critical eyewitness testimony would have devastated the prosecution's case. Both had received cash payments from law enforcement officials, and Stacey had effectively been given carte blanche to commit as many crimes as he wished from the preliminary examination through the trial without fear of prosecution. Stacey thus had a powerful motive to testify in a manner which would please the prosecution, and Barbara was similarly motivated not only by the cash payments from the prosecution, but also by her maternal desire to protect her son from prosecution. (See, e.g., *People v. Ruthford* (1975) 14 Cal.4th 399, 405.) Had the information been revealed, the credibility of these two witnesses would have been demolished, and the prosecution's case would have been shaken to its foundations.

31. Although it is clear from the facts regarding his contacts with Officer Delgadillo and others that prosecutor Anderson was aware of benefits given to Stacey Mabrey, petitioner's claim is not dependent upon the prosecutor's personal involvement. Indeed, if any law enforcement employee made these payments or provided other benefits to Stacey or Barbara in

exchange for their testimony or exchanged lenient treatment to Stacey in exchange for the testimony of either Stacey or Barbara, the conduct is imputed to the prosecutor and petitioner is entitled to relief. (*Giglio v. United States*, *supra*, 405 U.S., at p. 154; *People v. Kassim* (1997) 56 Cal.App.4th 1360, 1385-1386.)

32. The materiality of the suppressed evidence and the prejudicial effect of its suppression are also underscored by the fact that the jurors asked to have Stacey and Barbara Mabrey's testimony read back during the guilt phase deliberations. (RT 5640.) This fact indicates how critical and influential the jury believed this evidence was. (RT 5640.)

33. Accordingly, but for the suppression of this information, the jury would have returned a verdict more favorable to the defense at the guilt phase. In addition, because the death verdict at the penalty phase relied upon Mabrey's guilt-phase testimony, and because the prosecutor relied upon it in his closing argument at the penalty phase (see *infra*), the jury would have returned a life verdict at the penalty phase if this startling, material information had been provided to the defense.

34. Furthermore, it was due process error under *Napue v. Illinois* for the prosecution to have failed to correct Mabrey's testimony that he had not received any benefits in exchange for his testimony. The prosecution was aware of the bribery and Mabrey's astonishing history of contemporaneous arrests, and it is simply not credible that the prosecution would decline to press charges against a witness in a murder case who had himself committed a felonious assault against one of the codefendant's relatives, followed by 13 other felonies in the space of seven months just prior to the commencement of trial, unless there was a *quid pro quo* connection between this favorable

treatment and the testimony of the witness. The prosecution had a duty to correct the misleading impression left by Stacey's denial that he had received substantial benefits in exchange for his testimony, and relief must therefore be granted.

35. Moreover, the prosecutor withheld material exculpatory evidence favorable to the defense and suborned perjury by inducing several witnesses to alter their previous statements and testimony to the effect that petitioner was mentally ill or high on drugs and alcohol at the time of the crimes. Stacey Mabrey told police he believed petitioner was "wacked out on heroin and cocaine," but at trial testified that he had not said this "to my knowledge." (RT 4186.) Barbara Mabrey, who testified at the preliminary hearing that petitioner was "crazy," changed her story at trial and adamantly denied that she had ever said any such thing. Instead, she stated that "I never thought he was crazy. He is just plain evil." (RT 4286-4287, 4402-4403.) Barbara Mabrey's story also changed from her police statement of December 7, when she said that petitioner was high on drugs. Leslie Morgan also avoided testifying that petitioner's behavior had ever suggested mental illness. When asked whether petitioner had behaved as "a crazy, violent guy," Morgan testified only that, "he liked to hurt people." (RT 4488.) Angela Payton repeatedly insisted on cross-examination that petitioner was not crazy and denied that a friend had ever said that petitioner was crazy "because the man is not crazy." (RT 4555.) Asked again if she believed petitioner was crazy, she stated, "No he is not," and then reiterated, "That man is not crazy." (RT 4556.) Finally, Beverly Jermany testified that when she saw petitioner on the morning of the homicides, petitioner did not appear to be high on drugs, a statement which flies in the face of the truth, which was

that petitioner was intoxicated on a combination of alcohol, cocaine, and morphine when he arrived at her home shortly after the crimes. (RT 4782-4783; Exhibit 18, Declaration of Rita Lewis.)

36. It is transparently obvious that these witnesses were coached to avoid saying anything on the stand that would indicate that petitioner was either mentally ill or on drugs in order to deprive petitioner of a mental defense which would have produced a not guilty verdict or a verdict with a reduced degree or form of homicide. In addition, all these witnesses knew petitioner well, and it was universally known in the Sobrante Park neighborhood of Oakland that petitioner was mentally ill. (Exhibit 6, Declaration of Thomas Broome; Exhibit 26, Declaration of Konolus Smith; Exhibit 36, Declaration of Billy Williams; Exhibit 7, Declaration of Robert Cross.) Accordingly, even apart from their inconsistent prior statements, it is apparent that all these witnesses knew and believed that petitioner was mentally ill. The fact that one witness changed his or her story on such a point might be explained away, but the fact that *five* prosecution witnesses all avoided making statements they had previously made or which conflicted with the facts on these issues indicates that the prosecution coached the witnesses. 37. Coaching witnesses to change their testimony constitutes not merely the suppression of material evidence favorable to the defense within the meaning of *Brady* doctrine, but also the subornation of perjury, a violation of Penal Code section 127. The elements of the the crime of subornation of perjury consist of: a corrupt agreement to testify falsely; proof that perjury has in fact been committed; the statements of the perjurer were material; and evidence that such statements were willfully made with knowledge as to the falsity thereof. Moreover, one who procures another to

commit perjury must know that the perjurer's statements are false. All these elements are present here.

38. The evidence was material not only because it would have provided the defense with evidence which would have defeated the mental state elements of first degree murder, but also because it would have provided powerful evidence in mitigation at the penalty phase. The materiality of the evidence is also underscored by the fact that the jury requested read-backs of the testimony of four of the five witnesses listed above: Stacey and Barbara Mabrey, Leslie Morgan, and Angela Payton. (RT 5640.) Moreover, as indicated previously, the prosecutor relied extensively upon the testimony of these witnesses in his closing arguments at both the guilt and penalty phases. For the foregoing reasons, it is at least reasonably probable that a more favorable result would have been reached had the evidence not been withheld.

39. In addition, it was error under *Napue, surpa*, for the prosecution not to have corrected testimony the prosecution knew to be false.

40. Finally, the prosecution withheld evidence that Stacey Mabrey was not actually present in the house at the time of the killings, and therefore affirmatively presented false evidence that he was present. (Exhibit 2, Declaration of Troy Barnes.) It is readily apparent that the prosecution coached this witness and his mother, made cash payments to them, came to their residence to prepare their testimony, drove them to and from court, and obtained favorable treatment for Stacey Mabrey in connection with his many other criminal cases. (Exhibit 2, Declaration of Troy Barnes; Exhibits 45 through 52.) The prosecution was accordingly aware of both the importance of Stacey's testimony and the need to ensure that he testified he was actually

present when he was in fact not in the house at all and not a percipient witness to the crimes themselves. The prosecution therefore had a duty not to present this false testimony but to correct the testimony once it had been given. (*Napue v. Illinois* (1959) 360 U.S. 264.)

41. This evidence was material because it would have demolished Stacey's testimony regarding his version of the events which took place inside the Mabrey house on the early morning of December 8, 1986. In addition, this evidence also would have undermined the credibility of Stacey testimony regarding the incidents of October through December of 1986 regarding petitioner's other conduct to which Stacey Mabrey testified. Materiality is again underscored by the prosecutor's heavy reliance on Stacey's testimony in closing argument, and by the jury's request for a read-back of this testimony.

42. It is at least reasonably probable that a more favorable result would have been obtained in absence of the error. As indicated, Stacey Mabrey's testimony was a vital component of the prosecution's guilt and penalty phase case. It comprised a large part of the prosecutor's argument, and the jurors requested that this testimony be read back during their deliberations at the guilt phase. Moreover, Stacey Mabrey's testimony regarding the events of the morning of December 8, 1986, were incorporated into the factors in aggravation pursuant to Penal Code section 190.2, subdivision (a).

D. The facts pertaining to each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, establish a reasonable

probability that the outcome of the trial would have been different if the suppressed information had been disclosed to the defense. A "reasonable probability" of a different outcome is shown when the government's withholding of evidence "undermines confidence in the outcome." (*U.S. v. Bagley, supra,* 473 U.S. 667, 678.)

Claim 2: Judicial Error--Failing to Order a Determination of Petitioner's Competence; Trial While Mentally Incompetent in Fact

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because the trial judge failed to order a competency evaluation and hearing at numerous points during the pretrial, guilt, penalty, and post-trial proceedings even though substantial evidence of petitioner's incompetence was repeatedly presented to the court. Moreover, petitioner was actually incompetent throughout the pretrial, guilt, penalty, and post-trial phases of the case and certainly would have been found incompetent to stand trial or be sentenced. Thus, the court's failure to order a competency evaluation and hearing subjected petitioner to a trial while he was incompetent. The court's errors deprived petitioner of his federal and state constitutional rights to due process of law, equal protection, confrontation, the assistance of counsel, conflict-free counsel, a fair and reliable determination of guilt and penalty, trial only when mentally competent, a determination by a tribunal of mental competence, trial by an unbiased tribunal, and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Dusky v. United States* (1960) 362 U.S. 402 (defendant is incompetent to stand trial if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him") *Pate v. Robinson* (1966) 383 U.S. 375 (failure to observe procedures designed to assure defendant will not be tried or convicted while incompetent violates due process and right to fair trial); *Drope v. Missouri* (1975) 420 U.S. 162 (defendant's conduct after arraignment, such as conduct in court or in jail, may trigger competency proceedings); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky*, 488 U.S. 227 (1988) (confrontation clause violation where defendant not permitted to cross-examine complainant); *Gardner v. Florida,* 430 U.S. 439 (1977) (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma,* 447 U.S. 343 (1979) (federal due process claim in state-created right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates by reference as if fully set forth herein the facts and law set forth in Claims 4, 5, 18, 19, 23, 24, 47, 48, 77, and 78.

2. The conviction of a person while legally incompetent is a violation of federal due process. (*Pate v. Robinson* (1966) 383 U.S. 375.) A criminal defendant is incompetent to be tried, adjudge, or sentenced if, as a result of a mental disease or defect, he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him." (*Dusky v. United States* (1960) 362 U.S. 402; see also, Pen. Code §1368.) A defendant lacks a rational understanding required for competency to stand trial if his mental condition precludes him from perceiving accurately, interpreting and/or responding to the world around him. (*Lafferty v. Cook* (10th Cir. 1991) 949 F.2d 1546, cert. den. 112 S.Ct. 1942 (1992).)

3. When a "bona fide doubt" or substantial evidence of a defendant's competence exists, the court must sua sponte suspend proceedings and conduct a hearing into competence even if the defense does not request one. (*Pate v. Robinson* (1966) 383 U.S. 375, 385; *Drope v. Missouri* (1975) 420 U.S. 162, 172-173; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.3d 714, 716.)

4. In spite of substantial evidence that petitioner was not mentally competent to proceed with trial, including the court's own statements regarding its view of petitioner's incompetency and petitioner's own motion for a competency hearing, the court failed to order a competency determination pursuant to Penal Code section 1368. The court was aware of substantial evidence that, because of mental illness or defect, petitioner was incapable of understanding the nature of the proceedings against him or of

assisting in his defense. Once such substantial evidence became apparent, a bona fide doubt as to his competence existed and competency proceedings were required. (*Pate v. Robinson* (1966) 383 U.S. 375, 385; *People v. Pennington* (1967) 66 Cal.2d 508, 518; Pen. Code §1368.)

5. The court was aware that petitioner's previous attorneys, Thomas Broome and Robert Cross, had made a competence motion prior to the preliminary examination, citing the stress under which petitioner labored as a result of extraordinarily harsh conditions of his confinement in the county jail and the fact that petitioner was unable to assist his counsel in a rational manner. (Exhibit 6, Declaration of Thomas Broome; Exhibit7, Declaration of Robert Cross; Exhibit 12, Declaration of David Irving; Exhibit 13, Exhibit of Dwight Jackson.) These conditions, and their impact upon petitioner's deteriorating mental condition, are described in more detail in Claim 5, which is incorporated by reference as if fully set forth herein. The court was aware that these harsh conditions of confinement continued unabated during the period they represented petitioner, because counsel complained to the court about these conditions and their detrimental effect upon petitioner's mental state. (See, e.g., RT 640-641, 2404-2407, 3060-3033, 3723-3730.)

6. The court also was aware or should have been aware that petitioner had a longstanding reputation within the juvenile and adult justice system in Alameda County for being mentally ill. (Exhibit 6, Declaration of Thomas Broome; Exhibit 7, Declaration of Robert Cross.) Moreover, numerous witnesses had made prior statements or testified at the preliminary examination that petitioner was "crazy" and that this reputation was common knowledge in the East Oakland neighborhoods in which he was raised and lived.

7. The judge also was aware that the court had experienced great difficulty in obtaining counsel for petitioner because of petitioner's reputation within the legal community for being extremely paranoid and, consequently, difficult to deal with. (Exhibit 30, Declaration of Spencer Strellis.) As the court itself later stated (RT 77-79), the court was also aware of petitioner's numerous pro per motions, petitions, and other filings, many of which reflected his intellectual deficits, paranoid and delusional thought content, and impulsive and perseverative tendencies. The judge also was aware that petitioner had made a number of *Marsden* motions on grounds that were at best unusual and at worst bizarre. The judge also was aware that petitioner had sought to disqualify the entire Alameda County Municipal and Superior Court bench from presiding over his pretrial and trial proceedings, and that he had further sought to disqualify all members of the Alameda County bar from serving as his counsel. The theory in both of the later motions was that the parties petitioner sought to disqualify were engaged in a vast conspiracy against him.

8. Moreover, even if the judge had been unaware of substantial evidence of petitioner's incompetence prior to his assignment to the case, he certainly became aware of it in the fall of 1988, months prior to the commencement of trial, when petitioner moved to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806. When the motion came before the judge on November 9, 1988, the judge gave petitioner a *Faretta* questionnaire to fill out that evening in his jail cell. (RT 18-19; see *California Judges Benchbook; Criminal Pretrial Proceedings* (CJER/CEB 1991) §1.49.) On Wednesday, November 16, 1988, the court continued the *Faretta* motion to Monday, November 21, 1988. (RT 44). The trial court

indicated that it would consider the record pertaining to petitioner's previous *Marsden* motions in evaluating petitioner's motion to proceed as his own attorney. (RT 50-54). The trial court appointed Dr. Joseph Sattén, pursuant to Evidence Code section 730, to evaluate petitioner on the sole issue "whether he had the mental capacity and could waive his constitutional right to counsel with a realization of the probable risks and consequences of his action." (RT 59). The court then continued the *Faretta* proceedings until the following Monday. (RT 60.)

9. However, on Thursday, November 17, 1988, petitioner appeared in court with counsel to litigate issues related to petitioner's conditions of confinement. (RT 63-64.) Petitioner began the proceedings by moving to have his attorneys sit in the jury box on the grounds of conflict of interest. (RT 64.) He then asked for appointment of new counsel to represent him "not only through these proceedings but also through any proceedings concerning my 1368 motion that the Court is addressing to." (RT 66.) The court stated that it had no 1368 motion before it, and petitioner responded that it was his understanding that the court had ordered a competency hearing the previous day. (RT 66.) The court stated that it had ordered a psychiatric examination solely on the question of "whether or not you have the mental capacity to waive your right to counsel and proceed in pro per." (RT 66.)

10. Petitioner then requested that he be permitted to retain his own psychiatric experts and asked for a three-week continuance to permit them to examine him. (RT 68-69.) Petitioner further requested "a full-blown trial" on the issue of his competence to stand trial. (RT 70.) Counsel did not join in the competence motion but indicated that "once the Faretta motion is dealt with, then the issue of whether a 1368 is appropriate or not is an issue that

need be looked at, the issue of whether a plea of not guilty by reason of insanity ought be entered or not [is] an issue should be looked at." (RT 71.)

11. Accordingly, the trial judge was aware at this point that trial counsel and his predecessors as counsel entertained not only a substantial doubt regarding petitioner's competence to proceed with trial, but also a doubt as to petitioner's sanity. The court must accord great consideration to the opinion of defense counsel regarding his client's competence because "an expressed doubt in that regard by one with 'the closest contact with the defendant,' is unquestionably a factor to be considered" in deciding whether competency proceedings are required. (*Drope v. Missouri, supra*, 420 U.S. at p. 177, n. 13.)

12. On November 21, 1986, the trial court denied petitioner's motion to represent himself. (RT 75-85). The court determined that the petitioner was not mentally competent to waive counsel and represent himself. The court stated that petitioner's "mental condition in the Court's opinion precludes realistic assessment of the need for assistance and risk of waiving counsel." The court noted that petitioner had repeatedly alleged that conspiracies against him had been formed by various parties within the judicial system, asserting at various times that the court, the district attorney, the defense attorneys and former attorneys, the police, the public defender's office, and others had conspired against him. The court noted that petitioner had alleged that the district attorney had falsified records, that the sheriff's department had falsified the ballistics report, that jail officials were monitoring interviews with psychologists by placing listening devices in the room, that petitioner "engages in verbal displays and interrupts and interferes with the conduct of the courtroom proceedings," that he accused the bailiff of

tampering with his papers, and that he had asked his attorneys to sit in the jury box. (RT 77.) The court further recognizeded that petitioner had made a number of motions "which I am reluctant to describe as frivolous but make really no sense." The court particularly noted petitioner's motion to recuse the entire Alameda County Municipal and Superior Court bench, his motion to renew peremptory challenges each day, and his motion to investigate the victims on the ground of perjury. (RT 78-79.) The court also cited petitioner's own repeated assertions of mental incapacity, such as the fact that he had asserted on November 18th that he was unable to proceed with his *Faretta* or other motions because of stress, the fact that on October 4 he had informed the court he was "at a total mental breakdown" and accused the judge of causing him "mental stress" and "psychological, mental strain." (RT 79.) The court recognized that petitioner had himself asserted either present insanity or incompetence to stand trial under Penal Code section 1368, and that he had requested counsel in a trailing matter after being permitted to represent himself. (RT 79-80, 82-83.) The court then found as follows:

> I find Mr. Welch is a defendant who does not appreciate the extent of his own disability and, therefore, cannot be fully aware of the risk of self-representation. I find the disability of Mr. Welch significantly impairs the capacity to function in a courtroom.
>
> I further find that one of the defendant's reasons he wishes to dispense with defense attorney is a paranoid distrust of everyone connected with the judicial system. This is further evidence to this Court that he lacks the mental capacity to truly waive his right to counsel.
>
> Further, the defendant's history of improper if not irrational behavior in speaking in the courtroom in the

> *Marsden* hearing, 995 hearing further indicates doubt to this Court that he has the mental capacity to waive counsel.

(RT 84-85).

13. The trial court reiterated that petitioner had failed in his showing that he was competent to represent himself and waive counsel, stating:

> You have failed in your showing, and I have decided that a defendant facing the potential death sentence requires the assistance of competent counsel. You do not have the mental capacity to waive.

(RT 86).

14. The court's own findings at this point clearly showed the court was not merely aware of substantial evidence of incompetence, but had also concluded that petitioner was not actually competent. Accordingly, a competency proceeding was compelled as a matter of due process under Penal Code section 1368, *Dusky v. United States* (1960) 362 U.S. 402, and *Pate v. Robinson* (1966) 383 U.S. 375.

15. Although the court should have ordered competency proceedings at the time of the *Faretta* hearing, the court also should have ordered competency proceedings at many other points during the trial when substantial evidence of petitioner's incompetence became evident. These points include, but are not limited to, the following: (1) when petitioner complained of the lack of adequate mental health care (RT 643-645); (2) when petitioner alleged

that a fellow inmate, Michael Willis, had been called the victims' families and stirring up trouble (RT 647); (3) when he alleged that the sheriff's deputies had been going through the legal papers in his cell while petitioner was in court (RT 762-763); (4) when petitioner alleged that the sheriff's department was monitoring attorney-client discussions (RT 1572); (5) when petitioner again questioned his own mental competence (RT 1949); (6) when the court reiterated that petitioner was incompetent to represent himself (RT 2269); (7) when petitioner requested discovery of information regarding Willis, the alleged informant (RT 2404-2407); (8) when petitioner complained that sheriff's deputies in the jail were harassing and insulting him and trying to provoke him into committing violent acts (RT 3060-3063); (9) when petitioner became distraught over one of the court's rulings, used profanity in addressing the court, and allegedly urinated in the "well," a stairwell which connected the courtroom with the jury deliberation room and holding cells on the next floor (RT 3151, 3157-3158, 3171); (10) when the court was so perplexed by petitioner's comments in court that it had to ask defense counsel if they had "any idea what he's talking about?" (RT 3222-3223); (11) when petitioner explained that on the previous day he had been incompetent and incoherent, requested a continuance for medical care, and complained that he was supposed to have seen a psychiatrist but could not because the deputies

were monitoring the interview room (RT 3723-3730); (12) when petitioner was unable to control himself, could not stop talking, had to be removed from the courtroom; and was overheard by the jurors yelling after he was removed (RT 4582-4583); (13) when petitioner made legally improper motions and turned to face the courtroom wall when apparently addressing the court (RT 4932); (14) when petitioner again lost control, acted irrationally, spoke incoherently, had to be removed from the courtroom, pounded on the wall of the "well," and again urinated in the well (RT 4953-4965, 4985); (15) when petitioner insisted on taking the stand (RT 5000); (16) when petitioner complained that he could not understand the proceedings and did not understand why the defense was impeaching its own witness (RT 5261); (17) when petitioner interrupted the court's instructions to the jurors regarding re-reading testimony by objecting to ex parte communications with the jury (RT 5628); (18) when petitioner made statements that were so incomprehensible that the court could not understand what he was saying (RT 5915); (19) when petitioner apparently decided not to present mitigating evidence (RT 5916-5919); (20) when petitioner lost self-control and had to leave the courtroom during the testimony of a defense mental health expert (RT 5950); and (21) when Dr. Benson revealed in testimony that he was unable to interview petitioner because petitioner believed the interview room was bugged and that

everything they said would be monitored and reported to the district attorney (RT 6005).

16. Where, as here, a trial court is aware of substantial evidence of incompetence yet declines to hold a competency hearing and proceeds to try and convict the defendant, the trial court's error is reversible per se. (*People v. Pennington, supra*, 66 Cal.2d at p. 511.) Furthermore, a trial held when a defendant is "mentally incompetent in fact" is an act in excess of jurisdiction and a legal nullity. Such a trial, and any judgment or sentence resulted from it, may be successfully challenged by extraordinary writ. (*In re Dennis* (1959) 51 Cal.2d 666.)

17. Petitioner was mentally incompetent in fact, and his trial, judgment, and sentence are a legal nullity. Had a competency hearing been ordered by the court, all proceedings would have been halted and petitioner would have been committed to a state mental hospital. (Pen. Code §1370.)

18. Prior to and during petitioner's trial, petitioner was examined by two mental health professionals retained by the defense: Dr. William Pierce, a psychologist; and Dr. Samuel Benson, a psychiatrist. Both of these mental health professionals concluded that petitioner was mentally incompetent in fact.

19. Dr. Pierce was retained by Thomas Broome, petitioner's prior counsel, and asked to conduct a psychological evaluation of Mr. Welch for three purposes: 1) to generate a psychological profile that would be relevant to assessing and presenting any mental health defenses; 2) to prepare for the penalty phase if the case should proceed to sentencing; and 3) to determine if petitioner was competent to aid and assist counsel. Subsequently, when the court replaced Mr. Broome with Spencer Strellis, Dr. Pierce continued to advise the defense. (Exhibit 22, Declaration of William Pierce, Ph.D.)

20. Dr. Pierce conducted clinical interviews of petitioner prior to trial, in 1987 and 1988. He also reviewed relevant information about petitioner's social and psychological history, reviewed documents relevant to the charges against petitioner and excerpts of trial transcripts, consulted with counsel, and consulted with Dr. Benson. Following this evaluation, Dr. Pierce concluded that petitioner was not competent to aid and assist counsel due to the nature, severity, and effect of the multiple mental impairments from which he suffers. Dr. Pierce informed petitioner's trial counsel that, in his opinion, petitioner was incompetent to aid and assist counsel. (Exhibit 22, Declaration of William Pierce, Ph.D.)

21. Dr. Pierce concluded that petitioner suffers from a constellation of symptoms that significantly impair his ability to think

rationally and logically and to understand events around him. He believed that petitioner experienced paranoid and grandiose delusions, that are a hallmark of psychotic thinking, and that petitioner was unable to monitor, modulate, or control his impulses in a manner that allow him to consider the consequences of his actions. Pierce felt that petitioner demonstrated tangential thinking, impaired insight, bizarre behavior, and illogical and disordered thinking. He also felt petitioner was preoccupied and obsessed with irrational and delusional beliefs that compromised his reality testing throughout the course of the proceedings against him. (Exhibit 22, Declaration of William Pierce, Ph.D.)

22. Dr. Pierce believed that petitioner's delusions were pervasive and affected every aspect of his thinking relating to the charges against him, his relationship with defense counsel, the role of the court, the motives of the prosecution and presiding judges, his understanding of the law and facts in his case, the relevancy of evidence, and his ability to participate meaningfully in courtroom proceedings and act in his own best interests. Dr. Pierce also determined that due to his multiple mental impairments, petitioner was unable to comprehend and follow basic rules that govern courtroom proceedings and attorney-client relationships. Petitioner was unable to differentiate between harmful and helpful information, appreciate strategic considerations that

routinely develop during the course of a criminal trial, to view and weigh evidence against himself realistically, to understand the consequences of decisions he made, to keep pace with courtroom proceedings, and to conduct himself appropriately. (Exhibit 22, Declaration of William Pierce, Ph.D.)

23. In Dr. Pierce's view, petitioner's mental impairments dominated his behavior and actions throughout the course of the proceedings against him. Petitioner's paranoid and grandiose thinking prevented him from recognizing that his defense attorneys were acting in his best interests. He believed, despite evidence to the contrary, that he was the victim of an overarching conspiracy aimed at denying him basic constitutional rights. He viewed all developments, events, relationships, and proceedings against the backdrop of a conspiracy and was unable to think rationally. He believed that his defense attorneys, the presiding judge, prosecuting attorney, courtroom personnel, law enforcement, counsel for his co- defendant, and state forensic experts were part of the conspiracy. His paranoid delusions about the conspiracy against him resulted in Mr. Welch's repeated motions to dismiss counsel and represent himself, to disqualify the judges assigned to his case, and to replace the district attorney prosecuting his case. (Exhibit 22, Declaration of William Pierce, Ph.D.)

24. Mr. Welch also demonstrated bizarre behavior over which he had little or no control. He felt he was being drugged and his food was being poisoned. He urinated in the stairwell, shouted obscenities, professed to be knowledgeable in the law, inserted irrelevant and at times unintelligible comments during courtroom proceedings, and interrupted defense and prosecution witnesses. He was unable to control his emotional responses to stressful situations and had repeated outbursts during courtroom proceedings. He misperceived reality and interpreted neutral and helpful actions as harmful. He could not heed warnings by the court and was removed from court on numerous occasions. He thought his confidential communications with his attorney and mental health experts were being monitored, despite a court order specifically prohibiting jail staff from monitoring his communications. He requested that the court seize all evidence in his case and turn it over to the U.S. Marshall so that the Department of Justice could investigate the conspiracy against him. He moved to disqualify judges, the entire bench in Alameda County, and the district attorney's office because they were persecuting him. (Exhibit 22, Declaration of William Pierce, Ph.D.)

25. Dr. Pierce also found that petitioner was unable to communicate and to process information rationally. His thinking was

tangential, perseverative, confused, and at times, concrete. Petitioner was unable to move from one topic to another and persisted in repeating the same thought, even after the thought had been clearly rejected by others. He was unable to discern significant from insignificant facts, especially as they related to his defense. He had no insight or awareness of his mental impairments. His ideas and strategies were not grounded in reality and, at times, were absurd. Oftentimes, his statements were nonsensical. For these reasons, Dr. Pierce concluded that petitioner was unable to understand the proceedings or to assist counsel in a rational manner in the defense of his case, and was therefore incompetent to stand trial. (Exhibit 22, Declaration of William Pierce, Ph.D.)

26. Dr. Samuel Benson, the psychiatrist retained by Mr. Strellis to evaluate petitioner, was asked by petitioner's counsel to conduct a comprehensive psychiatric evaluation of Mr. Welch in order to determine Mr. Welch's competency to stand trial, his mental status at the time of the offense, and the presence of statutory and non statutory mitigating factors. conducted five clinical interviews of petitioner in 1989. He also reviewed school records, juvenile court records, adult criminal history, prison records, excerpts of transcripts of the preliminary hearing and trial proceedings showing petitioner's behavior during trial, a factual summary of events

surrounding the offense, police and sheriff reports, and hospital records, and consulted with petitioner's counsel and Dr. Pierce.

27. Dr. Benson found that petitioner met the diagnostic criteria for serious mental disorders, including delusional paranoid disorder (paranoid type) and substance abuse disorder. He also exhibited learning disabilities, speech articulation disabilities, and symptoms of impulsivity and lack of control that are characteristic of neurologic deficits, commonly referred to as brain damage. (Exhibit 3, Declaration of Samuel Benson, M.D.) Dr. Benson determined that petitioner was not mentally competent to stand trial.

28. Dr. Benson determined that the pervasive and persistent nature of petitioner's mental illness robbed him of the ability to participate meaningfully in the proceedings against him, to assist his attorneys in his own defense, and to understand rationally and factually the charges against him. In Dr. Benson's view, the most prominent feature of petitioner's mental disease was his delusional thought process that extended into every aspect of his life and incorporated his relationships and perceptions of himself and others. Petitioner was obsessed and preoccupied with paranoid and grandiose delusions that revolved around a universal conspiracy against him. He showed great vigilance concerning the possible implication of every action, word, or deed and its particular relevance to the universal conspiracy

against him. Petitioner was also excessively rigid about every belief he held, even when it was contrary to clear evidence. Petitioner's mental disorder invaded core aspects of his thinking including his ability to appraise, to evaluate, to forecast, and to plan. It resulted in bizarre, irrational, illogical, self defeating and nonsensical behavior throughout the course of his trial. (Exhibit 3, Declaration of Samuel Benson, M.D.)

29. Dr. Benson discovered that petitioner's persecutory delusions were elaborate and reflected a series of connected themes of being conspired against, spied upon, poisoned and drugged, maliciously maligned, threatened, harassed, and obstructed. His delusions caused him to believe that he was being malevolently treated even when others responded to him neutrally or favorably and to believe that minor slights represented major threats to his well being. He was unable to differentiate between significant and insignificant facts or perceived threats and reality. He had no insight into his delusions and was not aware that his behavior was the result of mental impairments. (Exhibit 3, Declaration of Samuel Benson, M.D.)

30. Dr. Benson believed that petitioner's symptom complex was compounded by his compromised intellectual functioning and his severely impaired ability to control his behavior and respond appropriately to events around him. At the time Dr. Benson evaluated petitioner, he did not have

benefit of of neuropsychological testing that would have shed light on the presence, severity and effect of neurologic deficits that contributed to petitioner's impulsivity, but he strongly suspected that his mental impairments were organic in nature. (Exhibit 3, Declaration of Samuel Benson, M.D.)

31. Dr. Benson also observed petitioner's bizarre, unpredictable, and confused behavior in the courtroom. He noted that petitioner urinated in the stairwell outside the courtroom, shouted obscenities, interrupted proceedings, paced, talked to the wall, laughed inappropriately, and stood or sat at random intervals. It became obvious to Dr. Benson that petitioner lacked the ability to understand the rules of the court and to conduct himself in a manner befitting judicial proceedings. He believed all participants in the trial — including the judge, defense counsel, defense witnesses, prosecution witnesses, bailiff, spectators, jurors, media representatives, and courtroom personnel — were part of a larger conspiracy against him. He believed he was being drugged and his food was being poisoned. He attempted to represent himself, dismiss his counsel, disqualify the judge and prosecutor, cross examine defense witnesses, and introduce inadmissible evidence without understanding the consequences of his actions. His understanding of the law was odd, irrational and illogical. He was unable to understand and follow instructions of the court and his counsel and to accept rules of the

court that were contrary to his idiosyncratic notions of the law. He was unable to comprehend his counsel's strategic considerations and viewed counsel's actions only in the context of his delusions. (Exhibit 3, Declaration of Dr. Samuel Benson.)

32. Dr. Benson's calculus of petitioner's inability to aid and assist counsel took into account petitioner's presentation during his clinical interviews with him, petitioner's behavior in court, his relationship with counsel as well as counsel's efforts to accommodate petitioner's concerns, and the nature of petitioner's longstanding mental disease. Dr. Benson found that petitioner lacked the capacity to make judgments and decisions about the charges and proceedings against him independently of his delusions. His ability to appraise the legal defenses available to him was decimated by his unshakable delusion that the entire judicial system was part of a larger conspiracy against him. He was unable to manage his behavior in court. His delusions distorted and defined his relationship with his counsel. He was not able to appraise the roles of various participants and believed they were all participating in the conspiracy against him. When he agreed to one strategy or course of action, he was unable to adhere to the agreement. His delusions caused him to become overwhelmed with suspicion, obsessive thoughts of

betrayal and intense emotions. (Exhibit 3, Declaration of Dr. Samuel Benson.)

33. Dr. Benson also ascertained that petitioner could not foresee or comprehend the likely outcome of his disruptive behavior on those occasions when he was unable to control his outbursts in court in the presence of the jury. He lacked the capacity to confront appropriately and challenge realistically prosecution witnesses and often confused defense witnesses with prosecution witnesses. Dr. Benson believed that petitioner's persistent pattern of erratic behavior in court reflected his mental deficits rather than volitional choices. His significant brain damage acted synergistically with his mental disorder when proceedings focused on events that were part of his delusional system. He became distraught, agitated, and confused when the court or other participants (including his defense counsel) were unable to view an event or fact in the same delusional frame of reference as he. He obsessed and perseverated on his delusional interpretations of events and facts and lacked the ability to abandon a defeated idea in order to move on to more relevant topics. (Exhibit 3, Declaration of Dr. Samuel Benson.)

34. The contemporaneous opinions of Dr. Pierce and Dr. Benson regarding petitioner's condition have been confirmed by recently performed neuropsychological testing, which reveals that petitioner suffers from

substantial organic impairments affecting the frontal lobes of his brain. In testing conducted over five separate days between March and June, 2002, Dr. Karen Froming administered intelligence and neuropsychological tests, including a complete Halstead-Reitan battery, and concluded that petitioner has an IQ of only 78, which by itself would place him in the borderline range of intelligence. However, Dr. Froming determined that petitioner's frontal lobe impairments have left him with severely limited memory functions[12] and equally severe learning disabilities which she found "have grave consequences for his appreciation of courtroom events and demeanor." (Exhibit 3, Declaration of Dr. Karen Froming.)

35. Dr. Froming found that petitioner "exhibits severe impairments in attention" and that "these impairments involve both his ability to maintain attention, select what matters to attend to, and pay attention to two things at once." Dr. Froming also found that petitioner also has problems in both verbal and nonverbal memory and "requires repetition to encode even a marginal amount of information." In her conclusion, Dr. Froming stated that:

> Mr. Welch's behavioral regulation, as assessed by rapid complex motor tasks, is impaired. He has defective smell

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[12]/ On the Wechsler Memory Scales, tests of verbal and visuo-spatial memory, petitioner's performance was so woeful that his scores consistently placed him in only the first or second percentile.

> identification, indicating orbitofrontal impairments. Impairments in this area also underlie behavioral control. He perseverates on details he does recall or his own idiosyncratic recollection of material. Based on a transcript review as well as previous doctor's reports, these deficits were clearly present in Mr. Welch's courtroom behavior.

(Exhibit 10, Declaration of Dr. Karen Froming.)

36. Petitioner's organic brain impairments may stem from a combination of (1) head trauma suffered prenatally, in infancy, and in childhood as the result of physical abuse inflicted upon petitioner and his mother by petitioner's father, and (2) hand prenatal and life-long exposure to neurotoxicants. (Exhibit 21, Declaration of Sarah Perrine; see also Claim 22 and associated exhibits.)

37. The contemporaneous opinion of Dr. Pierce and Dr. Benson is further supported by a recent psychiatric evaluation performed by Pablo Stewart, M.D. Dr. Stewart met with petitioner at San Quentin State Prison in June, 2002, and found petitioner to be "suspicious, paranoid and delusional." Dr. Stewart noted that petitioner attempted to measure all questions against his delusional frame of reference, which expanded to incorporate all exchanges, considerations, and topics of the interview. Petitioner demonstrated ideas of reference, pressured speech, intrusive thoughts and inappropriate affect, laughing loudly at insignificant and non-humorous comments and becoming upset at benign questions. Petitioner was preoccupied with ideas of reference about an event that occurred in his trial in 1989 when a court reporter or clerk had a desk ornament that petitioner believed had special meaning to him and his case. Once petitioner began describing the ornament, a kind of doll, he perseverated on the subject and could not move on to discuss another event or subject. According to

petitioner, the ornament was proof that a global conspiracy linked his 1989 trial to earlier charges against him in the same county, that courtroom personnel discussed his case outside the courtroom, that the court and district attorney were prejudiced against petitioner, and that his own defense attorney participated in a conspiracy against him. Petitioner was not able to answer questions about other matters or to change subjects. Petitioner became increasingly anxious as he discussed the special meaning of the doll to his life and was obsessed with explaining it to Dr. Stewart. (Exhibit 28, Declaration of Pablo Stewart, M.D.)

38. Dr. Stewart found that petitioner's responses to his questions reflected grandiose and persecutory delusions. Petitioner believed he had garnered enemies because of his stature as an independent thinker who would not bend to those in power. He believed that a far reaching conspiracy controlled all events related to his case in and out of courts. Petitioner interpreted current events on death row, actions of the guards, and relationships with his attorneys as part of the ongoing conspiracy and was vigilant to any detail that supported his delusion. (Exhibit 28, Declaration of Pablo Stewart, M.D.)

39. In Dr. Stewart's view, petitioner's concentration and attention were grossly impaired. He was not able to focus on any aspect of the interview for more than a few seconds or minutes before returning to his ideas of reference. Intrusive thoughts of the doll interrupted his responses and he was extremely distractible. His thinking was tangential. Petitioner was hyper-vigilant and responded to any intervening factor such as noises coming from outside the interview room. Judgment and insight were impaired with no recognition that his beliefs were delusional, idiosyncratic, or irrational. He

had no ability to recognize that his thought process was illogical and attempted to debate nonsensical topics. (Exhibit 28, Declaration of Pablo Stewart, M.D.)

40. Dr. Stewart concluded that petitioner's mental illness and neurologic deficits were serious and longstanding. Dr. Stewart found that petitioner's delusional thoughts constitute reality to him, and he has no insight into the nature and severity of his mental impairments. Dr. Stewart found that petitioner's mental impairments formed the core basis of his bizarre and idiosyncratic understanding of relationships with others. Petitioner is unable to think rationally, logically, and sensibly. Fear, anxiety, suspicion, and paranoia inform his thought process. Compromised intellectual functioning and brain damage limit and restrict his ability to understand events around him. Global paranoia intrudes into his assessment and response to daily tasks and interactions, leaving him unable to comprehend rationally the motives of others. Dr. Stewart formed the opinion that petitioner's behavior at the time of the offenses was the product of a mosaic of mental impairments that included limited intellect, neurologic deficits, disordered thinking, and delusional disorders. (Exhibit 28, Declaration of Pablo Stewart, M.D.)

41. The findings of Drs. Froming and Stewart provide further support for the contemporaneous conclusions of Dr. Pierce and Dr. Benson that at the time of trial, petitioner was not mentally competent. Accordingly, the court's failure to order a competence proceeding sua sponte not only violated the procedural requirements of *Pate v. Robinson* and Penal Code sections 1368 et seq., but also subjected petitioner to a trial while he was not competent to proceed, in violation of his federal constitutional right to trial only when competent. Because a person may not be tried, convicted, or

punished while incompetent, this error is prejudicial per se. (*Pate v. Robinson, supra,* 383 U.S. 375.)

42. In addition, while no showing of prejudice is required under *Pate* and its progeny, trial of petitioner while factually incompetent was extraordinarily prejudicial to the outcome in his case. Petitioner's impulsivity, perseveration, delusions, and other frontal lobe symptoms contributed substantially to the chaos caused by the court's imposition of a bizarre form of hybrid representation, prevented petitioner from cooperating with and assisting counsel in his own defense, and permitted him to be depicted in an unfavorable light before the finder of fact.

43. Trial of petitioner while incompetent was also prejudicial because the prosecutor exploited the supposed lack of evidence of mental illness in his closing arguments at the guilt and penalty phases, on which the jury relied in reaching their verdicts, and which petitioner incorporates herein by reference. At the conclusion of the guilt phase, the prosecutor argued that petitioner was "not delusional" (RT 5520), and argued that petitioner was "rational and clear" on the basis of his cross-examination during the guilt phase. (RT 5564-5564, 5567.) At the conclusion of the penalty phase, the prosecutor also improperly minimized the impact of any mental defense, arguing that "Mr. Welch would have to have an IQ of two and be a zombie to excuse his acts by a mental defense." (RT 6123.)

44. The court's error in failing to order a competency proceeding sua sponte violated his rights under the Eighth and Fourteenth Amendments and the requested relief is required.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 3: Judicial Error--Petitioner's Rights Were Violated by the Court's Imposition on the Defense of an Unworkable Form of Hybrid Representation.

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because he was deprived of due process, equal protection, the right to counsel, effective assistance of counsel, and a reliable determination of guilt and penalty during the pretrial, guilt, penalty, and sentencing phases of his trial when the court unilaterally imposed upon the defense a hybrid form of legal representation permitting petitioner to represent himself at times but requiring him to speak only through counsel at others. The court initially stated that it would permit petitioner to make motions on Fridays but require that he be represented by counsel during the other days of the week. However, this procedure was quickly abandoned, and throughout the proceedings the court alternately heard or refused to hear petitioner's motions and objections virtually at random. This bizarre form of hybrid legal representation, and its chaotic and inconsistent enforcement by the court, contradicted the court's ruling denying petitioner's *Faretta* motion, interfered with the attorney-client relationship, undermined defense counsel by depriving

them of control of the case, rendered the defense utterly chaotic, confused petitioner and his counsel with respect to who was actually representing petitioner, and encouraged petitioner to attempt to participate as his own counsel throughout the case, thereby prejudicing petitioner's case.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (right to effective counsel applies at all phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Faretta v. California* (1975) 422 U.S. 806 (defendant has Sixth Amendment right to self-representation); *McKaskle v. Wiggins* (1984) 465 U.S. 168 (core of *Faretta* right is the right to control the defense presented to the jury, and appointment of standby counsel cannot be permitted to undermine this right); *Maine v. Moulton* (1985) 474 U.S. 159 (after arraignment, accused has Sixth Amendment right to speak through "medium" of counsel; government may not interfere with that right); *Perry v. Leeke* (1989) 488 U.S. 272 (government

may not interfere with defendant's right to counsel); *Geders v. United* States (1976) 425 U.S. 80 (same); *Massiah v. United States* (1964) 377 U.S. 201 (same); *In re Murchison* (1955) 349 U.S. 133 (any procedure which would offer temptation to average man as a judge to skew balance between state and accused denies due process to the latter); *Liteky v. United States* (1994) 510 U.S. 540 (judicial bias established by showing of deep-seated favoritism even if no extrajudicial source of favoritism is shown); *Taylor v. Hayes* (1974) 418 U.S. 488 (judge may become so embroiled in controversy at trial he can no longer maintain balance between accused and state and should recuse himself); *Mayberry v. Pennsylvania* (1972) 400 U.S. 455 (judge who is repeatedly vilified by defendant during trial becomes involved in a running controversy and may lose impartiality); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial) *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The specific facts supporting this claim, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are as follows:

1. Petitioner incorporates by reference as if fully set forth herein the facts and law set forth in Claims 2, 4, 5, 19, 20, 28, 34, and 41.

2. On Wednesday, November 23, 1988, prior to the commencement of jury selection and in spite of its earlier denial of petitioner's *Faretta* motion, the court announced that it would henceforth require a unique and astonishing form of hybrid representation permitting petitioner to represent himself in court at some times but through counsel at others. The court told petitioner that "[d]uring the course of the trial the conduct of the trial will be performed by the attorneys. In addition, I'm going to provide that every Friday, probably from eleven to eleven-thirty until the afternoon, depending upon the size of my calendar, I will reserve it to you to make any additional motion you may want to make."

3. Although petitioner himself objected that this plan was unacceptable, his counsel failed to object to, and acquiesced in, this remarkable form of representation. (RT 156.) From that point on, the court arbitrarily either recognized or refused to recognize petitioner as counsel, sometimes ruling on his motions or objections and sometimes refusing to do so, without regard to the day of the week. The court's procedure created utter chaos in the defense, leaving petitioner and his counsel to present conflicting defenses and confusing them with regard to who was in control of the defense.

4. Moments after issuing the ruling that petitioner would be recognized only on Fridays, and in spite of the fact that this was a Wednesday, the accepted petitioner's handwritten pro per motion for a continuance and denied it, thereby contradicting the court's ruling of that morning and indicating that the court would sometimes permit petitioner to represent himself on days other than Fridays. (RT 162.) The court then permitted petitioner to renew his motion "to participate in the presentation of

this defense," but contradicted itself once again by reiterating that petitioner would only be heard in court on Fridays and would otherwise be permitted to speak only through counsel. (RT 164-165.)

5. That afternoon, the court again advised petitioner he would be heard only through counsel and refused to rule on petitioner's objection to admission of evidence in the form of transcripts. (RT 183-184.) When petitioner attempted to withdraw his in limine motion, the court informed petitioner he lacked standing to address the court and stated that the court would not pay any attention to anything he had to say. (RT 185-186.)

6. On the morning of Tuesday, November 29, petitioner again requested leave to withdraw his in limine motion, and this time the court ruled on the motion, denying it. (RT 187.) However, when petitioner attempted to support his motion with additional case law, the court refused to hear petitioner and stated that he could not "participate in the conduct of the trial except on Fridays." (RT 187-188.) Petitioner then objected to the use of transcripts as evidence, and the court declined to rule on this objection. (RT 188.)

7. That afternoon, petitioner asked to address the court and was permitted to object at length to what he perceived to be his counsel's ineffectiveness and the denial of his Sixth Amendment rights. The court then refused to give petitioner the right to speak except on Fridays. (RT 206.) However, the court then permitted petitioner to state his objection in full, speak again at length on the issue, citing two federal cases, and argue prejudice from counsel's perceived deficiencies. (RT 207.) The court then cut him off and stated that petitioner could make such a motion in writing and the court would rule on it on Friday. (RT 208.)

8. On the afternoon of Wednesday, January 11, 1989, the court permitted petitioner to speak regarding errors made in a supplemental points and authorities filed by counsel regarding a motion to suppress evidence. (RT 877-879.)

9. On Tuesday, January 17, the court permitted petitioner to speak at length, objecting to what petitioner viewed as extensive security in the courtroom and the potential prejudicial impact this might have on his case. (RT 976-978.) At the conclusion of petitioner's presentation, the court asked petitioner, "What is your motion?" (RT 978.) Petitioner stated that the security being imposed in the case was excessive, and the court ruled that "Your motion to decrease the security is denied. There will be two bailiffs in the courtroom and plainclothes in the audience." (RT 979.)

10. Petitioner then moved for an order that his shackles be removed before he entered the stairwell leading to the court, to ensure that jurors who also used that stairwell would not see him in a shackled condition. (RT 979.) The court declined to so order, ruling that "They will be removed before you come to court, not – they can transport whatever way they feel security requires. My only requirement is when you come into the courtroom you will not be shackled." With respect to the danger that jurors might see him in shackles outside the courtroom, the court ruled, "We will work that out." (RT 980.)

11. Petitioner then filed a written motion to strike the special circumstances and written points and authorities. (RT 980-981.) The court read the motion and authorities and permitted petitioner to address the motion. When petitioner submitted the matter, the court ruled that "Your motion to strike the special circumstance is denied." (RT 981.) When

petitioner attempted to reopen the matter, arguing that the court lacked sufficient factual information to rule at this point, the court reiterated that the motion had been denied. (RT 982.)

12. Petitioner then asked to address the change of venue motion, and the court stated "That will be argued tomorrow morning." (RT 982.) Petitioner then requested that he be permitted to be present in the courtroom before prospective jurors were admitted to the court. (RT 985.) The court granted the request. (RT 985-986.) Petitioner then moved that bailiff John Dimsdale be replaced due to prior altercations petitioner had with Dimsdale. The court denied petitioner's motion. (RT 986.) Petitioner then asked that the court admonish the bailiff not to stand immediately behind petitioner when he addressed his counsel. The court stated "I'll handle the bailiff without your request." (RT 987.) The court then twice asked petitioner if "You have anything else?" Petitioner replied that he would not have anything else until he had reviewed the change of venue motion. The court stated that "We'll argue tomorrow." (RT 988.)

13. At this point the prosecutor interjected that he had understood the court had denied petitioner co-counsel status, and the court confirmed that "That's correct." (RT 989.) The prosecutor objected that "we seem to be wasting an awful lot of time hearing his motions." The court explained that petitioner had been unable to make his motions the preceding Friday due to counsel's absence, and the court had therefore permitted him to make motions today instead. (RT 989.) In the future, the court said, petitioner would be permitted to make motions every Friday afternoon. (RT 990.) The prosecutor, though not defense counsel, objected to this procedure, and the court overruled the prosecutor's objection. (RT 990.)

14. On the morning of Thursday, January 19, petitioner asked to address the court and the court refused, stating that "questions can be done this afternoon. There are no questions from you this morning." (RT 1052.) When petitioner said, "Excuse me, your honor," the court abruptly responded, "Don't excuse me. You're not to say anything." (RT 1052.) Petitioner complained about the fact that he was being brought into the courtroom in shackles and asked to be unshackled before he was brought into court. (RT 1053. He also asked that he not be required to sit in shackles in a holding cell for two hours prior to court each day. (RT 1053.) Petitioner then asked the court to explain how many jurors would be voir dired each day, and the court stated "two in the morning, four in the afternoon, except for this afternoon. This afternoon I'm reserving for you to make your motions that I normally would let you do Friday; but I can't do it this afternoon, so you can do that this afternoon." (RT 1054-1055.) Petitioner then asked that the court voir dire more jurors per day in order to ensure his right to a fair and speedy trial, and the court stated, "Your motion is denied. Your motion is denied." (RT 1055.)

15. On Monday, January 30, petitioner moved to have the jury venire panel dismissed because its fairness had not been reviewed by the jury commissioner.[13] The court denied the motion. (RT 1351.) Petitioner also challenged the jury on the grounds that the court would not allow counsel to inquire into jury bias based on the extensive media coverage of the case. The court also denied this motion. (RT 1352.)

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[13]Petitioner's reference to the Sixth Amendment and the due process and equal protection clauses indicates that he was attempting to challenge the jury venire on the grounds that the panel did not constitute a representative cross-section of the community.

16. On Wednesday, February 1, the court permitted petitioner to address the court at length to complain about many of the court's rulings regarding voir dire and to request that the court dismiss his attorneys and appoint prior counsel, Thomas Broome, to defend him. (RT 1472-1474.) The court stated that "the record will indicate your remarks," and when petitioner attempted to expand on his remarks, the court added that "you already made your record." (RT 1474.)

17. On Friday, February 3, the court permitted petitioner to make "any motions you want to make," and petitioner began by objecting that his lead counsel was not present. He stated that he was entitled to be represented by both counsel and would not proceed unless they were present. The court therefore put the matter over until Monday, February 6. (RT 1538-1541.)

18. On Monday, February 6, the court conducted voir dire and then permitted petitioner to make several motions and reserved ruling until petitioner was finished. Petitioner first asked that prospective juror Randy Pennington be excused on the grounds of prejudice. (RT 1564-1567.) Petitioner then renewed his Marsden motion and requested that prior counsel Thomas Broome be permitted to represent him instead of Mr. Strellis and Mr. Selvin. (RT 1567.) Petitioner also requested that the sheriff be ordered to return confiscated legal books. (RT 1569.) Petitioner then asked for a court order to prevent the sheriff's department from monitoring attorney-client interviews. (RT 1572.) Petitioner asked for a continuance to permit him to appear telephonically in federal court for a hearing on February 8 regarding his civil suit against the sheriff regarding conditions of confinement. (RT 1572.) Petitioner then asked for a copy of the minute order instructing the sheriff to treat him like any other prisoner for visitation purposes. (RT 1575.)

The court then denied the motion regarding juror Pennington, denied the motion to replace counsel with attorney Broome, instructed defense counsel to investigate to determine whether petitioner was to be heard telephonically in federal court, and ordered the clerk to provide petitioner with a copy of the minute order. (RT 1575.)

19. On the morning of Tuesday, February 21, the court told petitioner he would not be allowed to make any motions until the afternoon session. (RT 1840.) However, before the morning session had ended, petitioner moved to inspect the records of the jury commissioner and to challenge the composition of the venire panel. He also objected to the dismissal for cause of prospective juror Betty Meyer and other jurors who had expressed an unwillingness to serve as jury foreman. (RT 1854.) The court denied both motions. (RT 1855.)

20. At the beginning of the afternoon session, petitioner asked that the record reflect why he was not permitted to file motions the previous "Thursday or Friday, the normal day for me to file my motions" and why motions had been continued to this date. (RT 1856.) The court explained that there had been a judges' criminal seminar in Monterey and that the court had been obliged to lecture there. (RT 1856.) Petitioner complained that his family had attempted to come and file motions with the clerk but had been informed that the clerk would no longer accept motions from petitioner unless the court and counsel had reviewed them first. (RT 1857.) The court then asked petitioner to sit down and stated that he could file his motions after jury selection had been completed for the day. (RT 1857.) Petitioner then renewed his motion to dismiss the jury panel, and the court denied the motion.

(RT 1858.) Petitioner then made a *Marsden* motion, and proceedings were suspended for a hearing on the issue. (RT 1858, 1860-1868.)

21. At the conclusion of the day's voir dire proceedings, petitioner objected that a black juror had been excused and then requested that the court rule on a motion for change of venue. (RT 1911-1912.) The court stated that "If I have to rule now, your motion is denied." (RT 1913.)

22. On the morning of Wednesday, February 22, petitioner asked to address the court and the court stated it would consider his motions at 2:00 p.m. (RT 1915.) Petitioner then noted that he had several motions pending, and the court responded that the motions had been timely made and would be ruled upon at 2:00 p.m. (RT 1915-1916.) Petitioner asked to be heard "at this particular time," and the court ordered him removed from the courtroom. (RT 1916.

23. During the afternoon session, petitioner returned to the courtroom. He moved to prevent the court from piping the proceedings into his cell through speakers when he was removed from the courtroom because he did not want other defendants to overhear the proceedings. (RT 1942.) The court explained that the law required that petitioner "be able to hear through electronic devices," and petitioner stated, "Well, I'm waiving that right." The court stated "I am not permitting you to waive that right," and petitioner repeated, "I waive that right." (RT 1943.) Counsel then joined in the waiver, and the court again stated it would not allow the defense to waive the right. (RT 1944-1945.)

24. On the morning of Monday, February 27, petitioner objected that his motions had not been heard the preceding Friday and stated for the record his understanding that his motions were to be heard the following day.

The court replied that it had continued petitioner's motions to this morning, and the confused petitioner replied that "my understanding was Tuesday. Since last time it was continued to Tuesday I thought it went to another Tuesday." (RT 1970-1971.) Petitioner then moved for a mistrial on the grounds that he had been subjected to "restraints" in court and also requested again that he be permitted to inspect the jury commissioner's records and to challenge the composition of the jury. (RT 1971-1972.) The court denied the motion to challenge the jury composition, but otherwise did not rule on petitioner's remaining motions. (RT 1972.)

25. During the afternoon session, petitioner again moved for a mistrial. This time he clarified that the restraint of which he complained occurred when he was removed from court by the bailiffs, who took him by both arms and prevented him from gathering his legal papers. (RT 1998.) The court denied petitioner's motion. (RT 1999.) Petitioner read into the record several authorities on excessive use of force. (RT 2000-2001.) Petitioner then renewed his request that the jury panel be dismissed, and the court again denied the motion. (RT 2002-2003.)

26. Later that morning petitioner renewed his earlier motion for funding for expert assistance, and the court responded that it could not properly hear the motion and that counsel already had money for experts. (RT 2054.)

27. On Wednesday, March 1, petitioner moved for a mistrial on the basis of the improper excuse of a juror for cause, and the court denied the motion. (RT 2186.) Petitioner then made a *Wheeler* motion, alleging improper systematic exclusion of jurors on the basis of race. (RT 2188.) The court again denied the motion. (RT 2188.) Petitioner then objected to

the fact that the prosecutor referred to the weapon allegedly used in the commission of the offenses during voir dire, and the court noted the objection for the record. (RT 2189.)

28. On Tuesday, March 7, petitioner requested discovery of documents pertaining to a grievance matter in the jail. (RT 2405.) The court first stated that it lacked jurisdiction over the matter, and then denied the motion. (RT 2406.) Petitioner again moved for discovery of information regarding Michael Willis, the alleged jail informant, and the court again denied the motion. (RT 2407-2408.)

29. On Monday, March 13, petitioner again objected to the composition of the jury and was permitted to address the court at length regarding whether the draw was random. (RT 2578-2579.) The court denied the motion. (RT 2580.) Petitioner then again moved to dismiss the entire jury panel, and the court denied this motion as well. (RT 2582.)

30. On Monday, March 20, petitioner objected to the dismissal of a juror, and the court noted the objection for the record. (RT 2765.) When all the jurors had been dismissed for the day, petitioner objected to the dismissal of another juror and the court again noted the objection for the record. (RT 2759.) Petitioner then addressed the court at length regarding what he alleged to be the sheriff's violations of an earlier court order permitting him access to newspaper subscriptions, and the court referred the matter to defense counsel for investigation. (RT 2760-2764.) Petitioner then asked for an evidentiary hearing regarding the dismissal of a juror, and the court denied the motion. (RT 2764-2765.) Petitioner then addressed the court at length regarding what he believed were ex parte contacts between the court and counsel in chambers. The court denied that petitioner's case was

being discussed in chambers. (RT 2765-2768.) Petitioner then made a *Marsden* motion, a hearing was held, and the motion was denied. (RT 2768-2769.)

31. On Wednesday, March 22, petitioner made a continuing objection to the adequacy of voir dire on death-qualification issues, and the court noted the objection for the record. (RT 2874.) Petitioner then made several objections regarding the voir dire process, objected that his counsel were not making adequate objections, asked that a particular juror be excused, and asked the court to dismiss his counsel. (RT 2876-2878.) The court denied all these motions. (RT 2878.)

32. Later that afternoon, the defense offered to stipulate the to excuse of a juror for financial hardship, and petitioner himself stipulated. (RT 2905.) Counsel then asked to put two brief matters on the record, and the prosecutor also asked to place matters on the record. (RT 2906.) Petitioner then stated, "First of all . . ." and the court told him, "You just be still." Petitioner then stated, "I thought I'm running this," and the court told him he was not. (RT 2906.)

33. On Tuesday, April 4, petitioner objected to physical and psychological abuse he had suffered from Deputy Dennis Higgins. The court stated the grievance could not be filed in court, but then directed petitioner to provide his complaint to counsel so that counsel could file it. (RT 3060-3063.)

34. On Monday, April 10, petitioner objected to his attorneys referring to the ages of the child victims during voir dire. (RT 3233-3234.) The court denied the motion. (RT 3235.)

35. On Thursday, April 13, petitioner complained about harassment by the deputies who transported him to and from the courtroom. (RT 3313-3314.) The court issued an order that the transporting deputies were not to discuss the case with petitioner. (RT 3314.)

36. On Monday, April 24, petitioner complained that his attorney was not informing prospective jurors that it was improper to consider future dangerousness. (RT 3508-3509.) The court then asked petitioner if he was challenging a juror for cause, and petitioner replied that he was. (RT 3509-3510.) The court then denied the motion. (RT 3510.)

37. On Monday, May 8, petitioner explained to the court that he had been assaulted by three sheriff's deputies on the way to court that morning and had suffered several injuries. Petitioner asked the court for an order that he be taken to Highland Hospital to medical treatment. (RT 3704.) He further asked for an evidentiary hearing regarding the incident that morning. (RT 3705.) The court granted the request for medical treatment by jail medical staff, but denied the request to be treated at Highland Hospital. (RT 3705.) Petitioner then requested a continuance, and the court denied this motion. (RT 3707.) That afternoon he again requested a continuance to compose himself, and the court again denied the request. (RT 3711.)

38. On Tuesday, May 9, petitioner again moved for a continuance on grounds of his own mental incompetence, and the court denied the motion. (RT 3725.) Petitioner addressed the court at length regarding his inability to speak to psychiatrists in a private setting, and once again moved for a continuance. (RT 2729.) The court again denied the motion. (RT 3729.)

39. That afternoon, petitioner complained at length regarding his treatment by sheriff's deputies. (RT 3782-3783.) Counsel then asked for an

order instructing the deputies not to discuss the case with petitioner, and the court denied the motion. (RT 3783-3784.) The court did order the deputies to permit petitioner time to assemble his legal papers before leaving court following each day's proceedings. (RT 3785.) The court then reviewed petitioner's motion to exclude evidence, stated it did not understand petitioner's first two points, and denied the remaining two requests, which had sought to exclude expert prosecution testimony regarding ballistic evidence and sought a hearing on the point. (RT 3786.) The court permitted petitioner to continue speaking regarding a number of maters. Finally, petitioner offered to make a showing regarding a change of venue motion and the court responded that petitioner was not "going to make a showing of anything." The court stated that "You're not your own lawyer." (RT 3790.) Petitioner then asked when it would be appropriate for him to make a showing regarding his challenge to the jury panel. The court stated that, "Tomorrow you proceed with any evidence you wish and I will make the ruling." (RT 3794.) The following colloquy took place:

> DEFENDANT: So what I'm saying, if I'm correct, because I'm kind of confused, you're saying I can't rule– comment on the challenge to the jury –
>
> COURT: You can't comment on anything.
>
> DEFENDANT: – change of venue -- change of venue. – but you're saying I can't state the grounds for the dismissal of the jury panel, challenge to the jury panel?
>
> COURT: I didn't say that ay all. I'm saying you don't say anything. That's why you have a lawyer. I let you talk just because I'm trying to be more than fair to you. You have no standing to even talk in this court. You're not the attorney. I'm telling you the only thing

remaining tomorrow is the challenge to the jury panel, after which we will commence getting the jury Monday."

(RT 3794-3795.)

40. The following day, Thursday, May 11, petitioner attempted to discuss the statistical information pertaining to the jury composition issue. In spite of the court's statement of the previous day assuring petitioner he would be permitted to resent any evidence he wished, the court repeatedly cut him off. Petitioner objected that "I can't properly make the motion –" and the court stopped him, stating "You're not making anything. Your lawyers are. I got news for you." (RT 3803.) After that, petitioner repeatedly attempted to discuss the issue, and the court consistently refused to permit him to speak. (RT 3804-3809.)

41. That afternoon, petitioner moved to dismiss the case on the grounds of prosecution and police misconduct, alleging that the deputies had taken his jury selection notes when he was removed from the court earlier. (RT 3816.) The court denied the motion. (RT 3816.) Petitioner then attempted to renew his change of venue motion and the court refused to permit him to do so. (RT 3818.) Petitioner asked that the record reflect the race of all jurors who had been dismissed during voir dire, and the court found this inappropriate. (RT 3820.)

42. On Monday, May 15, during the "Big Spin" portion of the jury selection proceedings, petitioner requested additional peremptory challenges and the court denied the motion. (RT 3841.) Subsequently, petitioner's counsel noted for the record that petitioner had objected to the fact that counsel failed to use all 20 of the peremptory challenges to which the defense was entitled and also noted that petitioner wanted a *Wheeler* motion brought.

(RT 3847.) Petitioner then addressed the court at length on the jury challenge issue. (RT 3847-3848.) The court permitted the district attorney to state reasons for excusing African-American jurors, and the court then ruled that petitioner had not made a prima facie case for a *Wheeler* challenge. (RT 3849.)

43. On Tuesday, May 16, the first day of trial with the jury present, petitioner objected when People's Exhibit 5 (a crime scene videotape) was presented, stating that "the defense is stipulating" to the location where the guns were located but not that petitioner ever possessed them. (RT 3874.) The court told petitioner not to "force me to throw you out" and denied the stipulation. (RT 3875.) Petitioner then asked to have the monitor which was playing the videotape turned to an angle at which he could see it, and the court ordered him removed from the courtroom. (RT 3875-3876.)

44. That afternoon, again in the presence of the jury, petitioner objected to his earlier removal from the courtroom and stated he had a right to be present at every stage f the proceedings. The court agreed, "as long as you follow the rules of court." (RT 3900.) Petitioner continued to address the court on this subject and asked that he not be ejected and returned to the courtroom repeatedly. The court then instructed the prosecutor to continue presenting evidence. (RT 3900.)

45. After the jury was excused for the day, petitioner moved to have juror Howard McGee dismissed from the jury, stating that he attempted to use a peremptory challenge. (RT 3953.) The court told petitioner that "you don't exercise peremptories. Your lawyers do." (RT 3953.) Petitioner then attempted to challenge McGee for cause, and the court denied the

motion. (RT 3954.) Petitioner also argued at length that he had been improperly prevented from challenging juror Sandra Williams by peremptory. (RT 3955.) Petitioner moved for a mistrial, and the court denied the motion.

46. On Wednesday, May 17, petitioner moved to sequester the jury and have them admonished not to read newspapers. The court denied the motion to sequester, but stated that he would admonish the jury after each recess. (RT 3959.)

47. On Monday, May 22, petitioner requested a recess during the middle of his counsel's cross-examination of a witness on the grounds that one of the jurors had been asleep for ten minutes. (RT 4361.) The court did not rule on the motion but instructed petitioner to "be still." (RT 4361.)

48. On Wednesday, May 24, prior to the jury's admission to the courtroom, petitioner moved for dismissal on the grounds that the prosecution had suborned perjury from the preceding three witnesses. (RT 4525.) Petitioner also requested a mistrial on the grounds of prosecutorial misconduct and for witness Leslie Morgan's identification of codefendant Rita Mae Lewis. The court denied these motions. (RT 4525-4526.) Petitioner then again requested that attorneys Thomas Broome and Robert Cross be substituted for his current counsel. (RT 4527.) The court denied this motion. (RT 4527.) Subsequently, in front of the jury, petitioner offered to stipulate regarding the Uzi found by Officer Newman Ng. (RT 4581.) The court ignored the request. Petitioner then asked if his attorneys would be permitted to cross examine as to the witness's previous arrest and guilty plea. (RT 4582.) The court had petitioner removed from the court. (RT 4582.)

49. On Thursday, May 25, petitioner objected before the jury that a question by the prosecutor called for a conclusion by the witness. (RT

4829.) The court admonished petitioner not to object, and petitioner stated his understanding that "I have a right to be heard through counsel or through person (sic) when I'm in court." (RT 4829.) The court stated this was not true and instructed the prosecutor to continue. When the prosecutor again asked the question, petitioner again objected that the prosecutor's question called for a conclusion. (RT 4830.) When the court admonished him not to "act like a– don't be silly," petitioner stated that "I have the right to exercise my, defend myself in person or through counsel." (RT 4830.) The court did not correct petitioner, but simply stated, "Please, sir." The prosecutor continued. (RT 4830.)

50. On the morning of Thursday, June 1, out of the presence of the jury, petitioner requested that the court "stop insulting me and trying to humiliate me." (RT 4930.) Petitioner then moved for a mistrial on the ground that he had been unable to confront and cross-examine his codefendant, Rita Mae Lewis, and because of prejudicial pretrial publicity. (RT 4931-4933.) The court denied the motion. (RT 4935.) Petitioner then moved for an acquittal under Penal Code section 1118.1. (RT 4936.) When defense counsel interjected, suggesting that the court hear petitioner's presentation but defer ruling until all the prosecution's evidence was in, the court responded that "he doesn't have any right to make this motion," but added "if you want to make it, you might as well finish it now." (RT 4937.) Petitioner argued at great length that the evidence was insufficient and that the prosecution had presented perjured testimony. (RT 4938-4940.) The court denied the motion. (RT 4940.)

51. That afternoon, out of the presence of the jury, as the parties were reviewing matters the prosecutor had moved into evidence, petitioner

strenuously objected to what he perceived to be the court's bias and hostility toward him and moved for a mistrial. (RT 4956.) The court denied the motion. (RT 4956.) Petitioner lost control and the court instructed the bailiffs to place him in shackles. Petitioner continued to address the court and protested that his lawyers "ain't putting on no defense at all. My defense. This is not my defense." (RT 4959.) Petitioner repeatedly asked to leave the courtroom, and the court would not permit him to do so. (RT 4959.)

52. On Friday, June 2, out of the presence of the jury, defense counsel sought to call Rita Mae Lewis and petitioner strenuously objected. (RT 4978.) The court ruled that "your lawyer called her, and I can't stop him from calling her." (RT 4978.) Defense counsel explained that he was calling Lewis over his client's objection. (RT 4979.) Petitioner then objected to the witness on the grounds of Evidence Code section 352, and the court denied the motion. (RT 4980.) Lewis declined to answer any questions on Fifth Amendment grounds. (RT 4981.) Petitioner then objected at length to the court permitting counsel to call witnesses in his behalf when he disagreed with counsel's decision. Petitioner again attempted to invoke his rights under *Faretta* and stated that the defense counsel was putting on was "totally not my defense." (RT 4984.) The court stated that based "upon all the evidence and your conduct, that's denied." (RT 4985.)

53. On Monday, June 5, petitioner asked that he be permitted to be the first defense witness. (RT 4986.) The court instructed petitioner to confer with his counsel. Petitioner did so, and his counsel requested a continuance until the afternoon. (RT 5000-5001.) Petitioner objected to the continuance, and petitioner took the stand as the first defense witness. (RT 5001.) Petitioner asked to be permitted to testify in a narrative fashion, and

the court denied the motion. (RT 5002.) Petitioner then asked to have independent counsel, rather than his own counsel, appointed to examine him. The court denied this motion. (RT 5002.)

54. On Tuesday, June 6, during defense direct examination of witness William Henderson, petitioner objected to his own defense attorney impeaching the witness. (RT 5261.)

55. On Wednesday, June 7, petitioner's counsel stated he had no other witnesses, and petitioner objected. He stated he wanted to call several witnesses, including his own physician from Highland Hospital. (RT 5467.) The court denied the motion. (RT 5467.) Counsel then rested, and petitioner continued to argue that he had not been permitted to present a firearms expert. (RT 5468-5469.) Petitioner then moved to have his counsel dismissed and requested permission to present his own witnesses. (RT 5470.) The court denied the motion. (RT 5470.) Petitioner continued to protest that this was "not my defense," and the court ordered him removed from the courtroom. (RT 5471.)

56. That afternoon, in the middle of the prosecutor's guilt-phase summation, petitioner moved for a mistrial. (RT 5488.) His motion was denied and he was removed from the courtroom. (RT 5488.)

57. On Tuesday, June 13, petitioner again objected during the prosecutor's closing argument to the prosecutor's use of victim impact argument. (RT 5556.) He was once again remove from the courtroom. (RT 5556.)

58. That afternoon, petitioner asked for five minutes to address the court regarding jury instructions, and the court granted the request. (RT 5602.) Requested that the court instruct the jury on voluntary manslaughter

as a lesser included offense, specifically requesting that the court read CALJIC No. 8.42. (RT 5602.) Petitioner also requested instructions on provocation, CALJIC No. 8.73, and witness identification, CALJIC No. 2.91. The court denied the motions.

59. On the morning of Wednesday, June 14, petitioner objected to ex parte communications between the court and the jurors and to any communications with jurors outside his presence. (RT 5628.) The court declined to entertain the motion. (RT 5628.)

60. Later that morning, petitioner objected to the court taking judicial notice of its records regarding his prior convictions and moved to set aside the jury verdict. (RT 5677.) The court held this matter in abeyance, stating the court would "take that up after the court session today." (RT 5677.) Petitioner then presented a written motion and objected to the lack of a preliminary hearing regarding the validity of his prior convictions before the evidence was presented to the jury. (RT 5678.) The court permitted petitioner to file the written motion and stated that petitioner "can make any motions you want at 4 o'clock after we finish today's session." (RT 5678.)

61. After the lunch break, out of the presence of the jury, petitioner argued his motion to set aside the jury verdict. The court stated that it had read the motion over the noon hour. Petitioner then moved to challenge the judge for cause and to have the motion to set aside the verdict heard before a different court. The court denied this motion and also denied the motion to set aside the verdict. (RT 5723-5724.) Petitioner then objected to prosecutorial misconduct in argument on the grounds that the prosecutor had improperly argued that petitioner would be unable to adjust to life in prison. Petitioner also objected that the prosecutor had violated the gag order

imposed by the court on contact with the media by the parties. (RT 5724-5725.) Petitioner moved for dismissal and also requested sanctions on the prosecutor. (RT 5726.) The court stated that it would "handle the prosecutor." (RT 5726.)

62. On Wednesday, July 5, petitioner requested that the court provide him with new regulations adopted by the Alameda County Superior Court pertaining to plea bargains, and the court instructed counsel to provide that document to petitioner. (RT 5915-5916.) Petitioner then stated that he did not plan to present mitigating evidence and requested that counsel not present such evidence either. (RT 5916.) Counsel stated that his understanding of the case law was that he was to present mitigation evidence even over his client's objections, and that he therefore intended to put on two witnesses in mitigation over his client's wishes. (RT 5917.) Petitioner then requested a reasonable doubt instruction with respect to uncharged misconduct evidence admitted in aggravation. (RT 5918.) The court agreed to give that instruction. (RT 5918.) Petitioner further requested an instruction stating that in weighing mitigation versus aggravation, the jury was to consider the "quality" of the evidence rather than "quantity" of the circumstances. (RT 5919.) The court also agreed to give this instruction. (RT 5919.) Petitioner then objected to any psychiatric evidence in mitigation. (RT 5919.) The court stated that it would permit defense counsel to present "medical" testimony in mitigation. (RT 5919.)

63. On Thursday, July 6, in the jury's presence, defense counsel sought to rest the penalty phase case, and petitioner asked the court whether he was entitled to testify under the law. The court responded that he was, and

petitioner requested a 24-hour continuance to decide whether to testify. (RT 6105-6106.) The court denied the motion. (RT 6107.)

64. On Monday, July 10, out of the jury's presence, the court asked petitioner if he had decided whether or not he wished to testify. (RT 6108.) Petitioner, understandably confused, stated that he thought the court had given him "five minutes previous to make up this decision, so I didn't never make it up." (RT 6108.) The court then ordered counsel to proceed with closing arguments. (RT 6108.) Petitioner then moved to have the court reporter, James Lee, replaced with another reporter, Rose Pitts, because he believed Mr. Lee was not reporting all occurrences which took place in the courtroom. (RT 6109.) The court denied the motion. (RT 6110.)

65. That afternoon, petitioner objected more than once to his own counsel's closing argument. (RT 6189, 6191-6192.) The court declined to rule on the objection and instructed petitioner he had no standing to make a statement. (RT 6189, 6192.)

66. On Tuesday, July 11, out of the jury's presence, petitioner objected to his lack of participation in the jury instruction conferences and lack of notice regarding which instructions would be given. (RT 6203.) The court stated that petitioner had no right to participate in such discussions. (RT 6203.) Subsequently, before the jury, petitioner objected to an instruction on the elements of assault with force likely to produce great bodily injury, which concerned an alleged assault by petitioner upon his wife, Terry Welch. (RT 6213.) The court stated that petitioner would be removed from the courtroom if he made any further interruptions, and petitioner replied "I don't think the court has to threaten me every time I state an objection for

the record." (RT 6213.) The court ordered petitioner removed from the courtroom. (RT 6213.)

67. On the afternoon of Wednesday, July 12, after the jury returned its verdict fixing the punishment at death, petitioner requested a sentencing death at the earliest possible time. (RT 6231.) Over counsel's request to be permitted until September to investigate and prepare documents, the court granted petitioner's request and set sentencing for two weeks later. (RT 6231-6232.)

68. On Tuesday, July 25, petitioner appeared for sentencing and objected to being required to wear jail clothing in court. (RT 6234.) His objection was noted for the record. (RT 6234.) Petitioner then objected to the probation report and requested it be removed from his file. The court declined to rule on this request. (RT 6235-6236.) Petitioner objected to his counsel's argument that he was mentally ill. (RT 6237.) When counsel had completed his remarks, petitioner asked whether the trailing assault case would be dismissed. (RT 6238.) The prosecutor agreed to dismiss the assault case, as well as a number of misdemeanor counts. (RT 6239.) Petitioner then objected that he had not received a fair trial. (RT 6239.) Petitioner requested a recess to be permitted to review the probation report, and the court denied the motion. (RT 6241-6242.)

69. Later, when the court was formally pronouncing sentence, the court asked whether there was any legal cause why the judgment should not be pronounce, and petitioner stated that "I have been denied of my right to say and control my own destiny where my life is at stake."(RT 6267.) The court made no comment in response, but instead proceeded to pronounce sentence.

70. As the foregoing discussion demonstrates, the court's unilateral decision to impose a form of hybrid representation upon the defense resulted in chaos, confusion, tactical conflicts, trial delays, and left petitioner and his counsel unable to determine when petitioner was being represented by counsel and when he was representing himself. This system of hybrid representation proved extraordinarily prejudicial, particularly when petitioner took the stand and presented a defense totally in conflict with that presented by defense counsel, and when counsel presented a penalty phase defense with which he disagreed. The court's hybrid representation plan directly resulted in petitioner's conviction for six counts of first degree murder and subsequent sentence of death.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 4: Judicial Error--Denial of Self-Representation

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the trial court denied petitioner's motion to represent himself on the basis that petitioner was not competent to do so. This was based solely upon the court's belief without either professional evaluations or a competency hearing. This denial of self-representation, and the bases upon which it was

predicated, abridged petitioner's rights to a fair trial; adequate assistance of counsel; self representation; an adequate competency determination; due process of law in the determination itself and to due process and fair trial rights regarding the unlawful, heightened standard of competency to waive counsel employed by the court; and further denied petitioner's right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; and the right to fair and reliable capital proceedings and sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Faretta v. California* (1975) 422 U.S. 806 (criminal defendant has constitutionally protected right under Sixth and Fourteenth Amendments to waive counsel and represent himself); *McKaskle v. Wiggins* (1984) 465 U.S. 168 (constitutional right to self representation); *Dusky v. United States* (1960) 362 U.S. 402 *(per curiam)* (standard of competency); and *see Godinez v. Moran* (1993) 509 U.S. 389; *Chandler v. Florida* (1981) 449 U.S. 560 (highly publicized criminal trial presents risk of compromising right to fair trial); *Shepard v. Maxwell* (1966) 384 U.S. 333 (external publicity and circumstances deprive defendant right of fair trial); *Estes v. Texas* (1965) 381 U.S. 532 (prejudice presumed where significant media on court proceedings during trial); *Rideau v. Louisiana* (1963) 373 U.S. 723 (prejudice presumed due to crucial pretrial publicity); *Batson v. Kentucky* (1986) 476 U.S. 79 (prosecutor's use of peremptory challenges violation of equal protection); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (prosecutorial misconduct); *Mattox v. United States* (1892) 146 U.S. 40 (fundamental right to impartial

jury): *United States v. Burr* (1807) 25 Fed. Cas. 25, no. 14,692b CCD. Va. (fundamental right to fair and impartial tribunal); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Beck v. Alabama* (1980) 447 U.S. 625 (constitutional requirements in capital proceeding apply to guilt phase); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (jury must determine truths of sentencing factors.)

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates by reference as if fully set further herein all facts and law set forth under Claims 2, 4, 5, 18, 19, and regarding petitioner's lack of competency.

2. In support of this claim, petitioner incorporates by reference as if fully set forth herein the facts and law set forth in Claims 18 through 33, 68, and 69 regarding ineffective assistance of counsel.

3. In support of this claim, petitioner incorporates by reference as if fully set forth herein the facts and laws set forth in Claims 47 and 48 regarding deprivation of the right to competent expert assistance.

4. In support of this claim, petitioner incorporates by reference all claims regarding judicial bias, judicial misconduct and error, as if fully set

forth herein the facts and law set forth in closing Claims 2 through 4, 34 through 54, and 56 through 67.

5. Petitioner made a pretrial motion to represent himself several times during the trial, and did so at the earliest possible time. As early as October 3, 1988, at a pretrial hearing three and one-half months before the start of jury selection, petitioner indicated that he wished to represent himself. (CT 2003, RT 5.) The next day, October 24, 1988, petitioner's motion for self representation was continued to the trial department. (CT 2018, RT 11, 29, 39.) On October 24, 1988, all matters were continued to November 7, 1988. (CT 2065, RT 20.) On November 7, 1988, the matter was continued to November 8, 1988 due to peremptory challenge, pursuant to Code of Civil Procedure section 170.6, to the Honorable Michael E. Ballachey. (CT 2110.) On November 8, 1988, the Honorable Martin M. Pulich continued petitioner's motion for self representation to the trial court for November 9, 1988. (CT 2117, 2120-2123, RT 52, 56-57, 89.)

6. The matter came before trial judge, the Honorable Stanley Golde on November 9, 1988. In the afternoon session, petitioner was given a *Faretta* questionnaire to fill out that evening in his jail cell.[14]

7. At the next court appearance, petitioner's counsel only briefly alluded to the *Faretta* motion. He stated that he was in the uncomfortable position of not knowing whether to speak on petitioner's behalf. (RT 34.) The next day, November 16, 1988, the court continued the *Faretta* motion until Monday, November 21, 1988. (RT 44.) The trial court indicated that

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[14]Neither the record on appeal nor the Superior court file contain a Faretta questionaire completed by petitioner.

it would consider previous *Marsden* motions in evaluating petitioner's motion to proceed as his own counsel. (RT 50-54.)

8. Also on November 16, 1988, the trial court appointed Dr. Joseph Satten, pursuant to Evidence Code section 730, to evaluate petitioner on the sole issue of "whether he had the mental capacity and could waive his constitutional right to counsel with a realization of the probable risks and consequences of his actions." (RT 59.) Petitioner requested that he be entitled to retain his own personal experts to observe him, and further stated that he believed these were in a 1368 proceedings. (RT 68.) The court gave him only two days to hire his own experts, refused to grant petitioner a continuance for his own experts, and definitively determined that the "competency" matter would be heard Monday. Petitioner's inquiries and the court's denials are reflected in the following colloquy:

DEFENDANT:	I'm going to request that I be entitled to retain my own personal experts to observe me, Your Honor.
THE COURT:	Go ahead and hire them.
DEFENDANT:	Huh? Before the proceedings that scheduled for Monday – I believe that's what, five days away.
THE COURT:	The matter's on Monday for me to decide whether or not you should represent yourself.
DEFENDANT:	I'm going to request that that hearing be delayed, Your Honor, and ask for a three-week

	continuance on that motion, Your Honor. It's in order that I can retain my own examine – psychiatrists to examine me, Your Honor. I'm entitled –
THE COURT:	I hired Dr. Satten at the Court's expense to examine you. Your motion for continuance on the Faretta will be denied. I'm going to decide it Monday morning.
DEFENDANT:	Not to the Faretta, Your Honor. My request that – is that I be able to retain my own psychiatrists, experts to examine me and not accept the experts of the Court.
THE COURT:	Your motion to have your own experts is denied.

(RT 68-69.)

By this time, the attorney-client relationship had deteriorated to the point where petitioner wished to have his defense attorneys sit in the jury box because of their perceived conflict of interest. (RT 64.)

9. Petitioner wished to have a "full-blown trial" on the issue of whether he was competent to stand trial or competent to waive his right to assistance of counsel. (RT 70.) He requested a jury trial on his competency. (RT 72.) The court denied this request. (RT 72-73.)

10. On November 21, 1986, trial court denied petitioner's motion to represent himself. (RT 75-85.) The court determined that the petitioner

was not mentally competent to waive counsel and represent himself. The court stated:

> Mr. Welch is a defendant who does not appreciate the extent of his own disability and, therefore, cannot be fully aware of the risk of self-representation. I find the disability of Mr. Welch significantly impairs the capacity to function in a courtroom.
>
> I further find that one of the defendant's reasons he wishes to dispense with defense attorney is a paranoid distrust of everyone connected with the judicial system. This is further evidence to this Court that he lacks the mental capacity to truly waive his right to counsel.
>
> Further, the defendant's history of improper if not irrational behavior in speaking in the courtroom in the Marsden hearing, 995 hearing further indicates doubt to this Court that he has the mental capacity to waive counsel.
>
> (RT 84-85.)

11. The court sharply underscored and reiterated that petitioner was not competent to represent himself or make a waiver. It made the following legal finding:

> You have failed in your showing, and I have decided that a defendant facing the potential death sentence requires the assistance of competent counsel. You do not have the mental capacity to waive.
>
> (RT 86.)

12. The court considered the documents in the file, took notice of the *Marsden* hearing before Judge Ballachey, the proceedings before Judge Pulich, and further parts of the transcript in Case No. 87170, an assault with a deadly weapon and burglary matter which trailed the instant case.

Specifically, the court reasoned that the ability to waive must be deemed to embody some minimal ability to present a personal competent defense, and determined that petitioner did not have that ability. The court found that petitioner's mental condition precluded a realistic assessment of the need for assistance and risk of waiving counsel. (RT 96.) Thus, the court held that petitioner lacked the capacity to waive counsel, yet nonetheless found petitioner capable of actually standing trial. (RT 75.)

13. A criminal defendant who is competent to stand trial has a constitutionally protected right, under the Sixth and Fourteenth Amendments, to waive the right to counsel and represent himself. (*Faretta v. California, supra,* 422 U.S. 806; accord *McKaskle v. Wiggins* (1984) 465 U.S. 168.) The Constitution requires that defendants be made aware of the "dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with his eyes open." *(Faretta v. California, supra,* 422 U.S. 806 at 835.) This standard for competence to stand trial or to waive the right to assistance of counsel is the same. The United States Supreme Court has specifically rejected "the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard." (*Godinez v. Moran* (1993) 509 U.S. 389, 399.) The standard for competence to stand trial is whether defendant has "sufficient present ability to consult with his lawyer and a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." *(Dusky v. United States, supra,* 362 U.S. at p. 403.)

14. The standard for competency to stand trial is not different from the standard for competency to represent oneself. (*People v. Hightower* (1996) 41 Cal.App. 4th 1108.)

15. It is logically and legally inconsistent that petitioner was found mentally incompetent to represent himself and mentally incompetent to waive, but that this incompetence did not even trigger a competency hearing. Where petitioner's competence is in question, self-representation is nullified. However, if it is legally determined, pursuant to the United States Constitution, that petitioner was fully competent and there was no need for a competency hearing, then he was competent to represent himself. (*Faretta v. California, supra,* 422 U.S. 806.) Under these circumstances, petitioner was competent to waive counsel and his ability to serve as counsel in a criminal proceeding should not have been questioned.

16. Petitioner was extremely unhappy with his defense counsel. He made numerous motions to relieve trial counsel, both pretrial and during trial, pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. (RT 89-90, 208, 289, 890-895, 1433, 1567, 157, 1672, 1859, 2269, 2278, 3279, 3454, 3657, 3766, 3957, 4527, 4943, 4959, 4984, 5002, 5372, 5470, 5666, 5916, 6267.) There were 16 *Marsden* hearings or oral motions, during which the conflicts, disagreements and petitioner's displeasure with his defense counsel were set forth. (RT Misc. Vol. 1 Page 8, RT 396-406, 890-895, 1433-1436, 1860-1868, 2769, 3456-3459, 3658-3664, 3768-3779, 3958, 4527, 4943-4950, 5002, 5372-5378, 5470.)

17. Petitioner complained at trial that the defense being put on was not his defense. (See, e.g., RT 4959 ("This is not my defense."); 4984 (defense not putting on his defense); 5002 (lost trust in his counsel); 5471

(defense presented at trial was not his defense); 5666 (petitioner cannot put on any less a defense than his counsel); 6267 (petitioner denied right to any sane control of his destiny).) Petitioner repeatedly made objections to his counsel's presentation of evidence at both the guilt and penalty phase. His removal from the courtroom by the trial judge was more often than not based on his frustration with the defense counsel. (RT 146-147, 191, 210-211, 1918, 3712, 3881, 4527, 4582, 4844, 4954, 4957-4960, 5659, 5950.) It was unequivocally clear that petitioner wished to conduct his own defense, and that his counsel was presenting a defense which he believed was not in his best interest.

18. If it is legally found petitioner was fully competent to stand trial and such competency did not trigger a competency hearing, then under the United States Constitution the denial of his motion to represent himself was a violation of petitioner's constitutional right to a fair trial and due process of law, the right to a trial judge who was unbiased and conducted the proceedings with not only fairness but an appearance of fairness, and the right to fair and reliable capital proceedings and sentence to deny his motion for self-representation. This error is exacerbated because the denial affected both the guilt and penalty phases of a capital case at which petitioner was ultimately sentenced to death.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 5: Prejudicial and Egregious Mistreatment of Petitioner While Incarcerated

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution because petitioner was subject to violent physical and outrageous psychological abuse while incarcerated in the North County Jail awaiting and during the trial in this case. This ongoing treatment of petitioner violated his constitutional rights to a fair trial; due process; a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; a fair and reliable capital proceeding; and his right to protection against cruel and unusual punishment during confinement. The trial judge's repeated failures to correct this were additional constitutional errors. The impact this treatment had on petitioner's mental state before and during trial egregiously and prejudicially affected the case, thereby mandating issuance of the writ.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Hutto v. Finney* (1978) 437 U.S. 678 (confinement in prison or in an isolation cell is form of punishment subject to scrutiny under Eighth Amendment standards); *Whitley v. Albers* (1986) 475 U.S. 312 (wanton infliction of pain constitutes cruel and unusual punishment); *Wolff v. McDonnell* (1974) 418 U.S. 539 (Fifth and Fourteenth Amendments prohibit government from depriving inmate of life, liberty, property without due process of law); *Dent v. West Virginia* (1889) 129 U.S. 114 (due process clause is designed to

protect individual against arbitrary government action); *Estelle v. Gamble* (1976) 429 U.S. 97 (deliberate indifference of prison officials to prisoner's injury or illness may constitute cruel and unusual punishment); *Daniels v. Williams* (1986) 474 U.S. 327 (due process violation where prisoner suffers personal injury or loss of property where prison officials acted oppressively or abusively); *City of Revere v. Massachusetts General Hospital* (1983) 463 U.S. 239 (pretrial detainees must receive at least standard of medical care to which prisoners are entitled – due process clause imposes affirmative obligation on state); *Drope v. Missouri* (1975) 420 U.S. 162 (due process violation for court's failure to make inquiry into petitioner's competency and failure to give adequate weight to pretrial showing of behavior); *Pate v. Robinson* (1966) 383 U.S. 375 (due process violation for failure to conduct competency hearing); *Dusky v. United States* (1960) 362 U.S. 402 (*per curiam)* (trial court must determine whether petitioner has sufficient present ability to consult with attorney in reasonable degree of rational understanding); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates both actual impartiality and appearance of impartiality); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings; *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Gregg v. Georgia* (1976) 428 U.S. 153 (higher degree of reliability of capital proceedings); *Lockett v. Ohio* (1978) 438 U.S. 586, 606-07 (plurality opinion) (right to present mitigating evidence is constitutionally protected); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth

Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others, to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. After petitioner's arrest in this case he was incarcerated in the Alameda County North County Jail. There, he was subjected to brutal physical assaults and beatings.

2. On December 16, 1987 an altercation between petitioner and a deputy, while petitioner was being moved to the staging area, was recorded on Alameda County Sheriff's Department (ACSD) Event Form No. 87-19933 as a 243(b) Battery Against a Peace Officer. However, when petitioner returned to court, his attorney Broome informed the court that petitioner "had been beaten up and was bloody when he came into the courtroom" on the previous day. (RT Misc. Vol. 1 at 21.) Petitioner was x-rayed for a broken rib, and had multiple abrasions on his face and bruises on his ribs. (RT Misc. Vol. 1 at 6-7.) Only a few days later, the court determined that a competency hearing on petitioner's competence to stand trial would not occur. The court was on notice of the wealth of physical injuries that petitioner sustained at the hands of the Alameda County Sheriffs.

3. On April 13, 1989 petitioner stated to the court that he was being harassed by an Alameda County sheriff's deputy, who was putting his fingers in petitioner's face and calling him a "baby killer." The court

responded that it would order the transporting sheriffs "not to discuss anything about this case or any of the allegations." (RT 3313-3314.)

4. Petitioner was beaten by three deputies on his way to court on May 8, 1989. He received bruises and scratches on his face, and his legs and back were hurt. He requested a hearing on the incident and asked if the court had authority to send him to Highland Hospital for an examination. The court responded that it did have the authority, but would not so order. (RT 3704-3707.)

5. Petitioner objected to a Sergeant Herbert making comments about petitioner's mother during recess. Defense counsel asked for a court order that no sheriff's deputy talk to petitioner except during the normal course of business. The court refused to make an order and stated: "I don't understand your client, incidentally." (RT 3780-3784).

6. Petitioner was extensively put on disciplinary diets by the staff of the North County Jail. These "disciplinary diets" were ostensibly utilized as punishment for disciplinary infractions. These include, but are not limited to the following:

1. On November 4, 1987, petitioner received 3 days of a disciplinary diet.
2. On December 22, 1987, petitioner received 3 days of a disciplinary diet.
3. On December 27, 1987, petitioner received 3 days of a disciplinary diet.
4. On January 18, 1988, petitioner received 3 days of a disciplinary diet.

5. On January 19, 1988, petitioner received 3 days of a disciplinary diet.
6. On April 2, 1988, petitioner received 3 days of a disciplinary diet.
7. On April 12, 1988, petitioner received 3 days of a disciplinary diet.
8. On April 13, 1988, petitioner received 3 days of a disciplinary diet.
9. On August 13, 1988, petitioner received 3 days of a disciplinary diet.
10. On August 14, 1988, petitioner received 3 days of a disciplinary diet.
11. On September 23, 1988, petitioner received 3 days of a disciplinary diet.
12. Again on September 23, 1988, petitioner received 3 days of a disciplinary diet.
13. On October 9, 1988, petitioner received 3 days of a disciplinary diet.
14. On December 24, 1988, petitioner received 3 days of disciplinary diet.
15. On January 15, 1989, petitioner received 3 days of a disciplinary diet.
16. On May 22, 1989, petitioner received 3 days of a disciplinary diet.
17. On May 30, 1989, petitioner received 3 days of a disciplinary diet.

7. The Alameda County Jail Disciplinary Regulations state that authorization of medical staff is required before imposing a disciplinary diet on an inmate, "to insure [sic] that there are no medical implications in imposing the diet." (Exhibit 84, Alameda County Jail Disciplinary Regulations, May 1987.) On 17 separate occasions, petitioner was punished with a disciplinary diet. However, no medical staff approved the initial imposition of any disciplinary diet imposed on petitioner, in direct violation of the Alameda County Jail Disciplinary Regulations.

8. Further, the Disciplinary Regulations state that the disciplinary diet "shall not be continued for more than seventy-two (72) hours without the written approval of a physician." (*Ibid.*) On at least four separate occasions, petitioner was sentenced to a three-day disciplinary diet in two consecutive disciplinary periods of time, resulting in six days of a disciplinary diet. The disciplinary diet consisted of two slices of bread, a piece of meat loaf, and water, twice a day. No medical staff ever provided the requisite approval for the prolonged, disciplinary diet imposed upon petitioner. Again, the Alameda County Sheriff's Department/North County Jail contravened their own internal regulations.

9. Disciplinary diets are considered highly damaging to incarcerated individuals, and in instances have been found unlawful and unconstitutional. There was significant testimony on the record from law enforcement officers about the non-use, mis-use and prohibitions on this prejudicial deprivation. On November 30, 1988 Captain Steven Lawrence, Department of Corrections, Sacramento, testified to an incident where he was the correctional lieutenant assigned to Soledad. Petitioner's counsel asked him if they'd ever had a disciplinary diet. Captain Lawrence responded, "I

don't think they ever – I don't know. I don't think they use that any more. I don't think that it's ever been used." (RT 279.)

10. On June 28, 1989 Sergeant Anthony Lee of San Quentin testified that a disciplinary diet is "a hard substance diet of things that [the prisoner] can't throw, things that – and it has to be *ordered by a doctor.*" He further stated, "I've been there ten years, and I've never seen that." (RT 4833-5834 (emphasis added).)

11. On June 28, 1989 Captain Steven Lawrence, DOC Sacramento, testified regarding the disciplinary diet. He stated, "As far as I know, that's by the wayside now. We don't do disciplinary diets." (RT 5865-5866.)

12. Petitioner's counsel was very concerned about the use of disciplinary diets and the impact upon petitioner. The court, however, expressly refused to inquire further as to this putative and egregious form of punishment.

> MR. STRELLIS: You don't want to know what is a disciplinary diet?
>
> THE COURT: Correct . . . I may want to know, but I'm not going to develop this with you. I may ask him later . . .

(RT 569.)

The court never renewed any inquiry about this form of punishment, or its impact upon the physical or mental well-being of petitioner.

13. On numerous occasions, petitioner's legal materials were either confiscated, purposely placed out of order or otherwise disturbed, by sheriff's deputies and other law enforcement personnel:

a. On November 2, 1987, petitioner's counsel stated:

> Even in this courtroom when he has come in to this courtroom on motions that the atmosphere makes it impossible for him to think, that he has not been able to do some things that he wants to do with his legal papers and even persons have gone in to his legal papers and, shall we say, changed or rearranged their general condition such that he has problems relocating things. And certainly all of this goes to the coercion and duress he has been under during the past few months

(CT 780-781.)

b. On December 17, 1987 petitioner stated, inter alia, to the court that, "the sheriff department is confiscating my legal materials, Your Honor . . ." (RT Misc. Vol. 1 at p. 20.)

c. On November 9, 1988 petitioner stated to the judge, "They torn up my few legal files and my folder. I have my folder right now, as you can see is torn up and misarranged, my papers." (RT 3.)

d. On December 1, 1987, petitioner requested a restraining order to prohibit sheriff's deputies from "interfering and searching my cell and my legal materials or any other of the kind out of the presence of the defendant." (CT 1666-1667.)

e. On January 9, 1989, petitioner made the following request:

> DEFENDANT: I wanted to request the Court order the sheriff's department to stop searching my cells, my legal papers, my legal files because every time I look at the legal files it's statements that's been within – received and transcribed by the District Attorney's Office been changed, rearranged . . .
>
> THE COURT: I will order the sheriff not to go through your papers.

(RT 790-791.)

f. However, three days later, petitioner told the court:

> And after I again returned from court proceedings yesterday, again my legal materials has been rambled through and has been ongoing problem since I've been in the North County Jail facility, Your Honor.

(RT 941.)

14. Petitioner was denied normal visitation rights from the time of his arrest up to the time of voir dire. In fact, it required court orders in order for petitioner to receive the visits which all prisoners are allowed:

a. On August 26, 1987 Judge Moore granted petitioner's request for regular visits. (CT 489.)

b. On December 1, 1987 Judge Walsh orally ordered that petitioner was "entitled to the visitation rights of any people who are entitled to them in the North County Jail, no more, no less." (CT 1622.)

c. On October 3, 1988 the petitioner said that he had not had any contact with family or friends, and his counsel agreed that there had been no visits. Petitioner further stated:

> Two years I've been imprisoned by Alameda County Sheriff's Department without visits and contacts with my family. I'm at a total mental breakdown at this point in time in these proceedings.

(RT Misc. Vol. 2 at pp. 4-5 and p. 7.)

d. On November 21, 1988 petitioner stated that his visits were "on and off again for the last two years." Judge Golde ordered petitioner to have the same visitation rights "as any other prisoner in North County Jail." (RT 98-99.)

e. On November 23, 1988 petitioner again brought up visitation. The court responded that the petitioner had the same visiting privileges "that every other prisoner in your situation gets." (RT 161.)

15. Numerous complaints and requests were made to stop the official abuse, mistreatment, physical and mental injury to petitioner, and direct interference with his relationship with his counsel:

a. On June 23, 1987 petitioner's counsel Broome requested relief from restriction of petitioner only being permitted one hour of exercise a day, and only being allowed clothes that did not fit. Judge Parrilli informed Broome that he needed to contact the North County Jail with the request. (CT 491.) Judge Parrilli refused to act on that request.

b. On September 18, 1987 petitioner's counsel Broome asked the court to restrain the sheriff's department from restricting petitioner's diet between that date and a requested hearing on the excessive, putative and egregious discipline exacted on petitioner. The court refused to restrain the sheriff's department from restricting petitioner's diet because, it stated, a court does not have jurisdiction over a sheriff's department. (CT 765-767.)

c. On September 30, 1987 petitioner's counsel Broome informed the court that he had requested petitioner's chains to be removed during attorney-client interviews in jail. He felt that it was impossible to conduct an adequate attorney-client interview or relationship while petitioner was so heavily shackled. He was informed by the sheriff's deputies, "No, by order of the sergeant these chains are to stay on him at all times." (CT 716.)

16. The trial court's failure to promptly ensure the immediate abatement of the physical, mental and emotional abuse of petitioner, and all

unconstitutional conduct by state actors within Alameda County, violated petitioner's rights to a fair trial; protection from cruel and unusual punishment; a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness. The trial court's further failure to take this treatment into account and to act accordingly also violated petitioner's right to a fair trial; due process of law; and a trial judge who was unbiased and conducted the proceedings with no only fairness, but an appearance of fairness.

17. Petitioner was severely prejudiced throughout the guilt and penalty phases by these errors. (Exhibit 2, Declaration of Samuel Benson; Exhibit 30, Declaration of Spencer Strellis.) Further, these errors were particularly egregious in view of the heightened requirement for reliability in a capital proceeding, where death is the potential punishment and the one to which petitioner was in fact sentenced. Accordingly, the requested relief should be granted.

D. Each error in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 6: Juror Misconduct: Private Communications by Bailiff to Jurors of Material, Extrinsic Evidence

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because

during the course of the trial, and prior to both the guilt and penalty verdicts, the bailiff communicated crucial, extrinsic information to the jurors. This information included statements regarding petitioner's alleged urination in the well of the courtroom and material communications that petitioner was violent and had threatened witnesses in his proceeding. None of this information had ever been proffered or admitted in open court. It was material both to petitioner's guilt and penalty, and thereby constituted error mandating reversal. These errors prejudicially impacted petitioner's rights to an impartial jury; a fair trial; rights guaranteed by the confrontation clause; due process; the right to a trial judge and court personnel who are unbiased; and the right to fair and reliable capital proceedings and sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Mattox v. United States* (1892) 146 U.S. 40 (bailiff's communication with a juror in a capital case fundamental error mandating reversal); *Parker v. Gladden* (1966) 385 U.S. 363 (bailiff's subjective statement on defendant's guilt to a juror violated right to impartial jury necessitating reversal of murder conviction); *Turner v. Louisiana* (1965) 379 U.S. 466 (trial by jury constitutionally mandates that evidence developed against criminal defendant shall not be extrinsic); *Irwin v. Dowd* (1961) 366 U.S. 717 (right to jury trial guarantees fair trial by a panel of impartial, "indifferent" jurors); *Estelle v. Williams* (1976) 425 U.S. 501 (unacceptable constitutional risk presented when impermissible factors come into play in the courtroom); *Chandler v. Florida* (1981) 449 U.S. 560 (highly publicized criminal trial presents risk of compromising right to fair trial); *Sheppard v. Maxwell* (1966) 384 U.S. 333

(external publicity and circumstances deprive defendant right of fair trial); *Estes v. Texas* (1965) 381 U.S. 532 (prejudice presumed where significant media on court proceedings during trial); *Rideau v. Louisiana* (1963) 373 U.S. 723 (prejudice presumed due to crucial pretrial publicity); *Batson v. Kentucky* (1986) 476 U.S. 79 (prosecutor's use of peremptory challenges violation of equal protection); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (prosecutorial misconduct); *United States v. Burr* (1807) 25 Fed. Cas. 25, no. 14,692b CCD. Va. (fundamental right to fair and impartial tribunal); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Beck v. Alabama* (1980) 447 U.S. 625 (constitutional requirements in capital proceeding apply to guilt phase); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. During the trial, the jurors developed a uniquely close unconstitutional relationship with the bailiff. (Exhibit 8, Declaration of Joseph Cruz; Exhibit 11, Declaration of Joanne Gonzales; Exhibit 35, Declaration of Bernard Wells.)

2. The bailiff, whom the prosecutor recognized in his closing argument as, "Mr. Dimsdale, the coffee making bailiff and your friend" (RT 6137) took it upon himself to communicate prejudicial, material, out-of-court "evidence" to the jurors during the trial. Alternate juror Bernard Wells, who was present throughout the trial and deliberations, declared:

> *The bailiff fed some jurors information that focused on what a bad man Mr. Welch was. He said that Mr. Welch was threatening witnesses and that even though there were more witnesses against him, some refused to testify because they were too scared of Mr. Welch. On one occasion, the bailiff told us that one of the prosecution witnesses had specifically been threatened and that something might happen to the witness.* Sure enough, during his testimony, from the back of the room came a sudden, loud noise that made all of us startle and look over. It turned to be nothing but an excellent indicator of how much influence the bailiff had over us and our fear. *The bailiff also told us that Mr. Welch urinated in the stairwell on the way to and from court. The bailiff actually showed us where he urinated.* We knew this was the route Mr. Welch took because the bailiff told us that he was housed above the court room and was brought down to the court room. Once, during the guilt phase, I saw Mr. Welch surrounded by guards being escorted to and from the court room, dressed in his court clothes with shackle on his hands and legs. I remember Mr. Welch cradled paperwork he carried in front of hm in his shackled hands. I guess they took his shackles off once he got into the court room. During trial, we also learned, either from the newspapers or from the bailiff, that the police had to fly Barbara Mabrey in to testify

because she was so afraid that Mr. Welch was going to kill her that she refused to live in the area.

(Exhibit 35, Declaration of Bernard Wells at p. 2. (emphasis added.)

3. The bailiff's communication of prejudicial, extrinsic evidence and impact that evidence had upon the jurors, also has been attested to by juror Joseph Cruz:

> *Contributing to the jurors' fear of Mr. Welch was the fact that we learned from the bailiff that witnesses in the case had been threatened, which contributed to the tense atmosphere in the court room.* For example, the bailiff told us about threats made to a specific witness. While that witness was testifying, a loud, bang-like noise came from the back of the court room. Because we were expecting something to happen we all startled and looked to the back. It turned out to be nothing, but we did talk about the noise. I started to become concerned about my own safety, and used to keep an eye out on my way to and from the car. I thought about possible connections Mr. Welch had to the outside world.

(Exhibit 8, Declaration of Joseph Cruz at p.2 (emphasis added.)

4. For over 100 years, the United States Supreme Court has consistently held that such receipt of extrinsic information in a criminal proceeding is prejudicial error compelling reversal. Nowhere is the prohibition against this out-of-court communication more strictly enforced than in a capital case. As the Supreme Court held in 1892, where they reversed a conviction due to such communication:

> It is vital in a capital case, that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any

> ground of suspicion that the administration of justice has been interfered with be tolerated.

(*Mattox v. United States, supra,* 146 U.S. at p. 150.)

5. The unauthorized, extrinsic communication is prejudicial, requiring reversal, even if only one juror became aware of the prejudicial information. (See *Parker v. Gladden, supra, 385* U.S. at p. 366 (a defendant is "entitled to be tried by 12, not 9, or even 10, impartial and unprejudiced jurors."); (*Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612) ("Even a single juror's improperly influenced vote deprives the defendant of an unprejudiced, unanimous verdict."); see also *(Jeffries v. Wood* (9th Cir. 1997) 114 F.3d 1494 (en banc) (cert. den.) 522 U.S. 1007) (granting habeas relief, vacating death sentence and aggravated murder conviction because one juror informed another juror that defendant had a criminal record).)

6. In *Parker v. Gladden, supra,* 385 U.S. 363, the United States Supreme Court held that a bailiff's comments to a juror, which were more innocuous than those in the present case, violated the Sixth Amendment and thereby granted the defendant, convicted of murder, a new trial. The rights underscored by the United States Supreme Court command the same result in the instant case.

> We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that "the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and] be confronted with the witnesses against him . . . " As we said in *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965), "the evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the

> defendant's right of confrontation, of cross-examination, and of counsel." Here there is dispute neither as to what the bailiff, an officer of the State, said nor that when he said it he was not subjected to confrontation, cross-examination or other safeguards guaranteed to the petitioner. Rather, his expressions were "private talk," tending to reach the jury by "outside influence." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). We have followed the "undeviating rule," *Shepard v. Maxwell*, 384 U.S. 333, 351 (1966), that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial. *Kirby v. United States*, 174 U.S. 47, 55, 56 (1899); *In re Oliver*, 333 U.S. 257, 273 (1948); *Pointer v. Texas*, 380 U.S. 400 (1965).

(*Parker v. Gladden, supra,* 385 U.S. at pp.365-366.)

7. The extrinsic communication here had an immediate, demonstrable impact on the jurors who heard it. It made them deeply afraid of petitioner. (Exhibit 35, Declaration of Bernard Wells; Exhibit 8, Declaration of Joseph Cruz.) It made them afraid of being in the courtroom. It made them afraid to walk to their cars. (Exhibit 11, Declaration of Joanne Gonzales.) Significantly, the bailiff's secretive, unsubstantiated "facts" about petitioner's alleged threats directly supplied a material element in both the guilt and penalty arguments of the prosecution's case. (RT 5569.) In his penalty phase closing argument, the prosecutor repeatedly warned the jurors that if they did not send this petitioner to death, he would commit hypothetical violent acts. (RT 6138-6142.) He further directed the jury that they "have a responsibility for those other persons who may or may not deserve Moochie Welch." (RT 6138.) He argued that it was necessary to impose death, because:

> You give him life without parole and everytime [sic] he goes to the yard for exercise, you give him life without parole, everytime [sic] he is escorted to the shower or to have a visit you are going to have hundreds of Harry Lords and Roy Gowins. Do you want that on your conscience?
>
> A vicious killer of six who is dangerous to this day, even by both his witnesses. Who hates authority figures. Who will come into contact with guards and others for the rest of his life if you give him that benefit, if you excuse his conduct and not give him the death penalty. There will be hundreds and more Deputy Lords with broken ribs and hundreds more correctional officer Gowins with feces in the face and split skulls.

(RT 6139.)

8. The bailiff's unconstitutional communication was not an isolated incident. Rather, in this case the bailiff had a uniquely close relationship with the jury throughout the trial. The bailiff took the jurors out to eat and to shop during the deliberations. The bailiff also drove the jurors to Pier 1 Imports, "so the women could get some shopping done while the men sat around and talked." (Exhibit 35, Declaration of Bernard Wells, at p. 4.) Juror Cruz declared, "A few times the bailiff took us in a van to restaurants outside the vicinity of the courthouse. I remember we ate at the Gingerbread House and Mexicali Rose in Alameda. Even the alternates were included with us, ate with us, and joined in our discussions." (Exhibit 8, Declaration of Joseph Cruz at p. 3.)

9. The personal relationship between the bailiff and the jurors even extended to the bailiff's family. Juror Joanne Gonzales declared, "I recall the bailiff was expecting a baby. During a two-hour lunch break, we jurors threw

him a baby shower. His wife was present as well." (Exhibit 11, Declaration of Joanne Gonzales.)

10. There were other unique circumstances contributing to the constitutional error and prejudice in this case. Jurors provided information about the case to other jurors, based upon newspapers they read about the case during the trial. As alternate juror Bernard Wells stated:

> The information provided by the bailiff and the newspapers jurors read during the trial about this case really made a number of jurors think badly of Mr. Welch. Not long after we started hearing all of this information during the guilt phase testimony, some of the jurors started saying that Mr. Welch was threatening them.

(Exhibit 35, Declaration of Bernard Wells at p. 3.)

This receipt of extrinsic evidence from the media during trial was corroborated by juror Joseph Cruz. "Because there was so much press, it was hard not to read anything in the papers. Stuff did end up coming in from the newspapers." (Exhibit 8, Declaration of Joseph Cruz at p.3.) Bernard Wells underscored the impact and import of this extrinsic information in the deliberations. "The information we received outside the courtroom became the main focus of our deliberations." (Exhibit 35, Declaration of Bernard Wells at pp. 2-3.)

11. Mr. Wells, an alternate, was present during those deliberations. *(Id.* at p. 1.) There were, in fact, four alternate jurors who potentially acted as jurors in determining the appropriate verdicts. In fact, juror Cruz referenced alternate juror Wells as "One juror, who had an active part in the deliberations". (Exhibit 8, Declaration of Joseph Cruz at p.1.)

12. The communication and receipt of material, extrinsic evidence denied petitioner his rights to a fair trial; impartial tribunal; confrontation clause rights; due process; and a fair and reliable capital proceeding and sentencing determination.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 7: Prejudicial Courtroom Atmosphere

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because throughout the trial the jury was exposed on an almost daily basis to the shouts of spectators in the courtroom clamoring for the jury to execute petitioner. This heated, vengeful atmosphere influenced the jury's verdict and prejudicially denied petitioner's rights to an impartial jury; a fair trial; rights guaranteed by the confrontation clause; due process; the right to an unbiased trial judge; and the right to fair and reliable capital proceedings and sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Mattox v. United States* (1892) 146 U.S. 40 (bailiff's communication with a juror in a capital case fundamental error mandating reversal); *Parker v.*

Gladden (1966) 385 U.S. 363 (bailiff's subjective statement on defendant's guilt to a juror violated right to impartial jury necessitating reversal of murder conviction); *Turner v. Louisiana* (1965) 379 U.S. 466 (trial by jury constitutionally mandates that evidence developed against criminal defendant shall not be extrinsic); *Irwin v. Dowd* (1961) 366 U.S. 717 (right to jury trial guarantees fair trial by a panel of impartial, "indifferent" jurors); *Estelle v. Williams* (1976) 425 U.S. 501 (unacceptable constitutional risk presented when impermissible factors come into play in the courtroom); Chandler v. Florida (1981) 449 U.S. 560 (highly publicized criminal trial presents risk of compromising right to fair trial); *Sheppard v. Maxwell* (1966) 384 U.S. 333 (external publicity and circumstances deprive defendant right of fair trial); *Estes v. Texas* (1965) 381 U.S. 532 (prejudice presumed where significant media on court proceedings during trial); *Rideau v. Louisiana* (1963) 373 U.S. 723 (prejudice presumed due to crucial pretrial publicity); *Batson v. Kentucky* (1986) 476 U.S. 79 (prosecutor's use of peremptory challenges violation of equal protection); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (prosecutorial misconduct); *United States v. Burr* (1807) 25 Fed. Cas. 25, no. 14,692b CCD. Va. (fundamental right to fair and impartial tribunal); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Beck v. Alabama* (1980) 447 U.S. 625 (constitutional requirements in capital proceeding apply to guilt phase); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); and

including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Prior to and during petitioner's trial, there was extensive publicity regarding what the prosecutor, in his opening guilt phase argument, called a trial "about a day of infamy . . . Oakland's day of infamy, December 8, 1986, 45 years and one day after the attack on Pearl Harbor." (RT 3870.) (See RT 5478, closing guilt phase argument.) The publicity at the time of this case was similarly inflammatory. In support of this claim, petitioner incorporates by reference Claim 53, Failure to Change Venue.

2. There were a number of extrinsic influences on the jurors during both the guilt and penalty phases, and some of these caused the jurors to actually feel threatened. Because of extrinsic information communicated to the jurors by the bailiff the jurors believed there could be violence in the courtroom. One juror was so afraid she asked the bailiff to walk her to the parking lot. (Exhibit 8, Declaration of Joseph Cruz at p.3; Exhibit 35, Declaration of Bernard Wells at p. 3; Exhibit 11, Declaration of Joanne Gonzales.)

3. It was within this environment the jury was exposed to repeated, prejudicial outbursts by spectators. According to juror Joanne Gonzales:

> During the trial, there were many, many loud outbursts by courtroom spectators, all of whom hated David. They yelled such things as "The jury is going to make you fry!" It was quite distracting, and happened just about every day.

(Exhibit 11, Declaration of Joanne Gonzales.)

4. The United States Supreme Court and the United States Court of Appeals for the Ninth Circuit have reaffirmed the longstanding right of a criminal defendant to be tried in an atmosphere undisturbed by public passion. (*Irwin v. Down* (1961) 366 U.S. 717, 728.)

The highest Court has instructed that:

> The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." . . . "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

(*Turner v. Louisiana, supra,* 379 U.S. at p. 472-473 quoting *Irvin v. Dowd, supra* 366 U.S. at p. 722.) *(See Norris v. Risley* (9th Cir. 1989) 878 F.2d 1178 (reversing denial of writ of habeas corpus where petitioner's right to fair trial was jeopardized by spectators wearing Women Against Rape buttons.)

5. The atmosphere in petitioner's courtroom created by the daily taunts and prejudicial outbursts of spectators constituted reversible error.

> The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial "in a courtroom presided over by a judge." (*Rideau v. Louisiana*

> (1963) 373 U.S. 723, 727.) There can be no doubt that they embrace the fundamental conception of a fair trial, and that they exclude influence or domination by either a hostile or friendly mob. There is no room at any stage of judicial proceedings for such intervention; mob law is the very antithesis of due process.

(*Cox v. Louisiana* (1965) 379 U.S. 559, at p. 562.)

6. In petitioner's case, there was an unacceptable risk of impermissible factors coming into play, due to the spectators' repeated outbursts within the forum in which petitioner's life was at stake. Indeed, one juror declared that this volatile environment was relentless and "distracting." These circumstances were "so inherently prejudicial as to pose an unacceptable threat" to petitioner's right to a fair trial. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 572.) At a minimum, this assaultive barrage dissuaded the jury from their constitutionally mandated duty. This error was prejudicial and denied petitioner's rights to an impartial jury; a fair trial; rights guaranteed by the confrontation clause; due process; the right to a trial judge and court personnel who are unbiased; and the right to fair and reliable capital proceedings and sentence.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 8: State Misconduct – Tampering With Exculpatory Forensic Evidence

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because the prosecution suppressed, destroyed, tampered with, and failed to preserve evidence the materiality and exculpatory nature of which was apparent before its destruction, and which petitioner would have been unable to obtain by other means. The prosecution suppressed, destroyed, tampered with, and/or failed to preserve blood drawn from petitioner at the time of his admission to Highland Hospital on December 8, 1986, which had not been subjected to a quantitative analysis, and which would have showed that petitioner was intoxicated on alcohol, cocaine, and morphine to such a degree that he could not have formed and did not actually form the mental states required for first degree murder. The suppression, destruction, tampering, and failure to preserve this evidence also constituted prosecutorial misconduct. The state's misconduct regarding this evidence deprived petitioner of his federal and state constitutional rights to due process, the right to confront and cross-examine adverse witnesses, the effective assistance of counsel, a fair and reliable determination of guilt and penalty, trial by an unbiased tribunal, trial by jury, and a fair trial.

B. The following United States Supreme Court decisions, *inter alia*, in effect at the time the errors occurred, are presented in support of this claim: *Arizona v. Youngblood* (1988) 488 U.S. 51 (state's bad faith failure to preserve material evidence violates due process); *Brady v. Maryland* (1963)

373 U.S. 83 (withholding of evidence favorable to accused violates due process); *California v. Trombetta* (1984) 467 U.S. 479 (state's duty to preserve evidence); *Giglio v. United States* (1972) 405 U.S. 150 (*Brady* doctrine includes impeachment evidence as well as exculpatory evidence); *United States v. Bagley* (1985) 473 U.S. 667 (same); *United States v. Agurs* (1976) 427 U.S. 97 (*Brady* rules apply to evidence which would affect the outcome on penalty as well as guilt issues); *Mooney v. Holohan* (1935) 294 U.S. 103 (prosecutor's nondisclosure of knowingly perjured testimony violated due process); *Napue v. Illinois* (1959) 360 U.S. 264 (due process violated by false testimony regardless of whether prosecutor solicited it or merely allowed it to go uncorrected); *Miller v. Pate* (1967) 386 U.S. 1 (14th Amendment cannot tolerate prosecution's knowing presentation of false evidence) *Alcorta v. Texas* (1957) 355 U.S. 28 (due process violated when prosecutor failed to correct misleading impression left by witness's testimony); *DeMarco v. United States* (1974) 415 U.S. 449 (if plea bargain made prior to testimony, reversal of conviction required under *Giglio* and *Napue*); *Donnelly v. DeChristoforo* (1974) 416 U.S. 637 (false evidence includes introduction of specific misleading evidence important to government's case); *Pyle v. Kansas* (1942) 317 U.S. 213 (knowing use of perjured testimony and deliberate suppression of favorable testimony requires reversal); *Imbler v. Pachtman* (1976) 424 U.S. 409 (obligation of prosecution to deal fairly in disclosing information and correcting misinformation continues after conviction); *Berger v. United States* (1935) 295 U.S. 78 (prosecutor shall not use improper methods to produce a wrongful conviction); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation clause provides criminal defendant right to directly confront adversarial evidence);

Douglas v. Alabama (1965) 380 U.S. 415 (right to confront includes right to cross-examine adverse witnesses); *Gardner v. Florida,* 430 U.S. 439 (1977) (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma,* 447 U.S. 343 (1979) (federal due process claim in state-created right).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates by reference as if fully set forth herein the facts and law included in Claims 1, 9 through 17, 21 and 25.

2. The killings in this case took place at approximately 5 a.m. on the morning of December 8, 1986. Petitioner was shot in the leg during the incident and was taken to the home of his cousin, Beverly Jermany, where he lay on a bed for the next several hours as his co-defendant, Rita Lewis, attempted to treat him for his wounds. Police surrounded the house, arrested petitioner at 1:30 p.m. and Lewis, and took petitioner to Highland Hospital for treatment.

3. Upon admission to the hospital, at approximately 2:00 p.m., samples of blood and urine were taken from petitioner as part of standard admission procedures. The blood sample was kept under refrigeration by the hospital. The urine sample was sent to the hospital's off-site laboratory for a trauma drug screen to determine whether it contained drugs of abuse. The urine sample tested positive for alcohol, cocaine, and morphine, but no test

was performed to determine the quantities of these drugs in the sample. Over the next several weeks, more blood samples were taken from petitioner, and these too were preserved.

4. Eight days later, on December 16, 1986, Oakland Police Sergeant Pete Peterson telephoned Highland Hospital, confirmed that the hospital had the blood sample taken at petitioner's admission, and prepared a search warrant affidavit stating that the police needed to obtain the blood in order to test it for the presence of drugs and alcohol and to match the blood against forensic evidence samples taken from the scene of the killings. Two days later, on December 18, Peterson served the search warrant on Highland Hospital staff, returned with several stoppered tubes of blood, and booked this evidence into the property room. (RT 5153-5160.) However, contrary to departmental procedures, the property slip Peterson prepared failed to describe the tubes and was not signed by a receiving property room officer, the person who responsible for the preservation of evidence.

5. Peterson did not take the blood to the county forensic laboratory, International Clinical Laboratories, for analysis until January 13, 1987, more than a month after the killings. (Exhibit 27, Declaration of Judy Stewart.) Peterson turned over three tubes which were labeled as having been obtained from petitioner, but none were dated December 8th, the day of the incident and petitioner's admission to the hospital. One tube had no date, another was dated December 14th, and the third was dated Dec. 19th – one full day *after* Sgt. Peterson seized the blood. These samples were evaluated and found to be either negative and/or inadequate in volume or solubility for testing. (*Ibid.*) Records of the Institute of Forensic Sciences establish that

no other analysis of petitioner's blood was attempted or performed at the ordered of the Oakland Police Department.

6. Prior to trial, the defense requested discovery of all evidence relating to the testing of petitioner's blood. These requests were granted. (CT 545-546.)

7. At trial, Sergeant Peterson was asked to explain the facts surrounding the seizure of the blood evidence. He stated that he had kept a typewritten log of his activity, referred to his log, and confirmed that the hospital had taken blood and urine samples from petitioner on December 8, 1987. He stated that he had obtained a search warrant and picked the samples up on December 18, 1986, and then took the samples to the Oakland Police Department property section. He stated that both a quantitative and qualitative analysis were ordered by the hospital on December 8, but that on December 19, he had received only a qualitative analysis. (RT 5153-5160.) Shortly thereafter, Dr. Paul Herrmann, a forensic pathologist and director of International Clinical Laboratories, which performed the analysis on the blood samples, confirmed that "There is no record of any quantitative tests" having been performed on the blood. (RT 5343.)

8. Because of the lack of any quantitative testing on the blood, petitioner's defense counsel were unable to present any evidence of whether petitioner's formation of the mental states required for first degree murder was affected by drugs and alcohol at the time of the killings. Dr. Fred Rosenthal, an expert witness called by the defense to testify regarding the effects of drugs and alcohol on cognition, was only able to speak generally about the effects of drugs and alcohol but was unable to apply this information to petitioner's case. Rosenthal testified that the absence of a

quantitative analysis was highly unusual. "It is strange but the laboratory did not do an evaluation that gave those values," he said. "All they gave was whether there was a presence or absence of this material." (RT 5246.)

9. The prosecutor capitalized on the lack of a quantitative analysis of the blood and contended that petitioner was unimpaired at the time of the killings. For example, during the testimony of defense exprt Dr. William Pierce, counsel asked the expert whether the effects of intoxication further aggravated petitioner's existing mental impairments. The prosecutor objected that there was no evidence of intoxication at the time of the killings, and the court sustained the objection and intervened to convert the form of defense counsel's question into a hypothetical. (RT 5971-5972.) In addition, the prosecutor relied heavily on the absence of a quantitative analysis in his closing argument to the jury. The prosecutor dismissed Dr. Rosenthal's testimony as "meaningless." The defense theory of intoxication was incredible, he argued:

> . . . because there were no facts upon which he could possibly base any opinion on any other thing but one simple piece of paper, Defendant's I, and that is a lab report saying that ethanol acetone, the results of alcohol metabolizing in the body was in the urine, cocaine was present in the urine. Morphine was present in the urine. He can give no opinion other than it might have affected. It might. Well, the sky might fall too.
>
> (RT 5519.)

10. The prosecutor continued his attack on Dr. Rosenthal's testimony and the weakness of the defense intoxication contentions at length, noting that the defense had not given Rosenthal copies of the police reports detailing petitioner's alleged actions, and excoriated the expert as "a paid

defense witness" who had "a long history of working for the defense only." (RT 5520.)

11. The prosecutor continued to capitalize on the lack of a quantitative analysis on rebuttal, arguing that although defense counsel had obtained testimony from other witnesses suggesting that petitioner was high on drugs at 9:00 p.m. on the night of December 7, there was no evidence that petitioner was intoxicated at the time of the killings "eight plus hours" later, and that petitioner's cousin had testified that he did not appear to be high when he arrived at her house between 5:00 and 6:00 a.m. (RT 5557-5558.)

12. The prosecutor also exploited this weakness in the defense case in his penalty closing, implying that the defense had apparently abandoned the intoxication defense because it did not produce Dr. Rosenthal again in the penalty phase and instead relied upon two other mental health professionals for testimony about petitioner's mental illness.

13. However, it is now clear that the prosecution and other state actors involved in this case engaged in the bad faith suppression, destruction, tampering, and failure to preserve critical and material exculpatory forensic evidence in a deliberate attempt to prejudice petitioner's guilt and penalty phase defense. A review of the actions of the police in this case renders this conclusion inescapable.

14. Law enforcement officers are trained in the collection and preservation of evidence, as well as the metabolism and excretion of drugs. Police sergeants, such as Sergeant Peterson, are far more experienced and highly trained in than beat officers.[15] Police officers are also aware of the

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[15]/ Sergeant Peterson is now the Chief of Police in Clayton, California.

policies of hospitals in their jurisdiction regarding the retention of samples of physiologic fluids. Oakland police officers are aware that in Alameda County, it is hospital policy to destroy blood and fluid samples within seven days following their collection. Accordingly, an investigator committed to understanding and documenting the actual blood levels of psychotropic substances present in an individual would have obtained a search warrant immediately to seize bodily fluids taken by a hospital on admission. (Exhibit 34, Declaration of William Welch.)

15. In addition, several factors unique to this case made it particularly obvious to any professional officer that fluid samples had to be collected immediately. The scene of the killings was a well-known crack house where drugs were actually present, and those residing at and visiting the house were regularly under the influence of crack cocaine. Moreover, petitioner was well known to law enforcement officers, and had been previously arrested on drug-related charges. He was a notorious repeat offender, arrested for an apparently crack-related killing in a notorious crack house in one of the most notoriously drug-infested neighborhoods in East Oakland.

16. Moreover, this was not just another crime or even another homicide case, but a multiple homicide case repeatedly described in the media and by the prosecutor himself as "the biggest mass-murder case in the history of Oakland." Homicides involving multiple victims, especially those involving children, are closely supervised by the police department hierarchy, up to and including the Chief of Police. The department would and did devote extraordinary departmental resources the investigation and required officers like Sergeant Peterson to focus their full attention and care to the

case. If ever there was a murder investigation which would have been done properly and "by the book," it was this one.

17. In addition, the police were actually aware of medical information indicating that petitioner was under the influence of drugs and alcohol. A qualitative urine screen done by the hospital on December 8 had tested positive for metabolites of alcohol, cocaine, and morphine. Furthermore, hospital records indicate that the intake medical staff smelled alcohol on petitioner's breath at the time of his admission to the hospital. The police, who kept petitioner under heightened security at the hospital, regularly monitored his condition and were aware of all information concerning his condition, and therefore knew these facts. In fact, there is a note in the hospital's records instructing staff to inform the police of all events.

18. For the foregoing reasons, any neophyte police cadet would have recognized that it was imperative to immediately obtain and preserve the fluid samples as evidence. However, Sergeant Peterson, an experienced and highly trained police investigator, did not even begin work on the search warrant affidavit until December 16, eight days later than the collection of the samples by the hospital, and one day after any competent officer would have known that the samples had been destroyed. He then did not then actually serve the warrant on the hospital until two days later, on December 18, at which time he collected three tubes of blood which had allegedly been collected from petitioner.

19. The department's transparent bad faith in failing to obtain and preserve this evidence is even more clearly demonstrated by the highly suspicious details surrounding its collection. Despite the fact that this was the biggest mass-murder in Oakland history, the property log is shockingly

incomplete. Sergeant Peterson did not describe the tubes of blood on the property sheet, a clear violation of established departmental procedures. More inexplicable still is the fact that no property officer ever signed for the evidence, another violation of procedure which effectively destroyed the chain of custody of this obviously critical evidence.

20. Still more astonishing is the fact that although evidence technicians had requested the blood specifically to test it for drugs and alcohol and to type and match it to stains found at the crime scene, Peterson did not actually deliver the blood to the lab until January 13, more than a month after the incident. At this time, one of these tubes bore no date at all, and another– incredibly– was dated December *19*– the day *after* Peterson claimed to have collected the blood.

21. Suppression, destruction, tampering, mishandling, and failure to preserve this evidence violated petitioner's constitutional rights in several respects. Suppression of the evidence was a clear *Brady* violation and is attributable to the prosecution even if the defense cannot establish that the prosecutor was himself aware of the actions of other state actors. (*Brady v. Maryland* (1963) 373 U.S. 83; *Napue v. Illinois* (1959) 360 U.S. 264.) Moreover, it is a federal and state due process violation for the police to fail in bad faith to obtain and preserve material evidence the exculpatory value of which was apparent before the evidence was destroyed, and which is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (*Arizona v. Youngblood* (1988) 488 U.S. 51; *People v. Cooper* (1991) 53 Cal.3d 771, 810.)

22. In addition, the suppression of this evidence constituted prosecutorial misconduct. (*Berger v. United States* (1935) 295 U.S. 78

(prosecutor shall not use improper methods to produce a wrongful conviction). The misconduct was prejudicial under any standard of review because it deprived petitioner of a defense; i.e., that by reason of intoxication he was incapable of and did not actually form the mental states required for first degree murder.

D. The facts pertaining to each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, establish a reasonable probability that the outcome of the trial would have been different if the suppressed information had been disclosed to the defense. A "reasonable probability" of a different outcome is shown when the government's withholding of evidence "undermines confidence in the outcome." (*U.S. v. Bagley, supra,* 473 U.S. 667, 678.) No harmless error analysis may be applied. Moreover, each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 9: Prosecutorial Misconduct--Prosecutor's Prejudicial Invocation of God's Authority and Consequences for Failure to Impose Death Penalty

A. Petitioner's sentence of death are violations of the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution because the prosecutor specifically invoked numerous passages from the Old Testament,

informed the jury there was religious sanctioning for the death penalty, and directed the jurors that the child victims would meet others in an afterlife. This outrageous argument, urging the jury to impose the sentence of death under threat of religious sanctions, weight of moral guilt, and warning of meeting victims in an afterlife violated numerous fundamental constitutional rights. Specifically, it violated the establishment clause of the First Amendment; petitioner's rights to due process; the right to the fair and reliable capital sentencing determination (which channels the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make the process for imposing the death penalty rationally reviewable); the right to a fair trial; the right to an impartial jury; 2nd confrontation clause rights.

B. The following United States Supreme Court cases, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Lynch v. Donnelly* (1984) 465 U.S. 687-688 (O'Connor, J., concurring) (the establishment clause of the First Amendment requires courts to be vigilant in guarding against religious argument – when state actor invoked Biblical teachings to persuade a jury there is, at the very least, an appearance of state endorsement of those teachings); *United States v. Tucker* (1972) 404 U.S. 443 (due process required that defendant not be sentenced on basis of misinformation of constitutional magnitude); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States*

(1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981)

451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); *Berger v. United States* (1935) 295 U.S. 78 (prosecutor shall not use improper methods to produce a wrongful conviction); *Napue v. Illinois* (1959) 360 U.S. 264 (reversible error for prosecution to introduce false testimony); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (constitutionally impermissible to risk death sentence on determination made by sentencer who has been misled on responsibility for determining appropriateness of defendant's death); *Lockett v. Ohio* (1978) 438 U.S. 586, 606-07 (plurality opinion) (right to present mitigating evidence is constitutionally protected); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and circumstances of offense proffered); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. At the close of the penalty phase trial, the prosecutor argued to the jury the death penalty was required by religious sanctions. He urged the jury:

> *Now, Ladies and Gentlemen, there is historical and religious sanction for the death penalty also. I'm going to indicate one thing for you lest you get a pang of conscience.*

> *You are jurors in this case and you were selected to render an opinion as to the appropriate penalty. Don't forget that. An opinion.* You are not the grim reaper executioners. You are not going to be over there at San Quentin dropping pellets, strapping people in. That is not your function. *You are a juror and you are to advise the court what is the appropriate penalty.* And as I indicated, there is religious sactioning [sic] for the death penalty and it goes all the way back to the Old Testament.
>
> *In chapter 21 in Exodus, Verse 12. "He that smiteth a man, so that he die, shall be surely put to death."*
>
> *Chapter 24 of the book of Leviticus, the same thing. "And he that killeth any man shall surely be put to death." That is Verse 17.*
>
> *Verse 21. "And he that killeth a beast, he shall restore it. And he that killeth a man, he shall be put to death."*

(RT 6140, emphasis added.)

2. Petitioner objected to this argument. (RT 6140.) Notwithstanding that objection, the prosecutor continued with his religious invocations:

> It comes up again in the Book of Numbers, Chapter 35, verse 16. "If", "and if he smite him an instrument of iron, so that he die, he is a murderer. The murderer shall surely be put to death."
>
> I wonder if people who were writing those things in the old days were writing about, even comprehending smiting him with a piece of iron. I wonder if they even thought of that (indicating).

(RT 6141.)

3. The prosecutor then explained what would happen to the children in an afterlife, and what those children would be doing:

> Ladies and Gentlemen, remember this: In another time in a different world as we know it now Mr. Welch is going to confront four-year-old Dwayne Walker and two-year-old Valencia Mabrey again and no, they are not going to be the same torn, bloody and ravaged children that Moochie left back in December of '86.
>
> No. They will not be wearing the same bloody baby clothing that you see before you in People's 79 and 87.
>
> They are not going to look like this when Moochie confronts them again.
>
> Take a good look. This is how Mr. Welch left these two children.
>
> Nor will they have the torn open heads that destroyed their brains that Mr. Welch did to them in '86. No.
>
> When he confronts them again they are going to be whole. When they see Moochie again they will be whole. There will be no disfiguring again and they will look at him and before the final witnesses they will say but two words, two words. Why, Moochie? That is what they say.
>
> And Ladies and Gentlemen, if ever a case called for the imposition of a death penalty, this is it. You should show no mercy to this miserable, miserable violent thug sociopath.

(RT 6141-6142.)

5. The constitutional purpose of closing argument is to explain to the jury what it has to decide, and what evidence is relevant to its decision. The prosecutor's argument undermined this purpose. Argument urging the jury to decide matters based upon factors other than those instructed is improper and unlawful. (Pen. Code section 190 et seq; *Chandler v. Florida*

(1981) 449 U.S. 560, 574 ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law").) The prosecutor's invocations of religious sanctioning for the death penalty, urging the jury not have a "pang of conscience," and invoking a vision of the murdered children in an afterlife appealed to bias, passion and prejudice. All of these are proscribed, un-enumerated, and unconstitutional factors to be considered in aggravation. The prosecutor's argument in this capital case was particularly prejudicial because the Eighth Amendment mandates the death penalty only be constitutionally imposed when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching that verdict. (*Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765; *Godfrey v. Georgia, supra,* 446 U.S. at p. 420, 428.) "Delegation of the ultimate responsibility for imposing the sentence to divine authority undermines the jury's role in the sentencing process." (*Sandoval v. Calderon, supra,* 241 F 3d at p. 777, citing *Caldwell v. Mississippi, supra,* 472 U.S. at 330.)

6. The prosecutor's invocation of God, urging the jury to heed religious sanctions for the death penalty, and informing that others would meet the victims in an afterlife was also a violation of the First Amendment to the United States Constitution. The establishment clause mandates courts "be especially vigilant in guarding against religious argument. When the state invokes Biblical teachings to persuade a jury, there is, at the very least, the appearance of state endorsement of those teachings." (*Sandoval v. Claderone, supra,* 241 F 3d. at pp. 777-778; *see Lemon v. Kurtzman* (1971) 403 U.S. 602 (clear delineation between church and stated mandated by

fundamental constitutional principles).) "For these reasons, religious arguments have been condemned by virtually every federal and state court to consider their challenge." *Sandoval v. Claderone, supra,* 241 F 3d. at 777 citing cases.) In the instant case, the prosecutor's argument was a direct invocation of divine authority to sway the jury's verdict. Petitioner objected to the argument and such objections went completely unheeded by the court. (RT 6140-6141.) The prosecutor specifically invoked "religious sanction for the death penalty . . . Lest you get a pang of conscience." This was an outrageous misdirection of the jurors' constitutional duties. The prosecutor's quotation of four specific sections from the Bible could not reasonably have been misconstrued. The prosecutor continued with his specific, religious version of physical and mental retribution and consequences by informing the jury that, four-year-old Dwayne Walker and two-year-old Valencia Morgan would be "whole" in an afterlife: Thus, "[i]n another time in a different world" they would see others "and before the final witnesses they will say but two words, two words. Why, Moochie? That is what they will say." (RT 6141-6142.) These statements were unequivocally directed to persuade the jury to impose death by appealing to passion, prejudice, fear and moral guilt. The prosecutor clearly informed that if they did not impose the death penalty, if they had "pang[s] of conscience," they would be violating tenets of the Bible, and would be seeing, in another time and another world, these two victims, "before the final witnesses." (RT 6141.)

7. Additionally, the prosecutor selected a jury that primarily had religious scruples, which fit neatly into his closing argument. When it had not already been established that jurors were religious, the prosecutor specifically queried to obtain this information. (*See, e.g.*, RT 1092 (voir dire

by Anderson of juror Grace Estarija); RT 2683 (voir dire by Anderson of juror Joseph Cruz); RT 2784 (voir dire by Anderson of juror Howard McGee); RT 1523 (voir dire by Anderson of alternate juror Bernard Wells).)

8. The persuasive effort to sway the jury by threat of religious sanction, guilt, and with attempt to obviate a potential "pang of conscience" misled the jury to such an extent that this error is reversible per se. (*Commonwealth v. Chambers* (Pa. 1991) 599 A.2d 630; Note, *Barring Foul Blows: An Argument for a Per Se Reversible Error Rule for Prosecutor's Use of Religious Arguments in the Sentencing Phase in Capital Cases* (1997) 50 Vand. L. Rev. 1335.) At a very minimum, the prosecutor's arguments, standing alone in the context of the prosecutor's argument as a whole, did not constitute harmless error on habeas review. (*See Sandoval v. Calderone, supra,* 241 F.3d 765, cert. den. (2001) (granting habeas relief from death sentence, petitioner denied fair penalty trial by prosecutor's closing argument invoking divine authority and paraphrasing well-known Biblical passages). *Brecht v. Abrahamson* (1993) 507 U.S. 619; (*Jeffries v. Wood* (9th Cir. 1997) 114 F.3d 1494, 1499 (en banc) ("Where, a conscientious judge is in grave doubt as to the harmlessness of an error, the error is not harmless and relief should be granted.").)

9. Petitioner incorporates by reference Claims 1, 8 through 17, and 21. Petitioner specifically re-asserts and re-alleges the supporting facts establishing the prosecutor's bias and prejudice. (See Exhibit 43, People v. Johnny Lee Barnes; Motion to Preclude the District Attorney from Seeking the Death Penalty; Declarations of Alfred J. Brandi and Charles M. Denton.)

10. The prosecution's argument in the penalty phase of this capital case denied petitioner's rights to a fair and reliable capital sentencing

determination; an impartial jury; due process; a fair trial; rights guaranteed by the First Amendment to the United States Constitution, particularly the Establishment Clause; and confrontation clause rights. These errors were highly prejudicial, warranting the relief requested

D. Each error in violation of the First and/or Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 10: Prosecutorial Misconduct--Unconstitutional and Shocking Interaction in Court With Petitioner and Prejudicial Comments on Petitioner During Trial

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 15, 16 and 17 of the California Constitution because throughout the trial, the prosecutor acted in a shocking and outrageous manner, calling petitioner names and deliberately provoking altercations. Further, in both the guilt and penalty phase arguments, the prosecutor personally attacked petitioner, called him names, and argued such vindictive, personal, provoking attacks on petitioner as aggravating factors. These acts of outrageous conduct and comment, individually and/or cumulatively, significantly prejudiced petitioner's case. By deliberately provoking petitioner, the prosecution capitalized on petitioner's mental state and conduct to persuade the jury to convict petitioner and sentence him to death. The personal attacks also were unconstitutional and prejudicial misconduct,

because they misled and misdirected the jury's attention from its mandated function. These errors, individually and cumulatively, denied petitioner his rights to due process; a fair trial; a fair and impartial jury; all confrontation rights to adequately confront and rebut accusations of witnesses against him; and his right to a fair, reliable and impartial capital trial and capital sentencing proceeding.

B. The following United States Supreme Court cases, inter alia, in effect at the time the error occurred, are presented in support of this claim: *United States v. Tucker* (1972) 404 U.S. 443 (due process required that defendant not be sentenced on basis of misinformation of constitutional magnitude); *In re Murchison* (1955) 349 U.S. 133(Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially

based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607(completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); *Berger v. United States* (1935) 295 U.S. 78 (prosecutor shall not use improper methods to produce a wrongful conviction); *Napue v. Illinois* (1959) 360 U.S. 264 (reversible error for prosecution to introduce false testimony); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (constitutionally impermissible to risk death sentence on determination made by sentencer who has been misled on responsibility for determining appropriateness of defendant's death); *Lockett v. Ohio* (1978) 438 U.S. 586, 606-07 (plurality opinion) (right to present mitigating evidence is constitutionally protected); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a

mitigating factor, any aspect of defendant's character or record and circumstances of offense proffered); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others, are presented in support of this claim after adequate funding, discovery, investigation, and an evidentiary hearing:

1. Early in the case, prosecutor Anderson engaged in conduct with petitioner which was both outrageous and provocative. Petitioner had requested information on the jury regarding constitutionality of the jury composition. (RT 1964.) The prosecutor replied, "I'm just going on record it will be a cold day in hell before I give him anything." (RT 1966.)

2. During voir dire, petitioner, who was authorized to participate in hybrid representation, stated, "I'd like to make an objection for the record, Your Honor. The Court did not make it unmistakably clear that [the last juror] couldn't vote to impose the death penalty." The prosecutor, wholly unnecessarily, entered this discussion with provocative and derogatory comments on petitioner: "I'm going to object to my questioning being interrupted by this clown here." (RT 2897.) Petitioner the objected to being called a clown by the prosecutor, and the court interrupted petitioner saying, "No, you are not to speak when the juror's here. Otherwise, you're going to be removed." (RT 2898.)

3. That same day, during a break in voir dire, petitioner's counsel informed the court that he had matters he would like to put on record. Petitioner, who had been authorized to perform in a hybrid representation, informed the court: "First of all . . ." (RT 2906.) The court told him to be still. The colloquy would have ended there, but for the wholly unauthorized, unconstitutional and provocative, denigrating statements by the prosecution. This colloquy occurred as follows:

MR. ANDERSON:	*You're a fool.*
THE COURT:	Mr. Strellis, proceed, please.
MR. STRELLIS:	Thank you very much. This morning as to juror – I don't know the number, but I don't know the name.
THE COURT:	Mrs. Goins.
MR. ANDERSON:	*You're a punk.*
DEFENDANT:	I went like this here; and they all over me, Your Honor.
THE COURT:	You just be – both of you just stop
DEFENDANT:	I didn't move at all out of my chair. They all over me. What kind of atmosphere this is I got to be in.
THE COURT:	Just keep your mouth shut. Mr. Strellis, I can't hear you.
MR. STRELLIS:	I'm not talking.

DEFENDANT:	It's just not for the district attorney to sit here and insult me and have all these different sheriff departments (sic) in here thinking I'm fixing to overreact toward him. He got all the protection; and he goes, shoots off the handle and says whatever he wants. The Court frowns down on me, and he just keep on abusing me, saying it's all my kind. He steadily mouthing off.
MR. ANDERSON:	I don't need protection from you.

(RT 2906-2907, emphasis added.)

4. The prosecutor continued his vitriolic and personal attacks on petitioner in his guilt phase statements to the jury. In showing pictures of one victim to the jurors, the prosecutor argued: "Here is one picture of an ugly, ugly first degree murder committed by an ugly, ugly human being." (RT 5568.) (*See United States v. Schuler* (9th Cir. 1987) 813 F.2d 978 (prosecutor's comment on defendant's laughter during testimony was reversible error because comment improperly put defendant's character at issue and impugned constitutional rights); *United States v. Francis* (6th Cir. 1999) 130 F.3d 546 (reversible error where prosecutor called petitioner "a liar" and "con man.").)

5. During the penalty phase, the prosecutor urged the jury to sentence petitioner to death on the following:

> There is really no redeeming quality that anyone can find in Mr. Welch, in his life, or in his lifestyle. He has led a life replete with violence not related to any mental defect or disease, for truly he is a sociopath, a miserable thug who hates people, pure and simple.

(RT 6112.)

> . . .
>
> Mr. Welch would have to have an IQ of two and be a zombie to excuse his acts by a mental defense.

(RT 6123.)

> . . .
>
> And, Ladies and Gentlemen, if a case ever called for the imposition of the death penalty, this is it, you should show no mercy to this miserable, miserable violent thug sociopath.

(RT 6142)

> . . .
>
> You will be asked to find mercy in your heart for this bloodthirsty assassin of the weak and the innocent.

(RT 6143.)

> . . .
>
> In Oakland December 8, 1986, Duane Walker and Valencia Mabrey [sic] lost the chance to grow up because of David Moochie Welch, the coward of the county.

(*Ibid.*)

6. These goading, derogatory comments on petitioner were designed to elicit a response from him and such response was utilized as an improper factor in aggravation. (RT 6136-6137.) Additionally, the prosecutor's improper jury remarks wholly misled the jury. The duty of the jury in the penalty phase of a capital case is statutorily prescribed. (Pen. Code §190.2.) Neither this statute, nor the United States constitution, permit

consideration of personal diatribes of the petitioner by the prosecutor to serve as legitimate factors in aggravation. *(Id.; Gregg v. Georgia* (1976) 428 U.S. 153 (Eighth Amendment requires adequately channeled and reliable capital sentencing – higher degree of reliability required than in non-capital proceeding); *Caldwell, supra* (due process violation for prosecutor to misdirect the jury's determination); and *see Hicks v. Oklahoma* (1979) 447 U.S. 343 (state created right gives rise to federal due process claim.))

7. These provocative comments on petitioner's character both elicited the prejudicial response they were designed to get, and prejudicially misled the jury as to its role and the proper considerations in sentencing the petitioner to death. These errors, singularly and cumulatively, prejudicially denied petitioner his rights to a fair and reliable capital sentencing proceeding; a fair and reliable capital trial; due process; an impartial jury; and were a violation of petitioner's fundamental confrontation right, because the prosecutor assumed the role of being a witness against petitioner, providing subjective beliefs and opinions which otherwise had not been admitted into evidence.

8. Petitioner incorporates by reference Claims 1, 8 through 17, and 21. Petitioner specifically re-asserts and re-alleges the supporting facts establishing the prosecutor's bias and prejudice. (Exhibit 32, People v. Johnny Lee Barnes; Motion to Preclude the District Attorney from Seeking the Death Penalty.)

D. Each error in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or

collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 11: Prosecutorial Misconduct--Prejudicial Introduction of Egregious, Extrinsic Evidence in Closing Argument

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 15, 16 and 17 of the California Constitution because during his closing argument, the prosecutor introduced evidence which had never formally been introduced in court, or openly told to the jury, regarding petitioner's conduct while the jurors were not present; i.e., urinating in the well of the courtroom. Petitioner did not have the opportunity to explain, rebut or deny this surprise evidence introduced by the prosecution. Further, this act, and other information given at the same time in the prosecutor's closing statement, was utilized as an unlawful factor in aggravation in support of the sentence of death. This extrinsic, untested information in the prosecutor's closing argument in this capital case violated petitioner's right to due process; to a fair, reliable and adequately channeled capital sentencing proceeding; to a fair trial; to all confrontation clause rights; to a fair tribunal; and the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness.

B. The following United States Supreme Court cases, inter alia, in effect at the time the error occurred, are presented in support of this claim: *United States v. Tucker* (1972) 404 U.S. 443 (due process required that defendant not be sentenced on basis of misinformation of constitutional magnitude); *In re Murchison* (1955) 349 U.S. 133(Constitution mandates actual impartiality

and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988)

486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); *Berger v. United States* (1935) 295 U.S. 78 (prosecutor shall not use improper methods to produce a wrongful conviction); *Napue v. Illinois* (1959) 360 U.S. 264 (reversible error for prosecution to introduce false testimony); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (constitutionally impermissible to risk death sentence on determination made by sentencer who has been misled on responsibility for determining appropriateness of defendant's death); *Lockett v. Ohio* (1978) 438 U.S. 586, 606-07 (plurality opinion) (right to present mitigating evidence is constitutionally protected); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and circumstances of offense proffered); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others, are presented in support of this claim after adequate funding, discovery, investigation, and an evidentiary hearing:

1. The prosecution explained to the jury what aggravating factors it had before it to support the decision to impose death:

> Now, if there was nothing else that I have shown in the penalty phase, the crimes themselves in the guilt phase are enough for me to be asking for the death penalty for Mr. Welch. *Yet we have proven many others [sic] factors in aggravation.*

(RT 6117, emphasis added.)

Among those other factors in aggravation, the prosecutor listed the following:

> We've also heard testimony during the particular trial the defendant liked to urinate in the well and urinate in the fitting room at J.C. Penny's when apprehended for shoplifting.
>
> Isn't it real cute? See how he handles his waste products.

(RT 6118.)

2. This argument deliberately and falsely informed the jury that urinating in the well and in the fitting room at J.C. Penny's were aggravating factors to be considered in the jury's sentencing decision. This was an egregious error, particularly because this evidence was not introduced in the prosecution's case in chief pursuant to permissible factors. *(People v. Boyd* (1987) 38 Cal.3d 762, 775; *Zant v. Stevens* (1983) 462 U.S. 862.)

3. This error, both as a violation of state law, and as a violation of the United States Constitution, was highly prejudicial and was part of a pattern of persistent and pronounced misconduct on behalf of the prosecutor in this case. *(Donnelly v. DeChristoforo* (1974) 416 U.S. 637.)

4. The prosecutor's introduction of petitioner's allegedly having urinated in the well further violated petitioner's right to confrontation guaranteed by the Sixth Amendment to the United States Constitution. In informing the jury of petitioner's previously alleged conduct, the prosecutor

himself became a witness against petitioner that, because this information was given by the prosecution in the closing statement in the penalty phase of this case, petitioner had no opportunity to rebut, deny, explain or otherwise cross-examine regarding possible bias, prejudice or any other factor which would undermine the veracity of the information. *Olden v. Kentucky* (1988) 488 U.S. 227, 231 (per curiam); *Davis v. Alaska,* 415 U.S. at 316-317 (confrontation clause violations when no examination of adverse witness.); see *Gardner v. Florida* (1977) 430 U.S. 439 (no due process in capital sentencing proceeding where petitioner sentenced to death on basis of information which he had no opportunity to rebut, to deny or explain.)

5. Injecting this information regarding petitioner's conduct into the prosecutor's closing argument, wholly violated the petitioner's fundamental rights guaranteed by the Sixth Amendment. "'The evidence developed' against a defendant shall come from the witness stand . . . where there was full judicial protection of the defendant's right of confrontation, of cross-examination . . ." *Parker v. Gladden* quoting *Turner v. Louisiana* 379 U.S. at 472-473. Here, there was never "evidence" admitted, developed, confronted or cross-examined regarding petitioner's alleged urination in the well of the courtroom. This act was particularly crucial in the jury's deliberations because they passed this well on their way to the jury room. The only time this "evidence" had been told to the jury was by the unauthorized, private communication by the bailiff. (See Exhibit 8, Declaration of Joseph Cruz.) However, the record does not indicate any way that the prosecutor could have known that the jurors were told about petitioner's alleged, out-of-court conduct, unless he had been in private communications with the bailiff. Petitioner incorporates by reference Claim

51 "Pattern of Ex Parte Contact by the Court with Counsel," in support of this claim. Petitioner further alleges that this claim incorporated by reference, the information set forth in this section, and the record in this case further substantiate the claim of prosecutorial misconduct regarding ex parte contacts, misuse and introduction of prejudicial, extrinsic evidence.

6. This evidence additionally was prejudicial and damaging because petitioner was not given the opportunity to utilize his conduct of alleged urination in the well as a factor in mitigation. However, both of petitioner's experts available in the penalty phase and testifying there in his behalf, did not believe he was competent to stand trial. Further, Dr. Samuel Benson believed that a significant amount of petitioner's conduct during the trial was evidence of mental illness, which could have and should have been used as essential mitigating evidence. (Exhibit The jury was required to consider and weigh such mitigating evidence, had petitioner had the opportunity to present it. *(See Skipper v. South Carolina,* 476 U.S. at 4; *Hitchcock v. Dugger,* 41 U.S. at 394.) (sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.)

7. Petitioner incorporates by reference Claims 1, 8 through 17, and 21. Petitioner specifically re-asserts and re-alleges the supporting facts establishing the prosecutor's bias and prejudice. (Exhibit 32, People v. Johnny Lee Barnes; Motion to Preclude the District Attorney from Seeking the Death Penalty.)

D. Each error in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or

collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 12: Prosecutorial Misconduct--Prosecutor's Prejudicial Misdirecting Jury to: "Advise" the Court; Serve as the "Conscience of This Community"; and Impose a Sentence of Death to Prevent Hypothetical, Future Acts

A. Petitioner's sentence of death is a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution because the prosecutor improperly urged the jury to sentence the petitioner to death by informing the jury that their duty was only to render an opinion and "advise the court." This violated petitioner's rights to a fair and reliable sentencing determination; a fair trial; due process; the right to constitutionally adequate review of the sentencing determination; and the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but also an appearance of fairness.

B. The following United States Supreme Court cases, inter alia, in effect at the time the error occurred, are presented in support of this claim: *United States v. Tucker* (1972) 404 U.S. 443 (due process required that defendant not be sentenced on basis of misinformation of constitutional magnitude); *In re Murchison* (1955) 349 U.S. 133(Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all

judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase

mandates state's adherence to constitutional guarantees); *Berger v. United States* (1935) 295 U.S. 78 (prosecutor shall not use improper methods to produce a wrongful conviction); *Napue v. Illinois* (1959) 360 U.S. 264 (reversible error for prosecution to introduce false testimony); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (constitutionally impermissible to risk death sentence on determination made by sentencer who has been misled on responsibility for determining appropriateness of defendant's death); *Lockett v. Ohio* (1978) 438 U.S. 586, 606-07 (plurality opinion) (right to present mitigating evidence is constitutionally protected); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and circumstances of offense proffered); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim :

1. The prosecutor informed the jury that it was its function to advise the court about the appropriate penalty. (RT 6140.) Specifically, the prosecutor argued:

> You are the jurors in this case and you were selected to render an opinion as to the appropriate penalty. *Don't forget that. An opinion. You are not the grim reaper executioners. You are not*

going to be over there at San Quentin dropping pellets, strapping people in. That is not your function. You are a juror and you are to advise the court what is the appropriate penalty. And as I indicated, there is religious sactioning [sic] for the death penalty and it goes all the way back to the Old Testament.

(RT 6140, emphasis added.)

2. A death verdict may not rest in the determination made by a jury which has been misled affirmatively to believe their responsibility for determining the sentence rests elsewhere. *(Caldwell v. Mississippi* (1985) 472 U.S. at 328-329; *see also Romano v. Oklahoma* (1984) 114 S.Ct. 2004.) The United States Supreme Court clearly stated in *Caldwell,* that "state induced suggestions that the sentencing jury may shift its sense of responsibility" violates the Eighth Amendment and invalidates a death sentence returned under that influence. *(Id.* at 330.) *(See People v. Milner* (1980) 45 Cal.3d 227,257 (error where prosecutor told jurors, in summation, that they did not bear personal responsibility for imposing the penalty); *People v. Farmer* (1989) 47 Cal.3d 888, 929 (error where prosecutor, during argument to the jury, declared "whether or not defendant should live or die was decided by the voters of the state when they passed the death penalty law and all the jury decides is whether the aggravating circumstances outweigh the mitigating circumstances.");

3. Here, the error was exacerbated by the prosecution's urging the jury that they were voting as the "conscience of this community". He argued:

> *You 12 are the conscience of this community.* And I ask you should this community, should our community show any mercy, compassion or sympathy to those who slaughter and butcher babies and their mothers? Should we? Should we really? I'm urging you to say no. Enough is enough.

(RT 6144, emphasis added.) The jurors are not the conscience of the community, and it is not their duty to be the "conscience" of the community. Urging such duty is prejudicially misleading and egregious. *Caldwell, supra; Viereck v. United States* (1943) 318 U.S. 236, 247 (prosecutor's statements suggesting that others were relying on the jurors for protection compromised right to a fair trial.)

4. The prosecution's directive to the jury to serve as "the conscience of this community" purposefully was underscored by his next argument, mandating their responsibility for preventing petitioner's hypothetical future dangerousness:

> Suppose he get [sic] one of his sodomy urges. There is a young inmate there who he feels he looks pretty good, or if he tells another inmate you have two minutes on deciding which way you are going to have sex with me.
> *You do have a responsibility to those other persons who may or may not deserve Moochie Welch.*

(RT 6138, emphasis added.)

5. The prosecution repeatedly urged the jury, and accordingly misdirected them, to vote for death so that the individual members would not have potential, hypothetical acts by petitioner "on your conscience." (RT 6193.) The prosecutor appealed to the jury's guilt, passions and prejudices:

> You give him life without parole and every time [sic] he goes to the yard for exercise, you give him life without parole, every time [sic] he is escorted to the shower or to have a visit you are going to have hundreds of Harry Lords and Roy Gowins. *Do you want that on your conscience?*
>
> A vicious killer of six who is dangerous to this day, even by both his witnesses. Who hates authority figures. *Who will come into contact with guards and others for the*

rest of his life if you give him that benefit, if you excuse his conduct and not give him the death penalty. There will be hundreds and more Deputy Lords with broken ribs and hundreds more correctional officer Gowins with feces in the face and split skulls.

Death row is the only place for him and in your hearts you know that is true.

(RT 6139-6140, emphasis added.)

6. These willful comments prejudicially tainted and misdirected the jury's determination of the appropriate sentence. *(Berger v. United States,* 295 U.S. 84; *Penry v. Lynaugh* (1989) 492 U.S. 302, 326-327 (right to reliable sentencing determination violated where prosecutorial comments impede jurors' full consideration of mitigating evidence.)) Further, directing the jury that there duty was to "advise" prejudicially violated the Eighth Amendment requirement of reliability. *(Caldwell,* 472 U.S. at 341.)

7. Petitioner incorporates by reference Claims 1, 8 through 17, and 21. Petitioner specifically re-asserts and re-alleges the supporting facts establishing the prosecutor's bias and prejudice. (See Exhibit 43, People v. Johnny Lee Barnes; Motion to Preclude the District Attorney from Seeking the Death Penalty.)

D. Each error in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 13: Prosecutorial Misconduct – Overt and Prejudicial Violation of Court Order

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 15, 16 and 17 of the California Constitution because the prosecutor willfully and repeatedly violated a gag order not to discuss the case with the media. The prosecutor made egregious and prejudicial comments about petitioner and his case at the close of the guilt phase and prior to the penalty phase and penalty phase determinations. This overt, highly prejudicial conduct violated petitioner's due process rights; right to a fair and reliable capital proceeding; the right to a fair trial; due process of law; and the right to an impartial jury which is not influenced or misled by improper evidence, arguments or instructions.

B. The following United States Supreme Court cases, inter alia, in effect at the time the error occurred, are presented in support of this claim: *United States v. Tucker* (1972) 404 U.S. 443 (due process required that defendant not be sentenced on basis of misinformation of constitutional magnitude); *In re Murchison* (1955) 349 U.S. 133(Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial

evidence; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607(completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); *Berger v. United States* (1935) 295 U.S. 78 (prosecutor shall not use improper methods to produce a wrongful conviction); *Napue v. Illinois* (1959) 360 U.S. 264

(reversible error for prosecution to introduce false testimony); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (constitutionally impermissible to risk death sentence on determination made by sentencer who has been misled on responsibility for determining appropriateness of defendant's death); *Lockett v. Ohio* (1978) 438 U.S. 586, 606-07 (plurality opinion) (right to present mitigating evidence is constitutionally protected); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and circumstances of offense proffered); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others, are presented in support of this claim after adequate funding, discovery, investigation, and an evidentiary hearing:

1. In support of this claim, petitioner incorporates by reference all claims of prosecutorial misconduct: Claims 8 through 17.

2. There were specific instances throughout the guilt and penalty phase where the court willfully and wholly failed to control prosecutorial conduct which deprived petitioner's rights. *See* C1, *supra.*

3. This conduct included, but was not limited to the prosecutor's willful and repeated violation of the court-imposed gag order specifically prohibiting contact with or comments to the media throughout the trial and penalty phase of the case. The court issued this unequivocal order at the

inception of the trial, and at no point was such order withdrawn. (RT 37, 36.) The court expressly informed the prosecutor, "You are not to open your mouth, except in court." (RT 37.) The prosecutor, however, did violate that gag order, repeatedly. Petitioner specifically objected to these continuing violations:

> I'm going to also request, it was my understanding we had a gag order in this court and it applied to both counsel and the prosecution.
>
> Numerous times the prosecution made statements to the newspaper reporters. He thinks he is above the law and he don't have to abide by this gag order. I didn't understand the court to make any type of limitations or time periods on how long this gag order was going to be in effect, Your Honor, and I'm saying, I'm saying now that concerning him making all these statements and stuff outside of the court, I think it is totally unfair, Your Honor. I think it is again, it goes to show that the prosecution is going to go to any means beyond limits to try to get a conviction and if that means grandstanding up before the newspaper media, he didn't have no comments whatsoever to say about my motion to vacate the verdict right here in open court. He has to go outside the courtroom and discuss with newspaper reporters. I think it is totally inappropriate.

(RT 5725-5726.)

4. Petitioner further requested there be some type of sanctions for overt and continuing violation of the court order. The court responded, "I will handle the prosecutor." (RT 5726.) However, the court did nothing to sanction the prosecutor, and continued to refuse throughout the penalty phase to admonish the jury to refrain from viewing any media, listening to radio or reading newspapers regarding the case. (RT 5748, 5769, 5802, 6026, 6076, 6220-6235.) This gag order was violated at a crucial time in petitioner's case; i.e., after the guilty verdict and before the penalty phase and shortly prior to the penalty phase deliberations where petitioner was sentenced to

death. In a front page article in the *Oakland Tribune* of June 20, 1989, both defense attorneys Strellis and Selvin "declined to comment after the verdict, citing a gag order imposed by Golde on participants in the case." The prosecutor, however, had no such scruples of complying with an absolute and unqualified court order. Instead, the paper reported:

> Anderson said he knew of "no basis" for Welch's remark about jury tampering and called it "a figment of his imagination." "This is a man who's just been convicted of six firsts and a special circumstance, and so what's he got to lose by making wild claims."

(Exhibit 39, Newspaper Articles re: Gag Order.)

Only one day before the penalty phase started, Anderson again violated the gag order in an interview with the *Oakland Tribune.* There, he stated as follows:

> Prosecutor James Anderson said for the past year he has spent 95 percent of his time on the Welch case. "That's the nature of the beast – Oakland's largest mass murder," Anderson said. "For probably the city's most heinous case, I don't think 95 percent was undeserved," he added.

((Exhibit 39, Newspaper Articles re: Gag Order.)

The prosecution further violated the gag order in express, prejudicial statements to the *San Francisco Chronicle* the day after the guilty verdict. On the June 20, 1989 issue of that paper, Anderson stated:

> Prosecutor Jim Anderson later said he was "elated" by the verdict. "Children were killed," Anderson said. "I'm sure the jury feels the same way about child murderers and mass murderers as I do."

(Exhibit 39, Newspaper Articles re: Gag Order.)

After the verdict was read, petitioner informed Judge Golde that he believed that there had been "jury tampering" during the proceeding. Anderson informed the paper as follows: "Anderson called the allegation a 'figment of David Welch's imagination'". *(Id.)*

6. The trial judge's failure to control proceedings which were highly prejudicial to petitioner stand the course of the trial. During voir dire, petitioner asked the court on several occasions for information on a potential informant who was highly prejudicing petitioner's case. That informant, Michael Willis, was allegedly communicating with victims' families in the matter. (RT 2407.) The court denied the motion as premature, and further stated that it did not have sufficient information to determine whether the grievance about potential informers in county jail in petitioner's case, contacting actual witnesses for the prosecution, "properly lies in this court or the federal court or some other court." (*Ibid.*) The Superior Court does have jurisdiction over this discovery, which was particularly crucial in a capital case. (See e.g. Cal. Const., art. VI, §10.) On May 8, 1989, petitioner told the court that on the way to court he was attacked by three sheriff's deputies, that he was injured and had bruises and scratches on his face, and his legs and back were hurt. He requested to go to Highland Hospital to be examined by a physician. The court stated its unilateral understanding that petitioner refused to go to court. However, petitioner asked for a hearing on what occurred and how these injuries were received. Petitioner specifically asked the court if it had sufficient authority to order he be taken to Highland Hospital. Petitioner was concerned about the hostility and prejudice exhibited by the North County Jail doctors. Regarding the request to be taken

to Highland Hospital and the authority to do so, the court responded, "That's right, I have enough authority, but I'm not." (RT 3707.)

7. The jury was not admonished to refrain from viewing media, listening to radio or reading newspaper articles about this case in between the guilt and penalty phases, or during the penalty phase. RT 5659 (jury excused for a four days – no admonishment regarding media prior to jury being excused); RT 5802 (court recesses for the day – no admonishment to jury regarding media); RT 5889 (recess with no prior admonishment about the media); RT 5914 (jury takes substantial recess for July 4th holiday – no admonishment about media prior to recess); RT 6026 (recess until next morning – no admonishment about media prior to recess); RT 6076 (recess – no prior admonishment about the media); RT 6145 (recess at close of prosecution's closing argument – no admonishment not to discuss the case, and no admonishment about the media); RT 6200-6201 (close of defense counsel's closing, jury recessed until the next day – no admonishments about the media; RT 6223-6225 (at close of instructions, court does not admonish jurors not to view media during deliberations.)) Further, the jury had ample opportunity to read outside material, including the newspapers in which the prosecutor made these highly prejudicial comments about petitioner. The jury was not in session from the time of the guilt phase verdict on Monday, June 19, 1989, until one week later, Monday, June 26, 1989, when the penalty phase began. From the close of the guilt phase on Monday, June 19, 1989, to the penalty phase verdict on Wednesday, July 12, 1989, a period of 23 days elapsed.

8. Petitioner incorporates by reference Claims 1, 6 through 17, and 21. Petitioner specifically re-asserts and re-alleges the supporting facts

establishing the prosecutor's bias and prejudice. (See Exhibit 43, People v. Johnny Lee Barnes; Motion to Preclude the District Attorney from Seeking the Death Penalty.)

D. Each error in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 14: Prosecutorial Misconduct--Improperly Urging Jury's Comparison of Petitioner to Ramon Salcido

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution because the prosecutor implored the jury to find petitioner guilty on six counts of first degree murder, and that the special circumstance was true, by directly comparing convicted mass murderer Ramon Salcido and petitioner. This prejudicial misleading of the jury denied petitioner his right to due process; fair trial; impartial tribunal; and a fair and reliable capital determination.

B. The following United States Supreme Court cases, *inter alia,* in effect at the time the error occurred, are presented in support of this claim: *United States v. Tucker* (1972) 404 U.S. 443 (due process required that defendant not be sentenced on basis of misinformation of constitutional magnitude); *In re Murchison* (1955) 349 U.S. 133(Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S.

455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors

in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607(completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); *Berger v. United States* (1935) 295 U.S. 78 (prosecutor shall not use improper methods to produce a wrongful conviction); *Napue v. Illinois* (1959) 360 U.S. 264 (reversible error for prosecution to introduce false testimony); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (constitutionally impermissible to risk death sentence on determination made by sentencer who has been misled on responsibility for determining appropriateness of defendant's death); *Lockett v. Ohio* (1978) 438 U.S. 586, 606-07 (plurality opinion) (right to present mitigating evidence is constitutionally protected); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and circumstances of offense proffered); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others, are presented in support of this claim after adequate funding, discovery, investigation, and an evidentiary hearing:

1. In his closing arguments, the prosecutor concluded by imploring the jury to send a message to others by convicting petitioner guilty on six

counts of first degree murder and find that the special circumstance is true. Specifically, the prosecutor urged:

MR. ANDERSON:	Ladies and Gentlemen, by returning verdicts of guilty of six counts of first degree murder and that the special circumstance is true, you can send a message to the Ramon Salcidos and David Welches of the world.
MR. STRELLIS:	I'm going to object to this, Your Honor, and –
MR. ANDERSON:	The massacre of babies, children and other innocents of this world will not be tolerated and I just pray that you will do the right thing and follow your oath.

(RT 5569.)

2. These remarks were unduly inflammatory. "A prosecutor shall not make remarks which so inflame the jury." *(People v. Haskett* (1982) 30 Cal.3d 841, 863-866; *People v. Morales* (1989) 48 Cal.3d 527, 571-572.) Nor is it proper for an argument to appeal to the jury's passions and prejudices. *(People v. Fields* (1983) 35 Cal.3d 329, 362-363.)

3. At the time of this case, Ramon Salcido was considered a notorious mass murderer, and his case was well known throughout the state. Thus, the comparison of Ramon Salcido to petitioner was a direct appeal to the jury's passions and prejudices. This unduly inflammatory argument

denied petitioner a fair trial. It diverted the jury's attention from its proper role and invited an irrational response.

4. Petitioner incorporates by reference Claims 1, 6 through 17, and 21. Petitioner specifically re-asserts and re-alleges the supporting facts establishing the prosecutor's bias and prejudice. (See Exhibit 43 ,People v. Johnny Lee Barnes; Motion to Preclude the District Attorney from Seeking the Death Penalty.)

D. Each error in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 15: Prosecutorial Misconduct and Judicial Error (*Batson*)

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the prosecutor used peremptory challenges to strike three African-American jurors from the jury, and one African-American from the pool of alternates. This use of peremptory challenges, to which petitioner and his counsel objected, violated petitioner's constitutional guarantees of equal protection; due process of law; fair trial; an impartial tribunal; and a fair and reliable capital proceeding and sentencing determination.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Batson v. Kentucky* (1986) 476 U.S. 79 (prosecutor's use of peremptory challenges violation of equal protection); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (prosecutorial misconduct); *Mattox v. United States* (1892) 146 U.S. 40 (fundamental right to impartial jury): *United States v. Burr* (1807) 25 Fed. Cas. 25, no. 14,692b CCD. Va. (fundamental right to fair and impartial tribunal); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Beck v. Alabama* (1980) 447 U.S. 625 (constitutional requirements in capital proceeding apply to guilt phase); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Jury must determine facts relevant to sentencing factors.).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates by reference Claim 51 regarding ex parte communication.

2. Petitioner incorporates by reference 9 through 17 regarding prosecutorial misconduct. These are incorporated in support of the claim independently and individually, as well as collectively, as establishing a

pattern and practice of unconstitutional actions and behavior by the prosecution and the office of the prosecuting attorney in petitioner's case.

3. The prosecutor used peremptory challenges to strike three African-American jurors from the panel. Petitioner, later joined by counsel, objected to the prosecution's use of these peremptory challenges. (RT 3837, 2713, 3850, 2738, 3932, 3851-3852, 3406.) The prosecutor later used an additional peremptory challenge to strike a African-American alternate juror. (RT 3406, 3852.)

4. The trial judge found that petitioner had not established a prima facie case of purposeful discrimination, despite the fact that the prosecutor had exercised three of his 11 peremptory challenges on African-American jurors. (RT 3849, 3853.) The court voted that three African-American jurors remained on the jury. (RT 3849.)

5. Petitioner objected, based on the rule of *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky, supra,* 476 U.S. 79. Under the procedure adopted by the California Supreme Court in *Wheeler,* the burden of showing that a peremptory challenge is not based on group bias does not shift to the prosecutor until a prima facie case of such bias has been made. Once such a prima facie case has been made, the prosecutor must articulate a race-neutral explanation related to the case, i.e., "specific bias" as opposed to "group bias" for each of the challenged jurors. Improper exercise of peremptory challenges violates article I, section 16 of the California Constitution (*People v. Turner* (1986) 42 Cal.3d 711, 716), as well as the equal protection clause of the United States Constitution. *Batson v. Kentucky, supra,* 476 U.S. 79.

6. The explanation offered by the prosecutor must be based on something other than race and cannot be merely a general assertion that denies a discriminatory motive, or claims good faith in individual selection. The prosecution's explanation must be clear and reasonably specific , and set forth legitimate reasons for challenges, all of which must be related to the particular case to be tried. (*Ibid.*) The trial court is then required to determine whether the petitioner carried his burden of proving successful discrimination. *Batson v. Kentucky* (*Id*), 476 U.S. at 98.

7. The prosecution acted unconstitutionally in challenging the African-American jurors and the trial court abused its discretion in determining that petitioner had failed to state a prima facie case for discrimination. The facts and circumstances of this case establish that Ms. LaDonna Young, Mr. Gerald Green, Ms. Teresa Huyghues and Mr. Carl Artis were all challenged because of their race. The fact that three of the 11 challenges exercised by the prosecutor directed at African-American jurors establishes a prima facie case of discrimination. (RT 3849.) Moreover, the prosecutor later exercised a peremptory challenge to an African-American alternate.

8. The record did not establish any non-race-related reasons why the prosecutor might want to excuse these four jurors. All of these jurors supported the death penalty. They evidenced no hostility to the prosecution, and if anything, were pro-prosecution in orientation. Moreover, none of the stated reasons for striking the jurors were supported by the record, further manifesting a clear pattern of discrimination.

9. Throughout jury selection, the prosecutor showed a bias against African-American jurors. The prosecutor earlier had challenged an African-

American woman, Ms. Jamie Griffen, solely because she failed to disclose a misdemeanor arrest. (RT 3041, 3055.) Another African-American juror, Mr. Donald Hall, was successfully challenged because he did not mention a misdemeanor driving under the influence conviction. (RT 3203.) Additionally, five African-American jurors were successfully challenged for causes by the prosecution for their purported reservations about the death penalty: Ms. Dorris Grady, Ms. Sheila Murry, Ms. Dorothy Parks, Ms. Dorothy Chambers, and Mr. Willie Turner. (RT 2027, 2275, 2755, 3298, 3536.)

10. The prosecutor's rationale for challenging the four African-American jurors was clearly pretextual. Ms. Young, an unemployed clerical worker, had no reservations about imposing the death penalty if appropriate. (RT 2714-2715, 2717-2791, 2721-2722.) She graduated from college and lived with her fiancee who was studying to be an electrician. (RT 2722, 2724.) The prosecutor's stated reason for striking her as a juror was the fact that she had a child and was living with a man. Thus, according to the prosecutor, she had a credibility problem. Rather, the record clearly points out that she had no children and was living with her fiancee. (RT 2724.) Ms. Young's family consisted only of her sister, mother and grandmother. (RT 2724.)

11. The prosecution's reasons for challenging Mr. Green was similarly constitutionally infirm. The pretext for the challenge was that this prospective juror purportedly had severe death penalty reservations. (RT 3851.) In fact, Mr. Green had no problem imposing the death penalty in appropriate circumstances, and so stated on voir dire. (RT 2740, 2742-2743, 2746.) He worked for the City and County of San Francisco Planning

Department. (RT 2739.) He was, however, strongly opposed to assault weapons. This fact would only have helped the prosecution. (RT 2752.)

12. Ms. Teresa Huyghues was a nurse living on Highland Avenue in East Oakland. She stated on voir dire that she could vote for the death penalty. (RT 2932, 2933-3937.) She had a 31-year-old daughter and a 17-year-old granddaughter whom she had raised. (RT 2738.) She answered all questions with direct answers and did not appear to have difficulty, on the record, following the court questioning. The prosecution stated the reason for challenging her was that she was not a staunch believer of the death penalty and had not been following the court's questioning. (RT 3851.) However, Ms. Huyghues never hesitated in her answer that she could vote to impose death in the appropriate case, and answered all questions put to her by the court, defense counsel and prosecution directly and succinctly.

13. Prospective juror Carl Artis answered that if the evidence supported the death penalty he could impose it. (RT 3409-3412.) Mr. Artis later explained that any initial hesitancy he may have had to the question regarding the death penalty was because he thought the question asked was whether he could actually be the executioner. (RT 3412.) This is reasonable, considering the question as it was posed to Mr. Artis.

14. The prosecution's reasons for striking Ms. Young, Ms. Huyghues, Mr. Green and Mr. Artis were pretextual and masked a race-based challenge. The office of the prosecution, and this specific prosecutor, have a pronounced history of racism. (See Exhibit 43 ,People v. Johnny Lee Barnes; Motion to Preclude the District Attorney from Seeking the Death Penalty.) Race-based peremptory strikes were part of a pattern and practice of the Alameda County District Attorney's office and this prosecutor's office.

15. The prosecutor's peremptory challenges of theses four African-American jurors denied petitioner's constitutional rights, including but not limited to the right to equal protection under the law. The stated reasons for exercising the peremptory challenges to these four African-American jurors were pre-textual and masked the prosecutor's race-based purpose. These four jurors were stricken because they were African-American.

16. The trial court's acceptance of the prosecutor's reasons for striking these jurors was compound constitutional error. The trial court's rationale manifested an unreliability and bias which does not conform with requisite fundamental guarantees. These guarantees include, but are not limited to, the rights to due process of law, a fair trial, a fair tribunal and particularly, a fair tribunal when the trial judge is not only unbiased but also conducts the proceedings with fairness and an appearance of fairness. Furthermore, excusing these four jurors denied petitioner his right to reliable capital proceeding in a case in which he ultimately faced death as the punishment.

17. These errors were unconstitutionally prejudicial to petitioner's case. He was found guilty on all counts (RT 5648-5658) and sentenced to be executed by a jury from which three African-American jurors had been carefully excluded on the basis of race. The constitution forbids striking even one juror on the basis of race. (*United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F. 3d. 900, 902.) (RT 6268.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually

and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 16: Brady Error--Penalty Phase Impact of Prosecution Suppression of Material Evidence.

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because the prosecution suppressed, distroyed, tampered with and failed to preserve material evidence favorable to petitioner and it is reasonably probable that a more favorable result would have been obtained in the penalty phase had the evidence been disclosed. The suppression of this evidence deprived petitioner of his federal and state constitutional rights to due process, the right to confront and cross-examine adverse witnesses, the effective assistance of counsel, a fair and reliable determination of guilt and penalty, trial by an unbiased tribunal, trial by jury, and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Brady v. Maryland* (1963) 373 U.S. 83 (withholding of evidence favorable to accused violates due process); *Giglio v. United States* (1972) 405 U.S. 150 (*Brady* doctrine includes impeachment evidence as well as exculpatory evidence); *United States v. Bagley* (1985) 473 U.S. 667 (same); *United States v. Agurs* (1976) 427 U.S. 97 (*Brady* rules apply to evidence which would affect the outcome on penalty as well as guilt issues); *Mooney v. Holohan* (1935) 294 U.S. 103 (prosecutor's nondisclosure of knowingly

perjured testimony violated due process); *Napue v. Illinois* (1959) 360 U.S. 264 (due process violated by false testimony regardless of whether prosecutor solicited it or merely allowed it to go uncorrected); *Miller v. Pate* (1967) 386 U.S. 1 (14th Amendment cannot tolerate prosecution's knowing presentation of false evidence) *Alcorta v. Texas* (1957) 355 U.S. 28 (due process violated when prosecutor failed to correct misleading impression left by witness's testimony); *DeMarco v. United States* (1974) 415 U.S. 449 (if plea bargain made prior to testimony, reversal of conviction required under *Giglio* and *Napue*); *Donnelly v. DeChristoforo* (1974) 416 U.S. 637 (false evidence includes introduction of specific misleading evidence important to government's case); *Pyle v. Kansas* (1942) 317 U.S. 213 (knowing use of perjured testimony and deliberate suppression of favorable testimony requires reversal); *Imbler v. Pachtman* (1976) 424 U.S. 409 (obligation of prosecution to deal fairly in disclosing information and correcting misinformation continues after conviction); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Douglas v. Alabama* (1965) 380 U.S. 415 (right to confront includes right to cross-examine adverse witnesses); *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause guarantees right to impeach credibility of adverse witness with proof of his prior crimes); *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466

U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates by reference as if fully set forth herein the facts and law alleged in support of Claim 1, 8 and 24.

2. As set forth in greater detail in Claim 1, *supra*, the prosecution suppressed material evidence of substantial benefits provided to prosecution witnesses Stacey Mabrey and Barbara Mabrey in exchange for their testimony at trial. The prosecution also suppressed evidence that it had induced five witnesses to change their earlier statements or testify falsely with respect to whether they knew or believed petitioner was mentally ill, and whether he was

intoxicated by alcohol and drugs at the time of the killings. Furthermore, the prosecution suppressed evidence that Stacey Mabrey was not present at the time of the killing, and that his testimony stataing he was a percipient witness to these events was false. As set forth in Calim 8, the state also suppressed, destroyed, tampered with, or failed to preserve crucial forensic evidence. This evidence was all favorable to the defense.

3. The suppressed evidence was material not only at the guilt phase, as set forth in Claims 1 and 8, but also in the penalty phase. The suppression of evidence favorable to the accused by the prosecution violates due process where the evidence is material *either* to guilt or punishment, irrespective of the good or bad faith of the prosecution. (*Brady v. Maryland*, *supra*, 373 U.S. 83, 87.) The suppressed Maybrey evidence was material because the testimony of these witnesses provided the facts relevant to "circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." (Pen. Code §190.3, subd. (a)), and these matters were in turn considered by the jury at the penalty phase in determining the appropriate penalty. The materiality of this evidence is underscored by the prosecutor's reliance on it in his closing argument at the penalty phase (RT 6113-6114, 6115-6117, 6133), and the jury's request that the testimony of these witnesses be read back during the guilt phase deliberations – an indication of the critical nature of the evidence to the guilt phase verdict. The blood evidence was critical because it would have established that petitioner was so intoxicated and impaired at the time of the offenses that the jury should have been permitted to consider this fact in mitigation. It is at least reasonably probable

that a more favorable result would have been obtained if the evidence had been disclosed.

D. The facts pertaining to each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, establish a reasonable probability that the outcome of the trial would have been different if the suppressed information had been disclosed to the defense. A "reasonable probability" of a different outcome is shown when the government's withholding of evidence "undermines confidence in the outcome." (*U.S. v. Bagley, supra,* 473 U.S. 667, 678.) No harmless error analysis may be applied.

Claim 17– Cumulative Error – Prosecutorial Misconduct

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7, 15, 16 and 17 of the California Constitution because the cumulative effect of the prosecutorial misconduct alleged in this petition and in petitioner's direct appeal deprived petitioner of his federal constitutional rights, including, but not limited to, his rights to due process of law, equal protection, confrontation, the effective assistance of counsel, and the right to reliable capital proceedings and sentence.

B. The following United States Supreme Court decisions, *inter alia,* in effect at the time the error occurred, are presented in support of this claim:

Taylor v. Kentucky (1978) 436 U.S. 478, 487, and fn. 15 (cumulative effect of errors may violate due process); *Berger v. United States* (1935) 295 U.S. 78 (prosecutor shall not use improper methods to produce a wrongful conviction); *Napue v. Illinois* (1959) 360 U.S. 264 (reversible error for prosecution to introduce false testimony); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (constitutionally impermissible to risk death sentence on determination made by sentencer who has been misled on responsibility for determining appropriateness of defendant's death); *Strickland v. Washington* (1984) 466 U.S. 668 (criminal defendant has right to effective assistance of counsel at all stages of proceedings); *Brady v. Maryland* (1963) 373 U.S. 83 (withholding of evidence favorable to accused violates due process); *Pointer v. Texas*, (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Gardner v. Florida,* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia,* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Hicks v. Oklahoma,* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among others to be discovered after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates as if fully set forth herein all facts and law set forth in all Claims 1, 8 through 17, and 21.

2. In this petition and in the briefing on direct appeal, petitioner has set forth separate post-conviction claims and arguments regarding the

numerous instances of prosecutorial misconduct which occurred in the pretrial, guilt, penalty, and post-trial phases of this case, and he submits that each one of these errors independently compels reversal of the judgment or alternative post-conviction relief.

3. A habeas corpus petitioner is entitled to relief if the cumulative effect of prosecutorial misconduct materially affected his conviction or sentence. (*United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1225; *United States v. Christophe* (9thCir. 1987) 833 F.2d 1296, 1301; see also, *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15 [due process violated by cumulative effect of error].)

4. Petitioner submits that the many instances of prosecutorial misconduct in this case require reversal both individually and because of their cumulative impact. As explained in detail in the separate claims and arguments on these issues, the errors in this case individually and collectively violated federal constitutional guarantees under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

5. The combined effect of the prosecutor's misconduct was prejudicial because it is more probable than not that the misconduct materially affected the verdict. (*United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1225.) For example, the prosecutor's suppression of material evidence deprived the defense of the means with which to demolish the credibility of critical prosecuti0on witnesses. His persistent provocation and taunting of petitioner contributed to petitioner's mental deterioration and decompensation at trial in front of the jury. Furthermore, his egregious and unconscionable appeals to passion and prejudice throughout closing argument

at both the guilt and penalty phases rendered the verdict and sentence unreliable. Accordingly, relief must be granted.

D. Each error in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 18: Ineffective Assistance – Failure to Competently Investigate and Present Social History

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 15, 16, and 17 of the California Constitution because he was deprived of the effective assistance of counsel during the pretrial, guilt, penalty, and sentencing phases of his trial when his trial counsel failed to competently investigate and present petitioner's compelling social history of abuse, organic impairment, mental illness, and emotional disturbance. Counsel's unprofessional errors deprived petitioner of his federal and state constitutional rights to the assistance of counsel, conflict-free counsel, confrontation, due process of law, a fair and reliable determination of guilt and penalty, trial only when mentally competent, a determination by a tribunal of mental competence, trial by an unbiased tribunal, trial by jury, and a fair trial.

B. The following United States Supreme Court decisions, *inter alia*, in effect at the time the errors occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Woodson v. North Carolina* (1976) 428 U.S. 280 (capital jury must be permitted to consider character of offender and circumstances of crime in determining appropriate punishment); *Lockett v. Ohio* (1978) 438 U.S. 586 (jury may not be precluded from considering any aspect of capital defendant's character or record in mitigation); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (evidence of defendant's troubled family background, abuse, and mental and emotional disturbance is "particularly relevant" mitigating evidence in capital case); *Ake*

v. Oklahoma (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky*, 488 U.S. 227 (1988) (confrontation clause violation where defendant not permitted to cross-examine complainant); *Gardner v. Florida,* 430 U.S. 439 (1977) (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma,* 447 U.S. 343 (1979) (federal due process claim in state-created right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates by reference as if fully set forth herein the facts and law alleged in support of Claims 2, 4, 5, 19, 23, 24, 47, 48, 77, and 78.

2. Trial counsel's investigation into petitioner's social history was woefully inadequate. Counsel failed to interview or have an investigator interview virtually any of petitioner's former teachers or educators, friends, relatives, neighbors, or persons with whom petitioner came in contact in institutions or the courts. Counsel's files reveal no notes of any such interviews. Counsel also failed to obtain important documentary evidence, including, but not limited to, building department records pertaining to the home in which petitioner's family lived when he was born.

3. Had trial counsel conducted an even minimally competent investigation, they would have discovered and presented the following social history:

(a) A mosaic of neurologic deficits, serious mental illness, severe deprivation, and chronic maltreatment shaped Mr. Welch's understanding of the world in which he lived. Mr. Welch is the second of three children born to African American parents who migrated to Oakland, California, area from rural Alabama in the decade after World War II. In 1932, Mr. Welch's father, Dave Welch, Jr., was born at home in Loxley, Alabama, to 37 year old Dave Welch and 19 year old Ollie Jackson. (Exhibit ..., David Welch, Jr. Birth Certificate.) Dave Welch, Mr. Welch's paternal grandfather, spent his life working as a chipper for turpentine, a backbreaking job that brought little pay. Two years later, in 1934, Mr. Welch's mother, Minnie Bell Millender, was born in Monroe County, Alabama, to parents who were farmers (Exhibit 98, Minnie Bell Millender Birth Certificate.)

(b) Both parents had only elementary school education and were unskilled. Mr. Welch's father left school after the eighth grade, moved to Mobile, and held a series of jobs in the late 1940's for earned him less than $700 annually, barely enough to survive (Exhibit 95, David Welch, Jr. Social Security Records.) He joined the U.S. Army, where he served as a corporal, and was discharged in December, 1953. Meantime, Mr. Welch's mother worked in a shrimp plant in Pascagoula, Mississippi, and earned $25.00 in 1954. She earned a few more dollars working for Clinton Cheramie in Cut Off, Louisiana, before leaving Alabama with her family and migrating to California in the hopes of a better life than the neo-slavery conditions

African-Americans faced in rural, southern Alabama. (Exhibit 101, Minnie Welch Social Security Records.)

(c) Although Minnie and David escaped the Jim Crow laws and the daily denial of basic human rights faced by African-Americans in Alabama, their lives were marked by turmoil. Mr. Welch's parents met in Oakland and married March 10, 1956, in Reno, Nevada, at the Ministry of the Gospel. (Exhibit 99, Welch Marriage Certificate.) Within a few months, on October 1, 1956, Mr. Welch's older sister, Cathie Diane Welch, was born at Herrick Memorial Hospital in Oakland, California. (Exhibit 106, Cathie Diane Welch Birth Certificate.) Her father was a construction worker who could barely support his small, but growing family.

(d) The Welch's rented an apartment at 5848 Fremont Street, an old home divided into small, barely inhabitable apartment units. The family lived in the apartment until after Mr. Welch and his younger brother, Dwight, were born. The apartment building's owner was cited by the sanitation department for health, safety, and sanitation violations. Built in 1890, a subsequent conversion altered the use to a four-unit apartment house but the building was being illegally occupied as a six-unit apartment house. The building was in a state of ill repair with "heavy cockroach and rodent infestation," "defective plumbing," improperly vented gas appliances, "unapproved wiring throughout the building (many violations)," inadequate "ventilation" in numerous rooms with no windows, and "ceiling leaks." (Exhibit ..., Building Inspection Records, 5848 Fremont.) An aunt who visited the apartment recollected that it was "in a very run down downstairs

apartment in a house on Fremont Street. The place where they lived was very dirty and falling apart. There were holes in the walls and ceilings and the paint was peeling from the walls." (Exhibit 21, Declaration of Sarah Perrine; Exhibit 53, Building Inspection Records, 5848 Fremont.)

(e) Life inside the apartment was as bleak as the building's appearance. Minnie and David had a miserable and violent marriage. David "was a very heavy drinker" who "was already aggressive with Minnie." A family member thought that "[l]iquor made David, cruel." David beat Minnie and rendered her helpless to defend herself, once backing "her into the bedroom . . . .with a chair." David beat Minnie often when she was pregnant with David and Dwight. Minnie fled to her aunts house for protection and they witnessed the bruises on her arms and face and black eyes. Mr. Welch was born March 21, 1958, at Herrick Memorial Hospital (Exhibit 111, David Welch III Birth Certificate). Mr. Welch's father was still a construction laborer. (Exhibit 21, Declaration of Sarah Perrine.)

(f) Developmental difficulties and delays plagued Mr. Welch from birth. One of his aunts remembered that, "when David was born, he was sickly, and had to have a ventilator in his room to help him breathe. As he grew older, he continued to have problems with his breathing. He also always had sensitive skin, and rashed easily. When he began talking, he spoke with a speech impediment that lasted for several years." Mr. Welch's brother, Dwight Chenier Welch, was born March 12, 1959, not quite a year after Mr. Welch. (Exhibit 118, Dwight Chenier Welch Birth Certificate.) Minnie's sister reported that, "What money David []did bring home he used

on himself to support his drinking habit. As a result, Minnie and the children were always hungry, and always very thin." Family members were concerned about David's development from an early age and wondered if he was mentally retarded. An aunt reported he was fearful of benign things such as food, he slept an unusual amount, banged his head, was incontinent, and was very emotional. (Exhibit 21, Declaration of Sarah Perrine.)

(g) The family of five continued to live in the unsafe and unsanitary apartment on Fremont until 1961, when they scraped together enough to put a down payment on a small home costing $13,000 in Sobrante Park. Mr. Welch's father relied on a G.I. Loan for financing.

(h) Mr. Welch's father earned a meager $4,000 annually, but did not make those earnings available to the family for its well being. For example, he "used to go out drinking all of the time. On weekend nights, before he left, David, Jr., used to give Minnie a little money. Then, after he was drunk, he returned to the apartment very drunk, and demanded his money back." Minnie begged money from her relatives to buy food for the children. An alcoholic given to unpredictable assaults on his family, Mr. Welch's father withheld money for basic daily needs of his family. By all accounts, he imposed harsh and cruel punishment at will on Mr. Welch and Minnie. (Exhibit 21, Declaration of Sarah Perrine.)

(i) After Minnie gave birth to her three children, she was "very sickly, and was suffering from depression." Many times, the children did not have enough to eat and went hungry. In 1961, Minnie's depression

was so severe she was unable to care for the children at all. Her sisters rescued Minnie and drover her and the children to Alabama to their mother's home where they could be safe from abuse at the hands of David and where Minnie could recuperate and regain her strength. Alabama relatives were shocked at the emaciated condition of Minnie and the children. Minnie's mother nursed the family back to health. Unfortunately, David found the family and forced them to return to Oakland with him. (Exhibit 21, Declaration of Sarah Perrine.)

(j) Mr. Welch, his mother, and his siblings lived in an atmosphere of chaos, neglect, and fear imposed on the family by David. Mr. Welch's father beat Mr. Welch and his mother frequently, threatened to kill them, held them captive, and starved them for extended periods of time. David beat Minnie without regard to the presence of the children, who witnessed the repeated life-threatening attacks. Minnie's family was called to the home on more than one occasion when David attempted to kill Minnie, attacking her with knives, spraining and twisting her arms, and threatening her with shooting.

(k) Although Mr. Welch's mother was unable to protect herself or any of her children, Mr. Welch was especially targeted by his father for the greatest abuse. Relatives speculated that David targeted Mr. Welch because he did not look as much like his father as the other children. David beat Mr. Welch with belts, extension cords, and "anything he got his hands on." He beat David for minor infractions such as "spilling something in the refrigerator" or getting wet when he played in the creek. (Exhibit 21, Declaration of Sarah Perrine)

(l) Mr. Welch and his siblings responded to the beatings and abuse in a manner characteristic of children who survive prolonged trauma. Relatives described them as "nervous" and "anxious kids who cried a lot." Mr. Welch grew withdrawn, avoided being around other children, trembled when he became upset, and failed at basic social relationships. was the most afraid of his father. Mr. Welch tried to be invisible around his father in an unsuccessful effort to avoid beatings. He tried to stay in rooms in the house where his father would not see him. When David attacked Mr. Welch, Mr. Welch did not cry or scream for help. David denied Mr. Welch small pleasures that he gave the other children. David allowed Mr. Welch's siblings to watch television, but beat Mr. Welch for watching television. David ridiculed, degraded, and cursed Mr. Welch, humiliating him in front of family and peers. (Exhibit 21, Declaration of Sarah Perrine.)

(m) His father and mother separated and divorced, but his father returned to the home at will and continued his physical and mental assault on Mr. Welch and his mother throughout Mr. Welch's adolescence. Mr. Welch's mother worked steadily but her employment opportunities were severely limited by her deteriorating mental health. She was overwhelmed by the demands of parenting a child like David who had special psychiatric needs and beat him severely for behavior over which he had no control.

(n) Mr. Welch responded to maltreatment in a pattern characteristic of children who have survived chronic exposure to life threatening abuse. His responses were altered by his underlying neurologic deficits which distorted his perception of his environment and intensified his maladaptive behavior. He became hypervigilant to threats of harm but was

unable to distinguish real threats from misperceived threats. He was suspicious and fearful of routine occurrences and mistrusted the motives of others — even those who attempted to assist him. He was preoccupied with safety and unable to attend to the normal tasks children and adolescents address during development. He also began to exhibit traits of obsessive compulsive behavior. He refused to use the school restroom and returned home to use the bathroom. He became incontinent when he was anxious, over stimulated, and distressed.

(o) Maltreatment at home, combined with underlying neurologic deficits, eroded Mr. Welch's ability to keep pace with his peers academically. He experienced developmental delays in academic performance that were noted by his teachers but never addressed effectively in special education or services provided to the child. His first grade teacher commented that his basic social perceptions were retarded as he had "no one to one concept," was "[o]verstimulated by group" activities and gave "up easily." He "adjusted some" in the second semester of kindergarten. He performed in the lowest quartile in the first grade and was enrolled in a speech therapy class for defects in articulation. He had learning difficulties, was hyperactive and immature for his chronological age, and was chronically ill. He demonstrated problems with impulsivity, but he struggled "to control himself" in the second grade. His performance was extremely low in the second grade and he scored in the fourth percentile in reading. His reading skills continued to lag behind his peers in the third grade. Like many brain damaged children, David's thinking inflexible and rigid, leading teachers to

conclude he was "stubborn or pouty." (Exhibit 112, Oakland Unified School District Records.)

(p) Manifestations of serious neurologic deficits are evident in his erratic performance and behavior at school. Academic achievement testing placed him in the lower third of his class in the fourth grade, and he was transferred to a different elementary school without explanation. (Exhibit ..., Oakland Unified School District Records.) A friend described Mr. Welch's academic experiences: "Even in kindergarten, David was in special classes for children with emotional and behavior problems. I remember David had a classmate in the classes for children with special needs whose name was Jason Mitchell. I last saw Jason about one year ago. He was a patient in the lockdown psychiatric unit of a hospital in San Leandro, California." (Exhibit 26, Declaration of Konolus Smith.)

(q) Initially Mr. Welch's teachers at the new elementary school reported they had "no problem" getting along with Mr. Welch, but he was subsequently suspended for "insubordination" when Mr. Welch "took off and hid" following a reprimand. (Exhibit ..., Oakland Unified School District Records.) School was a threatening environment for Mr. Welch, who was frequently punished for behavior caused by his mental deficits. A friend reported, "During the time we were in school, the teachers and administration practiced corporal punishment. Back then, they disciplined us in ways that today would send them to jail. They dug their finger nails into our arms, hit our hands with rulers, and spanked us with their hands and with other objects. Mr. Schmidt, one of our teachers, used a switch he called 'Mr. Black.' To

discipline us, Mr. Schmidt used to make us grab on to the sides of our desk, lean over and take the beatings. He hit us with Mr. Black repeatedly despite the tears and screams, and he hit us in the same spot. While this kind of physical discipline generally quieted the rest of us, it only made David lose control of himself even more." (Exhibit 26, Declaration of Konolus Smith.)

(r) School records show that a teacher inflicted corporal punishment on Mr. Welch and that Mr. Welch attempted to strike the teacher, a response that suggests he was extremely disturbed. However, by the second semester, his teacher commented, "David seems to be adjusting nicely to myself and the class. I am pleased to have him as a student." Within a relatively short time frame, the same teacher described Mr. Welch's behavior as "deplorable." This pattern of erratic and unpredictable behavioral changes continues to the present day. (Exhibit 112, Oakland Unified School District Records.)

(s) Standardized testing in the sixth grade placed Mr. Welch at least two grade levels below his peers. His IQ was measured at 78, falling within the borderline range of mental retardation. By the eighth grade, Mr. Welch no longer maintained pace with his peers and received more failing grades than passing. He failed miserably in public schools, transferred between public high schools, continuation schools, and county juvenile agencies and schools, and was unable to learn basic lessons of social relationships. (Exhibit 112, Oakland Unified School District Records.)

(t) Mr. Welch was ill-equipped and unable to weather the normal turmoil and upheaval of adolescence. As he entered his early teens,

his alcoholic father continued to hold sway over the home through brutality and intimidation, even though he and Mr. Welch's mother were divorced. The senior Mr. Welch found work as a merchant seaman and was assigned to tankers that carried supplies to the war in Viet Nam. His employers reprimanded him for drinking himself into an alcoholic coma. When he returned to the mainland, he continued his excessive drinking, withheld financial support for the family, beat mother and son alike, and threatened to kill them. Mrs. Welch had to work an increasing number of hours to support her family, and one teacher noted that the Welch home had no supervision. Mr. Welch began to use alcohol and illicit drugs in an effort to quell his intense emotional response to the helplessness he experienced at home, at school and in the community.

(u) The community of Sobrante Park offered little resources or protection to children in unsafe homes. Law enforcement served to keep the children confined to the neighborhood, and white and Latino youth in nearby communities attacked children from Sobrante Park who ventured away from their communities. A friend reported, "[O]ften our plans to go to the mall or movie in San Leandro got derailed because we were kept away by the white children in San Leandro who did not want us in their neighborhood." Mr. Welch's era of youth in Sobrante fended for themselves in the neighborhood surrounded by factories, metal recycling plants, and construction sites for fast expanding mass transportation. (Exhibit 26, Declaration of Konolus Smith.)

(v) Mr. Welch and his peers swam in the polluted stream that ran through their neighborhood, played in burned out and abandoned buildings, and were on guard against assaults by older youth and transients. Children who played in the stream developed a host of reactions to the toxins in the polluted water. Another child who played in the stream, reported: "Fences have been constructed to keep children out of the polluted waterways we used to play in. Adults and teachers in the neighborhood have developed programs to combat drug use among children. When we were growing up, these kinds of safeguards were not in place. Also, scientists are now studying East Oakland, and documenting what I have known for a long time, that Sobrante Park has a higher death rate, a higher disease rate, a higher addiction rate, and a higher injury and infection rate that the rest of Alameda County." A friend who grew up in Sobrante Park observed: "Fences have been constructed to keep children out of the polluted waterways we used to play in. Adults and teachers in the neighborhood have developed programs to combat drug use among children. When we were growing up, these kinds of safeguards were not in place. Also, scientists are now studying East Oakland, and documenting what I have known for a long time, that Sobrante Park has a higher death rate, a higher disease rate, a higher addiction rate, and a higher injury and infection rate that the rest of Alameda County." (Exhibit 26, Declaration of Konolus Smith.)

(w) Children in the community were injured and killed as a result of the unsafe physical environment and the absence of decent recreational opportunities. A long time resident of Sobrante Park described how the children occupied their time: " The only street in and out of town is

Edes Avenue, which connects to Acalanes Avenue. Just about every inch of Edes Avenue had industry on it, and there were diesel trucks coming in and out of there all day picking up and unloading whatever it was they were transporting. There were wrecking yards, metal storage, machineries, a GM plant, and there was usually chemical smells in the air. Until we were in our early teens, there was no real park in Sobrante Park. Where the park is now stood some buildings. When we were little, those buildings housed a dry cleaners, a grocery store and a five and dime store. Then, when I was still in elementary school, one of the neighborhood family's got mad and burned the buildings down. They stood abandoned for years, until our close friend James Miles was killed. James was in between my age and David's age. When he was about fifteen years old, we were all playing together trying to leap onto diesel trucks passing in and out on Edes. James lost his balance and got caught in the wheels of the truck. The truck went several streets before he realized what happened, and we watched James get crushed to death." (Exhibit 26, Declaration of Konolus Smith.)

(x) With no community support for safe activities, children created their own ways of entertaining themselves, according to one observer, who reported, "Because there was not a lot for children to do, we spent most of our time playing by the railroad tracks that ran through our neighborhood, jumping boxcars, chasing rabbits in "Rabbitsville," which was where the city was adding on to the airport. We also spent a lot of time playing in all of the construction going on in our neighborhood. When we were little, workers were building BART- which runs about half a football field north of Acalanes, the freeway, which runs about half a football field south of Edes,

and the airport, which is below the freeway." (Exhibit 26, Declaration of Konolus Smith.)

(y) Mr. Welch's peers, older by only a few years, were sent to Viet Nam and returned injured or dead, were killed by each other at an alarming rate, and fell victim to drug and alcohol addiction at an early age. Community violence colored Mr. Welch's view of life outside his violent home, and he became ever more vigilant to potential danger. He armed himself with guns, initially to protect himself from his father's frequent threats to shoot, maim, and kill him and his mother but eventually to protect himself from real and delusional threats.

(z) Peers, neighbors, family, and friends recognized that Mr. Welch was mentally ill. They described his bizarre and irrational behavior and learned not to enter into prolonged conversations with him because of his inability to respond appropriately. He over interpreted words and phrases, was hyper alert to any verbal slight, and read special meaning in events. He often made no sense in his conversations and became easily agitated when others could not understand him. Despite episodic and irrational behavior, neighbors reported that he also made every effort to help and protect friends. He was arrested for a series of relatively minor violations such as stealing wine and disturbing the peace. His unpredictable behavior escalated as he became older and increasingly paranoid. He was arrested for offenses that were rooted in his paranoid delusions, such as shooting at perceived enemies, and placed in juvenile facilities.

(aa) Mr. Welch responded to the structure and security of juvenile facilities in a remarkably positive manner. Juvenile authorities reported that Mr. Welch "has shown a dramatic change in his behavior at Juvenile Hall. He is now considered to be a model detainee. He is cooperative about following staff instructions and unit rules and is getting along well with his peers. David has recently demonstrated that he is capable of making a good adjustment in a secure and highly structured setting." Despite the recommendation that Mr. Welch be housed in a highly structured setting, Mr. Welch was sent to youth camps, where he was housed and fed in group settings. As an adult, Mr. Welch continued to be confined, fed and transported in loosely structured environments at the California Youth Authority. Absent structure and security, Mr. Welch's delusional thought processes were unmediated and dominated his actions. He was returned to his community in 1977 when he was 19 years old. (Exhibit ..., Alameda County Juvenile Court Records.)

(bb) Mental impairments formed the basis of his bizarre and idiosyncratic understanding of relationships with others as a young adult. Mr. Welch was perceived by people in the community to be "weird" and "crazy" as his behavior escalated into confrontations with friends and law enforcement. (Exhibit ..., Declaration of Rita Lewis). He was arrested and charged with a series of assaultive offenses and was imprisoned in county jail and the state prison system. A close friend reported that, "David was a very paranoid person. He never understood people's intentions. He always believed people were out to get him. For example, David had a terrible memory, and when he could not remember things, he came to accusatory

conclusions about what he could not remember." He showed traits of obsessive compulsive behavior and, according to a friend, "needed routines, and he needed to be able to stick to his routines." This same friend recollected that, "[e]ven though David was unable to understand most jokes, he loved to laugh, and always had a loud, wonderful, joyful laugh, childlike laugh." (Exhibit 26, Declaration of Konolus Smith.)

(cc) The only really positive event in Mr. Welch's life came with the birth of his son, whom he treasured. In 1981, his son, David Esco Welch IV, was born to him and Terri Yvonne West; they married in 1984. (Exhibit ..., David Welch IV Birth Certificate, Exhibit ..., Welch Marriage Certificate). For the next five years, Mr. Welch's behavior continued to be controlled by deeply-seated mistrust of others, delusions of grandiosity and persecution, and his hyper alertness to any perceived threat of danger. His neurologic deficits caused him to be unable to understand, modulate, or control his intense emotional responses to confusing and frightening events. His use of drugs and alcohol was an unsuccessful effort to self medicate the confusion and paranoia he experienced. He consumed lethal quantities of illicit drugs and alcohol, stopping only when he lost consciousness. His erratic behavior led to numerous arrests, convictions, and confinement in jails and state prisons, which he incorporated into his delusional frame of reference. By the time of his arrest for the current offenses, Mr. Welch lived in a delusional world that had invaded every domain of his life.

(dd) Throughout his adult life, petitioner's inability to understand, modulate, or control his emotional responses to stimuli have resulted in his repeated arrest and incarceration for a variety of offenses. During these periods of incarceration he has been subjected to persistent, nightmarish abuse at the hands of other inmates and custodial personnel, who uniformly have either failed to recognize or have intentionally exploited Mr. Welch's neurologic and memory deficits to their own ends. Because his impairments render him incapable of comprehending or complying with a host of custodial regulations, petitioner has been repeatedly beaten, subjected to disciplinary diets, and been denied basic privileges accorded to other prisoners. He has also been degraded, humiliated, and raped by other prisoners. Unable to formulate a strategy to adapt to these conditions, and compelled to view the world through a lens of paranoid delusion, petitioner had responded by lashing out at those whom he perceives to be his tormentors. His impulsive reactions have led to petitioner's placement in administrative segregation units and further deprivations of privileges. However, petitioner's impairments have left him incapable of learning from these experiences or modulating his behavior, further contributing to his deteriorating mental condition.

4. It is at least reasonably probable that a more favorable outcome would have been obtained at petitioner's trial, penalty trial, and sentencing but for counsel's unprofessional failure to investigate, procure, and present the foregoing social history information. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668.) The failure to obtain and present a social history left the defense with only the two mental health experts to

testify about petitioner's mental problems. However, without a social history, the jury was left without any explanation of how petitioner's mental problems were reflected in his daily life. Moreover, the jury was never presented with sympathetic information regarding petitioner's background of character, the very material competent defense counsel are expected to present in the penalty phase of a capital trial. (See, e.g., *Williams v. Taylor* (2001) 529 U.S. 362, and cases cited therein.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 19: Ineffective Assistance of Counsel--Failure to Move for Competence Determination

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because he was deprived of the effective assistance of counsel during the pretrial, guilt, penalty, and sentencing phases of his trial when his trial counsel unprofessionally and inexplicably failed to move for a determination of petitioner's competence when they became aware of substantial evidence of his incompetence. Counsel's repeated, persistent, and unprofessional errors deprived petitioner of his federal and state constitutional rights to the assistance of counsel, conflict-free counsel, confrontation, due process of law, equal protection, a fair and reliable

determination of guilt and penalty, trial only when mentally competent, a determination by a tribunal of mental competence, trial by an unbiased tribunal, and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Dusky v. United States* (1960) 362 U.S. 402 (defendant is incompetent to stand trial if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of

the proceedings against him") *Pate v. Robinson* (1966) 383 U.S. 375 (failure to observe procedures designed to assure defendant will not be tried or convicted while incompetent violates due process and right to fair trial); *Drope v. Missouri* (1975) 420 U.S. 162 (defendant's conduct after arraignment, such as conduct in court or in jail, may trigger competency proceedings); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Pointer v. Texas,* (1965), 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. In spite of repeated indications that petitioner was not mentally competent to proceed with trial, including the court's own statements regarding its view of petitioner's incompetency and petitioner's own motion for a competency hearing, counsel failed to move for a competency determination pursuant to Penal Code section 1368.

2. Petitioner's trial counsel, Spencer Strellis and Alexander Selvin, were aware or should have been aware that petitioner's previous attorneys, Thomas Broome and Robert Cross, had made a competence motion prior to the preliminary examination, citing the stress under which petitioner labored as a result of the extraordinarily harsh conditions of his confinement in the county jail and the fact that petitioner was unable to assist his counsel in a rational manner. (Ct-778-783; exhibits) Counsel were aware that these harsh conditions of confinement continued unabated during the period they represented petitioner, and themselves complained to the court about these conditions and their detrimental effect upon petitioner's mental state. (See e.g. RT 640-641, 2404-2407, 3060-3033, 3723-3730.)

3. Counsel were also aware or should have been aware that petitioner had a longstanding reputation within the juvenile and adult justice system in Alameda County for being mentally ill. (Exhibit 6, Declaration of Thomas Broome; Exhibit 7, Declaration of Robert Cross.) Moreover, numerous witnesses made statements or testified at the preliminary examination that petitioner was "crazy" and that this reputation was common knowledge in the East Oakland neighborhoods in which he was raised and lived.

4. To the extent that counsel were aware of the foregoing information and failed to act upon it by moving for a psychiatric evaluation and competence determination, they were ineffective as counsel. To the extent counsel were unaware of the foregoing information, they were ineffective for failing to investigate petitioner's background and personal history to discover this information.

5. Counsel were specifically aware of the fact that the trial court had experienced great difficulty in obtaining counsel for petitioner because of petitioner's reputation within the legal community for being extremely paranoid and, consequently, difficult to deal with. (Exhibit 30, Declaration of Spencer Strellis). Counsel were also specifically aware that petitioner had "serious mental problems" and had "grave doubts about his ability to cooperate with any lawyer." (Exhibit 30, Declaration of Spencer Strellis) Not long after he began to represent petitioner, it became obvious to Mr. Strellis that petitioner was not competent to assist counsel in any meaningful way. (Exhibit 30, Declaration of Spencer Strellis)

6. After trial counsel began to represent petitioner in January, 1988, they became aware of numerous facts indicating petitioner's lack of competence. Petitioner moved to represent himself in the Superior Court, pursuant to *Faretta v. California* (1975) 422 U.S. 806, on October 3, 1988. Following numerous continuances, the matter came before the trial judge, Honorable Stanley P. Golde, on November 9, 1988. In the afternoon session, defendant was given a *Faretta* questionnaire to fill out that evening in his jail cell. (RT 18-19.) At the next court appearance, on November 15, 1988, only a brief mention of the pending *Faretta* motion was made by lead defense counsel, Spencer Strellis, who stated that until the issue was decided he was "in the uncomfortable position of not knowing whether or not I'm to speak on his [petitioner's] behalf." (RT 34.)

7. The next day, Wednesday, November 16, 1988, the trial court continued the *Faretta* motion to Monday, November 21, 1988. (RT 44.) The trial court did indicate, however, that it was going to consider the previous *Marsden* motions in evaluating defendant's motion to proceed as his own

attorney. (RT 50-54). The trial court appointed Dr. Joseph Satten, pursuant to Evidence Code section 730, to evaluate defendant on the sole issue "whether he had the mental capacity and could waive his constitutional right to counsel with a realization of the probable risks and consequences of his action."[16] (RT 59.) The court then continued the *Faretta* proceedings until the following Monday. (RT 60.)

8. However, on Thursday, November 17, 1988, petitioner again appeared in court with counsel to litigate issues related to petitioner's conditions of confinement. (RT 63-64.) Petitioner began the proceedings by moving to have his attorneys sit in the jury box on grounds of conflict of interest. (RT 64.) He then asked for appointment of new counsel to represent him "not only through these proceedings but also through any proceedings concerning my 1368 motion that the Court is addressing to." (RT 66.) The court stated that it had no 1368 motion before it, and petitioner responded that it was his understanding that the court had ordered a competency hearing the previous day. (RT 66.) The court stated that it had ordered a psychiatric examination solely on the question of "whether or not you have the mental capacity to waive your right to counsel and proceed in pro per." (RT 66.)

9. Petitioner then requested that he be permitted to retain his own psychiatric experts and asked for a three-week continuance to permit them to examine him. (RT 68-69.) Petitioner further requested "a full-blown trial" on the issue of his competence to stand trial. (RT 70.) Counsel did not join

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[16]Dr. Satten was unable to interview petitioner. However, he has now reviewed the transcripts and concluded on this basis that a competency proceeding would have been warrented. (Exhibit 24, Declaration of Joseph Satten, M.D.)

in the competence motion but stated that "once the Faretta motion is dealt with, then the issue of whether a 1368 is appropriate or not is an issue that need be looked at, the issue of whether a plea of not guilty by reason of insanity ought be entered, or not an issue, should be looked at." (RT 71.)

10. On November 21, 1986, the trial court denied petitioner's motion to represent himself. (RT 75-85.) The court determined that the petitioner was not mentally competent to waive counsel and represent himself. The court stated that petitioner's "mental condition in the Court's opinion precludes realistic assessment of the need for assistance and risk of waiving counsel." The court noted that petitioner had repeatedly alleged that conspiracies against him had been formed by various parties within the judicial system, asserting at various times that the court, the district attorney, his defense attorneys and former attorneys, the police, the public defender's office, and others had conspired against him. The Court noted petitioner alleged the district attorney had falsified records, the sheriff's department had falsified the ballistics report, jail officials were monitoring his interviews with psychologists by placing listening devices in the room, petitioner "engages in verbal displays and interrupts and interferes with the conduct of the courtroom proceedings," petitioner accused the bailiff of tampering with his papers, and asked his attorneys to sit in the jury box. (RT 77.) The Court further noted that petitioner had made a number of motions "which I am reluctant to describe as frivolous but make really no sense." The Court particularly noted petitioner's motion to recuse the entire Alameda County Municipal and Superior Court bench, his motion to renew peremptory challenges each day, and his motion to investigate the victims on the ground of perjury. (RT 78-79.) The court also cited petitioner's own repeated

assertions of mental incapacity, such as the fact that he asserted on November 18 he was unable to proceed with his *Faretta* or other motions because of stress, and that on October 4 he informed the court he was "at a total mental breakdown" and accused the judge of causing him "mental stress" and "psychological, mental strain." (RT 79.) The court noted that petitioner himself asserted either present insanity or incompetence to stand trial under Penal Code section 1368, and requested counsel in a trailing matter after being permitted to represent himself. (RT 79-80, 82-83.) The court then found as follows:

> I find Mr. Welch is a defendant who does not appreciate the extent of his own disability and, therefore, cannot be fully aware of the risk of self-representation. I find the disability of Mr. Welch significantly impairs the capacity to function in a courtroom.
>
> I further find that one of the defendant's reasons he wishes to dispense with defense attorney is a paranoid distrust of everyone connected with the judicial system. This is further evidence to this Court that he lacks the mental capacity to truly waive his right to counsel.
>
> Further, the defendant's history of improper if not irrational behavior in speaking in the courtroom in the *Marsden* hearing, 995 hearing further indicates doubt to this Court that he has the mental capacity to waive counsel.

(RT 84-85.)

11. The trial court then reiterated that defendant had failed in his showing that he was competent to represent himself and waive counsel, stating:

> You have failed in your showing, and I have decided that a defendant facing the potential death sentence requires the assistance of competent counsel. You do not have the mental capacity to waive.

(RT 86.)

12. Trial counsel performed ineffectively by failing to make competence motions at numerous points during the Faretta hearing. Counsel should have moved for a competency determination as soon as the court appointed a psychiatrist, Dr. Satten, to examine petitioner to determine whether he was competent to waive counsel. (RT 59.) Counsel also performed ineffectively in failing to move for a competency determination when petitioner stated he understood the Satten appointment as a 1368 proceeding, and when petitioner asked to retain his own experts and have a "full-blown" 1368 proceeding. (RT 66-70.) Furthermore, counsel also should have moved for a competency hearing when petitioner requested a continuance to permit his experts to examine him and asked that the proceedings be terminated until his competency had been established. (RT 74.) Counsel also performed ineffectively in half-heartedly suggested that 1368 proceedings should be "looked at" at some point in the future, after the *Faretta* issue had been resolved, when petitioner's present competence to proceed at all was clearly in question. (RT 71.) The most egregious example of counsel's ineffectiveness occurred when they failed to move for a

competence examination and hearing when the court itself found that petitioner suffered from such sever mental disabilities and paranoia he lacked the mental capacity to waive counsel. (RT 84-86.)

13. Although counsel's failure to move for competency proceedings at the time of the *Faretta* hearing was most inexplicable, counsel also performed ineffectively by failing to move for competence evaluations at many other times during subsequent proceedings. Counsel erred in failing to request a competence determination when petitioner: (1) complained of lack of adequate mental health care (RT 643-645); (2) alleged that a fellow inmate, Michael Willis, had been calling the victims' families and stirring up trouble (RT 647); (3) alleged that the sheriff's deputies had been going through the legal papers in his cell while petitioner was in court (RT 762-763); (4) alleged that the sheriff's department was monitoring attorney-client discussions (RT 1572); (5) again questioned his own mental competence (RT 1949); (6) when petitioner requested discovery of information regarding Willis, the alleged informant (RT 2404-2407); (7) complained that sheriff's deputies in the jail were harassing and insulting him and trying to provoke him into committing violent acts (RT 3060-3063); (8) became distraught over one of the court's rulings, used profanity in addressing the court, and allegedly urinated in the "well," a stairwell which connected the courtroom with the jury deliberation room and holding cells on the next floor (RT 3151, 3157-3158, 3171); (9) explained that on the previous day he had been incompetent and incoherent, requested a continuance for medical care, and complained that he was supposed to have seen a psychiatrist but could not because the deputies were monitoring the interview room (RT 3723-3730); (10) was unable to control himself, could not stop talking, had to be removed from the

courtroom; and was overheard by the jurors yelling after he was removed (RT 4582-4583); (11) made legally improper motions and turned to face the courtroom wall when apparently addressing the court (RT 4932); (12) again lost control, acted irrationally, spoke incoherently, had to be removed from the courtroom, pounded on the wall of the "well," and again urinated in the well (RT 4953-4965, 4985); (13) insisted on taking the stand (RT 5000); (14) complained that he could not understand the proceedings and did not understand why the defense was impeaching its own witness (RT 5261); (15) interrupted the court's instructions to the jurors regarding re-reading testimony by objecting to ex parte communications with the jury (RT 5628); (16) made statements that were so incomprehensible that the court could not understand what he was saying (RT 5915); (17) apparently decided not to present mitigating evidence (RT 5916-5919); (18) lost self-control and had to leave the courtroom during the testimony of a defense mental health expert (RT 5950); counsel also erred in failing to request a competency determination when Dr. Benson (19) revealed in testimony that he was unable to interview petitioner because petitioner believed the interview room was bugged and that everything they said would be monitored and reported to the district attorney (RT 6009-6010); (20) the court reiterated that petitioner was incompetent to represent himself (RT 2269); (21) and was so perplexed by petitioner's comments in court that it had to ask defense counsel if they had "any idea what he's talking about?" (RT 3222-3223);

14. Counsel had no strategic reasons for these repeated failures to move for a competency determination. (Exhibit 30, Declaration of Spencer Strellis M.D..) Counsel believed throughout the case that petitioner was incompetent and possibly insane, that he lacked the ability to cooperate or

assist in his own defense, that he lacked the ability to control himself, and that he suffered from irrational, paranoid fixations or obsessions. (*Ibid.*) Counsel wanted to have petitioner examined by a psychiatrist in the hope that he could present a defense of not guilty by reason of insanity. (*Ibid.*) However, counsel was unable to do so because the room at the jail in which psychiatric interviews took place was monitored. (*Ibid.*) Although he noted to the court that the issue of petitioner's competence should be examined once the *Faretta* issue had been resolved, counsel failed to actually make a competence motion thereafter and lacked any strategic reason for not doing so. (*Ibid.*)

15. Counsels' unprofessional errors in failing to move for competency determinations pursuant to Penal Code section 1368 prejudiced petitioner by subjecting him to a trial while he was not competent to proceed, prevented him from cooperating with and assisting counsel in his own defense, and permitted him to be depicted in an unfavorable light before the finder of fact, thereby creating at least a reasonable probability that the outcome would have been more favorable to petitioner in the absence of errors.

16. Petitioner hereby incorporates by reference as if fully set forth herein the facts and law set forth in Claims 2, 4, 5, 22, 23, 24, and 33.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 20: Ineffective Assistance of Counsel -- Acquiescing in and Failing to Object to a Hybrid Form of Legal Representation Devised by the Court

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because he was deprived of the effective assistance of counsel during the pretrial, guilt, penalty, and sentencing phases of his trial when his trial counsel unprofessionally acquiesced in and failed to object to a hybrid form of legal representation, unilaterally imposed upon the defense by the court, permitting petitioner to represent himself at times but requiring him to speak only through counsel at others. The court initially stated that it would permit petitioner to make motions on Fridays but require that he be represented by counsel during the other days of the week. However, this procedure was quickly abandoned, and throughout the proceedings the court alternately heard or refused to hear petitioner's motions and objections virtually at random. This bizarre form of hybrid legal representation, and its chaotic and inconsistent enforcement by the court, contradicted the court's ruling denying petitioner's *Faretta* motion, interfered with the attorney-client relationship, undermined defense counsel by depriving them of control of the case, rendered the defense utterly chaotic, confused petitioner and his counsel with respect to who was actually representing petitioner, and encouraged petitioner to attempt to participate as his own counsel throughout the case, thereby prejudicing petitioner's case.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Faretta v. California* (1975) 422 U.S. 806 (defendant has Sixth Amendment right to self-representation); *McKaskle v. Wiggins* (1984) 465 U.S. 168 (core of *Faretta* right is the right to control the defense presented to the jury, and appointment of standby counsel cannot be permitted to undermine this right); *Maine v. Moulton* (1985) 474 U.S. 159 (after arraignment, accused has Sixth Amendment right to speak through "medium" of counsel; government may not interfere with that right); *Perry v. Leeke* (1989) 488 U.S. 272 (government

may not interfere with defendant's right to counsel); *Geders v. United* States (1976) 425 U.S. 80 (same); *Massiah v. United States* (1964) 377 U.S. 201 (same); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial) *Gardner v. Florida,* 430 U.S. 439 (1977) (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The specific facts supporting this subclaim, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are as follows:

1. Petitioner incorporates as if fully set forth herein the facts and law set forth in Claim 3.

2. On Wednesday, November 23, 1988, prior to the commencement of jury selection and in spite of its earlier denial of petitioner's *Faretta* motion, the court announced that it would henceforth require a unique and astonishing form of hybrid representation permitting petitioner to represent himself in court at some times but through counsel at others. The court told petitioner that "[d]uring the course of the trial the conduct of the trial will be performed by the attorneys. In addition, I'm going to provide that every Friday, probably from eleven to eleven-thirty until the afternoon, depending upon the size of my calendar, I will reserve it to you to make any additional motion you may want to make."

3. Although petitioner himself objected that this plan was unacceptable, his counsel failed to object to, and acquiesced in, this remarkable form of representation. (RT 156.) From that point on, the court arbitrarily either recognized or refused to recognize petitioner as counsel, sometimes ruling on his motions or objections and sometimes refusing to do so, without regard to the day of the week. The court's procedure created utter chaos in the defense, leaving petitioner and his counsel to present conflicting defenses and confusing them with regard to who was in control of the defense.

4. Moments after issuing the ruling that petitioner would be recognized only on Fridays, and in spite of the fact that this was a Wednesday, the accepted petitioner's handwritten pro per motion for a continuance and denied it, thereby contradicting the court's ruling of that morning and indicating that the court would sometimes permit petitioner to represent himself on days other than Fridays. (RT 162.) The court then permitted petitioner to renew his motion "to participate in the presentation of this defense," but contradicted itself once again by reiterating that petitioner would only be heard in court on Fridays and would otherwise be permitted to speak only through counsel. (RT 164-165.)

5. That afternoon, the court again advised petitioner he would be heard only through counsel and refused to rule on petitioner's objection to admission of evidence in the form of transcripts. (RT 183-184.) When petitioner attempted to withdraw his in limine motion, the court informed petitioner he lacked standing to address the court and stated that the court would not pay any attention to anything he had to say. (RT 185-186.)

6. On the morning of Tuesday, November 29, petitioner again requested leave to withdraw his in limine motion, and this time the court ruled on the motion, denying it. (RT 187.) However, when petitioner attempted to support his motion with additional case law, the court refused to hear petitioner and stated that he could not "participate in the conduct of the trial except on Fridays." (RT 187-188.) Petitioner then objected to the use of transcripts as evidence, and the court declined to rule on this objection. (RT 188.)

7. That afternoon, petitioner asked to address the court and was permitted to object at length to what he perceived to be his counsel's ineffectiveness and the denial of his Sixth Amendment rights. The court then refused to give petitioner the right to speak except on Fridays. (RT 206.) However, the court then permitted petitioner to state his objection in full, speak again at length on the issue, citing two federal cases, and argue prejudice from counsel's perceived deficiencies. (RT 207.) The court then cut him off and stated that petitioner could make such a motion in writing and the court would rule on it on Friday. (RT 208.)

8. On the afternoon of Wednesday, January 11, 1989, the court permitted petitioner to speak regarding errors made in a supplemental points and authorities filed by counsel regarding a motion to suppress evidence. (RT 877-879.)

9. On Tuesday, January 17, the court permitted petitioner to speak at length, objecting to what petitioner viewed as extensive security in the courtroom and the potential prejudicial impact this might have on his case. (RT 976-978.) At the conclusion of petitioner's presentation, the court asked petitioner, "What is your motion?" (RT 978.) Petitioner stated that the

security being imposed in the case was excessive, and the court ruled that "Your motion to decrease the security is denied. There will be two bailiffs in the courtroom and plainclothes in the audience." (RT 979.)

10. Petitioner then moved for an order that his shackles be removed before he entered the stairwell leading to the court, to ensure that jurors who also used that stairwell would not see him in a shackled condition. (RT 979.) The court declined to so order, ruling that "They will be removed before you come to court, not – they can transport whatever way they feel security requires. My only requirement is when you come into the courtroom you will not be shackled." With respect to the danger that jurors might see him in shackles outside the courtroom, the court ruled, "We will work that out." (RT 980.)

11. Petitioner then filed a written motion to strike the special circumstances and written points and authorities. (RT 980-981.) The court read the motion and authorities and permitted petitioner to address the motion. When petitioner submitted the matter, the court ruled that "Your motion to strike the special circumstance is denied." (RT 981.) When petitioner attempted to reopen the matter, arguing that the court lacked sufficient factual information to rule at this point, the court reiterated that the motion had been denied. (RT 982.)

12. Petitioner then asked to address the change of venue motion, and the court stated "That will be argued tomorrow morning." (RT 982.) Petitioner then requested that he be permitted to be present in the courtroom before prospective jurors were admitted to the court. (RT 985.) The court granted the request. (RT 985-986.) Petitioner then moved that bailiff John Dimsdale be replaced due to prior altercations petitioner had with Dimsdale.

The court denied petitioner's motion. (RT 986.) Petitioner then asked that the court admonish the bailiff not to stand immediately behind petitioner when he addressed his counsel. The court stated "I'll handle the bailiff without your request." (RT 987.) The court then twice asked petitioner if "You have anything else?" Petitioner replied that he would not have anything else until he had reviewed the change of venue motion. The court stated that "We'll argue tomorrow." (RT 988.)

13. At this point the prosecutor interjected that he had understood the court had denied petitioner co-counsel status, and the court confirmed that "That's correct." (RT 989.) The prosecutor objected that "we seem to be wasting an awful lot of time hearing his motions." The court explained that petitioner had been unable to make his motions the preceding Friday due to counsel's absence, and the court had therefore permitted him to make motions today instead. (RT 989.) In the future, the court said, petitioner would be permitted to make motions every Friday afternoon. (RT 990.) The prosecutor, though not defense counsel, objected to this procedure, and the court overruled the prosecutor's objection. (RT 990.)

14. On the morning of Thursday, January 19, petitioner asked to address the court and the court refused, stating that "questions can be done this afternoon. There are no questions from you this morning." (RT 1052.) When petitioner said, "Excuse me, your honor," the court abruptly responded, "Don't excuse me. You're not to say anything." (RT 1052.) Petitioner complained about the fact that he was being brought into the courtroom in shackles and asked to be unshackled before he was brought into court. (RT 1053. He also asked that he not be required to sit in shackles in a holding cell for two hours prior to court each day. (RT 1053.) Petitioner then asked

the court to explain how many jurors would be voir dired each day, and the court stated "two in the morning, four in the afternoon, except for this afternoon. This afternoon I'm reserving for you to make your motions that I normally would let you do Friday; but I can't do it this afternoon, so you can do that this afternoon." (RT 1054-1055.) Petitioner then asked that the court voir dire more jurors per day in order to ensure his right to a fair and speedy trial, and the court stated, "Your motion is denied. Your motion is denied." (RT 1055.)

15. On Monday, January 30, petitioner moved to have the jury venire panel dismissed because its fairness had not been reviewed by the jury commissioner.[17] The court denied the motion. (RT 1351.) Petitioner also challenged the jury on the grounds that the court would not allow counsel to inquire into jury bias based on the extensive media coverage of the case. The court also denied this motion. (RT 1352.)

16. On Wednesday, February 1, the court permitted petitioner to address the court at length to complain about many of the court's rulings regarding voir dire and to request that the court dismiss his attorneys and appoint prior counsel, Thomas Broome, to defend him. (RT 1472-1474.) The court stated that "the record will indicate your remarks," and when petitioner attempted to expand on his remarks, the court added that "you already made your record." (RT 1474.)

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[17]Petitioner's reference to the Sixth Amendment and the due process and equal protection clauses indicates that he was attempting to challenge the jury venire on the grounds that the panel did not constitute a representative cross-section of the community.

17. On Friday, February 3, the court permitted petitioner to make "any motions you want to make," and petitioner began by objecting that his lead counsel was not present. He stated that he was entitled to be represented by both counsel and would not proceed unless they were present. The court therefore put the matter over until Monday, February 6. (RT 1538-1541.)

18. On Monday, February 6, the court conducted voir dire and then permitted petitioner to make several motions and reserved ruling until petitioner was finished. Petitioner first asked that prospective juror Randy Pennington be excused on the grounds of prejudice. (RT 1564-1567.) Petitioner then renewed his Marsden motion and requested that prior counsel Thomas Broome be permitted to represent him instead of Mr. Strellis and Mr. Selvin. (RT 1567.) Petitioner also requested that the sheriff be ordered to return confiscated legal books. (RT 1569.) Petitioner then asked for a court order to prevent the sheriff's department from monitoring attorney-client interviews. (RT 1572.) Petitioner asked for a continuance to permit him to appear telephonically in federal court for a hearing on February 8 regarding his civil suit against the sheriff regarding conditions of confinement. (RT 1572.) Petitioner then asked for a copy of the minute order instructing the sheriff to treat him like any other prisoner for visitation purposes. (RT 1575.) The court then denied the motion regarding juror Pennington, denied the motion to replace counsel with attorney Broome, instructed defense counsel to investigate to determine whether petitioner was to be heard telephonically in federal court, and ordered the clerk to provide petitioner with a copy of the minute order. (RT 1575.)

19. On the morning of Tuesday, February 21, the court told petitioner he would not be allowed to make any motions until the afternoon

session. (RT 1840.) However, before the morning session had ended, petitioner moved to inspect the records of the jury commissioner and to challenge the composition of the venire panel. He also objected to the dismissal for cause of prospective juror Betty Meyer and other jurors who had expressed an unwillingness to serve as jury foreman. (RT 1854.) The court denied both motions. (RT 1855.)

20. At the beginning of the afternoon session, petitioner asked that the record reflect why he was not permitted to file motions the previous "Thursday or Friday, the normal day for me to file my motions" and why motions had been continued to this date. (RT 1856.) The court explained that there had been a judges' criminal seminar in Monterey and that the court had been obliged to lecture there. (RT 1856.) Petitioner complained that his family had attempted to come and file motions with the clerk but had been informed that the clerk would no longer accept motions from petitioner unless the court and counsel had reviewed them first. (RT 1857.) The court then asked petitioner to sit down and stated that he could file his motions after jury selection had been completed for the day. (RT 1857.) Petitioner then renewed his motion to dismiss the jury panel, and the court denied the motion. (RT 1858.) Petitioner then made a *Marsden* motion, and proceedings were suspended for a hearing on the issue. (RT 1858, 1860-1868.)

21. At the conclusion of the day's voir dire proceedings, petitioner objected that a black juror had been excused and then requested that the court rule on a motion for change of venue. (RT 1911-1912.) The court stated that "If I have to rule now, your motion is denied." (RT 1913.)

22. On the morning of Wednesday, February 22, petitioner asked to address the court and the court stated it would consider his motions at 2:00

p.m. (RT 1915.) Petitioner then noted that he had several motions pending, and the court responded that the motions had been timely made and would be ruled upon at 2:00 p.m. (RT 1915-1916.) Petitioner asked to be heard "at this particular time," and the court ordered him removed from the courtroom. (RT 1916.

23. During the afternoon session, petitioner returned to the courtroom. He moved to prevent the court from piping the proceedings into his cell through speakers when he was removed from the courtroom because he did not want other defendants to overhear the proceedings. (RT 1942.) The court explained that the law required that petitioner "be able to hear through electronic devices," and petitioner stated, "Well, I'm waiving that right." The court stated "I am not permitting you to waive that right," and petitioner repeated, "I waive that right." (RT 1943.) Counsel then joined in the waiver, and the court again stated it would not allow the defense to waive the right. (RT 1944-1945.)

24. On the morning of Monday, February 27, petitioner objected that his motions had not been heard the preceding Friday and stated for the record his understanding that his motions were to be heard the following day. The court replied that it had continued petitioner's motions to this morning, and the confused petitioner replied that "my understanding was Tuesday. Since last time it was continued to Tuesday I thought it went to another Tuesday." (RT 1970-1971.) Petitioner then moved for a mistrial on the grounds that he had been subjected to "restraints" in court and also requested again that he be permitted to inspect the jury commissioner's records and to challenge the composition of the jury. (RT 1971-1972.) The court denied the

motion to challenge the jury composition, but otherwise did not rule on petitioner's remaining motions. (RT 1972.)

25. During the afternoon session, petitioner again moved for a mistrial. This time he clarified that the restraint of which he complained occurred when he was removed from court by the bailiffs, who took him by both arms and prevented him from gathering his legal papers. (RT 1998.) The court denied petitioner's motion. (RT 1999.) Petitioner read into the record several authorities on excessive use of force. (RT 2000-2001.) Petitioner then renewed his request that the jury panel be dismissed, and the court again denied the motion. (RT 2002-2003.)

26. Later that morning petitioner renewed his earlier motion for funding for expert assistance, and the court responded that it could not properly hear the motion and that counsel already had money for experts. (RT 2054.)

27. On Wednesday, March 1, petitioner moved for a mistrial on the basis of the improper excuse of a juror for cause, and the court denied the motion. (RT 2186.) Petitioner then made a *Wheeler* motion, alleging improper systematic exclusion of jurors on the basis of race. (RT 2188.) The court again denied the motion. (RT 2188.) Petitioner then objected to the fact that the prosecutor referred to the weapon allegedly used in the commission of the offenses during voir dire, and the court noted the objection for the record. (RT 2189.)

28. On Tuesday, March 7, petitioner requested discovery of documents pertaining to a grievance matter in the jail. (RT 2405.) The court first stated that it lacked jurisdiction over the matter, and then denied the motion. (RT 2406.) Petitioner again moved for discovery of information

regarding Michael Willis, the alleged jail informant, and the court again denied the motion. (RT 2407-2408.)

29. On Monday, March 13, petitioner again objected to the composition of the jury and was permitted to address the court at length regarding whether the draw was random. (RT 2578-2579.) The court denied the motion. (RT 2580.) Petitioner then again moved to dismiss the entire jury panel, and the court denied this motion as well. (RT 2582.)

30. On Monday, March 20, petitioner objected to the dismissal of a juror, and the court noted the objection for the record. (RT 2765.) When all the jurors had been dismissed for the day, petitioner objected to the dismissal of another juror and the court again noted the objection for the record. (RT 2759.) Petitioner then addressed the court at length regarding what he alleged to be the sheriff's violations of an earlier court order permitting him access to newspaper subscriptions, and the court referred the matter to defense counsel for investigation. (RT 2760-2764.) Petitioner then asked for an evidentiary hearing regarding the dismissal of a juror, and the court denied the motion. (RT 2764-2765.) Petitioner then addressed the court at length regarding what he believed were ex parte contacts between the court and counsel in chambers. The court denied that petitioner's case was being discussed in chambers. (RT 2765-2768.) Petitioner then made a *Marsden* motion, a hearing was held, and the motion was denied. (RT 2768-2769.)

31. On Wednesday, March 22, petitioner made a continuing objection to the adequacy of voir dire on death-qualification issues, and the court noted the objection for the record. (RT 2874.) Petitioner then made several objections regarding the voir dire process, objected that his counsel

were not making adequate objections, asked that a particular juror be excused, and asked the court to dismiss his counsel. (RT 2876-2878.) The court denied all these motions. (RT 2878.)

32. Later that afternoon, the defense offered to stipulate the to excuse of a juror for financial hardship, and petitioner himself stipulated. (RT 2905.) Counsel then asked to put two brief matters on the record, and the prosecutor also asked to place matters on the record. (RT 2906.) Petitioner then stated, "First of all . . ." and the court told him, "You just be still." Petitioner then stated, "I thought I'm running this," and the court told him he was not. (RT 2906.)

33. On Tuesday, April 4, petitioner objected to physical and psychological abuse he had suffered from Deputy Dennis Higgins. The court stated the grievance could not be filed in court, but then directed petitioner to provide his complaint to counsel so that counsel could file it. (RT 3060-3063.)

34. On Monday, April 10, petitioner objected to his attorneys referring to the ages of the child victims during voir dire. (RT 3233-3234.) The court denied the motion. (RT 3235.)

35. On Thursday, April 13, petitioner complained about harassment by the deputies who transported him to and from the courtroom. (RT 3313-3314.) The court issued an order that the transporting deputies were not to discuss the case with petitioner. (RT 3314.)

36. On Monday, April 24, petitioner complained that his attorney was not informing prospective jurors that it was improper to consider future dangerousness. (RT 3508-3509.) The court then asked petitioner if he was

challenging a juror for cause, and petitioner replied that he was. (RT 3509-3510.) The court then denied the motion. (RT 3510.)

37. On Monday, May 8, petitioner explained to the court that he had been assaulted by three sheriff's deputies on the way to court that morning and had suffered several injuries. Petitioner asked the court for an order that he be taken to Highland Hospital to medical treatment. (RT 3704.) He further asked for an evidentiary hearing regarding the incident that morning. (RT 3705.) The court granted the request for medical treatment by jail medical staff, but denied the request to be treated at Highland Hospital. (RT 3705.) Petitioner then requested a continuance, and the court denied this motion. (RT 3707.) That afternoon he again requested a continuance to compose himself, and the court again denied the request. (RT 3711.)

38. On Tuesday, May 9, petitioner again moved for a continuance on grounds of his own mental incompetence, and the court denied the motion. (RT 3725.) Petitioner addressed the court at length regarding his inability to speak to psychiatrists in a private setting, and once again moved for a continuance. (RT 2729.) The court again denied the motion. (RT 3729.)

39. That afternoon, petitioner complained at length regarding his treatment by sheriff's deputies. (RT 3782-3783.) Counsel then asked for an order instructing the deputies not to discuss the case with petitioner, and the court denied the motion. (RT 3783-3784.) The court did order the deputies to permit petitioner time to assemble his legal papers before leaving court following each day's proceedings. (RT 3785.) The court then reviewed petitioner's motion to exclude evidence, stated it did not understand petitioner's first two points, and denied the remaining two requests, which had sought to exclude expert prosecution testimony regarding ballistic evidence

and sought a hearing on the point. (RT 3786.) The court permitted petitioner to continue speaking regarding a number of maters. Finally, petitioner offered to make a showing regarding a change of venue motion and the court responded that petitioner was not "going to make a showing of anything." The court stated that "You're not your own lawyer." (RT 3790.) Petitioner then asked when it would be appropriate for him to make a showing regarding his challenge to the jury panel. The court stated that, "Tomorrow you proceed with any evidence you wish and I will make the ruling." (RT 3794.) The following colloquy took place:

DEFENDANT:	So what I'm saying, if I'm correct, because I'm kind of confused, you're saying I can't rule– comment on the challenge to the jury –
COURT:	You can't comment on anything.
DEFENDANT:	– change of venue -- change of venue. – but you're saying I can't state the grounds for the dismissal of the jury panel, challenge to the jury panel?
COURT:	I didn't say that ay all. I'm saying you don't say anything. That's why you have a lawyer. I let you talk just because I'm trying to be more than fair to you. You have no standing to even talk in this court. You're not the attorney. I'm telling you the only thing remaining tomorrow is the challenge to the jury panel, after which we will

commence getting the jury Monday."

(RT 3794-3795.)

40. The following day, Thursday, May 11, petitioner attempted to discuss the statistical information pertaining to the jury composition issue. In spite of the court's statement of the previous day assuring petitioner he would be permitted to resent any evidence he wished, the court repeatedly cut him off. Petitioner objected that "I can't properly make the motion –" and the court stopped him, stating "You're not making anything. Your lawyers are. I got news for you." (RT 3803.) After that, petitioner repeatedly attempted to discuss the issue, and the court consistently refused to permit him to speak. (RT 3804-3809.)

41. That afternoon, petitioner moved to dismiss the case on the grounds of prosecution and police misconduct, alleging that the deputies had taken his jury selection notes when he was removed from the court earlier. (RT 3816.) The court denied the motion. (RT 3816.) Petitioner then attempted to renew his change of venue motion and the court refused to permit him to do so. (RT 3818.) Petitioner asked that the record reflect the race of all jurors who had been dismissed during voir dire, and the court found this inappropriate. (RT 3820.)

42. On Monday, May 15, during the "Big Spin" portion of the jury selection proceedings, petitioner requested additional peremptory challenges and the court denied the motion. (RT 3841.) Subsequently, petitioner's counsel noted for the record that petitioner had objected to the fact that counsel failed to use all 20 of the peremptory challenges to which the defense was entitled and also noted that petitioner wanted a *Wheeler* motion brought.

(RT 3847.) Petitioner then addressed the court at length on the jury challenge issue. (RT 3847-3848.) The court permitted the district attorney to state reasons for excusing African-American jurors, and the court then ruled that petitioner had not made a prima facie case for a *Wheeler* challenge. (RT 3849.)

43. On Tuesday, May 16, the first day of trial with the jury present, petitioner objected when People's Exhibit 5 (a crime scene videotape) was presented, stating that "the defense is stipulating" to the location where the guns were located but not that petitioner ever possessed them. (RT 3874.) The court told petitioner not to "force me to throw you out" and denied the stipulation. (RT 3875.) Petitioner then asked to have the monitor which was playing the videotape turned to an angle at which he could see it, and the court ordered him removed from the courtroom. (RT 3875-3876.)

44. That afternoon, again in the presence of the jury, petitioner objected to his earlier removal from the courtroom and stated he had a right to be present at every stage f the proceedings. The court agreed, "as long as you follow the rules of court." (RT 3900.) Petitioner continued to address the court on this subject and asked that he not be ejected and returned to the courtroom repeatedly. The court then instructed the prosecutor to continue presenting evidence. (RT 3900.)

45. After the jury was excused for the day, petitioner moved to have juror Howard McGee dismissed from the jury, stating that he attempted to use a peremptory challenge. (RT 3953.) The court told petitioner that "you don't exercise peremptories. Your lawyers do." (RT 3953.) Petitioner then attempted to challenge McGee for cause, and the court denied the

motion. (RT 3954.) Petitioner also argued at length that he had been improperly prevented from challenging juror Sandra Williams by peremptory. (RT 3955.) Petitioner moved for a mistrial, and the court denied the motion.

46. On Wednesday, May 17, petitioner moved to sequester the jury and have them admonished not to read newspapers. The court denied the motion to sequester, but stated that he would admonish the jury after each recess. (RT 3959.)

47. On Monday, May 22, petitioner requested a recess during the middle of his counsel's cross-examination of a witness on the grounds that one of the jurors had been asleep for ten minutes. (RT 4361.) The court did not rule on the motion but instructed petitioner to "be still." (RT 4361.)

48. On Wednesday, May 24, prior to the jury's admission to the courtroom, petitioner moved for dismissal on the grounds that the prosecution had suborned perjury from the preceding three witnesses. (RT 4525.) Petitioner also requested a mistrial on the grounds of prosecutorial misconduct and for witness Leslie Morgan's identification of codefendant Rita Mae Lewis. The court denied these motions. (RT 4525-4526.) Petitioner then again requested that attorneys Thomas Broome and Robert Cross be substituted for his current counsel. (RT 4527.) The court denied this motion. (RT 4527.) Subsequently, in front of the jury, petitioner offered to stipulate regarding the Uzi found by Officer Newman Ng. (RT 4581.) The court ignored the request. Petitioner then asked if his attorneys would be permitted to cross examine as to the witness's previous arrest and guilty plea. (RT 4582.) The court had petitioner removed from the court. (RT 4582.)

49. On Thursday, May 25, petitioner objected before the jury that a question by the prosecutor called for a conclusion by the witness. (RT

4829.) The court admonished petitioner not to object, and petitioner stated his understanding that "I have a right to be heard through counsel or through person (sic) when I'm in court." (RT 4829.) The court stated this was not true and instructed the prosecutor to continue. When the prosecutor again asked the question, petitioner again objected that the prosecutor's question called for a conclusion. (RT 4830.) When the court admonished him not to "act like a– don't be silly," petitioner stated that "I have the right to exercise my, defend myself in person or through counsel." (RT 4830.) The court did not correct petitioner, but simply stated, "Please, sir." The prosecutor continued. (RT 4830.)

50. On the morning of Thursday, June 1, out of the presence of the jury, petitioner requested that the court "stop insulting me and trying to humiliate me." (RT 4930.) Petitioner then moved for a mistrial on the ground that he had been unable to confront and cross-examine his codefendant, Rita Mae Lewis, and because of prejudicial pretrial publicity. (RT 4931-4933.) The court denied the motion. (RT 4935.) Petitioner then moved for an acquittal under Penal Code section 1118.1. (RT 4936.) When defense counsel interjected, suggesting that the court hear petitioner's presentation but defer ruling until all the prosecution's evidence was in, the court responded that "he doesn't have any right to make this motion," but added "if you want to make it, you might as well finish it now." (RT 4937.) Petitioner argued at great length that the evidence was insufficient and that the prosecution had presented perjured testimony. (RT 4938-4940.) The court denied the motion. (RT 4940.)

51. That afternoon, out of the presence of the jury, as the parties were reviewing matters the prosecutor had moved into evidence, petitioner

strenuously objected to what he perceived to be the court's bias and hostility toward him and moved for a mistrial. (RT 4956.) The court denied the motion. (RT 4956.) Petitioner lost control and the court instructed the bailiffs to place him in shackles. Petitioner continued to address the court and protested that his lawyers "ain't putting on no defense at all. My defense. This is not my defense." (RT 4959.) Petitioner repeatedly asked to leave the courtroom, and the court would not permit him to do so. (RT 4959.)

52. On Friday, June 2, out of the presence of the jury, defense counsel sought to call Rita Mae Lewis and petitioner strenuously objected. (RT 4978.) The court ruled that "your lawyer called her, and I can't stop him from calling her." (RT 4978.) Defense counsel explained that he was calling Lewis over his client's objection. (RT 4979.) Petitioner then objected to the witness on the grounds of Evidence Code section 352, and the court denied the motion. (RT 4980.) Lewis declined to answer any questions on Fifth Amendment grounds. (RT 4981.) Petitioner then objected at length to the court permitting counsel to call witnesses in his behalf when he disagreed with counsel's decision. Petitioner again attempted to invoke his rights under *Faretta* and stated that the defense counsel was putting on was "totally not my defense." (RT 4984.) The court stated that based "upon all the evidence and your conduct, that's denied." (RT 4985.)

53. On Monday, June 5, petitioner asked that he be permitted to be the first defense witness. (RT 4986.) The court instructed petitioner to confer with his counsel. Petitioner did so, and his counsel requested a continuance until the afternoon. (RT 5000-5001.) Petitioner objected to the continuance, and petitioner took the stand as the first defense witness. (RT 5001.) Petitioner asked to be permitted to testify in a narrative fashion, and

the court denied the motion. (RT 5002.) Petitioner then asked to have independent counsel, rather than his own counsel, appointed to examine him. The court denied this motion. (RT 5002.)

54. On Tuesday, June 6, during defense direct examination of witness William Henderson, petitioner objected to his own defense attorney impeaching the witness. (RT 5261.)

55. On Wednesday, June 7, petitioner's counsel stated he had no other witnesses, and petitioner objected. He stated he wanted to call several witnesses, including his own physician from Highland Hospital. (RT 5467.) The court denied the motion. (RT 5467.) Counsel then rested, and petitioner continued to argue that he had not been permitted to present a firearms expert. (RT 5468-5469.) Petitioner then moved to have his counsel dismissed and requested permission to present his own witnesses. (RT 5470.) The court denied the motion. (RT 5470.) Petitioner continued to protest that this was "not my defense," and the court ordered him removed from the courtroom. (RT 5471.)

56. That afternoon, in the middle of the prosecutor's guilt-phase summation, petitioner moved for a mistrial. (RT 5488.) His motion was denied and he was removed from the courtroom. (RT 5488.)

57. On Tuesday, June 13, petitioner again objected during the prosecutor's closing argument to the prosecutor's use of victim impact argument. (RT 5556.) He was once again remove from the courtroom. (RT 5556.)

58. That afternoon, petitioner asked for five minutes to address the court regarding jury instructions, and the court granted the request. (RT 5602.) Requested that the court instruct the jury on voluntary manslaughter

as a lesser included offense, specifically requesting that the court read CALJIC No. 8.42. (RT 5602.) Petitioner also requested instructions on provocation, CALJIC No. 8.73, and witness identification, CALJIC No. 2.91. The court denied the motions.

59. On the morning of Wednesday, June 14, petitioner objected to ex parte communications between the court and the jurors and to any communications with jurors outside his presence. (RT 5628.) The court declined to entertain the motion. (RT 5628.)

60. Later that morning, petitioner objected to the court taking judicial notice of its records regarding his prior convictions and moved to set aside the jury verdict. (RT 5677.) The court held this matter in abeyance, stating the court would "take that up after the court session today." (RT 5677.) Petitioner then presented a written motion and objected to the lack of a preliminary hearing regarding the validity of his prior convictions before the evidence was presented to the jury. (RT 5678.) The court permitted petitioner to file the written motion and stated that petitioner "can make any motions you want at 4 o'clock after we finish today's session." (RT 5678.)

61. After the lunch break, out of the presence of the jury, petitioner argued his motion to set aside the jury verdict. The court stated that it had read the motion over the noon hour. Petitioner then moved to challenge the judge for cause and to have the motion to set aside the verdict heard before a different court. The court denied this motion and also denied the motion to set aside the verdict. (RT 5723-5724.) Petitioner then objected to prosecutorial misconduct in argument on the grounds that the prosecutor had improperly argued that petitioner would be unable to adjust to life in prison. Petitioner also objected that the prosecutor had violated the gag order

imposed by the court on contact with the media by the parties. (RT 5724-5725.) Petitioner moved for dismissal and also requested sanctions on the prosecutor. (RT 5726.) The court stated that it would "handle the prosecutor." (RT 5726.)

62. On Wednesday, July 5, petitioner requested that the court provide him with new regulations adopted by the Alameda County Superior Court pertaining to plea bargains, and the court instructed counsel to provide that document to petitioner. (RT 5915-5916.) Petitioner then stated that he did not plan to present mitigating evidence and requested that counsel not present such evidence either. (RT 5916.) Counsel stated that his understanding of the case law was that he was to present mitigation evidence even over his client's objections, and that he therefore intended to put on two witnesses in mitigation over his client's wishes. (RT 5917.) Petitioner then requested a reasonable doubt instruction with respect to uncharged misconduct evidence admitted in aggravation. (RT 5918.) The court agreed to give that instruction. (RT 5918.) Petitioner further requested an instruction stating that in weighing mitigation versus aggravation, the jury was to consider the "quality" of the evidence rather than "quantity" of the circumstances. (RT 5919.) The court also agreed to give this instruction. (RT 5919.) Petitioner then objected to any psychiatric evidence in mitigation. (RT 5919.) The court stated that it would permit defense counsel to present "medical" testimony in mitigation. (RT 5919.)

63. On Thursday, July 6, in the jury's presence, defense counsel sought to rest the penalty phase case, and petitioner asked the court whether he was entitled to testify under the law. The court responded that he was, and

petitioner requested a 24-hour continuance to decide whether to testify. (RT 6105-6106.) The court denied the motion. (RT 6107.)

64. On Monday, July 10, out of the jury's presence, the court asked petitioner if he had decided whether or not he wished to testify. (RT 6108.) Petitioner, understandably confused, stated that he thought the court had given him "five minutes previous to make up this decision, so I didn't never make it up." (RT 6108.) The court then ordered counsel to proceed with closing arguments. (RT 6108.) Petitioner then moved to have the court reporter, James Lee, replaced with another reporter, Rose Pitts, because he believed Mr. Lee was not reporting all occurrences which took place in the courtroom. (RT 6109.) The court denied the motion. (RT 6110.)

65. That afternoon, petitioner objected more than once to his own counsel's closing argument. (RT 6189, 6191-6192.) The court declined to rule on the objection and instructed petitioner he had no standing to make a statement. (RT 6189, 6192.)

66. On Tuesday, July 11, out of the jury's presence, petitioner objected to his lack of participation in the jury instruction conferences and lack of notice regarding which instructions would be given. (RT 6203.) The court stated that petitioner had no right to participate in such discussions. (RT 6203.) Subsequently, before the jury, petitioner objected to an instruction on the elements of assault with force likely to produce great bodily injury, which concerned an alleged assault by petitioner upon his wife, Terry Welch. (RT 6213.) The court stated that petitioner would be removed from the courtroom if he made any further interruptions, and petitioner replied "I don't think the court has to threaten me every time I state an objection for

the record." (RT 6213.) The court ordered petitioner removed from the courtroom. (RT 6213.)

67. On the afternoon of Wednesday, July 12, after the jury returned its verdict fixing the punishment at death, petitioner requested a sentencing death at the earliest possible time. (RT 6231.) Over counsel's request to be permitted until September to investigate and prepare documents, the court granted petitioner's request and set sentencing for two weeks later. (RT 6231-6232.)

68. On Tuesday, July 25, petitioner appeared for sentencing and objected to being required to wear jail clothing in court. (RT 6234.) His objection was noted for the record. (RT 6234.) Petitioner then objected to the probation report and requested it be removed from his file. The court declined to rule on this request. (RT 6235-6236.) Petitioner objected to his counsel's argument that he was mentally ill. (RT 6237.) When counsel had completed his remarks, petitioner asked whether the trailing assault case would be dismissed. (RT 6238.) The prosecutor agreed to dismiss the assault case, as well as a number of misdemeanor counts. (RT 6239.) Petitioner then objected that he had not received a fair trial. (RT 6239.) Petitioner requested a recess to be permitted to review the probation report, and the court denied the motion. (RT 6241-6242.)

69. Later, when the court was formally pronouncing sentence, the court asked whether there was any legal cause why the judgment should not be pronounce, and petitioner stated that "I have been denied of my right to say and control my own destiny where my life is at stake."(RT 6267.) The court made no comment in response, but instead proceeded to pronounce sentence.

70. As the foregoing discussion demonstrates, the court's unilateral decision to impose a form of hybrid representation upon the defense resulted in chaos, confusion, tactical conflicts, trial delays, and left petitioner and his counsel unable to determine when petitioner was being represented by counsel and when he was representing himself. It was trial counsel's responsibility to object to this hybrid form of representation and to exercise control over the defense. In failing to do so, counsel was ineffective.

71. It is at least reasonably probable that a more favorable outcome would have been obtained at both the guilt and penalty phases but for counsel's unprofessional failure to object and acquiescence in the court's hybrid representation plan. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) The hybrid representation plan thoroughly undermined the defense, producing chaos and encouraging the brain-damaged petitioner to act out to his own detriment. Counsel's incompetence proved extraordinarily prejudicial both when petitioner took the stand and presented a defense totally in conflict with that presented by defense counsel, and when counsel presented a penalty phase defense with which petitioner adamantly disagreed. Trial counsel had no strategic reason for failing to object to the court's imposition of hybrid representation upon the defense. (Exhibit 30, Declaration of Spencer Strellis) Accordingly, counsel fell below the standard of reasonable competence with devastatingly prejudicial results to petitioner's case.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually

and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 21: Ineffective Assistance of Counsel – Failure to Competently Investigate and Present Impeachment Evidence Regarding Prosecution Witnesses

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because he was deprived of the effective assistance of counsel during the pretrial, guilt, penalty, and sentencing phases of his trial when counsel failed to competently investigate and present impeachment evidence attacking the credibility of prosecution witnesses. Counsel's unprofessional errors deprived petitioner of his federal and state constitutional rights to the assistance of counsel, conflict-free counsel, confrontation, due process of law, a fair and reliable determination of guilt and penalty, trial only when mentally competent, a determination by a tribunal of mental competence, trial by an unbiased tribunal, trial by jury, and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable

investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Brady v. Maryland* (1963) 373 U.S. 83 (withholding of evidence favorable to accused violates due process); *Giglio v. United States* (1972) 405 U.S. 150 (*Brady* doctrine includes impeachment evidence as well as exculpatory evidence); *United States v. Bagley* (1985) 473 U.S. 667 (same); *United States v. Agurs* (1976) 427 U.S. 97 (*Brady* rules apply to evidence which would affect the outcome on penalty as well as guilt issues); *Mooney v. Holohan* (1935) 294 U.S. 103 (prosecutor's nondisclosure of knowingly perjured testimony violated due process); *Napue v. Illinois* (1959) 360 U.S. 264 (due process violated by false testimony regardless of whether prosecutor solicited it or merely allowed it to go uncorrected); *Miller v. Pate* (1967) 386 U.S. 1 (Fourteenth Amendment cannot tolerate prosecution's knowing presentation of false evidence) *Alcorta v. Texas* (1957) 355 U.S. 28 (due process violated when prosecutor failed to correct misleading impression left by witness's testimony); *DeMarco v. United States* (1974) 415 U.S. 449 (if plea bargain

made prior to testimony, reversal of conviction required under *Giglio* and *Napue*); *Donnelly v. DeChristoforo* (1974) 416 U.S. 637 (false evidence includes introduction of specific misleading evidence important to government's case); *Pyle v. Kansas* (1942) 317 U.S. 213 (knowing use of perjured testimony and deliberate suppression of favorable testimony requires reversal); *Imbler v. Pachtman* (1976) 424 U.S. 409 (obligation of prosecution to deal fairly in disclosing information and correcting misinformation continues after conviction); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Douglas v. Alabama* (1965) 380 U.S. 415 (right to confront includes right to cross-examine adverse witnesses); *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause guarantees right to impeach credibility of adverse witness with proof of his prior crimes); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates by reference as if fully set forth herein the facts and law alleged in support of Claim 1.

2. Trial counsel was ineffective in failing to perform any investigation into the criminal backgrounds of the prosecution witnesses. Counsel only learned that prosecution witness Stacey Mabrey had once been arrested for assault because this arrest was disclosed by district attorney John Stark in the transcript of the preliminary examination. Had counsel merely gone to the public counter of the clerk's office and requested Mabrey's public file, counsel would have discovered that: (1) Mabrey had a lengthy history of criminal arrests and convictions; (2) had been arrested on five occasions for at least 16 separate felonies between the conclusion of the preliminary examination and the commencement of petitioner's trial; and (3) the prosecution had declined to prosecute him for any of these offenses, apparently in exchange for his testimony at petitioner's trial. This information indicates that Mabrey received extraordinarily favorable treatment in exchange for his testimony, and that he had a compelling motive for attempting to please the prosecution.

3. Counsel also performed deficiently in failing to research available public records regarding the criminal background of any other prosecution witnesses to determine whether any of them had any felony arrests or convictions which could have been used to impeach their credibility. (Exhibit 30, Declaration of Spencer Strellis.)

4. In addition, counsel was ineffective in failing to present evidence of which he was aware--that Stacey Mabrey had been provided with substantial benefits, consisting of favorable treatment by the prosecution in another case, in exchange for his testimony. At trial, Mabrey testified for the prosecution that he was present in the house at the time of the killings, saw petitioner in the hallway with a gun, heard gunshots, and narrowly escaped

being killed himself by hiding in a closet. On cross-examination, Mabrey denied having received anything in exchange for his testimony:

DEFENSE COUNSEL:	Have you been offered any benefits whatsoever from the District Attorney's Office in Alameda County, and I don't necessarily mean this gentleman here but any district attorney in Alameda County, that would have benefitted you after these events and before your testimony here today?
MABREY:	No.
DEFENSE COUNSEL:	So far as you know you have received no benefits whatsoever in exchange or as a result of your testifying here today?
MABREY:	No, I haven't.

(RT 4184.)

5. After Mabrey and the jurors had been excused from the courtroom, counsel made an offer of proof that Mabrey "was arrested for a felonious assault upon Rita Lewis' brother and having sat in jail, was released without charges four days later." (RT 4192.) Counsel stated that he "acquired the information from reading the preliminary examination where [Deputy District Attorney John] Stark suggested it might be required as a consideration pursuant to the law." (RT 4192.) However, counsel never used this favorable treatment in exchange for testimony evidence to impeach

Stacey Mabrey during trial, and the jury therefore never learned that Mabrey received this consideration for his testimony.

6. Under venerable California case law, the fact that a witness has been given benefits or favorable treatment in another criminal case in exchange for his or her testimony is relevant and admissible at trial to show bias or motive to fabricate testimony. (*People v. Pantages* (1931) 212 Cal. 237, 258; *People v. Phillips* (1985) 41 Cal.3d 29, 45.) Accordingly, in failing to inform the jury of this favorable treatment, counsel was ineffective.

7. It is at least reasonably probable that a more favorable outcome would have been obtained by the defense had counsel performed effectively in investigating and presenting this information to the jury. Evidence that Mabrey was receiving substantial benefits from the prosecution in exchange for his testimony, and therefore had a powerful motive to try to please the prosecution, would have severely undercut Mabrey's credibility and caused the jury to view the prosecution's case with doubt and skepticism. In addition, Mabrey's testimony was particularly important to the prosecution's case–a fact established both by the prosecutor's reliance on this testimony in his closing argument at both the guilt and penalty phases (RT 3877-3878, 5480, 5490-5491, 5494, 5512, 5520, 5522, 5557) and by the fact that the jury requested this testimony be read back during guilt phase deliberations (RT 5640). In failing to investigate, discover, and present this information to the jury in the form of cross-examination impeachment, counsel was prejudicially ineffective.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually

and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 22: Ineffective Assistance of Counsel --Failing to Adequately Investigate and Challenge the Conditions of Petitioner's Confinement in the County Jail

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because he was deprived of the effective assistance of counsel during the pretrial, guilt, penalty, and sentencing phases of his trial when his trial counsel unprofessionally and inexplicably failed to investigate and challenge the conditions of petitioner's confinement in the county jail. Counsel's unprofessional errors deprived petitioner of his federal and state constitutional rights to the assistance of counsel, conflict-free counsel, confrontation, due process of law, a fair and reliable determination of guilt and penalty, trial only when mentally competent, a determination by a tribunal of mental competence, trial by an unbiased tribunal, and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable

investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Dusky v. United States* (1960) 362 U.S. 402 (defendant is incompetent to stand trial if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him") *Pate v. Robinson* (1966) 383 U.S. 375 (failure to observe procedures designed to assure defendant will not be tried or convicted while incompetent violates due process and right to fair trial); *Drope v. Missouri* (1975) 420 U.S. 162 (defendant's conduct after arraignment, such as conduct in court or in jail, may trigger competency proceedings); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Pointer v. Texas*, (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky*, (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Gardner v.*

Florida (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates by reference as if fully set forth herein the facts and law alleged in support of Claim 2, 5, 18, 19, 24, 27, 28, 30, 31, 46, 47, 48, 49, 50, 51, and 78.

2. Counsel were aware that petitioner was being subjected to unfairly harsh and inhumane conditions of confinement from the time of his arrest through the conclusion of trial. Petitioner repeatedly complained on the record that the conditions under which he was housed in Alameda County Jail subjected him to undue stress and affected his competence and mental health throughout the trial. Petitioner complained that he was repeatedly physically, verbally, and psychologically abused by sheriff's deputies while being held in jail or while being transported to and from court. (RT 1-3, 3060-3063, 3313-3314, 3704-3707, 3723-3730, 3780-3784.) He objected that he had been placed in a disciplinary unit from the beginning of his confinement; had been subjected to unfair restrictions of phone calls, visitation with his family, and access to legal materials; had been given inadequate medical and mental health care and inadequate clothing; had been placed on disciplinary diets; and had received other undeservedly harsh treatment; all of which interfered

with his ability to prepare for and participate at trial. (RT 60-61, 98, 160-162, 209-211, 390-393, 567-569, 578-579, 640-641, 643-645 756.)

3. Petitioner also objected on the record that during periods when he was not present in court, the proceedings were broadcast over speakers into his cell at a volume and manner which enabled other inmates of the jail to overhear. (RT 209-211, 384, 387, 1942-1946.) He objected that another inmate or inmates had been enlisted as a prosecution informant as well as had been calling the families of the alleged victims to stir up trouble for petitioner and his friends and relatives. (RT 647-648, 2404-2407.) He objected that his legal papers and other materials in his cell had been searched, confiscated, and disrupted. (RT 791-795, 940-941.) He also objected that the sheriff's department was monitoring his conversations with his counsel and with mental health professionals retained by the defense. (RT 1572.)

4. Defense counsel, the prosecution, the sheriff's department, and the sheriff's deputies and bailiffs were aware that petitioner was mentally ill, yet the sheriff continued to subject him to stressful and inhumane conditions which exacerbated his illness and interfered with his ability to participate rationally in his own defense. (Exhibit 6, Declaration of Thomas Broome; Exhibit 30, Declaration of Spencer Strellis; Exhibit 7, Declaration of Robert Cross.) In addition, the prosecutor himself taunted and intentionally provoked petitioner in order to encourage him to engage in negative behavior in the courtroom. (RT 1965-1969.)

5. Counsel, the prosecution, the sheriff's department, and its deputies were aware that disciplinary diets were unconstitutional, illegal, and inappropriate and that they were likely to have a detrimental effect on the mental state of petitioner. (RT 279, 5833-5834, 5865-5866.)

6. Counsel, the prosecution, the sheriff's department, and its deputies were also aware that the conditions of confinement to which petitioner was subjected were harsh, unfair, stressful to petitioner, and detrimentally affected his ability to prepare, assist, or participate rationally in his own defense. (RT 1-3, 60-61, 98, 160-162, 209-211, 382, 387, 390-393, 1572.)

7. A minimally competent investigation would have shown that petitioner was in fact assaulted and beaten by guards on numerous occasions. (Exhibit 12, Declaration of David Irving; Exhibit 13, Declaration of Dwight Jackson; Exhibit 31, Declaration of AllenTurk.)

8. A person already suffering from mental impairments and illnesses will decompensate further when subjected to unusually harsh conditions of confinement. (T. Kupers, *Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It* (Jossey-Bass, 1999; Exhibit 28, Declaration of Pablo Stewart)

9. Although defense counsel made perfunctory objections regarding petitioner's conditions of confinement, these objections failed to describe more than a small portion of the abuse to which petitioner was subjected in jail. Indeed, counsel did little more than pass on to the court a few of petitioner's objections without conducting any substantial investigation. Counsel did not interview other prisoners or sheriff's deputies to develop the factual basis to substantiate petitioner's claims of abuse. (Exhibit 12, Declaration of David Irving; Exhibit 13, Declaration Dwight Johnson.)

10. It is at least reasonably probable that a more favorable result would have been obtained but for counsel's unprofessional errors. A

reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) An adequate investigation would have provided factual support for and compelled the court to hold a competency hearing at which petitioner would have been found incompetent. (Exhibit 22, Declaration of William Pierce, Ph.D.; Exhibit 3, Samuel Benson, M.D.) Petitioner would then not have been tried and would not have been found guilty, and might instead have received the mental health treatment he so desperately required.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 23: Ineffective Assistance of Counsel — Failure to Competently Investigate and Present Mental Health Evidence

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because he was deprived of the effective assistance of counsel during the pretrial, guilt, penalty, and sentencing phases of his trial when his trial counsel failed to competently investigate and present mental health evidence in his defense. Counsel's unprofessional errors deprived petitioner of his federal and state constitutional rights to the assistance of counsel, conflict-free counsel, confrontation, due process of law, equal protection, a

fair and reliable determination of guilt and penalty, trial only when mentally competent, a determination by a tribunal of mental competence, trial by an unbiased tribunal, and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect atthe time the errors occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Dusky v. United States* (1960) 362 U.S. 402 (defendant is incompetent to stand trial if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of

the proceedings against him") *Pate v. Robinson* (1966) 383 U.S. 375 (failure to observe procedures designed to assure defendant will not be tried or convicted while incompetent violates due process and right to fair trial); *Drope v. Missouri* (1975) 420 U.S. 162 (defendant's conduct after arraignment, such as conduct in court or in jail, may trigger competency proceedings); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Pointer v. Texas* 380 U.S. 400 (1965) (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Loven v. Kentucky* 488 U.S. 227 (1988) (confrontation clause violation where defendant not permitted to cross-examine complainant); *Gardner v. Florida* 430 U.S. 439 (1977) (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* 447 U.S. 343 (1979) (federal due process claim in state-created right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates by reference as if fully set forth herein the facts and law set forth in Claims 2, 4, 5, 18, 19, 22, 24, 27 through 31, 33, 47 and 48.

2. Petitioner has suffered throughout his life from a constellation of symptoms which have long been recognized as indicators of the presence

of frontal lobe brain damage, including impulsivity, perseveration, and profound memory deficits.

3. From the very beginning of their representation, petitioner's trial counsel were aware of petitioner's symptoms and their impact on his ability to assist in his own defense. Thomas Broome, petitioner's counsel at the preliminary examination and during early Superior Court proceedings, had known petitioner from Broome's previous career as a probation officer and knew that petitioner "had a reputation throughout the criminal justice system for being severely mentally ill." (Exhibit 6, Declaration of Thomas Broome.) Broome also found it "often impossible to obtain [petitioner's] assistance because of his paranoia and inability to focus on the issues." (*Ibid.*) Broome found it extremely difficult to work with petitioner due to his paranoia, delusions, memory problems, perseveration, impulsivity, and lack of insight. (*Ibid.*) Broome thought petitioner's problems were also aggravated by beatings administered by guards at the county jail. (*Ibid.*) Broome concluded that petitioner was incompetent to stand trial and moved for competency proceedings, but the motion was denied. (*Ibid.*)

4. Broome's co-counsel, Robert Cross, also agreed with Broome's assessment that petitioner was incompetent to stand trial due to his mental illness. (Exhibit 7, Declaration of Robert Cross.) Cross felt that as he and Broome began working on the case, it became clear that "something was mentally wrong" with petitioner. (*Ibid.*) Cross noted that the facts of the crimes were bizarre of themselves. Moreover, as word leaked out in the African-American community in East Oakland, where both Cross and petitioner lived, that Cross was representing petitioner, many people from the

neighborhood approached Cross to tell him that petitioner was widely known for being mentally ill. (*Ibid.*) Cross recalls that:

> in our discussions with Mr. Welch, he often thought and spoke in irrational ways. When we tried to talk to him about the case in order to develop a theory of defense, Mr. Welch focused on trivial, irrelevant details and we could not get him to pay attention to larger, more important matters. He read cases he obtained from the library or from us and became fixated on issues or motions he read about, even if they were completely irrelevant to his case, and we were unable to get him to focus on assisting us. He also seemed incapable of helping us with the factual details of the case. We frequently tried to get him to explain what had happened at the scene of the homicides and he was able to discuss some of the incidents which led up to the killings. However, it was clear from the beginning that there were substantial holes in his memory.

(Exhibit 7, Declaration of Robert Cross.)

5. Broome and Cross retained a psychologist, Dr. William Pierce, to examine petitioner, and Pierce determined that petitioner was incompetent to stand trial. (Exhibit 22, Declaration of William Piece, Ph.D.; Exhibit 6, Declaration of Thomas Broome; Exhibit 7, Declaration of Robert Cross.)

6. Subsequently, in early 1988, Spencer Strellis was appointed to replace Broome as lead counsel, and Alexander Selvin eventually became associate counsel. Strellis too believed that petitioner was mentally incompetent to assist his counsel or to stand trial. (Exhibit 30, Declaration of Spencer Strellis.) In addition, Strellis retained a psychiatrist, Dr. Samuel Benson, to examine petitioner. Benson visited petitioner on five occasions

and also concluded petitioner was incompetent to stand trial. (Exhibit 3, Declaration of Samuel Benson, M.D.)

7. In spite of lay and professional agreement that petitioner was mentally ill, counsel failed to perform the basic investigation necessary to identify the cause of petitioner's symptoms or determine the etiology of his impairments. Although petitioner himself requested psychiatric assistance and evaluation many times prior to trial, counsel did not retain a neuropsychologist to perform testing that would have identified the damage. Counsel also failed to gather publicly available documents or conduct basic social history interviews of family and friends to obtain information that would have permitted his experts to prepare a coherent and persuasive explanation of petitioner's behavior for the jury.

8. As set forth in more detail in Claim 18, which is incorporated by reference as if fully set forth herein, this information was freely and easily available. Briefly, this information would have shown that petitioner's brain damage may have resulted in part from both the brutal, persistent physical abuse he suffered at the hands of his father in utero and throughout his childhood as well as other head trauma he suffered throughout his life. In addition, readily available information would have shown that petitioner suffered diffuse brain damage as the result of in utero and life-long neurotoxin exposure.

9. Petitioner was exposed to neurotoxins on a regular basis in his childhood, which was a major contributing factor to the diffuse brain damage identified by Dr. Karen Froming. (Exhibit 10, Declaration of Karen Bronk Froming,Ph.D.) A neurotoxin is a chemical substance that causes adverse effects on the structure or functioning of the central and/or peripheral nervous

system. Exposure during one's childhood is even more physically devastating than adulthood. From infancy through adolescence, children experience rapid growth and development, especially for the nervous system, the lungs, the reproductive organs and the immune system. The permanent structures of these organs are established in childhood. (Exhibit 55.)

10. Additionally, vital connections between cells are established during the developmental stage of organs. These delicate developmental processes in children may easily and irreversibly be disrupted by toxic environmental substances. Due to the fact that a child's internal systems are immature, their ability to neutralize and rid their bodies of certain toxics is reduced. Hence, "if cells in the developing brain are destroyed by lead, mercury, or other neurotoxic chemicals, or if vital connections between nerve cells fail to form, the damage is likely to be permanent and irreversible. This may mean a loss of intelligence and alteration of normal behavior." (Exhibits. 55, 56, 66.)

11. Trial counsel failed to investigate or recognize the significance of neurotoxin exposure and therefore failed to adequately investigate, prepare, and present evidence of exposure and its toxic effects on petitioner. This evidence would have been relevant to the following legal issues, among others:

(1) petitioner's mental state at the time of the crimes (sanity, intent to kill, premeditation and deliberation, intent to inflict great bodily injury);

(2) petitioner's long term mental functioning and disabilities (bearing on mental state at the time of the crime, and evidence in mitigation of penalty);

(3) petitioner's competence to stand trial; and

(4) petitioner's social and cultural history as evidence in mitigation of penalty.

12. The following facts demonstrate that petitioner was prejudiced by counsel's unreasonable failure to investigate petitioner's neurotoxin exposure and its effects, and to employ experts and present evidence on these facts in support of the legal issues noted above.

13. While pregnant with petitioner, his mother, Minnie, lived in a house contaminated with lead-based paint. Built in approximately 1890, this house received a multitude of serious violations from mid-1957 until it was officially declared a nuisance and ordered demolished in 1969. In addition to being heavily infested with cockroaches and rodents during Mrs. Welch's pregnancy, there were 41 other serious violations where repair was demanded and never completed by the landlord. Among other incidents of disrepair, many walls and other structures were crumbling. Petitioner spent his infancy in this house and lived there until the family moved in 1961. (Exhibit 53.)

14. Spending time in areas where leaded paints have been used and are deteriorating has long been acknowledged as a method of lead exposure. Lead paint was not even banned for use in the United States until 1973—one gram of such paint contains 500 mg of lead, or 20,000 times the permissible intake for a child. As paint ages, it chalks, flakes, and powders, and becomes part of the household dust—this process became tremendously amplified at 5848 Fremont because nearly all wall surfaces, both indoors and outdoors were deteriorating. Due to the fact that the placenta is an imperfect barrier between the mother and fetus for lead and other heavy metals, petitioner was exposed to lead in utero. The placental transfer of lead begins as early as the

12th week of gestation and continues throughout fetal development. Lead exposure in utero, even at low-levels, has been shown to cause neurologic impairment. Neurological deficits include a diminution in nerve cell development in the cerebral cortex, IQ reduction, behavioral problems and a specific reduction in the nerve cell size in the optic nerve. It also impairs motor skill development and alters the level and utilization of important brain chemicals such as dopamine, serotonin, and norepinephrine. A 1943 study showed that children exposed to lead made unsatisfactory progress in school due to sensory motor deficits, short attention span, and behavioral disorders. (Exhibits 56; 57 at pp. 4, 7-8; 58 at pp. 715-24, 728, 731-33; 59 at pp. 1-2; 61 at pp. 6-10; 63 at pp. 1-2.)

15. Petitioner's exposure to lead continued throughout his infancy via his mother's breast milk as well as living in a dilapidated house. Due to the fact that there is an increased and sustained mobilization of maternal skeletal lead during lactation, breast milk is a known pathway for lead exposure. Petitioner was also now living and breathing in an 1890 house cited for deteriorating walls and ceilings with inadequate ventilation. It is well-documented that older, poorly maintained houses, with dust and chips from deteriorating lead paint falling into window wells, rooms, and into the soil at the base of the house, is a prime source of lead exposure. Lead exposure impacts the newly born particularly severely because it is a time of rapid development of the central nervous system. (Exhibits 56; 57 at pp. 7-9; 60 at p. 1; 62 at p. 1; 63 at pp. 1-2.)

16. In 1959, right after petitioner turned one, his childhood home was again cited with 13 "Emergency Hazards." Despite these egregious violations, his parents did not move from the house until petitioner was 3

years old, so his lead exposure continued unabated. Due to the fact that the walls and ceilings in the house were decaying and crumbling, petitioner's lead exposure was high. Crawling around on the floors in his infancy, petitioner ingested lead by placing his hands, toys and other objects and dust, soil, and/or flaking paint on those objects into his mouth. Because children's gastrointestinal tracts absorb 50% of ingested lead compared to adult absorption of 10-15%, lead ingested through hand-to-mouth behavior is an exposure source of significant concern. (Exhibits 56; 57 at p. 4; 58 at p. 728; 60; 62; 63 at p. 4.)

17. Petitioner was also likely exposed (both in utero and in early childhood) to lead from drinking water. His house was built in the 1890's and was very poorly maintained. Because plumbing installed before 1940 is likely to contain lead, lead-contaminated drinking water is commonly a problem in old houses. This is especially true because petitioner's 1890 house was specifically cited for defective interior and exterior plumbing in 1957. (Exhibits 56; 58 at pp. 729-30; 63 at p. 2.)

18. When petitioner was 3 years old he moved to an area of Oakland notorious for its overwhelming amount of heavy industry, where his neurotoxin exposure continued. In the early 1960's and 1970's, during his youth, there was a pervasive and unregulated use of toxins in industry. The National Environmental Policy Act, the nation's first major environmental legislation, as well as the Environmental Protection Agency (EPA) were not even in existence until 1969. Both the Clean Air and Clean Water Acts, the first two pieces of national legislation enacted by Congress in response to growing public concern for serious and widespread pollution, were not passed until the early 1970's. Accordingly, it was not until virtually the end of

Welch's childhood that anyone even began considering the regulation of toxins. As a marker it is useful to consider that DDT, an extremely hazardous pesticide, was not even banned in the U.S. until Welch was 12 years old.

19. San Leandro Creek, which begins at Lake Chabot and terminates into San Leandro Bay, runs 3 blocks from petitioner's residence. This creek was petitioner's favorite childhood location—he played, collected lizards and other plants and animals, and swam in this creek on a daily basis during the 1960's and 1970's. His mother stated that petitioner came home "soaking wet" all the time from swimming in the creek. (Exhibit 33, Declaration of Minnie Welch.) At the time petitioner played in San Leandro Creek it existed in its natural condition and was fully accessible at all times. San Leandro Creek is no longer accessible and has been directed into a lined concrete channel for at least 2 miles surrounding petitioner's neighborhood. (Exhibit 126.) Additionally, there are immense impenetrable gates enclosing the concrete channel throughout petitioner's neighborhood, serving to further dissuade any contact with the water.

20. The watershed that San Leandro Creek is contained within traces the creek from Lake Chabot to San Leandro Bay. At its widest, the watershed is about 2 miles across. In the 1960's and 70's all storm drains fed directly into the creek, causing any pollutants that went into the street within the watershed to wash into San Leandro Creek. (See watershed details on Exhibit 126; Exhibit 15, Declaration of Keith Kelson.) It is well-documented that, especially in the time period of petitioner's youth, many businesses would establish direct connections to storm drains as a wastewater disposal method. (Exhibit 83.) Furthermore, the toxins problems associated with

storm drain pollution in Alameda County creeks has been recognized for a considerable amount of time. For example, in 1987 the Alameda County Task Force was specifically formed in order develop a solution to the storm water pollution problem plaguing the county. (Exhibits 64, 67 at p. ES 1.)

21. There are over 950 suspected neurotoxicants. Hundreds of these neurotoxicants are strongly associated with industry. It has long been established that exposure to industrial chemicals can damage the nervous system, resulting in irreparable brain damage. Not only is there a concern with direct washing into or disposal from industry into the storm drains, thus the creek, but industrial and residential areas themselves are highly impervious surfaces. Impervious surfaces, such the area petitioner grew-up in, prevent the infiltration of rainwater and, consequently, cause a tremendous amount of pollutant loadings to the storm water. The main storm water pollutants of concern identified in the creeks of Alameda County include the following: organophosphate pesticides (diazinon and chlorpyrifos), organochlorine pesticides (DDT, chlordane and dieldrin), copper, lead, zinc, mercury, polycyclic aromatic hydrocarbons (PAHs), and polychlorinated biphenyls (PCBs). Exposure to any, all or a combination of these toxins would have had an adverse impact on the petitioner. The storm water pollutants identified as being of concern in Alameda County creeks are virtually all neurotoxins (Exhibits 67 at p. ES 1-2; 12 ; 13; 64 at pp. 3-5, 4-14, 5-11, 6-3):

22. Organophosphate pesticides are a group of closely related pesticides that affect functioning of the nervous system. Substantial toxicologic evidence has shown that repeated low-level exposure to organophosphate pesticides may affect neurodevelopment and growth in

developing animals. In particular, samplings and analysis have shown that both upper and lower San Leandro Creek contain diazinon at levels higher than those that would cause acute toxicity to C. dubia. (Exhibits 68-70.)

23. Organochlorine pesticides biodegrade slowly and are highly lipid-soluble, hence they tend to accumulate with repetitive exposure, hence the duration of toxicity may be prolonged. Organochlorine pesticides act as neurotoxins by interfering with the transmission of nerve impulses, especially in the brain, resulting in CNS stimulation. (Exhibit 71 at p. 2.)

24. Copper, lead, zinc and mercury are all heavy metals (elements having atomic weights between 63.546 and 200.590, and a specific gravity greater than 4.0). The neurotoxic effects of heavy metals, especially lead and mercury, are well-known. Due to the widespread poisoning of Japanese fisherman and their families in the 1950's as a result of consumption of methyl mercury contaminated fish, we have known about the toxicity of mercury for a long time. A primary route of exposure to mercury is through transport into surface waters. Because methyl mercury is a neurotoxin (particularly toxic to the developing nervous system), unborn fetuses and young children are especially susceptible to mercury's toxic effects. Because it is easily vaporized, air around chlorine-alkali plants, smelters, municipal incinerators, sewage treatment plants and even contaminated soils may contain increased levels of mercury. Primary among its over 3000 industrial uses are catalysts and pigments, cells for caustic soda and chlorine production, fungicides, metal plating, solder, tanning and dyeing, textile production, use in boilers/turbines for electricity generation, paints and pesticides. Simple research would have demonstrated that petitioner played

daily in a creek and breathed the air constantly in a neighborhood rife with industries known for using methyl mercury. (Exhibits 72, 73.)

25. Polycyclic aromatic hydrocarbons (PAHs), a known skin or sense organ toxicant, are a group of over 100 different chemicals that are formed during the incomplete burning of coal, oil and gas, garbage, or other organic substances. Some PAHs are manufactured and are found in coal tar, crude oil, creosote, roofing tar, dyes, plastics, and pesticides. PAHs enter water through discharges from industrial and wastewater treatment plants. One common method a person can be exposed to PAHs is by coming in contact with air, water, or soil near hazardous waste sites, an event petitioner did on a daily basis as a child. (Exhibits 74, 75.)

26. Polychlorinated biphenyls (PCBs), a developmental toxicant as well as neurotoxin, enter the air, water, and soil during their manufacture, use, and disposal; from accidental spills and leaks during their transport; and from leaks or fires in products containing PCBs. PCBs can also be released into the environment from hazardous waste sites; illegal or improper disposal of industrial wastes and leaks from old electrical transformers. (Exhibits 76, 77.)

27. There are 6 sites on the Comprehensive Environmental Response, Compensation and Liability Information Systems (CERCLIS) at an equal or higher elevation than petitioner's home and the creek (meaning the movement is headed in the direction of the house/creek). These are hazardous waste sites that have been reported to the U.S. Environmental Protection Act (hereinafter "EPA") states, municipalities, private companies and private persons, pursuant to Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

CERCLA, commonly known as Superfund, was enacted by Congress on December 11, 1980. This law created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. (Exhibit 54.)

28. There are an additional 12 CERCLIS hazardous waste sites designated "No Further Remedial Action Planned." These are sites where the contamination has been removed, or did not require Federal Superfund Action or to be placed on the National Priorities List. (Exhibit 54.)

29. There are 3 CORRACTS sites within 2 miles of petitioner's home. CORRACTS is a list of handlers with Resource Conservation and Recovery Act (RCRA) Corrective Action Activity, meaning these are sites that generate, store, treat, or dispose of hazardous waste that have had to take corrective action for spills or other mishandling. (Exhibit 54.)

30. There are 92 sites on the RCRA database, all within 1.25 miles of petitioner's home. This database includes selected information on sites that generate, store, treat, or dispose of hazardous waste as defined by the Act. The source of this database is the U.S. EPA. (Exhibit 54.)

31. The Emergency Response Notification System (hereinafter "ERNS") records and stores information on reported releases of oil and hazardous substances. The source of this database is the U.S. EPA. There are 27 sites on the ERNS database, all of which are within 1 mile of petitioner's home. (Exhibit 54.)

32. There are 8 sites on the California Department of Toxic Substances Control's Annual Workplan (hereinafter "AWP") database. The

AWP identifies known hazardous substance sites targeted for cleanup. (Exhibit 54.)

33. The Cal-Sites database contains both known and potential hazardous substance sites. There are 47 sites listed on the Cal-Sites database. (Exhibit 54.)

34. There are 31 sites on the California Hazardous Material Incident Report System (hereinafter "CHMIRS") database. CHMIRS contains information on reported hazardous material incidents, i.e. accidental releases or spills. (Exhibit 54.)

35. CORTESE identifies public drinking water wells with detectable levels of contamination, hazardous substance sites selected for remedial action, sites with known toxic material identified through the abandoned site assessment program, sites with Underground Leaking Storage Tanks (USTs) having a reportable release, and all solid waste disposal facilities from which there is a known migration. The source is the California Environmental Protection Agency/Office of Emergency Information. There are 261 sites within 2 miles of petitioner's home on the CORTESE database. (Exhibit 54.)

36. Notify 65 records contain facility notifications about any release that could impact drinking water and thereby expose the public to a health risk. The data comes from the State Water Resources Control Board's Proposition 65 database. There are 27 sites within 2 miles of petitioner's home on the Notify 65 database. (Exhibit 54.)

37. There are 6 solid waste disposal facilities and landfill sites within 1.5 miles of petitioner's childhood home. (Exhibit 54.)

38. There are 241 incident reports of leaking underground storage tanks within 1.5 miles of petitioner's childhood home. (Exhibit 54.)

39. There are 65 Underground Storage Tanks (USTs) registered within 1.25 miles of petitioner's home. USTs store petroleum or hazardous substances that can harm the environment and human health if the USTs release their stored contents. USTs are regulated under Subtitle I of RCRA. Additionally, there are 90 active and inactive USTs within 1.25 miles of petitioner's home. (Exhibits 54; 78 at p. 1).

40. The Toxic Chemical Release Inventory System identified a site within 1 mile of petitioner's childhood home that releases toxic chemicals to the air, water, and land in reportable quantities. (Exhibit 54.)

50. There are 7 dry cleaner related facilities with EPA ID numbers within 1.25 miles of petitioner's childhood home. These dry cleaners are regulated because they use perc (perchloroethylene) as their cleaning solvent, a highly toxic carcinogen that has been shown to have harmful effects on the nervous system and all major organs. (Exhibit 54.)

51. The California Regional Water Quality Control Board runs the Spills, Leaks, Investigations and Cleanups (SLIC) program. There are 37 SLIC sites within the San Leandro Creek watershed. Sites in the SLIC program are generally small to medium-sized industrial sites with non-fuel contamination. (Exhibits 54; 79.)

52. HAZNET collects data from copies of hazardous waste manifests received by the Department of Toxic Substances Control. There are 326 HAZNET sites within 1.25 miles of petitioner's home. (Exhibit 54.)

53. Air, water, and soil pollutants caused by construction of the Bay Area Rapid Transit (hereinafter "BART") subway. Construction of the Oakland portion began in January, 1966, when petitioner was 8 years old. Not only does BART run within ½ mile of petitioner's home, it crosses San Leandro Creek, so there was clearly some disruption of the creek in that time. Construction went on for many years—by early 1971, 10 test prototype transit cars were being operated on the Fremont line (the line which runs by petitioner's home) in a round-the-clock program to prove out the new design before it went into full-scale production. (Exhibit 80.)

54. Pollutants caused by the various railroad tracks which surround and run within ½ mile of petitioner's home. Not only is there a concern with the tracks themselves, including rail dust contamination, but also with possible leaks or other contamination coming from loads on the cars passing by. Approximately ¾ of a mile from petitioner's house, and upstream from the closest area where he could have played in the creek, the railroad tracks pass over San Leandro Creek. (Exhibit 126.)

55. Contamination caused by both the building of the Oakland Colesium and the massive airport expansion that occurred within a few miles of petitioner's home in the early 1960's. Construction of the Oakland-Alameda County Coliseum began in 1962 and continued until the fall of 1966. Two huge craters were dug into the ground for the Coliseum and Arena. In the early 1960's the Port of Oakland was conducting a $17,5000.000 expansion of Metropolitan Oakland International Airport, including a new 10,000 foot runway. (Exhibits 81, 82.)

56. Petitioner's exposure to neurotoxins, and its irreversible effects, became obvious from his earliest school days. Lead in particular is related

to delayed mental development, lower IQ, speech and language handicaps, poor attention span, and behavioral problems, all of which petitioner demonstrated. In kindergarten petitioner was placed into a special group for the emotionally handicapped and had learning difficulties and conceptual problems. His learning difficulties and behavioral problems were also noted in the first grade, where he was labeled "hyperactive" and "immature." In first grade he was administered the Metropolitan Readiness Test, one of the most frequently used measures of learning readiness at the kindergarten and first grade level, on which he scored in the bottom 25th percentile. At 6 years old he was diagnosed with a speech handicap. On his second standardized test, administered in the second grade, he scored in the bottom 4th percentile for reading. His delayed mental development, poor attention span and behavioral problems continued throughout his school years. Throughout elementary school teachers negatively noted petitioner's behavior: "deplorable behavior," "insolence behavior," "pouts, stubborn." In the sixth grade he was administered a portion of the Lorge-Thorndike Intelligence Test on which he achieved a verbal IQ of 78, which is far below average. Studies have shown that lead-exposed children have lower IQ scores particularly on verbal scales. In addition to receiving an exceedingly low score on the IQ test he was given, petitioner consistently earned negative grades and achieved extremely low scores in all verbal areas. His fifth grade teacher specifically listed "Reading Comprehension" in the "Learning Difficulties" section of petitioner's report card. (Exhibits 58 at pp.716-19, 731-33; 63 at pp. 1, 4; 112, David Welch Oakland Public School Records.)

57. Petitioner played in the sanitary sewer throughout his childhood. Pursuant to its sewer easement, the city of Oakland placed a 4

foot wide manhole cover, to provide access to the main sewer, in petitioner's backyard. This access existed throughout petitioner's childhood. He often removed the manhole cover and climbed down the short built-in ladder to play in the water below. At the bottom of the ladder is what appears to be a small creek, which maintains a constant flow of water. In addition to the main flow (containing the waste of at least 100 houses and/or businesses), at this access there are 2 smaller sewer mains perpetually flowing, which feed the discharge from all houses on his side of La Prenda into the big main. The water petitioner often played in contains anything disposed of in more than 100 houses and/or businesses in the area. This includes anything flushed in toilets or washed down bathtubs or sinks. Additionally, in the 1960's and 70's storm water run-off and ground water often seeped into the sewer mains. This problem was well-documented, and in the mid-1990's the city undertook an extensive project, installing sliplines into the clay pipes in order to stop the ground and storm water infiltration. Hence, petitioner's creek exposure to toxins already noted as present in the storm and ground water were amplified. Besides exposure to human waste flushed down the toilets of more than 100 homes and/or businesses, as well as contaminated storm and ground water, petitioner played in the myriad of hazardous chemicals poured down all of the sinks and drains. To name a few, this would likely include bleach, paint, hydrofluoric acid, varnishes, lye, hair treatment chemicals, solvents, disinfectants and pesticides. The fact that petitioner frequented the main sewer as a playground throughout his childhood is especially dangerous considering the fact that developing children are much more vulnerable to environmental health threats than adults. (Exhibits 55, 56.)

58. As a result of long-term, repetitive and excessive exposure to neurotoxic chemicals petitioner has suffered neurological damage. These effects may have been exacerbated by other neurological damage suffered by petitioner, and the chemical exposure may have contributed to other neurological symptoms exhibited by petitioner.

59. Petitioner's neurologic impairments compromised his mental functioning to the degree that he had little awareness of his actions or of alternative causes of action. The inhibition of petitioner's neural controls due to toxic chemical exposure and other sources of impairment cause him to behave impulsively and to perseverate, and further impair his memory, consciousness, and other essential brain functions. The nature of the neurologic response precluded a rational awareness of or conformance with the requirement of the law.

60. Counsel's failure to investigate, consult expert and lay witnesses, and present evidence regarding petitioner's organic impairments, history exposure of head trauma, and exposure to neurotoxicants was unreasonable, and counsel had no legitimate strategic reasons for these omissions.

61. Counsel's unprofessional errors in failing to competently investigate and present a mental defense subjected petitioner to a trial while he was not competent to proceed, in violation of his federal constitutional right to trial only when competent. Because a person may not be tried, convicted, or punished while incompetent, this error is prejudicial per se. (*Pate v. Robinson* (1966) 383 U.S. 375.)

62. In addition, it is at least reasonably probable that a more favorable result would have been obtained but for counsel's unprofessional

errors. (*Strickland v. Washington* (1984) 466 U.S. 668.) Petitioner's behavior at the time of the crime was affected by his neurological damage due to chemical exposure, and this evidence would have supported defenses to guilt. The facts set forth above are also powerful evidence in mitigation, and would have provided the jury with a compelling basis for returning a life sentence.

63. Counsel's failure to investigate deprived petitioner's mental health experts of adequate data and social history information to present to the jury to prove that petitioner had suffered throughout his life from organic brain damage. This evidence would have provided defense counsel with the essential component missing from their case– a cogent and credible mental defense which at a minimum would have defeated the prosecution's contention that petitioner premeditated and deliberated the crimes. In addition, this testimony would have explained to the jury petitioner's bizarre outbursts, permitted the defense to portray him in a more sympathetic light, and mitigated the prejudice which resulted from petitioner's impulsive behavior in the courtroom.

64. Counsel's failure to adequately investigate and present a coherent mental defense was also prejudicial because the prosecutor exploited the lack of evidence of mental illness or impairment in his closing arguments at the guilt and penalty phases, on which the jury relied in reaching their verdicts. At the conclusion of the guilt phase, the prosecutor argued on the basis of his cross-examination of petitioner during the guilt phase that petitioner was "not delusional" (RT 5520), but was instead "rational and clear" (RT 5564-5564, 5567.) At the conclusion of the penalty phase, the prosecutor also exploited the lack of persuasive mental health evidence,

ridiculing the defense mental health experts and arguing that "Mr. Welch would have to have an IQ of two and by a zombie to excuse his acts by a mental defense." (RT 6123.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 24: Ineffective Assistance of Counsel--Failure to Move for a Private Psychiatric Examination of Petitioner

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because he was deprived of the effective assistance of counsel during the pretrial, guilt, penalty, and sentencing phases of his trial when his trial counsel unprofessionally and inexplicably failed to move for a psychiatric examination of petitioner by a defense psychiatrist under circumstances in which petitioner would have been assured of the confidentiality of the interview. Counsel's failure to do so deprived petitioner of his federal and state constitutional rights to the assistance of counsel, confrontation, due process of law, a fair and reliable determination of guilt and penalty, trial only when mentally competent, a determination by a tribunal of mental competence, trial by an unbiased tribunal, and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Dusky v. United States* (1960) 362 U.S. 402 (defendant is incompetent to stand trial if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him") *Pate v. Robinson* (1966) 383 U.S. 375 (failure to observe procedures designed to assure defendant will not be tried or convicted while incompetent violates due process and right to fair trial); *Drope v. Missouri* (1975) 420 U.S. 162 (defendant's conduct after arraignment, such as conduct in court or in jail, may trigger competency proceedings); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to

expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Gardner v. Florida,* 430 U.S. 439 (1977) (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates by reference as if fully set forth herein all the facts and law alleged in Claims 2 through 5, 18, 19, and 20.

2. Counsel were aware that petitioner repeatedly requested appointment of defense psychiatric experts to determine his competence to stand trial and assist the defense at the guilt and penalty phases. (RT 68-69, 2054, 3723-3730, 3733.) Counsel was also aware that petitioner declined to speak with the court-appointed psychiatrist, Dr. Joseph Satten, or discuss defense mental health experts on the grounds that the conditions under which the interviews were conducted at the jail were not private and therefore the confidentiality of these communications was not assured. (RT 67-69, 2054, 3723-3730, 3733, 5921, 6009-6010.) Counsel were also aware that these concerns were legitimate. Counsel themselves noted on the record that

deputies stood immediately outside the doors of the interview room and looked in the window to monitor the interview, over the objections of both petitioner and mental health experts. (RT 3723-3727.) Counsel were also aware that petitioner's papers were repeatedly searched by the sheriff's department and that he was continually harassed by sheriff's deputies. (RT 791-795, 940-941, 3060-3063, 3704-3707.) Accordingly, it was incompetent of counsel to fail to move for appointment of an independent defense psychiatric expert to evaluate petitioner's competence, and/or to move for an order requiring that evaluation and interviews by other defense mental health experts be conducted in private so that the confidentiality of the interviews could be assured.

3. It is at least reasonably probable that a more favorable result would have been obtained but for counsel's unprofessional errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington, supra*, (1984) 466 U.S. at p. 668, 694.) Counsel's unprofessional errors were profoundly prejudicial. Because the privacy of the evaluations was not assured, the Court's expert was prevented from evaluating petitioners competence and the defense mental health experts were also hindered in the efforts to assess his competence. Instead, guilt phase, defense counsel chose to present an expert who had never examined or even met petitioner (RT 5388-5389) and therefore had no information or opinion regarding his mental state–a fact the prosecutor exploited at length in his closing argument. (RT 5520-5521.) These defense experts were unable to settle on a coherent psychiatric diagnosis, and instead offered alternative differential diagnoses. (RT 5921, 5936-5938, 6050-6051.) This failure created an obvious and extraordinarily damaging weakness in the

defense case, because questions regarding petitioner's mental state were critical both to the guilt and penalty phase outcomes. Moreover, the prosecutor exploited this weakness at length in his closing arguments at both phases, subjected the defense mental health experts to ridicule. (RT 6123-6136.) Accordingly, counsel's unprofessional errors in failing to request defense experts and private interview conditions so prejudiced petitioner's case as to alter the outcome, and relief is required.

4. Counsel had no strategic reason for their failure to seek further psychiatric expert assistance or request private conditions interview condition. (Exhibit 30, Declaration of Spencer Strellis)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 25: Ineffective Assistance of Counsel--Failure to Challenge Loss or Destruction of Forensic Evidence

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because trial counsel performed ineffectively by failing to challenge, by means of a *Trombetta* or *Youngblood* motion, the prosecution's loss or destruction of crucial forensic evidence. Counsel's unprofessional errors violated

petitioner's rights to a fair trial, due process of law, the effective assistance of counsel, and the right to reliable capital proceedings and sentencing.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *California v. Trombetta* (1984) 467 U.S. 479; *Arizona v. Youngblood* (1988) 488 U.S. 51 (bad faith destruction of material evidence by prosecution); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Gardner v. Florida*

(1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (jury to determine sentencing factors).

C. The following facts, among others, to be presented after adequate funding, discovery, investigation, and an evidentiary hearing are presented in support of this claim:

1. Petitioner incorporates as if fully set forth herein all facts and law set forth in Claims 8 and 24.

2. Counsel performed inadequately in failing to investigate, cross-examine, and impeach prosecution witnesses and/or present defense witnesses regarding the prosecution's bad faith suppression, destruction, tampering, and/or failure to preserve crucial forensic evidence favorable to the defense.

3. As set forth in more detail in Claims 8 and 24, which are incorporated by reference herein, the prosecution and the Oakland Police Department acted in bad faith in suppressing, destroying, tampering with, and/or failing to preserve blood samples taken from petitioner at the time of his admission to Highland Hospital. Because of the circumstances of the crimes and other facts of which police were aware, the exculpatory nature of the evidence was apparent before its destruction, and it was apparent that petitioner would have been unable to obtain this crucial evidence by other means if the evidence was destroyed by the police.

4. Under federal and state law, both today and at the time of trial, the bad faith destruction or failure to preserve evidence under these circumstances constitutes a due process violation. (*California v. Trombetta*, *supra*, 467 U.S. 479; *Arizona v. Youngblood*, *supra*, 488 U.S. 51; *People v. Hitch* (1974) 12 Cal.3d 641.) It is incumbent upon defense counsel to investigate and challenge bad faith conduct by state actors and to seek sanctions, up to and including dismissal of the charges, for destruction of this evidence. Such a challenge, commonly known as a *Trombetta* or *Youngblood* motion, or, in California, as a *Hitch/Trombetta* motion, should be brought prior to trial. (See, e.g., *Cal. Criminal Law and Procedure* (5th Ed. 2000) §11.24, California Continuing Education of the Bar.)

5. Trial counsel was ineffective in failing to make this motion prior to trial. Such a motion would have been meritorious and would have resulted in either outright dismissal with prejudice, or, at a minimum, appropriate sanctions such as limiting the charged offenses to manslaughter or second-degree murder. Counsel also should have objected on *Brady* and prosecutorial misconduct grounds.

6. It is at least reasonably probable that the outcome would have been more favorable to petitioner but for counsel's unprofessional error. (*Strickland v. Washington*, *supra*, 466 U.S. 668.) A reasonable probability is a probability sufficient to undermine confidence in the outcome, but need not rise to the level of a preponderance of the evidence. (*Ibid.*) As set forth in more detail in Claims 8 and 24, the lack of a quantitative analysis of petitioner's blood eliminated a potent voluntary intoxication defense and rendered the presentation of his expert witness, Dr. Fred Rosenthal, ineffectual. The lack of this analysis not only deprived petitioner of a

voluntary intoxication defense and persuasive mitigation evidence, but also permitted the prosecutor to argue that petitioner had not been impaired by drugs or alcohol at the time of the offense. The prosecutor capitalized on the lack of a quantitative analysis throughout his closing arguments at the guilt and penalty phases. This tactic obviously worked, resulting in verdicts of first degree premeditated murder on all six counts– verdicts that would have been impossible had petitioner been shown to be unconscious due to voluntary intoxication. (*People v. Graham* (1969) 71 Cal.2d 303, 316-317.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 26: Ineffective Assistance of Counsel--Jury Selection Proceedings

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because trial counsel performed ineffectively during the jury selection phase of the trial, thereby prejudicing petitioner's defense at both the guilt and penalty phases of the trial. Specifically, counsel performed ineffectively in failing to competently voir dire prospective jurors regarding exposure to both prejudicial pretrial publicity and/or prejudicial comments emanating from another prospective juror (who provided other jurors with many details of the case.) Counsel also performed incompetently by failing to object when the

trial judge excused four prospective jurors who were not "automatic life" jurors and who stated on voir dire they could have voted to impose death. Counsel performed incompetently by failing to object when the trial judge, sua sponte, took time and effort to "rehabilitate" prospective jurors who were clearly "automatic death" jurors (one such prospective juror was seated and voted to sentence petitioner to death.) The unconstitutional excusing of the jurors and the partial and unreliable context within which these judicial errors occurred violated petitioner's rights to the effective assistance of counsel, a fair trial, due process, an impartial tribunal, a trial judge who was unbiased and conducted the proceedings not only with fairness, but also an appearance of fairness, and reliable capital proceedings and sentencing.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel

entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Wainwright v. Witt* (1985) 469 U.S. 424 and *Witherspoon v. Illinois* (1968) 391 U.S. 510 (automatic-life and automatic-death jurors may be excluded based on their views); *Irvin v. Dowd* (1959) 359 U.S. 394 (pretrial publicity can so prejudice a panel that the jurors voir dire responses that they can be impartial cannot be believed); *Chandler v. Florida* (1981) 449 U.S. 560 (highly publicized criminal trial presents risk of compromising right to fair trial); *Patton v. Yount* (1984) 467 U.S. 1025 (same); *Shepard v. Maxwell* (1966) 384 U.S. 333 (same); *Rideau v. Louisiana* (1963) 373 U.S. 723 (prejudice presumed due to crucial pretrial publicity); *Estes v. Texas* (1965) 381 U.S. 532 (prejudice presumed where significant media on court proceedings during trial); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (prosecutorial misconduct); *Mattox v. United States* (1892) 146 U.S. 40 (fundamental right to impartial jury): *United States v. Burr* (1807) 25 Fed. Cas. 25, no. 14,692b CCD. Va. (fundamental right to fair and impartial tribunal); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Gardner v. Florida* 430 U.S. 439 (1977) (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner hereby incorporates as if fully set forth herein the facts and law set forth in Claims 38, 40, 52, 53, and 78.

2. Although trial counsel were aware that pretrial publicity in this case was extensive and highly prejudicial, and that the jury pool was overwhelmingly and negatively influenced by media coverage, counsel performed ineffectively in failing to adequately voir dire prospective jurors with regard to their exposure to pretrial publicity.

3. Prior to petitioner's trial, he requested a change of venue. (RT 993.) This motion was renewed after voir dire of the prospective jurors. (RT 3715, 3717.) The trial court denied the motion, finding that petitioner could get a fair trial in Alameda County. (RT 1051, 3717.)

4. Petitioner introduced the testimony of Joie B. Hubbert, venue specialist, who testified that 65 percent of the eligible jury in Alameda County recognized the case, and 78 percent of these polled individuals prejudged the petitioner as guilty. (RT 998, 1007, 1009, 1011, 1015.) Of those who were aware of the case and who read Alameda County, San Francisco or San Jose newspapers, 91 percent prejudged petitioner as guilty. (RT 1011.) The venue specialist found that the approximately 80 percent prejudgment rate was among the highest in all her cases. (RT 1037.)

5. In denying the motion to change venue the court recognized that there was "sensationalism" to the nature and extent of news coverage, "particularly in the last six months." (RT 1049-1050.) Despite these admissions, the trial judge held the nature and extent of news coverage was

not inflammatory, Alameda County was a large county, and the status of petitioner and victims was not such to warrant a change of venue. (RT 1049-1051.) With respect to the final factor, the court reasoned, "I'm not trying to belittle the lives of these people taken, but they really do not fall into that status of the victim they're concerned about." RT 1050. The court reviewed the materials of the jury venue expert and stated: "Frankly, I am impressed with the recognition factor. I agree with her that that does concern me." The court reasoned that the venue expert did not conclude that petitioner could not get a fair trial. However, as she expressly stated in her testimony, her role of the expert, as that of all venue experts, was not to form a specific conclusion but rather to conduct a scientific survey which would set forth the facts upon which the venue decision should reasonably be predicated. (RT 1009-1015.)

6. On this basis, the court denied the motion for a change of venue. The court, however, informed defense counsel it was possible that the motion would be renewed after voir dire. Significantly, the court expressly and explicitly informed counsel and petitioner as to what the court's conduct would be during this voir dire:

> However, at some point we are going to conduct the voir dire of jurors. *And I think probably a proper question at least in part would be what extent, if any, publicity has upon them; and I will ask that question to them.*
>
> (RT 1051, emphasis added.)

Notwithstanding the trial judge's express representation, this crucial issue was not fully explored. In fact, of the 82 jurors who subsequently qualified on voir dire, the trial judge asked only two if they had heard or read anything about the case. (RT 1070, 2998.)

7. In spite of the fact trial counsel was aware of this background prior to the commencement of voir dire, counsel consistently failed to adequately inquire whether jurors had been influenced by anything they read or heard about the case. Counsel's error was compounded when it was learned during jury selection one of the prospective jurors, who had read extensively about the case, freely discussed the facts and her opinions about the case with other prospective jurors. Prospective juror John Banducci revealed during his voir dire questioning that one of the other jurors had explained to him and one other juror, a schoolteacher, "whatever went on regarding the house and everything and the gentleman coming into the home with an Uzi machine gun." (RT 1295.) Banducci had heard about the case on television, and the juror with whom he spoke obviously knew much more than he did. Counsel performed ineffectively in not immediately calling for a hearing regarding the extent to which the jury pool had been exposed to prejudicial information from the juror or jurors in question. Moreover, even after this discovery, counsel consistently failed to adequately inquire on voir dire into the impact of pretrial publicity and the dissemination of information among the prospective jurors. (RT 1292-1304.)

8. When counsel made inquiries into media exposure, counsel usually let the matter drop after a single question. For example, counsel asked juror Grace Estarija whether she had "heard anything about this case, read anything in the newspapers or anything?" Estarija said no, and counsel dropped the matter. Counsel failed to inquire into radio and television exposure, the methods by which a majority of people get their news. (RT 1070.)

9. Counsel's voir dire of juror Virgie Williams on media exposure was also wholly inadequate. Counsel asked no questions about what newspapers or other publications Williams read, what television programs she watched, what radio programs or stations she listened to, or whether she had heard any other jurors discussing the case during the voir dire process. (RT 2335.) Counsel simply relied on Williams' initial statement that she had not heard about the case.

10. Similarly, counsel failed to inquire adequately into juror Joanna Gonzales' knowledge of the case. Gonzales' only comment on the subject was "I don't remember it." (RT 2424.) However, she then added, "I *may have* and just . . ." (RT 2426, emphasis added.) In spite of this ambiguous response, counsel failed to ask any further questions about Gonzales' television, radio, or newspaper habits and also failed to inquire whether Gonzalez received any information from other jurors. (RT 2419-2432.)

11. During the voir dire of juror David Larson, Larson revealed that he had "a dim recollection at the time of hearing a radio, a radio report about the killings." (RT 2544.) In spite of this revelation, counsel made no further inquiries into exactly what the juror had heard, whether he read the newspapers or watched television, what his reading and media habits were, or whether he had heard any information about the case from other jurors. (RT 2544-2547.)

12. In the case of juror Sally Jessie, counsel asked only whether she had "heard anything" about the case before coming into court two weeks previously. Jessie said no. (RT 2553.) Counsel again failed to pursue this answer with more specific questioning about newspapers, television, radio, and exposure to information passed on by other jurors and other sources.

Counsel's omission was particularly egregious in this case in light of the fact that Jessie was a long-time paralegal employed by a law firm and was likely to have been exposed to legal newspapers and magazines and the inevitable office chat that accompanies a notorious case.

13. Equally remarkable was counsel's failure to inquire in detail about pretrial publicity in the case of juror Joseph Cruz. Cruz revealed that he had read about the case in the papers before he came to court. When asked whether he had read anything in the last two weeks, he said "there hasn't been any" coverage. (RT 2668.) Cruz told counsel that he read the *Oakland Tribune*. Counsel's failure to ask more specifically what Cruz knew about the case was extraordinary in view of the fact that Cruz was a regular reader of Oakland's only daily newspaper, a newspaper which had carried numerous lurid stories about the case.

14. Counsel's performance in the voir dire of juror Howard McGee was also inadequate, both because of counsel's inadequate questioning on McGee's exposure to media and information from other jurors, and because McGee so strongly favored the death penalty he should have been excused on the basis of his views, yet counsel failed to so move. (RT 2779-2780, 2783.)

15. Shortly after the voir dire of McGee, counsel again learned that members of the jury pool had disseminated information about the case to other prospective jurors with potentially devastating effect. Prospective juror Etta Goins informed the court and counsel that on the first day she attended court with the other 90 jurors in her group, she walked to the parking lot with one of the other prospective jurors and asked when the killings in the case had occurred. The other juror informed her that the killings took place in 1987 in

East Oakland, and "the guy" had killed two children and four adults. (RT 2837.) Once again, counsel failed to move for a hearing to determine whether the entire pool of which Ms. Goins was a member had been prejudiced by extrinsic information. More remarkably, counsel continued to fail to inquire about contacts with other jurors in subsequent voir dire.

16. Moments later, in the voir dire of alternate juror Sandra Williams, Ms. Williams revealed that she had also been exposed to information transmitted by another juror, who had read about the case in the papers, recalled that the incidents occurred in 1987, and knew that "there were murders and children involved." (RT 2865-2866.) Counsel still made no motion to further investigate the degree of prejudice arising from the extrinsic information presented by other jurors.

17. Subsequently, prospective juror Raymond Velasco testified that a few of the jurors had talked about what they had read in the paper. (RT 3151.) Counsel was by now aware of evidence that numerous jurors had overheard others talking about the case and what they had read in the newspapers before coming to court. However, counsel still failed to move for an evidentiary hearing or further investigation on the issue.

18. Later, prospective juror Yao Zhu testified that "I just feel that I've seen the person somewhere before." (RT 3222.) She further stated, "I mean a lot of other people have seen him too. Maybe it was on TV, but I don't know the person." (RT 3221-3222.) Incredibly, counsel's reaction to this statement was simply, "Okay." (RT 3222.) Counsel failed to inquire further regarding what this juror recalled about the case, what the other jurors had said or seen, how many other jurors had been discussing the case, or when these discussions took place.

19. It is at least reasonably probable that a more favorable result would have been obtained but for counsel's deficient performance during the jury selection proceedings. (*Strickland v. Washington, supra*, 466 U.S. at p. 668.) The prejudicial impact from counsel's deficient performance became apparent when the court took up the change of venue motion, on which it had deferred ruling until after the conclusion of the voir dire process. Counsel's failure to question the witnesses regarding their exposure to pretrial media accounts permitted the prosecutor to ridicule as "fatally flawed" the jury expert's conclusion regarding the large percentage of people who were familiar with the case and had prejudged petitioner guilty. The prosecutor pointed out that only a small percentage of the jury pool actually recognized the case. The judge also noted that he had counted only 29 jurors out of the total pool of 284 jurors who stated that they had some recollection of the case. (RT 3714-3715.) The court then pronounced itself "satisfied beyond any doubt" that the case was not "affected by adverse publicity." (RT 3717.)

20. In fact, the low number of jurors who recognized the case is attributable not to the jurors' lack of interest in current affairs, as the court appeared to believe (RT 3715), but rather to counsel's inadequate voir dire. Counsel may not simply ask if a juror has "heard anything" about a case and rely upon a juror's negative response. It is commonplace for jurors to honestly believe they have never heard about a case only to discover later that they were familiar with many of the most prejudicial details and simply forgot them over time. Accordingly, it is incumbent upon counsel to inquire in depth on voir dire into the media habits of each individual juror to determine whether the juror has been exposed to sensational media accounts.

21. As this Court has stated, "[I]n an antagonistic atmosphere interior 'there will remain the problem of obtaining accurate answers on voir dire – is the jury consciously or subconsciously harboring prejudice against the accused resulting from widespread news coverage in the community?'" (*Main v. Superior Court* (1968) 68 Cal.3d 375, 380.) Even when all selected jurors claim the ability to sit impartially, such a claim is, of course, not conclusive.

> Questioned on voir dire as to the effect of the media's evidentiary disclosures, one prospective juror may deny or admit prejudgment. One may falsely deny both knowledge and prejudice for the sake of a place on the jury. An honest juror may admit knowledge or tentative prejudgment and find himself excluded. Many will sincerely try to set aside their preconceptions and give assurance of impartiality, yet unconsciously bend to the influence of initial impressions gained from the news media . . . Authoritative decisions now recognize the lack of realism inherent in expectations that jurors can insulate their verdict from inadmissible knowledge. When prejudicial publicity has been injected into jurors' consciousness, the courts do not give dispositive effect to jurors' assurances of impartiality. To expect a juror to confess prejudice is not always a reliable practice. A juror can be completely honest in denying prejudice. In the words of Alexander Pope, 'All looks yellow to the jaundiced eye.' In addition, there is the danger in any well publicized case that the very process of voir dire, with its repeated questions about publicity and prejudice, will tend to prejudice the jury. Listening to other jurors' comments and observing the widespread press and community involvement in the case, the jurors are likely to develop a bias even if they did not harbor one before the commencement of voir dire.
>
> (*Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 881.)

22. Counsel's failure to inquire about pretrial media exposure or information obtained from other jurors was not motivated by any tactical

concerns. Indeed, on a few occasions, counsel did ask whether jurors had read about the case in the newspapers and, if so, which newspapers. (See, e.g., RT 2166.) Counsel was capable of performing competently, but in a majority of instances during this voir dire, failed to do so through inadvertence, lack of preparation, or indolence. As a result, petitioner was deprived of his constitutional rights to effective assistance of counsel and an impartial jury, and relief must be granted.

23. Counsel performed ineffectively by waiting until well into the voir dire process to request jurors be admonished not to discuss, read about, or otherwise be exposed to media accounts about the case. (RT 1502.) Petitioner hereby incorporates as if fully set further herein the laws and facts set fourth by Claim 38.

24. Although the petitioner is African-American, counsel failed to ask questions designed to assess the views of individual jurors, particularly white jurors, regarding race issues. Counsel did inquire of an African-American juror whether that juror would make decisions on the merits or on the basis of race. (RT 1519-1520.) Accordingly, counsel had no tactical reason for asking such questions of white jurors. Counsel's performance in this regard not only constituted ineffective assistance but also contributed to tensions between counsel and petitioner and deprived petitioner of a fair and impartial jury.

25. It is at least reasonably probable that a more favorable verdict would have been obtained but for counsel's deficient performance in failing to inquire regarding racial views during jury selection proceedings. Empirical evidence shows that race is a significant factor in Alameda County death penalty prosecutions and convictions.

26. Statistics compiled by the California Department of Corrections demonstrate a marked disparity in the number and proportion of African-Americans convicted and sentenced to death in Alameda County. As of January 1, 2001, there were 35 inmates on Death Row in California as a result of convictions and death sentences imposed in the Alameda County Superior Court. Of those 35 inmates, 18 were African-Americans, 11 were Caucasians, three were Hispanic, one was Native American, and two were listed as "Other." (Exhibit 42, California CDC Condemned Inmate List, January 2001, Alameda County.) Thus, 51.4% of all persons sentenced to death in Alameda County and currently awaiting execution are African-Americans. However, according to statistics compiled by the California Department of Finance based upon data from the 2000 census, African-Americans comprise only 18% of the population of Alameda County. (Exhibit 41, Alameda County Race/Ethnic Report.) Thus, Alameda County juries, in combination with the charging and trying practices of the Alameda County District Attorney's office, have imposed death sentences upon African-American defendants at a rate more than *three times* higher than would be expected based upon the percentage of African-Americans in the county. Accordingly, it was incumbent upon counsel to be particularly attuned to indications of racial bias among the jurors undergoing voir dire. Instead, counsel asked no questions designed to develop this issue.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 27: Ineffective Assistance of Counsel – Failure to Competently Confront and Respond to Prosecution Case in Aggravation.

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7, 15, 16 and 17 of the California Constitution because his trial counsel performed ineffectively during the penalty phase of petitioner's trial in failing to competently confront and respond to the prosecution's case in aggravation. Counsel's unprofessional errors violated petitioner's rights to a fair trial, due process of law, confrontation, the effective assistance of counsel, an impartial jury, trial only while competent, the right to a trial judge who was unbiased and conducted the proceedings not only with fairness but also with an appearance of fairness, and the right to reliable capital proceeding and sentence.

B. The following United States Supreme Court decisions, *inter alia,* in effect at the time the error occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing

phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); (*Dusky v. United States* (1960) 362 U.S. 402 (defendant is incompetent to stand trial if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him") *Pate v. Robinson* (1966) 383 U.S. 375 (failure to observe procedures designed to assure defendant will not be tried or convicted while incompetent violates due process and right to fair trial); *Drope v. Missouri* (1975) 420 U.S. 162 (defendant's conduct after arraignment, such as conduct in court or in jail, may trigger competency proceedings); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Estelle v. Williams* (1976) 425 U.S. 501; *In re Murchison*, (1955) 349 U.S. 133 (due process mandates impartial judge – both actual impartiality and appearance of impartiality constitutional violation); *Mayberry v. Pennsylvania,* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States,* (1921) 255 U.S. 22 (constitutional mandate prescribing all judicial bias); *Tumey v. Ohio,* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas*, (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Gardner v. Florida,* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner

sentenced on basis of unreliable information); *Godfrey v. Georgia,* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Taylor v.* Kentucky (1978) 436 U.S. 478 (cumulative effect of errors may violate due process); *Hicks v. Oklahoma,* (1979) 447 U.S. 343 (federal due process claim in state-created right); and including *Apprendi v. New Jersey,* (2000) 530 U.S. 466.

C. The following facts, among others, are presented in support of this claim, after adequate funding, discovery, investigation, and an evidentiary hearing:

1. Petitioner incorporates by reference as if fully set forth herein the facts and law set forth in Claims 2 through 5 and 9 through 24.)

2. Counsel performed deficiently in failing to adequately investigate, cross-examine, or impeach prosecution witnesses throughout the penalty phase. Specifically, counsel failed to ask any of the prosecution witnesses questions designed to elicit information about petitioner's mental state or reputation for mental illness during the incidents used in aggravation. Although petitioner had a reputation throughout the criminal justice system in Alameda County for being mentally ill (Exhibit 6, Declaration of Thomas Broome), and although many of the prosecution's witnesses were law enforcement officers in the county, counsel failed to investigate or interview these witnesses, ascertain their knowledge of petitioner's mental illness, or ask any questions regarding petitioner's confused, delusional mental state during any of the incidents to which these witnesses testified. Counsel's unprofessional and deficient performance allowed a parade of prejudicial,

violent conduct to go unchallenged and unexplained, to the overwhelming prejudice of petitioner's case.

3. For example, counsel failed to investigate, interview or competently cross-examine Oakland Police Officer Rosemary Dixon, who testified that petitioner had verbally abused her at the counter of the records department of the Oakland Police main station, and then assaulted her as she attempted to apprehend him. On cross-examination, counsel asked the witness to repeat all of the most prejudicial facts already elicited by the prosecutor without ever inquiring about petitioner's perseveration, impulsivity, paranoia, persecutory symptoms, or any other characteristic consistent with his mental impairments. (RT 5688-5701.) In fact, counsel actually elicited information harmful to petitioner, not only reemphasizing the violence of the alleged attack on Dixon but also permitting the witness to add the unhelpful allegation that petitioner was "using profanity throughout" the incident. (RT 5700.)

4. Counsel also failed to investigate, interview, or competently cross-examine prosecution witness Juanell Turner, a former girlfriend of petitioner, whom the prosecutor alleged had been sodomized by petitioner in 1980 petitioner. (RT 5702-5703.) Turner was a reluctant witness for the prosecution who stated she did not remember petitioner ever giving her an ultimatum about having sex with him. (RT 5705.) Petitioner objected that Turner had consented to have sex with him, and Turner herself did not contradict him but continued to insist that she did not remember what had happened ten years earlier. (RT 5710.) Therefore, the prosecutor was limited to reading questions and answers from her testimony at a preliminary hearing held nine years earlier. (RT 5710-5719.)

5. Although Turner was plainly sympathetic to petitioner and, on the basis of her previous romantic relationship with petitioner, would have been able to provide substantial, credible mitigating evidence regarding petitioner's long-standing mental illness, counsel was unable to ask these questions because they had made no effort to interview her in advance of trial. Petitioner's counsel therefore was left to resort to the preliminary hearing transcript from 1980, just as the prosecutor had done, to establish that Turner had been asked whether petitioner was crazy and had replied, "Um-hum. A woman beater." (RT 5719.) Obviously, this ill-prepared, thoughtless attempt to introduce evidence of petitioner's mental illness through Turner's prior testimony was hardly mitigating. Since the prosecutor had not introduced any evidence that petitioner had beaten Turner, her testimony– elicited by petitioner's own counsel– prejudiced petitioner's case.

6. Similarly, petitioner's counsel failed to investigate, interview, or competently or cross-examine prosecution witness Faye McPherson regarding the incident in which petitioner as a juvenile allegedly fired a shotgun into a window of her home. Counsel failed to elicit mitigating testimony from McPherson regarding petitioner's delusional mental state. Counsel's omission is particularly inexplicable in view of the fact that McPherson's testimony makes it clear that she had known petitioner for eleven years and was fond of him, testified for the prosecution only reluctantly, and actually sought to help petitioner. (See, e.g., RT 5731-5732, 5736.) Moreover, as they had done with Rosemary Dixon, counsel's cross-examination of this witness only made matters worse, eliciting such damaging information as whether or not the witness knew that petitioner "was going around bashing in his father's car [windows]." (RT 5737.) Once again, instead of mitigating the alleged

offense, counsel's inept performance actually resulted in the introduction of additional aggravating evidence.

7. Petitioner's counsel also performed incompetently in failing to investigate, interview or competently cross-examine San Francisco Police Officers Daniel McDonagh and Jeffrey Lindbergh and Highway Patrol Officer Robert Barbero. These officers testified for the prosecution regarding an alleged high-speed pursuit of petitioner as he rode his motorcycle on the freeway and in the neighborhood of San Bruno and Silver Avenues in San Francisco in 1979, when petitioner was twenty years old. Once again, counsel failed to ask any questions regarding petitioner's mental state at the time of the incident, in spite of the fact that petitioner appeared to have fled the police in terror over what was nothing more than a potential speeding ticket, and even though Lindbergh testified that petitioner's actions at the time "didn't seem to make a lot of sense." (RT 5767.) With respect to McDonagh, counsel's entire inept cross-examination consisted of three questions which merely asked the officer to repeat his damaging direct testimony that petitioner had led police on a 15-minute, high-speed chase. Counsel asked whether the chase had been "reminiscent of something you see in the movie (sic), like, one of these things." (RT 5759.) When the witness answered that the chase was not like a movie because "you don't now how it is going to end," counsel actually endorsed this prejudicial remark, stating "That is correct, that is correct," and mercifully ended his cross-examination. (RT 5759.) In the case of Lindbergh, counsel's brief cross-examination, which covers half a page of transcript, emphasized that it had taken four police officers and, apparently, a kick to the groin to subdue petitioner– hardly helpful information for the defense. (RT 5767.) In the case of Barbero,

counsel simply had the witness repeat his damaging testimony and sat down. (RT 5896-5899.)

8. Had counsel conducted an adequate investigation, counsel would have discovered that the foregoing incident resulted from and was a manifestation of petitioner's profound paranoia and persecutory delusions. Petitioner's childhood friend and neighbor, Billy Williams, could have described for the jury another closely similar incident in which petitioner was riding his motorcycle, saw police officers approaching, and was so afraid of them that he leaped from the moving motorcycle and ran away. The police, who knew petitioner previously, were not chasing or looking for him, but instead laughed as he ran away and called a tow-truck for his motorcycle. Williams, who knew petitioner well, knew that this incident was simply a result of petitioner's paranoid delusions. Petitioner's counsel was ineffective in failing to investigate, discover, and present this evidence in mitigation. (Exhibit 36, Declaration of Billy Williams.)

9. Counsel's failure to investigate, interview, or competently cross-examine Deputy Sheriff Jack Cessna was also deficient. Cessna related details of an alleged fight between petitioner and a cellmate in 1985. Counsel again asked no questions going to petitioner's mental state or illness, asked the odd and unhelpful question whether the deputy would characterize what he had seen as "a fight between two inmates," and had no further questions. (RT 5777.) As the witness was about to leave the stand, counsel finally asked a helpful question and elicited the answer that did not know which inmate had started the fight. (RT 5777.) The fact that this questioning came as an afterthought after the witness had been excused demonstrates counsel's sloth and lack of preparation.

11. Counsel similarly failed to investigate, interview, or competently cross-examine Deputy Sheriff Raymond Bernauer, who testified that petitioner had been involved in a fight while locked in the back of a van with other prisoners while being transported from North County Jail to the main jail in Santa Rita. Once again, counsel failed to ask any questions regarding petitioner's delusional mental state at the time of this incident, emphasized that petitioner was "on top of the other fellow," and elicited only that Bernauer did not know who started the fight. (RT 5788.)

12. Counsel also failed to investigate, interview, or competently cross-examine Deputy Charles Utvick, who testified regarding an incident which occurred in North County Jail on December 17, 1987, more than a year *after* the killings for which petitioner was on trial. (RT 5789.) In the incident, as related by Deputy Utvick, petitioner was late getting ready to go to court, was ordered out of his cell by another deputy, attacked Deputy Utvick, and was then restrained by four deputies. Counsel's cross-examination once again consisted of having the witness repeat all of the details pertaining to petitioner's alleged obstreperous and violent behavior and concluded, ineptly, with the question "And so far as you can tell there was no reason whatsoever for this behavior." (RT 5801.)

13. Counsel not only failed to ask questions designed to elicit information about petitioner's delusional, paranoid mental state, but failed to investigate or present evidence through or in response to this witness, and other jail personnel presented as prosecution witnesses, regarding the harassment and mistreatment petitioner received in the jail while awaiting trial and the way in which this mistreatment contributed to his deteriorating mental state. These appalling conditions have been set forth in more detail in Claim

5, which petitioner incorporates as if fully set forth herein. Instead, counsel's questioning, and the particularly prejudicial final question, left the jury with the impression that petitioner's violent behavior was simply inexplicable.

14. Counsel similarly performed deficiently during the cross-examination of San Quentin Prison Correctional Sergeant Anthony Darryl Lee, who testified that petitioner assaulted him in 1982 after Lee strip-searched petitioner in preparation to transport him from a holding cell to the visiting room. Counsel again failed to investigate or ask any questions regarding petitioner's delusional mental state apart from a single question designed to elicit the answer that petitioner was in a bad mood. (RT 5826.) Counsel also performed ineffectively in failing to object to the prosecutor's questioning of this witness regarding the prison's supposed inability to discipline prisoners with life without parole sentences who assault guards– a thinly veiled attempt to introduce evidence of petitioner's supposed future dangerousness. (RT 5833.) At a minimum, petitioner should have repaired the damage by using redirect examination of this witness to point out that prisoners who assault guards are placed in administrative segregation, a harsh and bleak existence.

15. Counsel performed ineffectively in failing to investigate, interview, or adequately cross-examine San Quentin Prison Guard Sam Luzadas, who testified that he was present in 1982 when petitioner assaulted his wife, Terry Welch, during a prison visit. Again, counsel elicited no information regarding petitioner's delusional mental state at the time of the incident, but instead asked the prejudicial question whether is was true that petitioner "for no reason at all" assaulted his wife. (RT 5848.) Once again, petitioner's counsel left the jury with the impression that petitioner's behavior

was inexplicable. Counsel also failed to adequately investigate this incident and did not even bother to interview petitioner's wife to see whether there was available mitigation evidence which could have been presented.

16. Counsel performed ineffectively in failing to investigate, interview, or competently cross-examine San Quentin prison guard Steve Lawrence, who testified that petitioner once spat in his face following an informal disciplinary hearing. (RT 5859.) Once again counsel failed to ask any questions regarding petitioner's delusional, persecutory mental state, and again counsel failed to respond to the prosecutor's thinly veiled questioning regarding future dangerousness with objections or contrary evidence explaining the true conditions under which life-without-parole inmates live. (RT 5852-5857.)

17. Counsel also performed ineffectively in failing to investigate, interview, or competently cross-examine Soledad Prison guard Roy Wade Gowin, who testified that while petitioner was being held in the Secure Housing Unit at Soledad in 19 , he threw fecal matter from his cell toilet at Gowin and later struck Gowin with the free end of a pair of handcuffs which were cuffed to his wrist. (RT 5876-5879.) Counsel once again failed to ask any questions about petitioner's delusional, persecutory mental state.

18. Counsel's also performed ineffectively in failing to investigate, interview, and competently cross-examination former Deputy Sheriff Harry Lord, who testified that he and petitioner had gotten into a fight at the old Alameda County Jail in Santa Rita known as "Greystone." Although Lord had testified that the incident was set off when petitioner responded to an innocuous and apparently friendly greeting with an obviously paranoid, suspicious, and delusional response, counsel asked no questions aimed at

uncovering information regarding petitioner's mental state or persecutory delusions. (RT 5909.)

19. Although the prosecution had used its own witnesses to suggest that if given a sentence of life without parole petitioner would be pampered with a life of "television, canteen, and cosmetics" and other privileges (RT 5833), and that he would be protected by federal law from any discipline even if he assaulted guards, defense counsel failed to present any competing evidence to explain to the jury that a life without parole sentence is in fact a brutal, harsh, and unremitting punishment. Counsel failed to present any expert witness regarding the conditions of confinement petitioner would have faced if given an LWOP sentence, or the effects such a sentence would be likely to have on a person with his mental impairments and illnesses. (T. Kupers, *Prison Madness, supra*; Exhibit 40, Special Report re Mental Health and Treatment of Inmates and Probationers, July 1999.) In failing to present this evidence, petitioner's counsel were woefully ineffective and failed to subject the prosecution's case to a meaningful adversarial testing.

20. But for counsel's unprofessional errors in failing to confront the prosecution's case in aggravation, it is at least reasonably probable that a more favorable penalty verdict would have been obtained by the defense. (*Strickland v. Washington* (1984) 466 U.S. 668.) Some of the prejudice from counsel's ineffectiveness in failing to confront the prosecution penalty phase case has been discussed above. However, any doubt with respect to the question of prejudice is resolved by reference to the prosecutor's argument, which focused extensively on the parade of aggravating evidence the prosecutor had presented and the failure of the defense to respond to that evidence.

21. The prosecutor opened his argument by noting that the jury could consider in aggravation the "presence or absence of criminal activity by the defendant other than the crimes for which he stands convicted and which involve the use or attempted use of force and violence." (RT 6114.) The prosecutor also noted that the jury could consider the "presence or absence of any prior felony convictions other than the crimes for which he has been tried and convicted for (sic) in the present proceeding." (RT 6114.) He then remarked that "You got him for nine. He has three priors which I have provide by the court documents in this particular phase of the trial." (RT 6114.)

22. The prosecutor then specifically pointed to the three prior felony convictions: "the attacks on Deputy Harry Lord and Rosemary Dixon, and the third was receiving stolen property." (RT 6117.) He then maintained that "We've proven many, many other crimes of violence committed by the defendant." The prosecutor pointed to the shotgun fired into Faye McPherson's house, noting that petitioner had been only 16 at the time–a fact the prosecutor seemed to view as aggravating. He then described the motorcycle chase incident involving Officer Barbero, and the assault on Rosemary Dixon, the prison assault on petitioner's wife. (RT 6117-6118.)

23. The prosecutor reserved special vitriol for the Gowin incident.

> Finally, we've proved the utterly vulgar and disgusting attack on Correctional Officer Roy Gowin, who got a face full of the defendant's liquid feces and then was struck with handcuffs in the head while he was at Soledad in addition to being bitten by him on the kidney area.
>
> We've also heard testimony during the particular trial the defendant liked to urinate in the well and urinate in the fitting room at J.C. Penney's when apprehended for shoplifting.
> Isn't it real cute? See how he handles his waste products.

(RT 6118.)

24. The prosecutor then listed the "six other batteries on peace officers– Officer McDonagh, Inspector Lindbergh, Deputy Utvick, Sergeant Anthony Lee, and Captain Lawrence." (RT 6118.) He then went into detail recanting the alleged battery of petitioner's wife and the Juanell Turner incident. (RT 6118-6119.) Finally, the prosecutor noted that "we've also proven three other batteries, to juvenile counselor Mark Johnson and two other inmates that the defendant worked over as testified to by deputy sheriffs Jack Cessna and Ray Bernauer. (RT 6122.)

25. The prosecutor summed up this portion of his argument by contending that on the basis of the evidence in aggravation the jury could conclude that petitioner was "a true sociopath." (RT 6122.) He stated that "the real issue here" was that:

> . . . this horrible person has earned the death penalty. And for you not to give him death is to jeopardize the health and safety of any guards, visitors, social workers, inmates or clergy who may come int o contact with him if he is given life without the possibility of parole.
>
> (RT 6137.)

26. The prosecutor further argued at length on the basis of the evidence in aggravation that petitioner would always pose a danger to others in prison if he were permitted to live.

> You give him life without parole and every time he goes to the yard for exercise, you give him life without parole, every time he is escorted to the shower or to have a visit you are going to have hundreds of Harry Lords and Roy Gowins. Do you want that on your conscience?

> A vicious killer of six who is dangerous to this day, even by both his witnesses. Who hates authority figures. Who will come into contact with guards and others for the rest of his life if you give him that benefit, if you excuse his conduct and not give him the death penalty. There will be hundreds and more Deputy Lords with broken ribs and hundreds more correctional officer Gowins with feces in the face and split skulls.
>
> Death Row is the only place for him and in your hearts you know that is true.
>
> (RT 6139-6140.)

27. In view of the prosecutor's heavy reliance on the aggravating evidence, counsel's deficient performance in failing to cross-examine, challenge, or respond to the testimony of these witnesses made it at least reasonably probable that a life verdict would have resulted but for counsel's incompetence.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict

Claim 28: Ineffective Assistance of Counsel – Pretrial Proceedings

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution because trial counsel performed ineffectively throughout the pretrial phase of the case. In addition to counsel's other pretrial errors already alleged in this section,

counsel failed to object to judicial or government misconduct, failed to object to improper expert questioning, failed to move to strike special circumstances, failed to make an adequate record, and failed to object to and even participated in ex parte proceedings during the pretrial phase of the case. Counsel's unprofessional errors violated petitioner's rights to the effective assistance of counsel, a fair trial, a fair and impartial jury, due process, right to confront witnesses and evidence against him, the right to a trial judge who was unbiased and conducted the proceedings with not only fairness but an appearance of fairness, and the right to fair and reliable capital proceedings and a fair and reliable sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial

testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Faretta v. California* (1975) 422 U.S. 806 (criminal defendant has constitutionally protected right under Sixth and Fourteenth Amendments to waive counsel and represent himself); *McKaskle v. Wiggins* (1984) 465 U.S. 168 (constitutional right to self representation); *Dusky v. United States* (1960) 362 U.S. 402 *(per curiam)* (standard of competency for pleading guilty is same as competency for standing trial); and *see Godinez v. Moran* (1993) 509 U.S. 389; *Caldwell v. Mississippi* (1985) 472 U.S. 320 (prosecutorial misconduct); *Pate v. Robinson* (1966) 383 U.S. 375 (failure to observe procedures designed to assure defendant will not be tried or convicted while incompetent violates due process and right to fair trial); *Drope v. Missouri* (1975) 420 U.S. 162 (defendant's conduct after arraignment, such as conduct in court or in jail, may trigger competency proceedings); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Mattox v. United States* (1892) 146 U.S. 40 (fundamental right to impartial jury): *United States v. Burr,* (1807) 25 Fed. Cas. 25, no. 14,692b CCD. Va. (fundamental right to fair and impartial tribunal); *In re Murchison*, (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and any circumstances of offense

proffered); *Griffin v. Illinois* (1956) 351 U.S. 12 (due process guarantees criminal appellant a record of proceedings adequate to permit effective appellate review); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466.

C. The following facts, among others, are presented in support of this claim, together with others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing:

1. Petitioner incorporates as if fully set forth herein the facts and law set forth in Claims 2 through 5, 18 through 23, and 61.

2. Petitioner made a *Faretta* motion prior to trial and the court found that petitioner was competent to stand trial. However, the court stated an incorrect legal principle upon which it based its ruling on petitioner's *Faretta* motion:

> The question the Court has to decide is whether the defendant has the mental capacity to waive his constitutional right to counsel without a realization of the probable risks and the consequences of his action. The ability to waive must further be deemed to embody some minimal ability to present a personal competent defense. If unable to present such effective defense the defendant would lack capacity to stand trial without benefit of counsel even though the Court finds, and this Court does find, that he is capable of actually standing trial.

(RT 75.)

3. The foregoing statement was incorrect as a matter of law. The standard for competence to stand trial is the same as the standard for competence to represent oneself at trial. (*Dusky v. United States* (1960) 362 U.S. 402; *People v. Welch* (1999) 20 Cal.4th 701.) In failing to object to this incorrect statement of law, counsel were ineffective. Counsel were similarly ineffective when they failed to object to the court's ruling that petitioner was not competent to represent himself. (RT 79-86.) It is at least reasonably probable that a more favorable outcome would have been obtained but for counsel's unprofessional errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Had counsel objected, requested a hearing on the issue, and briefed the matter, the court would not have ruled improperly or unilaterally imposed on the defense an unprecedented form of hybrid representation which lay at the heart of the majority of the other errors which occurred at trial.

4. Counsel also performed incompetently in failing to request a continuance, adequately investigate, or object when the court reviewed papers petitioner had submitted in a pending civil matter and announced that petitioner "is well able to present his case without the assistance of counsel." (RT 762-763.) Counsel should have pointed out the irreconcilable inconsistency between this ruling and the court's earlier ruling finding petitioner incompetent to represent himself. Counsel's deficiency in this respect prejudiced petitioners case and deprived him of his right to self-representation. It is at least reasonably probable that a more favorable outcome would have been obtained but for counsel's unprofessional errors.

(*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Had the inconsistency been brought to the court's attention it is at least reasonably probable that the trial court would have held a competence hearing or permitted petitioner to proceed as his own counsel. Either way, petitioner would not have been subjected to trial while incompetent or the bizarre system of hybrid representation inflicted upon the defense by the trial court.

5. Counsel also performed ineffectively in failing to object to judicial misconduct and bias when the court refused to rule on petitioner's oral motion for a continuance by stating that "No oral motions are accepted in this court." (RT 97.) In fact, the court continued to accept and rule on oral motions throughout the pretrial, guilt, penalty, and post-trial phases of the case. It is at least reasonably probable that a more favorable outcome would have been obtained but for counsel's unprofessional error in failing to object to this ruling. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Counsel's ineffectiveness in failing to object to this improper ruling and its inconsistent enforcement contributed to the tensions between petitioner and the court and between petitioner and his counsel and exacerbated the chaos resulting from the court's hybrid representation decision.

6. Counsel also performed ineffectively in failing to move for a continuance or investigate more fully petitioner's treatment in the jail, particularly when petitioner objected to the lack of adequate medical care he received in the jail. (RT 578-579, 643-645.) A continuance was required to permit an investigation into petitioner's treatment, and to secure him proper medical attention. It is at least reasonably probable that a more favorable outcome would have been obtained but for counsel's unprofessional error in failing to investigate or move for a continuance. (*Strickland v. Washington*

(1984) 466 U.S. 668, 694.) As set forth in more detail in Claim, petitioner's medical condition and treatment in jail undermined his competence and contributed to his deteriorating mental state throughout the trial. Moreover, counsel's failure to take action to alleviate the problem contributed to the chaos in the defense brought about by the court's hybrid representation ruling.

7. Similarly, counsel performed ineffectively by failing to request a continuance, investigate, and object to the prison's continuing imposition of illegal disciplinary diets on petitioner. Counsel stood back and permitted petitioner to litigate this issue himself instead of taking the lead. (RT 640-641.) It is at least reasonably probable that a more favorable outcome would have been obtained but for counsel's unprofessional error in failing to object, investigate, or move for a continuance. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) As set forth more fully in Claims, which are incorporated by reference as if fully set forth herein, this error contributed to the tensions between petitioner and his counsel brought on by the hybrid representation ruling, and also contributed to petitioner's deteriorating mental state.

8. Counsel performed deficiently in failing to request a continuance, adequately investigate, and object to the harassment of petitioner by inmate Michael Willis, a sheriff's trustee and informant incarcerated in the county jail, who contacted the homicide victims' family members in an apparent attempt to prejudice petitioner's case. It is at least reasonably probable that a more favorable outcome would have been obtained but for counsel's unprofessional error in failing to object, investigate, or move for a continuance. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Willis' activities contributed to petitioner's deteriorating mental state and lack of

competence, and counsel's failure to take action to alleviate the problem contributed to the chaos in the defense brought about by the court's hybrid representation ruling. (RT 647.)

9. Counsel performed deficiently in failing to request a continuance, adequately investigate, and object to governmental misconduct when counsel learned that the sheriff's department was going through and rearranging petitioner's legal papers in his cell while he was in court. (RT 791-795.) At a minimum, counsel should have requested that petitioner be housed in a different unit due to the harassment and unfair treatment he received in the jail. Counsel's failure was compounded when further searches of petitioner's legal materials were conducted the following day, despite the court's order not to conduct such searches. (RT 940-941.) It is at least reasonably probable that a more favorable outcome would have been obtained but for counsel's unprofessional error in failing to object, investigate or move for a continuance. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Counsel's failure to act in petitioner's behalf prejudiced his case and contributed both to the chaos within the defense brought on by the hybrid representation ruling and to petitioner's deteriorating mental state.

10. Counsel was ineffective in failing to move to strike special circumstances, abdicating their role to petitioner, who was left to file his own motion. Counsel should have investigated, researched, prepared, and filed a motion for this purpose. Because the court ruled on a motion prepared by a person previously ruled to be incompetent, counsel's failure deprived petitioner not only of his right to effective assistance of counsel, but also his rights to due process of law, a reliable determination of guilt and penalty, and a fair trial. It is also at least reasonably probable that a more favorable

outcome would have been obtained but for counsel's unprofessional error in failing to object, investigate, research, prepare and or move for a continuance to strike special circumstances. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Counsel's failure to act on petitioner's behalf prejudiced his case and contributed both to the chaos within the defense brought on by the hybrid representation ruling and to petitioner's deteriorating mental state.

11. For the reasons set forth in Claim, counsel performed deficiently when they acquiesced and failed to object to the court's improper restrictions with respect to the definitions of aggravating and mitigating circumstances. Counsel had no tactical purpose for this failing because they themselves questioned the propriety of the court's ruling. It is at least reasonably probable that a more favorable outcome would have been obtained but for counsel's unprofessional error in failing to object. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) For reasons set forth more fully in Claim 61, which petitioner incorporates by reference as if fully set forth herein, counsel's ineffectiveness in this regard resulted in the jury receiving an inaccurate and improper explanation on critical legal principles.

12. Petitioner's counsel performed deficiently in failing to make a record of obscene verbal abuse inflicted upon petitioner by the prosecutor on April 6, 1989. (RT 3157-3158, 3171.) It is at least reasonably probable that a more favorable outcome would have been obtained but for counsel's unprofessional error in failing to make this record. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Counsel's failure to make a record of the appalling language used by the prosecutor deprived petitioner of a reversal for prosecutorial misconduct.

13. In addition, as set forth in more detail in Claims 28 and 51, which petitioner incorporates by reference as if fully set forth herein, counsel similarly performed deficiently in failing to make an adequate record during the pretrial phase, participating in ex parte proceedings in a capital case, and failing to object to ex parte proceedings counsel knew or suspected were taking place between the court and the prosecutor. (Exhibit 30, Declaration of Spencer Strellis; see also, Exhibit 6, Declaration of Thomas Broome; Exhibit 7, Declaration of Robert Cross.) It is at least reasonably probable that a more favorable outcome would have been obtained but for counsel's unprofessional error in failing to make an adequate record. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Counsel's deficient performance in this regard was prejudicial for the reasons set forth in more detail in Claim.

14. Finally, if no individual error of counsel set forth in this section and in the incorporated claims is sufficient to compel relief, petitioner submits that the cumulative effect of these errors constituted ineffective assistance of counsel which resulted in prejudice to his case because those errors, taken together, deprived petitioner of a fair and impartial jury, trial only while competent, effective assistance of counsel, due process, equal protection, and a reliable determination of guilt and penalty. (*Taylor v. Kentucky* (1978) 436 U.S. 478 [cumulative effect of errors may violate due process]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.) [same] It is at least reasonably probable that a more favorable outcome would have been obtained but for the cumulative effect of counsel's unprofessional errors during the pretrial phase. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 29: Ineffective Assistance of Counsel--Guilt Phase Errors

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because his trial counsel performed ineffectively during the guilt phase of petitioner's trial in numerous respects. Counsel's unprofessional errors violated petitioner's rights to a fair trial, due process of law, the effective assistance of counsel, trial only while competent, an impartial jury, the right to a trial judge who was unbiased and conducted the proceedings not only with fairness but also with an appearance of fairness, and the right to reliable capital proceedings and sentencing.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that

counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Dusky v. United States* (1960) 362 U.S. 402 (defendant is incompetent to stand trial if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him.") *Pate v. Robinson* (1966) 383 U.S. 375 (failure to observe procedures designed to assure defendant will not be tried or convicted while incompetent violates due process and right to fair trial); *Drope v. Missouri* (1975) 420 U.S. 162 (defendant's conduct after arraignment, such as conduct in court or in jail, may trigger competency proceedings); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Estelle v. Williams* (1976) 425 U.S. 501; *In re Murchison* (1955) 349 U.S. 133 (due process mandates impartial judge – both actual impartiality and appearance of impartiality constitutional violation); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate prescribing all judicial bias); *Tumey v. Ohio*

(1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Gardner v. Florida,* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Taylor v. Kentucky* (1978) 436 U.S. 478 (cumulative effect of errors may violate due process); and *Apprendi v. New Jersey* (2000) 530 U.S. 466.

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates as if fully set forth herein all facts and law set forth in Claims 1, 8 through 17, 25, 37 through 40, and 56 through 65.

2. Counsel failed to competently investigate, cross-examine, or impeach prosecution witnesses on a number of crucial issues, particularly those issues related to petitioner's mental state. As set forth in more detail in Claims 1 and 21, counsel failed to cross-examine and impeach numerous prosecution witnesses-- including Barbara Mabrey (RT 4402-4403), Stacey Mabrey (RT 4186-4187), Leslie Morgan (RT 4488), Angela Payton (RT 4555-4559), and Beverly Jermany (RT 4782-4783, 4790-4805)-- regarding changes in their previous statements or testimony as to whether petitioner was or had a reputation for being an abuser of drugs or alcohol, mentally ill or "crazy."

3. Counsel was also deficient in failing to elicit in more detail from these witnesses regarding petitioner's conduct or reputation for conduct which was consistent with his severe frontal lobe deficits, including but not limited to his memory problems, perseveration, impulsivity, delusions, and other symptoms of frontal lobe impairments. Counsel also failed to adequately investigate, cross-examine, or impeach these witnesses regarding their character for truthfulness or their ability to perceive and accurately relate incidents they claimed to have seen.

4. Counsel's failures in this regard were particularly prejudicial in view of the fact that the prosecutor specifically relied on this testimony to argue that petitioner was not drunk or on drugs at the time of the killings. (RT 5558-5559; see *People v. Woodard* (1979) 23 Cal.3d 329, 341 (prosecutor's reliance on erroneously admitted evidence in argument demonstrates prejudice of error).) Moreover, the jury heavily relied upon this testimony. Their reliance is aptly demonstrated by the fact that the jury requested that the testimony of Angela Payton, Barbara Mabrey, and Leslie Morgan be read back during guilt phase deliberations. (RT 5629-5631, 5640-5641; see *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 (request for read-back indicative of close case and prejudice).) Accordingly, it is at least reasonably probable that a more favorable result would have been obtained but for counsel's unprofessional errors in cross-examining and impeaching these witnesses. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington, supra*, 466 U.S. at p., 694.)

5. Lead counsel also performed incompetently in his opening statement, a woeful performance occupying less than two pages of transcript

in which counsel began by stating "I'm not very good at this" and proceeded to apologize for his client and for the shocking pictures which the jury would have to view. (RT 3885-3887.) Counsel implicitly argued against his client, thereby prejudicing petitioner's case. (*People v. Williams* (1997) 16 Cal.4th 153, 265 (argument which concedes guilt, withdraws a crucial defense, or relies on illegal defense is ineffective and requires reversal).) It is at least reasonably probable that a more favorable result would have been reached but for counsel's unprofessional concession of guilt. (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)

6. Counsel performed inadequately in failing to object to, request a continuance, conduct voir dire, and investigate the fact that jurors were asleep during substantial portions of the guilt phase trial. (RT 4361.) Counsel's error deprived petitioner of a reliable determination of guilt and penalty as well as the right to a trial by jury, an impartial jury, and a fair trial. (Cf. *United States v. Springfield* (1987) 829 F.2d 860, 864 (sleeping juror doesn't require reversal if juror missed only insubstantial portion of trial).) It is at least reasonably probable that a more favorable result would have been reached but for counsel's unprofessional failure to object on these grounds and request a hearing to determine the portions of the trial the jurors missed. (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)

7. Counsel performed ineffectively in failing to investigate or provide their expert witness, Dr. Fred Rosenthal, with adequate information. Counsel failed to prepare Dr. Rosenthal for adequate testimony, or adequately examine him with regard to petitioner's mental state. Although petitioner suffers from extraordinary and debilitating organic impairments, counsel failed to investigate, discover, or provide this expert with adequate

information to permit him to discover this fact. Additionally, counsel failed to competently prepare or examine Dr. Rosenthal regarding the interaction between petitioner's organic impairments and other mental illnesses on the one hand, and the combination of alcohol, morphine, and cocaine, which was found in his system upon admission to Highland Hospital only hours after the incident. The evidence which counsel should have discovered and presented through this witness is set forth in detail in Exhibit 1, Declaration of Karen Froming, Ph.D., which petitioner incorporates by reference as if fully set forth herein.

8. Dr. Rosenthal testified that he had never examined or spoken to petitioner and knew only generally about the case. (RT 5388-5389.) Thus, the only information he offered was about the effects of drugs and alcohol on people generally, which he could not apply to petitioner because the defense had no information regarding the quantities of these substances in petitioner's system at the time of the killings or the nature and extent of his mental impairments. Poor preparation of this witness also resulted in an exceedingly poor explanation for the jury of brain functions, an incomprehensible and apparently facetious explanation of the distinction between mind and brain, and an inadequate and ineffective explanation of how any of the Dr. Rosenthal's testimony related to petitioner or his conduct. Counsel also performed ineffectively in asking the witness several questions about a case in which the witness had testified without first acquainting the witness with the case by showing him a transcript, resulting in the witness stating he did not recall testifying in the case at all. This error demonstrates that counsel failed to review with the witness what his testimony was to cover in advance.

9. It is at least reasonably probable that a more favorable result would have been reached but for counsel's unprofessional failure to investigate, provide this witness with information, prepare this witness to testify, and examine this witness during the guilt phase. (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) The errors in counsel's performance in connection with this witness were especially prejudicial in light of the fact that the prosecutor capitalized upon and ridiculed Dr. Rosenthal's testimony at length in his argument to the jury. (RT 5519-5520; see *People v. Woodard, supra*, 23 Cal.3d at p. 341.)

10. Counsel failed to adequately object to pervasive prosecutorial misconduct in closing argument or to obtain a sufficient remedy for the misconduct. Counsel did not object during the closing argument itself, but waited until after the jury had departed until they objected to the argument as an appeal to passion and prejudice. (RT 5600.) Although the court gave a passion and prejudice instruction, it did not go to the procescutor's argument and was therefore insufficient to vitiate the error. (RT 5571-5572. Moreover, counsel did not object to a variety of other misconduct in argument, such as the prosecutor's introduction of facts not in evidence to explain the presence of alcohol, cocaine, and morphine in petitioner's system shortly after the killings. (RT 5521.) A complete discussion of the misconduct in the prosecutor's argument to which counsel should have objected, and the prejudice resulting from that argument, is set forth in Claims 9 through 14. For the reasons set forth in that claim, it is at least reasonably probable that a more favorable result would have been reached but for counsel's unprofessional failure to object to the prosecutor's egregious misconduct in arguent. (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)

11. Counsel failed to competently represent petitioner in connection with jury instructions at the guilt phase. Counsel did not request or obtain instructions on voluntary manslaughter as a lesser included offense in all six counts, even though petitioner himself requested such instructions. (RT 5602.) Counsel also failed to object to numerous instructional errors committed by the court. Furthermore, councel failed to make a record of the jury instruction conference. These errors and the prejudice resulting from them have been set forth in greater detail in Claims 35, 43, 56 through 65. Counsel's unprofessional errors deprived petitioner of due process, an impartial jury, and a reliable determination of guilt and penalty. For the reasons set forth in the foregoing claims, it is at least reasonably probable that a more favorable result would have been obtained but for counsel's unprofessional errors in failing to request proper instructions or object to improper ones. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.)

12. Counsel failed to object to judicial bias expressed in the presence of the jury. For example, counsel did not object when the court instructed the jury that petitioner "refused to obey" the court's directions and that this was "upsetting to the court." (RT 5572.) Counsel's failure to object was prejudicial for the reasons set forth in Claim 57. The court berated petitioner in front of the jury at other points during the guilt phase without objection from counsel, once telling petitioner "You have some understanding at some point in your life. Now just be still." (RT 56528.) Counsel's unprofessional errors deprived petitioner of his right to trial before a tribunal which was impartial and had the appearance of impartiality. For the reasons set forth in the foregoing claim, it is at least reasonably probable that a more favorable result would have been obtained but for counsel's unprofessional

errors in failing to request proper instructions or object to improper ones. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.)

13. Counsel further performed abysmally during a closing argument that was ineffective from start to finish. For example, counsel entirely failed to explain that petitioner's behavior was not under his own volition or control and even suggested that his behavior was beyond understanding, stating, "My client is a gentleman who, for whatever reason, does not evoke warm and sympathetic feelings and that stuff." (RT 5535.) Counsel rambled on aimlessly at times,at one point telling the jury a pointless, irrelevant story about how he had cooked hamburgers and hot dogs for a child's swim meet over the preceding weekend and how important this kind of effort was in instilling values in the young.

14. Counsel was so ill-prepared for his closing argument that he could not even keep the names of his own expert witnesses straight, at one point calling a forensic expert "Dr. Rogers" until co-counsel corrected him, explaining that the doctor's last name was "Herrmann." Counsel's flippant response was "Herrmann. What the hell. One pathologist is just like another." (RT 5539.) Moments later, counsel again forgot the doctor's name, this time calling him "Hymer," until co-counsel again corrected him. (RT 5540-5541.)

15. Counsel's closing argument was so deficient that he periodically appeared to be arguing against his own client and undercutting his own case for a reduced form or degree of homicide. For instance, counsel stated "It's fairly clear what we have here is a madman, and I'm not talking in legal terms." (RT 5545.) Counsel's explanation of how petitioner's intoxication affected his culpability was incredibly ineffective:

> Now, my client, the evidence shows, may well have had some alcoholic beverages. He may well have had some drugs. So what about those? The judge is going to tell you, I don't like it but this is what the judge is going to tell you so hang in with me for another few minutes and I'll shut up and you will be done with me, hopefully, but listen to this because it is important . . .
>
> (RT 5546-5547.)

16. It is at least reasonably probable that a more favorable result would have been obtained but for counsel's unprofessional errors in closing argument. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.)

17. Counsel's ineffectiveness in the guilt phase was exacerbated by counsel's ineffectiveness in the pretrial phase, which carried over to and infected the jury's guilt phase determination. Specific instances and the prejudice resulting from them– particularly counsel's unprofessional errors in failing to object to hybrid representation or request a competence determination at specific points during the guilt phase--are set forth in more detail in Claims 18 through 33, which are incorporated by reference as if fully set forth herein. It is at least reasonably probable that a more favorable result would have been obtained but for counsel's unprofessional errors set forth in the above referenced claims. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.)

18. To the extent that any of counsel's unprofessional errors during the guilt phase were not prejudicial individually, these errors, in combination with all other such errors occurring during the guilt phase, were prejudicial in their cumulative effect. (*Taylor v. Kentucky, supra*, 436 U.S. at p. 478 (cumulative effect of errors may violate due process); *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 30: Ineffective Assistance of Counsel--Deficient Performance Throughout the Penalty Phase

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because his trial counsel performed ineffectively during the penalty phase of petitioner's trial in numerous respects. Counsel's unprofessional errors violated petitioner's rights to a fair trial, due process of law, confrontation, the effective assistance of counsel, trial only while competent, an impartial jury, the right to a trial judge who was unbiased and conducted the proceedings not only with fairness but also with an appearance of fairness, and the right to reliable capital proceedings and sentencing.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that

counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Dusky v. United States* (1960) 362 U.S. 402 (defendant is incompetent to stand trial if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him") *Pate v. Robinson* (1966) 383 U.S. 375 (failure to observe procedures designed to assure defendant will not be tried or convicted while incompetent violates due process and right to fair trial); *Drope v. Missouri* (1975) 420 U.S. 162 (defendant's conduct after arraignment, such as conduct in court or in jail, may trigger competency proceedings); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Estelle v. Williams* (1976) 425 U.S. 501; *In re Murchison* (1955) 349 U.S. 133 (due process mandates impartial judge – both actual impartiality and appearance of impartiality constitutional violation); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate prescribing all judicial bias); *Tumey v. Ohio*

(1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Taylor v. Kentucky* (1978) 436 U.S. 478 (cumulative effect of errors may violate due process); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); and *Apprendi v. New Jersey,* (2000) 530 U.S. 466 (jury must make determination of sentencing factors).

C. The following facts, among others, are presented in support of this claim, after adequate funding, discovery, investigation, and an evidentiary hearing:

1. For the purposes of this claim, petitioner incorporates by reference as if fully set forth herein the facts and law set forth in Claims 3, 9 through 14, 20, and 57 through 65.

2. Counsel failed to adequately investigate, interview witnesses, or prepare for the penalty phase of the trial and therefore failed to request an evidentiary hearing regarding the validity and reliability of petitioner's prior convictions as required under the Eighth Amendment and the Fifth and Fourteenth Amendments due process clauses. Instead, petitioner was forced to make this request himself.

3. It is at least reasonably probable that a more positive result would have been obtained but for counsel's unprofessional error. A

reasonable probability is a probability sufficient to undermine confidence in the outcome, and need not rise to a preponderance of the evidence. (*Strickland v. Washington, supra*, 446 U.S. 668.) Counsel's errors resulted in both the introduction of unreliable aggravating evidence and the failure to subject the prosecution's case to a meaningful testing. In addition, counsel's failure to act on petitioner's behalf exacerbated the prejudice created by the court's hybrid representation order and counsel's unprofessional acquiescence in that order.

4. Counsel's opening statement at the penalty phase was also woefully inadequate, occupying only a page of transcript. Counsel merely stated he would present two mental health expert witnesses to testify in connection with mitigating factors (d) and (h). (Pen. Code, § 190.3, subd. (d) and (h).) Counsel then completed his opening statement as follows:

> I'm not going to try now to paraphrase what they are going to say. That would be kind of dumb. You are going to hear it as soon as I shut up. So without further ado, we will start out calling the first doctor.
>
> (RT 5921.)

5. The foregoing eloquently demonstrates the lack of effort counsel put into petitioner's defense. Moreover, it is at least reasonably probable that a more positive result would have been obtained but for counsel's unprofessional, indolent effort. (*Strickland v. Washington, supra*, 446 U.S. 668.) Although an opening statement is designed to serve as a "roadmap" for the entire defense case, counsel's inept opening statement in the instant case left the jury without any understanding of what evidence the defense intended to present or how the two experts would fit into that overall picture.

6. This was ineffective. As Seventh Circuit Chief Judge Richard Posner recently wrote:

> Of course to the extent that opening statements accurately forecast the course of the trial, the impression they make on the jury is more likely to be confirmed than contradicted by the evidence. It does not follow that jurors "tune out" after the opening statements, thinking they have heard the evidence. If that were common, most cases would be submitted to juries on stipulated facts. There is no doubt about the importance of opening statements in providing the jury with a roadmap to the often confusing presentation of evidence that is characteristic of the Anglo-American trial--some witnesses testify only to links in an elaborate chain the end of which is not visible from their testimony, witnesses are often called out of order to accommodate their schedules, and the smooth development of each side's case is interrupted by cross-examination.

(*Hydrite Chem. Co. v. Calumet Lubricants Co.* (7th Cir. 1995) 47 F.3d 887, 891-892.)

7. Counsel also performed deficiently in failing to object to extremely prejudicial error when the court informed the jury that petitioner had declined to appear for a session of the proceedings at which Dr. William Pierce was to testify. The facts, law, and prejudice resulting from the court's statement has been set forth more fully in Claim 57, which petitioner incorporates by reference as if fully set forth herein. It is at least reasonably probable that a more positive result would have been obtained but for counsel's unprofessional failure to object. (*Strickland v. Washington*, *supra*, 446 U.S. 668.) The court's explanation to the jury that it could only compel petitioner's attendance by "forcing, gagging, and shackling" was bad

enough. (RT 5961.) However, the court continued to instruct the jury that it could take this fact into consideration in making its penalty determination:

> When John [the bailiff] went up to get him today to get him to come down for the session, he refused to come down and would not leave his cell. It would require forcing, gagging and shackling to get him down. I'm not going to do that. The law permits him to be up in his cell if he doesn't want to hear it . . . Again, if there is a ruckus, he will leave him back up. And again, Ladies and Gentlemen, you can't be biased against the defendant because of this. You are obviously going to take it into consideration, the doctor's comment on it, but you have to do it in terms of what the evidence shows.
>
> (RT 5961.)

8. Counsel also performed deficiently in failing to object or request a continuance when the court refused to allow petitioner sufficient time to consider whether or not he wished to testify at the penalty phase. As set forth in more detail in Claim 36, which petitioner incorporates by reference as if fully set forth herein, petitioner asked the court on Thursday, July 6, whether he had a right to testify at the penalty phase. The court stated that he had this right, and petitioner then requested a continuance to decide whether he wished to do so. The court denied the request and told petitioner he could either testify then or not at all. Petitioner then again requested a 24-hour continuance to make up his mind, and the court denied the request, telling the jury the defense had rested. (RT 6106-6107.)

9. However, on the morning of the next court day, Monday, July 10, the court unexpectedly asked petitioner if he had decided whether or not to testify. The stunned petitioner responded, "I thought Your Honor gave me five minutes previous to make up this decision, so I didn't never make it up."

(RT 6108.) The court then stated that "the matter will stand rested," and requested that counsel begin their arguments.

10. Counsel should have strenuously objected on both of the forgoing dates to the court's arbitrary, capricious and cruel denial of petitioner's basic right to due process. Petitioner was entitled to be heard, and counsel shamefully allowed the court to run roughshod over his rights, thereby depriving him of due process and a reliable determination of penalty.

11. It is at least reasonably probable that a more positive result would have been obtained but for counsel's unprofessional failure to object. (*Strickland v. Washington*, *supra* 446 U.S. 668.) The court's action prejudiced petitioner by depriving him of his right to allocution--his right to be heard in his own defense before punishment. (*Taylor v. Hayes, supra*, 418 U.S. at 498 quoting *Groppi v. Leslie* (1972) 404 U.S. 496, 502.) It also deprived petitioner of the opportunity to express remorse for the killings. The fact that petitioner did not do so was noted in aggravation in the presentencing report and contributed to the court's decision to deny the modification and new trial motions and sentence him to death. Although petitioner appears to have expressed remorse in the media, this was not taken into consideration by the probation department. (Exhibit ___, Presentencing Report, p. ___.)

12. Counsel was perhaps most deficient in failing to object to the prosecutor's outrageous, egregious misconduct in closing argument. As set forth in greater detail in Claims 9 through 14, which petitioner incorporates by reference as if fully set forth herein, the prosecutor not only exceeded, but utterly demolished all standards of prosecutorial deportment and fair play in persistently and intentionally appealing to the passions and prejudices of the jurors. This was particularly well illustrated in his disgraceful prediction of

a retributive meeting petitioner would have in the afterlife with the infant victims. (RT 6141.) Counsel should have been on their feet shouting objections at this vengeful fantasy. Instead, they sat by silently, gathering dust like potted plants. For the reasons set forth in Claims 9 through 14, it is at least reasonably probable that a more positive result would have been obtained but for counsel's unprofessional failure to object. (*Strickland v. Washington, supra* 446 U.S. 668.)

13. Counsel also performed abysmally in their closing penalty phase arguments. Counsel never provided the jury with a coherent explanation of what petitioner's mental problems were, nor how they affected his ability to function. Instead, both counsel in separate arguments contended that petitioner was "crazy" and "mentally ill." Counsel's argument made clear, however, that counsel actually had no independent evidentiary support for this proposition. As noted in Claim 23, the defense experts did not have sufficient information from counsel or other sources to reach a coherent diagnosis of petitioner's mental illness. Accordingly, lead counsel argued that the jury should simply infer that petitioner was mentally ill on the basis of their common sense, as an "old neighbor across the fence thing," because petitioner had attacked a police woman on the third floor of a police station (RT 6181.) Counsel's argument left the jury with no ability to evaluate the sort of individualized characteristics relevant to their life or death determination.

14. Counsel was also ineffective in improperly basing his closing argument on religion. Counsel argued that under ancient Jewish and Christian law, the death penalty was to be sparingly imposed:

> Under the ancient Jewish law before a person could be condemned to death for murder, there had to be not one but two witnesses. And, in addition, at least one of those witnesses must have said to the man or woman at the time of the homicide, do you understand the gravity of what you are doing? Do you appreciate this act? That is the old hermetic law.
>
> And the courts that administered this law was the Sombic [sic].[18] And the Rabbi said if once in a hundred years a son's head should sentence someone to death, it would be characterized as a bloody son's heaven. That is in fact what God said at the same time he said render to Caesar those things that are his and leave to God those things that are his.
>
> (RT 6178.)

15. Counsel also made an improper appeal to religious beliefs later in his argument, noting that "mercy" is something "God shows to a sinner." He then added, "I thought we were supposed to try to emulate God, not ignore him. (RT 6198-6199.) He also read a list of famous quotations on the topic of mercy, including "earthly power doth then show likest God's when mercy season[s] justice." (RT 6199) (a quote from Shakespeare's *Merchant of Venice*), and "God's grace was not a confusion of power moving towards the perfection of man. There was a forgiveness of sins needed newly in each moment." (RT 6200.)

16. Counsel at times undermined petitioner's case by appearing to ask the jury to have sympathy with *him* for the awkward position in which his client had placed him:

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[18] Counsel apparently meant to refer to the Sanhedrin, the supreme religious body in ancient Palestine.

> This is a strange case. In all my years I have never had a case where I suddenly have been thrusted in this almost schizophrenic position. Where much of what I can say or can't say has been dictated for me. Most of my clients let me say and do what I consider to be appropriate.
>
> (RT 6185.)

17. Counsel inappropriately used profanity in argument, once describing the prosecutor's argument as "bullshit." (RT 6186.) This slip of the tongue was not merely unprofessional, but also offensive to many jurors and certainly not persuasive in convincing the jury to opt for life.

18. It is at least reasonably probable that if counsel had argued competently, a more positive result would have been obtained. (*Strickland v. Washington*, *supra* 446 U.S. 668.) Counsel's lackadaisical performance prejudiced petitioner's case, conveying to the jurors the obvious fact that counsel had no passion–or even much interest–in defending petitioner. (Exhibit 8, Declaration of Joseph Cruz; Exhibit 35, Declaration of Bernard Wells.) Given that petitioner's lawyers had no enthusiasm for the case, failed to explain petitioner's behavior, and put forward no convincing reason to spare petitioner's life, the jurors saw no reason why they should fight for his life either and returned a verdict of death.

19. Counsel also performed ineffectively in failing to object to numerous incorrect instructions, many of which the court gave extemporaneously. The specific instructions to which counsel should have objected are set forth in Claims 57 through 65, which are incorporated by reference as if fully set forth herein. Counsel also performed ineffectively in failing to make a record of the jury instruction conference and in conducting this proceeding in camera without petitioner's presence. Because of the

court's highly improper, extemporaneous approach to jury instructions, it is at least reasonably probable that if counsel had performed competently during the jury instruction conference a more positive result would have been obtained. (*Strickland v. Washington, supra* 446 U.S. 668.)

20. Finally, if no individual error of counsel set forth in this section and in Claims 18 through 33 is sufficient to compel relief, petitioner submits that the cumulative effect of these errors constituted ineffective assistance of counsel which resulted in prejudice to his case because those errors, taken together, deprived petitioner of a fair and impartial jury, trial only while competent, effective assistance of counsel, due process, equal protection, and a reliable determination of penalty. (*Taylor v. Kentucky, supra* 436 U.S. 478 (cumulative effect of errors may violate due process); *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.) It is at least reasonably probable that a more favorable outcome would have been obtained but for the cumulative effect of counsel's unprofessional errors during the penalty phase. (*Strickland v. Washington, supra* 466 U.S. at p. 694.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 31: Ineffective Assistance of Counsel During the Post-Trial Phase

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and

article I, sections 7, 15, 16 and 17 of the California Constitution because his counsel were ineffective in their representation of petitioner during the sentencing and post-trial proceedings. Counsel failed to adequately investigate or prepare for the new trial, verdict modification, or sentencing proceedings, thereby resulting in an unfair and unreliable sentence. Counsel's deficient performance violated petitioner's rights to a fair trial, due process; a trial judge who was unbiased and conducted the proceedings with both fairness and an appearance of fairness; and a fair and reliable sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v.*

Lockhart (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *United States v. Tucker* (1972) 404 U.S. 443 (due process required that defendant not be sentenced on basis of misinformation of constitutional magnitude); *In re Murchison* (1955) 349 U.S. 133 (due process mandates impartial judge–both actual impartiality and appearance of impartiality constitutionally required); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes,* 418 U.S. 488 (1974) (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate prescribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *United States v. Burr* (1807) 25 Fed. Cas. 25, no. 14,692b CCD. Va. (fundamental right to fair and impartial tribunal); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (jury must determine truth of sentencing factors.)

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates as if fully set forth herein the facts and law set forth in Claims 6, 7, 8, 37, 44, 45, 51, 54, 66.

2. Counsel performed deficiently in failing to present mitigating evidence to the probation department for inclusion in the pre-sentencing report. The report contained no information regarding petitioner's mental state at the time of the crimes or at the time of any of the incidents introduced as aggravating circumstances. It was counsel's responsibility to prepare and present such information. Counsel also failed to challenge any of the negative information in the pre-sentencing report or inform petitioner that such a report was being prepared so that he could present such information himself. (RT 6241-6266; Exhibit ___, Presentencing Report.) Counsel failed to object to judicial bias and errors in the court's findings at sentencing, in particular, but not limited to, the court's failure to consider petitioner's mental state at the time of the offenses and during the incidents which were introduced in aggravation at the penalty phase. (RT 6241-6266.)

3. Counsel failed to present to the probation department any compelling mitigating evidence of petitioner's organic impairments and mental disease available at the time of trial. This material is set forth in greater detail in Claims 2, 18, 19, 23, and 24, which are hereby incorporated as if fully set forth herein, together with supporting exhibits and declarations.

4. Such evidence is mitigating as a matter of law and should have been presented. California Rules of Court, rule 4.423(b) (formerly rule 423(b)) states that circumstances in mitigation to be considered at sentencing include "facts relating to the defendant, including the fact that . . . (2) [t]he defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime." (Cal. Rules of Court, rule 4.423 (b)(2).)

5. Instead of presenting the available, potent mitigating evidence, counsel submitted nothing at all. The pre-sentencing report states that "a

written statement was requested on July 12, 1989 for use in this report. As of July 20, 1989, nothing has been received." (Exhibit ___, Presentencing Report, p. 8.) Not only did counsel fail to submit a written statement, they failed to ask the probation department to solicit letters of reference. (*Ibid.*, at p. 11.) Instead, counsel weakly asserted at the sentencing hearing that they had been unable to provide material due to *petitioner's* refusal to waive time for sentencing. (RT 6240-6241.) Counsel's attempt to lay the blame on petitioner was a transparent cover for their own indolence. The fact that only two weeks passed between the verdict and sentencing did not prevent the district attorney from presenting a statement in aggravation. (Exhibit ___, Presentencing Report, p. 8 and attachment.) It also does not explain why counsel failed to ask the probation department to solicit reference letters. Moreover, counsel's duty to perform with reasonable competence cannot be made contingent upon a defendant's agreement to waive a constitutional or statutory right.

6. Counsel permitted the numerous prejudicial misstatements and mis-characterizations of fact continued in the pre-sentencing report to stand uncorrected. Among numerous other errors, the report misstated the maiden name of petitioner's mother (Exhibit ___, Pre-sentencing Report, p. 8); described petitioner's behavior as "antisocial," a pejorative term also implying a personality disorder with which petitioner was never diagnosed (*ibid.*, and *id*, at p. 13); stated that petitioner was not married, when he was not only married but also a father (*id.*, at p. 9; Exhibit 113, Marriage Certificate of David Esco Welch and Terry Yvonne West); stated that petitioner was armed with two weapons at the time of the offense, when in fact his codefendant, Rita Lewis, carried the revolver and used it to shoot

petitioner (*id.*, at p. 11; Exhibit 18, Declaration of Rita Lewis); and stated that the crimes were "planned" and demonstrated "sophistication," when they were in fact spontaneous and impulsive (*id*, at pp. 11-12). Even a cursory investigation and an hour's drafting effort would have permitted counsel to prepare a statement correcting these falsehoods and inaccuracies.

7. Counsel's performance in this regard constituted a complete abdication of their responsibility to petitioner and resulted in a complete breakdown in the adversary process, compelling relief without a showing of prejudice. (*United States v. Cronic, supra,* 466 U.S. at p. 648, 659.) However, counsel's incompetence was also manifestly prejudicial. Because of counsel's incompetence, the probation report falsly concluded, falsely, that "there are no circumstances in mitigation in this matter." On the contrary, petitioner's mental defects and diseases, his horrific childhood and upbringing, his lifelong neurotoxicant exposure, and other factors set forth herein by incorporation, all provided powerful evidence in mitigation.

8. In addition, counsel's incompetent performance permitted the court to erroneously conclude there was no proof of intoxication that would have interfered with petitioner's ability to premeditate and deliberate the killings. The court also failed to find that petitioner's conduct resulted from or was mitigated by his many mental impairments, and made no findings at all regarding petitioner's mental state during the uncharged conduct. Counsel's failure to competently prepare and present mental health evidence during this phase of the trial also permitted the court to "frankly suspect" the mental health professional's testimony that petitioner was acting under the influence of an emotional disturbance, could not appreciate the criminality of his

conduct, could not conform his conduct to the requirements of law, and was impaired by drugs or alcohol at the time of the crimes. (RT 6253.)

9. It is at least reasonably probable that a more favorable result would have been obtained if counsel had conducted an adequate investigation, submitted materials in mitigation, and corrected the numerous errors in the report. (*Strickland v. Washington, supra,* 466 U.S. at p. 668, 694.) Moreover, counsel's incompetence rendered petitioner's sentence unreliable within the meaning of the Eighth Amendment. (*Godfrey v. Georgia, supra,*446 U.S. 420.)

10. Counsel performed deficiently in failing to adequately investigate and prepare for the new trial motion and verdict modification proceedings. In particular, counsel failed to conduct juror interviews which would have revealed the misconduct set forth in more detail in Claims 6, 7, and 8, which are incorporated by reference as if fully set forth herein. Counsel once again feebly attempted to place the blame on petitioner for refusing to waive time for sentencing. (RT 6240-6242.) However, counsel's Sixth Amendment duty to perform competently is not contingent upon petitioner's agreement to waive a constitutional or statutory right. Moreover, counsel appears to have based their failure to investigate on a fundamental misunderstanding of the law. Counsel indicated they believed they could not conduct juror interviews without first obtaining permission or information from the court. (RT 6240.) In fact, the law permits counsel to conduct juror interviews at any time. (Code Civ. Proc. § 206.)

11. It is at least reasonably probable that a more favorable result would have been obtained but for counsel's unprofessional errors. If counsel had conducted juror interviews, they would have discovered the juror

misconduct described in detail in Claims 6,7, and 8, which are incorporated by reference as if fully set forth herein. In addition, if counsel had investigated and prepared for the new trial motion and verdict modification proceedings, they would have discovered, presented, and competently argued the many matters in mitigation presented in this petition, including, but not limited to, the matters set forth in Claims 3, 7, 44, 46, 51, 54, and 56. Had counsel performed competently, there is at least a reasonable probability that the court would have granted a new trial motion, modified the verdict, and sentenced petitioner to life without the possibility of parole. A reasonable probability is a probability sufficient to undermine confidence in the outcome, and need not rise to a preponderance of the evidence. (*Strickland v. Washington*, supra, 446 U.S. 668.)

12. If no error of counsel in the new trial, verdict modification, or sentencing proceedings was prejudicial individually, the cumulative effect of all counsel's errors was prejudicial. (*Taylor v. Kentucky* (1978) 436 U.S. 478.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 32: Ineffective Assistance of Counsel--Failure to Object to Prosecutorial Misconduct

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution and Article I, Sections 7, 15, 16, and 17 of the California Constitution because he was deprived of the effective assistance of counsel during the pretrial, guilt, penalty, and sentencing phases of his trial when his trial counsel failed to object to repeated and egregious incidents of prosecutorial misconduct. Counsel's unprofessional errors deprived petitioner of his federal and state constitutional rights to the assistance of counsel, conflict-free counsel, confrontation, due process of law, equal protection, a fair and reliable determination of guilt and penalty, a determination by a tribunal of mental competence, trial by an unbiased tribunal, trial by jury, and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial

testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Pointer v. Texas* 380 U.S. 400 (1965) (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (prosecutorial misconduct); *Berger v. United States* (1935) 295 U.S. 78 (prosecutor shall not use improper methods to produce a wrongful conviction); *Mattox v. United States* (1892) 146 U.S. 40 (fundamental right to impartial jury): *United States v. Burr* (1807) 25 Fed. Cas. 25, no. 14,692b CCD. Va. (fundamental right to fair and impartial tribunal); *In re Murchison* (1955) 349 U.S. 133 (constitution mandates actual impartiality and appearance of impartiality); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* 447 U.S. 343 (1979) (federal due process claim in state-created right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates as if fully set forth herein the facts and law set forth in Claims 8 through 17.

2. In his closing argument at the penalty phase, the prosecutor repeatedly committed serious misconduct in invoking religious authority and a vengeful fantasy about a meeting in the afterlife when the child victims

would confront petitioner. Counsel mildly objected to the initial invocation of religion but failed to object to the prosecutor's appalling demand for retribution. Counsel also failed to call for a mistrial. In so doing, counsel was ineffective. This claim is further supported by the facts and law set forth in Claim 9.

3. Counsel also performed incompetently by failing to object and demand a mistrial when the prosecutor introduced prejudicial extrinsic evidence in closing argument to the effect that petitioner had urinated in the court's "well," the stairwell which connected the court to the jury assembly room and holding cell. This claim is further supported by the facts and law set forth in Claim 11.

4. Counsel further performed ineffectively by failing to object and demand a mistrial when the prosecutor falsely informed the jury that their duty was only to render an opinion and "advise" the court regarding the appropriate sentence. This claim is further supported by the facts and law set forth in Claim 12.

5. Counsel also performed deficiently by failing to object and request a mistrial when the prosecutor committed misconduct in closing argument by comparing petitioner to Ramon Salcido, whose case was notorious throughout the state of California at the time of trial. This claim is further supported by the facts and law set forth in Claim 14.

6. It is at least reasonably probable that a more favorable outcome would have resulted but for counsel's unprofessional errors in failing to object to the prosecutor's inflammatory closing argument. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668.) The prosecutor's argument

raised highly improper matters in a naked appeal to passion, prejudice, and improper considerations which distracted the jury from their constitutionally required evaluation of petitioner's character and background and resulted in a death verdict rather than a verdict of life without parole.

7. Counsel also performed ineffectively in failing to object to the prosecutor's flagrant violation of a gag order imposed by the court prior to trial. The prosecutor repeatedly violated the gag order and was even quoted in several newspapers during the break between the guilt and penalty phases discussing the extraordinary cost of the trial and exulting over the guilt verdict. These comments were profoundly prejudicial and influential to the jury. This claim is further supported by the facts and law set forth in Claim 13. There is at least a reasonable probability that the outcome of the proceedings would have been more favorable but for counsel's unprofessional errors. The jurors were exposed to newspapers throughout this period because the trial court had not issued an admonition to avoid media.

8. Counsel performed ineffectively in failing to object to the prosecutor's flagrant subornation of perjury. Counsel's unprofessional errors prejudiced petitioner because there is at least a reasonable probability that the outcome of the proceedings. This claim is further supported by the facts and law set forth in Claim 1.

9. Counsel performed ineffectively by engaging in ex parte contacts with Judge Golde. Counsel also performed ineffectively in failing to object to such contacts by the prosecution. (Exhibit ___, Declaration of Spencer Strellis.) This claim is further supported by the facts and law set forth in Claim 51. Counsel's unprofessional errors prejudiced petitioner because

there is at least a reasonable probability that the outcome of the proceedings would have been more favorable to petitioner in the absence of the errors.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 33 – Ineffective Assistance of Counsel – Cumulative Error

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the cumulative effect of the ineffective assistance of counsel errors alleged in this petition and in petitioner's direct appeal deprived him of his federal constitutional rights, including, but not limited to, his rights to due process of law, equal protection, confrontation, the effective assistance of counsel, and the right to reliable capital proceedings and sentencing.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15 (cumulative effect of errors may violate due process); *Strickland v. Washington* (1984) 466 U.S. 668 (criminal defendant has right to effective assistance of counsel at all stages of proceedings); *Brady v. Maryland* (1963) 373 U.S. 83 (withholding of evidence favorable to accused violates due process); *Pointer v. Texas*

(1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates as if fully set forth herein all facts and law set forth in all Claims 18 through 33 in this petition.

2. In this petition and in the briefing on direct appeal, petitioner has set forth separate post-conviction claims and arguments regarding the numerous instances of ineffective assistance of counsel which occurred in the pretrial, guilt, penalty, and post-trial phases of this case, and he submits that each one of these errors independently compels reversal of the judgment or alternative post-conviction relief. 3. A habeas corpus petitioner may prove he has suffered ineffective assistance of counsel based on the cumulative effect of errors. (*Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319; see also, *Taylor v. Kentucky*, *supra*, 436 U.S. at p. 478, 487, and fn. 15 (due process violated by cumulative effect of error).) The judgment or sentence must be overturned if "multiple deficiencies have the cumulative effect of denying a fair trial to the petitioner . . ." (*Ewing v. Williams* (9th Cir, 1979) 596 F.2d 391, 396.)

4. Petitioner submits that the many instances of ineffective assistance of counsel in this case require reversal both individually and because of their cumulative impact. As explained in detail in the separate claims and arguments on these issues, the errors in this case individually and collectively violated federal constitutional guarantees under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

5. The combined effect of counsels' errors was prejudicial because it is at least reasonably probable that the outcome would have been more favorable to petitioner but for the cumulative effect of counsels' unprofessional errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington, supra,* 466 U.S. 668.)

D. These errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, give rise to a reasonable probability of a more favorable outcome in the absence of the error and are moreover prejudicial under any standard of review.

Claim 34: Judicial Bias--Misconduct--Failure to Control Proceedings

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the trial judge failed to control the prosecution's continuing and outrageous misconduct; failed to curtail prosecutor's violations of court orders; failed to utilize the power of the court to ensure petitioner's rights; and manifested a

distinct prosecutorial bias throughout the proceedings. These errors highly prejudiced petitioner's guilt and sentencing proceedings, and violated petitioner's rights to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; impartial jury; due process; equal protection; a fair trial; and the right to fair and reliable capital proceedings.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates both actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Ungar v. Sarafite* (1964) 376 U.S. 575 (Constitution mandates that trial judge not only be free of actual bias but also that there be no appearance of bias); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly and fairly confront adversarial evidence); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Hicks v. Oklahoma* (1979) 447 U.S.

343 (federal due process claim in state-created right); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and circumstances of offense proffered); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others, to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. In support of this claim, petitioner incorporates by reference Claims 8 through 17.

2. There were specific instances throughout the guilt and penalty phase where the court willfully failed to control prosecutorial conduct which deprived petitioner's rights. This conduct included, but was not limited to the prosecutor's continual repeated violations of the court-imposed gag order specifically prohibiting contact with or comments to the media throughout the trial and penalty phase of the case. The court issued this unequivocal order at the inception of the trial, which at no point was withdrawn. (RT 37, 36.) The court expressly informed the prosecutor, "You are not to open your mouth, except in court." (RT 37.) The prosecutor, however, did violate that

gag order, repeatedly. Petitioner specifically objected to the prosecutor's constant violations:

> I'm going to also request, it was my understanding we had a gag order in this court and it applied to both counsel and the prosecution.
>
> Numerous times the prosecution made statements to the newspaper reporters. He thinks he is above the law and he don't have to abide by this gag order. I didn't understand the court to make any type of limitations or time periods on how long this gag order was going to be in effect, Your Honor, and I'm saying, I'm saying now that concerning him making all these statements and stuff outside of the court, I think it is totally unfair, Your Honor. I think it is again, it goes to show that the prosecution is going to go to any means beyond limits to try to get a conviction and if that means grandstanding up before the newspaper media, he didn't have no comments whatsoever to say about my motion to vacate the verdict right here in open court. He has to go outside the courtroom and discuss with newspaper reporters. I think it is totally inappropriate.

(RT 5725-5726.)

4. Furthermore, petitioner requested sanctions be imposed for the overt and continuing violations. The court responded, "I will handle the prosecutor." (RT 5726.) The court, however, did nothing to sanction the prosecutor, and throughout the penalty phase continued to refuse to admonish the jury to refrain from viewing or listening to any media regarding the case. (RT 5748, 5769, 5802, 6026, 6076, 6220-6235.) The gag order was violated at critical junctures in petitioner's case; i.e., after the guilty verdict and before the penalty phase as well as shortly prior to the penalty phase deliberations where petitioner was sentenced to death. In a June 20, 1989, front page article in the *Oakland Tribune*, both defense attorneys "declined to comment

after the verdict, citing a gag order imposed by Golde on participants in the case." The prosecutor, however, had no such scruples:

> Anderson said he knew of "no basis" for Welch's remark about jury tampering and called it "a figment of his imagination." This is a man who's just been convicted of six firsts and a special circumstance, and so what's he got to lose by making wild claims."

(Exhibit 39, Newspaper Articles re: Gag Order.)

With only one day remaining before the penalty phase was set to begin, Anderson violated the gag order in an interview with the *Oakland Tribune*:

> Prosecutor James Anderson said for the past year he has spent 95 percent of his time on the Welch case. "That's the nature of the beast – Oakland's largest mass murder," Anderson said. "For probably the city's most heinous case, I don't think 95 percent was undeserved," he added.

(Exhibit 39, Newspaper Articles re: Gag Order.)

Additionally, the prosecutor violated the gag order in express, prejudicial statements to the *San Francisco Chronicle* the day after the guilty verdict. In the June 20, 1989 issue of that paper, Anderson is quoted:

> Prosecutor Jim Anderson later said he was "elated" by the verdict. "Children were killed," Anderson said. "I'm sure the jury feels the same way about child murderers and mass murderers as I do."

(Exhibit 39, Newspaper Articles re: Gag Order.)

After the verdict was read, petitioner informed Judge Golde he believed there had been "jury tampering" during the proceeding.s Anderson informed the paper as follows: "Anderson called the allegation a 'figment of David Welch's imagination'." (*Ibid.*)

5. The trial judge's failures to control proceedings highly prejudicial to petitioner infuse the entire trial. On several occasions, during voir dire, petitioner asked the court for information on a potential informant who was highly prejudicing petitioner's case. That informant, Michael Willis, was allegedly communicating with victims' families. (RT 2407.) The court denied the motion as premature, and stated it did not have sufficient information to determine whether the grievance about potential county jail informers contacting witnesses for the prosecution, "properly lies in this court or the federal court or some other court." (*Ibid.*) The Superior Court have jurisdiction over this discovery, particularly crucial in a capital case. (See e.g. Cal. Const., art. VI, §10.) On May 8, 1989, petitioner told the court that on the way to court he was attacked and injured by three sheriff's deputies, had bruises and scratches on his face, and his legs and back were hurt. He requested to be examined by a physician at Highland Hospital. The court responded by stating its unilateral understanding that petitioner refused to go to court. Petitioner asked for a hearing to determine what occurred and how these injuries were received. Petitioner specifically asked the court if it had sufficient authority to order he be taken to Highland Hospital. Petitioner was concerned about hostility and prejudice exhibited by North County Jail doctors. Regarding the request to be taken to Highland Hospital, and the authority to do so, the court responded, "That's right, I have enough authority, but I'm not." (RT 3707.)

6. Petitioner incorporates by reference Claims 34 through 45.

7. The court's failure to control the proceedings in a non-partial manner and the trial judge's express and manifest bias against petitioner and in favor of the prosecution in its rulings, orders, and nonfeasance,

prejudicially denied petitioner's right to a fair trial; to a neutral and impartial judge who exhibited not only fairness, but the appearance of fairness; his right to due process; an impartial jury; and fair and reliable capital proceedings.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 35: Judicial Bias: Unconstitutional Instruction Precluding Requisite Consideration of Testimony

A. Petitioner's conviction and sentence of death violate of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution because the trial court, in its formal instructions, concerning inconsistent statements and disbelief of a witness's testimony, limited such consideration to a single witness. This sua sponte and unlawful deviation from the pattern instructions unconstitutionally and prejudicially foreclosed the jury's consideration of the untrustworthiness of prosecution witness's testimony in violation of the confrontation clause, shifted the burden of proof in violation of the due process clause, and rendered the guilt and penalty determinations unreliable.

B. The following United States Supreme Court cases, inter alia, in effect at the time the error occurred, are presented in support of this claim: *In re Murchison* (1955) 349 U.S. 133 (constitution mandates both actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania*

(1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings; *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-examinations regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (jury must determine facts on which sentence is based); *Duncan v. Louisiana* (1968) 391 U.S. 145 (jury reasonable doubt requirements); *Nebraska Press Association v. Stewart* (1976) 427 U.S. 539 (judges have a constitutional responsibility to protect the right to an impartial jury and assuring fair trial.)

C. The following facts, among others, are presented in support of this claim after adequate funding, discovery, investigation, and an evidentiary hearing:

1. Willie Henderson was one of only 17 witnesses who testified for the defense during the guilt phase. (RT 5246-5426.)

2. At the conclusion of the guilt phase, the court gave the following instructions:

> Now, Ladies and Gentlemen, we had evidence that on some former occasion a witness made a statement or statements that were inconsistent or consistent with his testimony at this trial.
>
> Now, this may be considered by you not only for the purpose of testing the credibility of the witness, the believability, but, again, as evidence of the truth of the facts stated by the witness on such former occasion.
>
> (RT 5578.)

3. The court then instructed the jury regarding inconsistent statement and witnesses who claimed not to recall events as followed:

> Now, in addition, if you disbelieve a witness' testimony –*Here, I'm talking about Willie Henderson.*
>
> If you disbelieve a witness' testimony that he no longer remembers a certain event, such testimony is inconsistent with the prior statement or statements by him wherein he described the events.
>
> (RT 5578, emphasis added.)

4. By its terms, the court's instruction was limited soley to Willie Henderson, a defense witness. However, the prosecution presented witnesses in its case in chief who clearly had made a statement or statements that were inconsistent with their earlier statements. These included, but were not limited to, key prosecution witnesses: Stacey Mabrey, (RT 4109-4194); Barbara Mabrey, (RT 4195-4407); Leslie Morgan (RT 4437-4527); Angela Payton (RT 4528-4564); Beverly Jermany (RT 4763-4805.)

5. The prior inconsistent statements were crucial evidence in undermining the credibility of these prosecution witnesses, with regard to a fundamental element of the offense – petitioner's *mens rea.* (RT 5480-5481, 5490-5493, 5495, 5506-5508, 5510-5512, 5558.)

6. Directing the jury that disbelief about a witness's testimony was only in relation to petitioner's witness "Willie Henderson," the court conclusively directed and precluded the jury from considering the prior inconsistent statements of prosecution witnesses as evidence of lack of credibility. Petitioner had no opportunity to refute, explain or deny the express directive by the judge that a basis for a negative influence of credibility applied only to this specific witness for the defendant. This instruction shifted the burden of proof and lessened the prosecution's burden of proving every fact beyond a reasonable doubt, because it implicitly directed the jury not to consider prior inconsistent statements in evaluating the credibility of the prosecution witnesses. prosecution. The institution also undermined the reliability of these capital proceedings.

7. By directing the jury to consider prior consistent statements only in assessing the credibility of a witness, and by failing to then mention any of the witnesses for the prosecution, the judge evidenced clear and egregious

bias towards the defendant and partiality toward the prosecution. This unfairness and appearance of unfairness were manifest constitutional error.

8. The error was highly prejudicial to petitioner's case for the reasons set forth above. Additionally, the error was particularly prejudicial because: (1) the jury requested read backs of the testimony of the five prosecution witnesses listed above, and therefore relied heavily on the testimony of these witnesses; and (2) because the prosecutor devoted a substantial portion of his argument to a discussion of this testimony. Further, he was found guilty on all counts, following the testimony of the witnesses, *supra* and the prosecution's use of this testimony to petitioner's unconstitutional detriment.

D. Each error in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 36: Judicial Error--Bias: Denial of Allocution Rights--Fundamental Constitutional Violation and Judicial Bias/Error

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7, 15, 16 and 17 of the California Constitution because the petitioner was effectively denied the fundamental right to address the jury prior to its deliberations in the penalty phase of his capital case. This denial of the opportunity to be heard, which is a fundamental right and particularly crucial in the context of determining whether to impose a death sentence,

abridged petitioner's right to due process of law; to a fair trial; to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; to an impartial jury; and the right to reliable capital proceedings and sentence.

B. The following United States Supreme Court decisions, *inter alia,* in effect at the time the error occurred, are presented in support of this claim: *United States v. Burr* (1807) 25 Fed. Cas. 25, no. 14,692b CCD. Va. (recognize fundamental right to fair trial/impartial tribunal); *Mattox v. United States* (1892) 146 U.S. 40(fundamental right to fair trial/impartial tribunal); *Parker v. Gladden* (1966) 385 U.S. 363 (fundamental right to fair trial/impartial tribunal); *Estelle v. Williams* (1976) 425 U.S. 501 (fundamental right to fair trial/impartial tribunal); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (denial of allocution in imposing sentence abridgement of core fundamental right – denial of such rights further constitutes unconstitutional appearance of impartiality); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible

bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); and including *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (jury to decide facts relevant to sentencing determination.).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. The United States Supreme Court has "stated time and again that reasonable notice of a charge and *an opportunity to be heard in defense before punishment is imposed 'are basic to our system of jurisprudence'*." (*Taylor v. Hayes,* 418 U.S. at 498 (quoting Groppi v. Leslie (1972) 404 U.S. 496, 502) (emphasis added.)

2. The Eighth Amendment to the United States Constitution guarantees that, in the penalty phase of a capital case, a criminal defendant be permitted the right to present any and all relevant mitigating evidence. A trial court's actual or functional curtailment of this presentation on petitioner's behalf requires reversal of a sentence of death. The trial court must permit the sentencer to hear, consider and give full effect to all relevant mitigating evidence amidst all such mitigating evidence. (*See Hitchcock v. Dugger* (1987) 481 U.S. 393, 394 ("Sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence."); *accord Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *Lockett v. Ohio* (1978) 438 U.S. 586, 606-607 (plurality opinion) (right to present mitigating evidence is constitutionally protected).) The right to present mitigating evidence may not be precluded either by a state statute or by a trial judge. (*Eddings,* 455 U.S. at 113.)

3. Exclusion of relevant mitigating evidence further violates the due process clause by denying petitioner a fair trial on the issue of punishment, and such exclusion cannot be justified by state's evidentiary and procedural rules. (*Green v. Georgia* (1979) 442 U.S. 95, 97 (*per curiam).)*

4. Fundamental due process further mandates that care be taken and procedures utilized to ensure notice *and an opportunity to be heard* in proceedings in which incarceration is a potential punishment. "Due process cannot be measured in minutes and hours or dollars and cents." [The petitioner's]"liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." (*Taylor, supra*, at 500; *Morrissey v. Brewer* (1972) 408 U.S. 471, 482.

5. The right to due process and the opportunity to be heard are underscored and heightened in a capital penalty phase proceeding. Here, petitioner's life was at stake, and where a penalty of death is faced the Constitution compels heightened reliability. (*See Lowenfield v. Phillips* (1988) 484 U.S. 231, 238-239 ("Qualitative difference between death and other penalties calls for greater degree of reliability when the death sentence is imposed").

6. Where the trial court's attitude shows evidence of some appearance of bias, these constitutional mandates are amplified. (*See Mayberry v. Pennsylvania* (1971) 400 U.S. 455 at 465 (Constitution requires that judge "maintain the calm detachment necessary for a fair adjudication")). The Supreme Court has consistently recognized that a trial judge may not be actually biased, but may have an appearance of bias as a result of the continuing provocation by a criminal defendant. The United States Constitution, however, requires that the trial judge "hold the balance nice, clear and true between the state and the accused . . ." (*Tumey v. Ohio* (1927) 273 U.S. 510, 532.)

> In making this ultimate judgment the inquiry must not be whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable

to hold the balance between vindicating the interests of the court and the interest of the accused." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 588.) "Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties," but due process requires no less. (*In re Murchison* (1955) 394 U.S. 133, 136.)

(*Taylor v. Hayes* 411 U.S. at p. 501.)

7. Each and every constitutional error set forth in Section C1 through C5 of this Claim occurred, individually and collectively, in the trial court's denial of petitioner's right to allocution in the penalty phase of his capital case. At the conclusion of the penalty phase, but prior to deliberations by the jury, to determine whether or not petitioner should be sentenced to death, petitioner inquired whether he had the right to take the stand to address the jury. The following colloquy ensued:

DEFENDANT: Well, excuse me, Your Honor.

THE COURT: The admitted order of commitment.

DEFENDANT: I have one.

THE COURT: Hang on. You have five minutes to go. You can last.

DEFENDANT: I want to know right now am I entitled under the law to testify?

THE COURT: Yes, sir.

DEFENDANT: In my mitigation stuff right now?

THE COURT: Yes. Yes.

DEFENDANT: I'm going to request right now a continuance so I can evaluate and figure out if I want to testify.

THE COURT: No. If you want to testify you can proceed right now or your attorney is going to rest. What is your pleasure?

MR. STRELLIS: I have already rested. If he wants to testify he has a right to testify.

THE COURT: Absolutely. Do you want to take the stand?

DEFENDANT: I'm requesting a 24-hour continuance, Your Honor. I think I'm entitled to that.

THE COURT: Your motion is denied. All right, Ladies and Gentlemen. That will complete the testimony. What is left will be the arguments of the attorneys and my instructions of the law.

(RT 6106-6107.)

8. Thus, the court specifically denied petitioner's motion, forced him to make this decision on the spot and accordingly denied his right to speak. This ruling wholly and unjustly deprived petitioner his constitutional rights to allocution.

9. The next day of trial, the court asked petitioner if he wanted to testify. (RT 6108.) Understandably confused since he had been unequivocally prohibited from addressing the jury, petitioner stated that he understood the court had ruled he could not testify. Rather than correcting his previous error, the trial judge again foreclosed petitioner from making this decision or addressing the jury in the penalty phase of his capital case. This is evidenced in the following colloquy:

THE COURT: Mr. Welch, have you decided whether or not you're going to testify?

DEFENDANT: I thought – I thought – I thought Your Honor gave me five minutes previous to make up this decision, so I didn't never make it up.

THE COURT: All right. We're ready to proceed with the arguments.

DEFENDANT: I didn't know the Court was going to let me renew –

THE COURT: The matter will stand rested.

. . .

DEFENDANT: I don't think – I don't understand, Your Honor. I thought you were asking if I was ready to testify.

THE COURT: Never mind. Let's just proceed. Call the jury down.

(RT 6108.)

10. By foreclosing petitioner from testifying in the penalty phase of his capital case, the trial court denied petitioner his constitutional rights to a fair trial, due process of law, an impartial jury, a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness, his Fifth Amendment right to testify in his own behalf, and the right to reliable capital proceedings and sentence.

11. Petitioner incorporates by reference as if fully set farther herin the facts and law set further by Claims.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 37: Judicial Bias--Court's Unconstitutional Denial of Petitioner's Opportunity to Review Probation Report

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the court specifically refused to permit petitioner any opportunity to read, review, refute, deny or correct in the probation report any way. This report was relied upon by the court in its ruling on the automatic motion for modification of the sentence. The denial of petitioner's right to review the report violated his right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; a fair trial; due process of law; confrontation rights; and the right to fair and reliable capital proceedings and sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *United States v. Tucker* (1972) 404 U.S. 443 (due process required that defendant not be sentenced on basis of misinformation of constitutional magnitude); *In re Murchison* (1955) 349 U.S. 133(Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right

to directly confront adversarial evidence); *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam litigation regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be precluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to

trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. On July 25, 1989, the court reconvened following imposition of the jury decision to impose death as the appropriate punishment. Petitioner was unclear whether sentence was going to be imposed on that day, or whether the would be allowed to raise several legal issues prior to imposition of the sentence. (RT 6235.) The court stated that the attorneys would speak then petitioner would be permitted to speak if he wished, and then the sentence would be pronounced. (*Ibid.)*

2. The judge then stated the matter in the case of *People v. Welch* was on for "report and sentence" and stated: "*The court is in receipt of the probation report.*" (RT 3265, emphasis added.) Petitioner then stated, "I'm going to request, Your Honor, that [the probation report] be removed from my file, and the court not consider it before any sentencing at this time." (RT 6236.) Defense counsel then raised the issue of reduction of penalty, focusing on a general argument regarding petitioner's mental health. (RT 6235-6238.)

3. The court stated once again "The court has read and considered the report of the probation officer." Petitioner then again specifically requested as follows:

> I think I'm entitled – I'm going to request we take a recess, so I can have a chance to review the probation recommendation since nobody never told me about a probation report.
>
> (RT 6241.)

The trial judge then ruled on petitioner's request: "No, sir, you do not have the right to do that." (*Ibid.*) Petitioner asked again: "You say you're not going to allow me enough time to read the probation report?" The court again made it clear that petitioner did not have the right to read the report and would not be permitted to read the report on which the sentence of death was being imposed. In reply to petitioner's last question, the court answered: "That's correct." (RT 6242.)

4. A statutory sentencing scheme is constitutionally infirm unless it effectively channels the sentencer's discretion. Thus, the sentencing process and the scheme that follows must provide "clear and objective standards; specific and detailed guidance and an opportunity for rational review of the process of imposing a sentence a death. *(Godfrey v. Georgia, supra* , 446 U.S. at p. 428.) Further, the sentencing review scheme cannot lawfully preclude consideration of evidence in mitigation. *(Lockett v. Ohio* (1978) 438 U.S. 586; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Mills v. Maryland, supra*, (1988) 486 U.S. 367) By refusing the petitioner not only to challenge and correct, but even review the probation report, upon which this sentencing determination was made, the judge precluded its own proper consideration of mitigating evidence, did not follow clear and objective standards, and did not undertake the requisite rational review, process for imposing a sentence of death.

5. By refusing petitioner the opportunity to review or challenge any of the information contained in the probation report in its ruling on the

modification of the verdict of death to life without possibility of parol, the court arbitrarily, capriciously, unconstitutionally and unlawfully denied petitioner's right to confrontation to witnesses against him, and particularly to due process of law. *(Gardner v. Florida, supra,* 430 U.S. 439) This denial of rights was no less severe because the judge, not the jury, was the final arbiter on the sentence of death. *(Eddings v. Oklahoma, supra,* 455 U.S. 104; *Maynard v. Cartwright* (1988) 486 U.S. 456, 360.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in the judgement and sentencing and were prejudicial under any standard of review.

Claim 38: Judicial Bias--Failure to Control Juror's Access to Media and Failure to Admonish Jurors Regarding the Extensive Pre-Trial, Trial and Penalty Phase Publicity

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7, 15, 16 and 17 of the California Constitution because there was extensive pretrial publicity and extensive media coverage of petitioner during the guilt and penalty phases of his case. At petitioner's request, the trial judge imposed a gag order on counsel throughout the entire guilt and penalty phase. However, both prosecution and defense counsel violated the gag order, and the prosecution specifically commented on significant aspects of petitioner's case prior to the penalty phase. Notwithstanding this extensive, highly prejudicial publicity during the voir dire, guilt phase and penalty phase of petitioner's case, the trial judge failed

to admonish to jurors to refrain from reading newspapers, listening to radios or viewing television regarding petitioner's case, and further failed to do so in spite of a continuing objection by defense counsel that such admonitions occur. The trial judge attenuated the import and weight of any admonishment he did make which would have directed the jury to properly performing its crucial function. These omissions and commissions violated petitioner's right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; fair trial; due process; an impartial tribunal; and a fair and reliable capital guilt and penalty determination.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates both actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings; *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Ungar v. Sarafite* (1964) 376 U.S. 575 (Constitution mandates that trial judge not only be free of actual bias but also that there be no appearance of bias); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly and fairly confront adversarial evidence); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446

U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and circumstances of offense proffered); *Duncan v. Louisiana* (1968) 391 U.S. 145 (jury trial fundamental right); *Wainwright v. Witt* (1985) 469 U.S. 424 (constitutional standard re: excusing jurors); *Nebraska Press Association v. Stewart* (1976) 427 U.S. 539 (judges have responsibility of protecting fundamental right to an impartial jury to ensure defendant receives a fair trial); *Remmer v. United States* (1954) 347 U.S.227 (jury tampering and unapproved private communication presumptively prejudicial, and court is to investigate jurors exposed to extraneous influences to determine prejudicial impact); *Shepard v. Maxwell* (1966) 384 U.S. 333 (jury deliberations must be based on evidence in open court, not on external publicity); *Chandler v. Florida* (1981) 449 U.S. 560 (any highly publicized criminal trial presents risk of compromising right to fair trial); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others, are presented in support of this claim, after adequate funding, discovery, investigation, and an evidentiary hearing:

1. There was wide-spread media coverage on petitioner's case from the time that the crimes occurred. Petitioner incorporates by reference Claim 53.

2. This publicity throughout the trial was prejudicial. Numerous articles appeared in the *Oakland Tribune* and *San Francisco Chronicle* regarding petitioner and the crimes. (CT 296-381.)

3. From the inception of the trial, the court imposed a gag order on the prosecution and defense counsel. (RT 34-35.); (RT 37: "The lawyers are gagged" . . . Court informs both counsel: "You're not allowed to open your mouth except in court."); (RT 56 (gag order reiterated). The prosecution, however, openly violated this gag order, potentially on several different occasions. *(See,* e.g., RT 5725.) Petitioner strenuously objected to this violation and specifically noted the prejudicial impact of the prosecution's comments in the media. (RT 5725-5726.)

4. An extensive article appeared in the May 15, 1989 edition of the *Oakland Tribune* regarding petitioner. Counsel for petitioner requested that the jury be polled to find out which of them read the article that appeared on that date. The court stated it was not necessary to poll the jury because he had told them not to read the newspaper. This is one of the few times that the court actually did instruct the jury not to read a specific article. These instructions soon went by the wayside, and his malfeasance continued throughout the remainder of the trial.

5. On May 17, 1989 petitioner put on the record that he wanted to request the jury to be sequestered about recent news media publication, and particularly the news media of that morning, which was the first day the jurors were sworn. The court denied the motion to be sequestered. Specifically, the trial judge stated: "I have already admonished them, and I will admonish them each recess." (RT 3949.) On that same day, the judge admonished the jury about the publicity of that day, but specifically swayed them from being concerned with any other publicity. The judge instructed:

> There was an article in the paper and I don't think there will be one tomorrow because I don't see the press here.
>
> So again, you are admonished, of course, not to discuss the case among yourselves, with anyone else, nor let anyone to talk to you about it. You, of course, are to make no decisions until all the evidence, arguments, and instructions. And, further, you are not to read any articles. And if you see anything on T.V. you just turn the station.

(RT 4031.)

6. There were almost no further admonishments regarding the media at any other recess in the entire trial. Petitioner's counsel requested that jurors who were not excused be admonished by the court not to discuss the case or read anything about the case "because we're not going to voir dire them again." Counsel further stated: "There's likely to be more publicity as we go forward." This was a standing request by counsel Strellis. (RT 1502.) Defense counsel Strellis particularly urged that the court so instruct, "given the fact that we're getting slightly more publicity in this case than in the average situation . . ." (RT 3997.)

7. Notwithstanding the trial judge's own proclamation that he would admonish the jurors at every recess to refrain from viewing publicity and

media, and notwithstanding the ongoing request by counsel and objections by petitioner, or the acknowledgment that there was more publicity, as the trial continued the trial judge did not issue any further instructions on this matter. (RT 3845 (no admonishment about media); RT 4321 (no admonishments prior to recess regarding media); RT 4367 (no admonishments prior to recess regarding media); RT 4424 (no admonishments prior to recess regarding media); RT 4521 (no admonishments prior to recess regarding media); RT 4647 (no admonishments prior to recess regarding media); RT 4760 (weekend recess – no admonishments regarding media prior to recess); RT 4866 (recess for a day – no admonishments regarding media prior to recess); RT 4760 (jury recessed for Memorial Day weekend – no admonishment regarding media prior to recess); RT 4813 (no admonishments prior to recess regarding media); RT 4929 (court adjourns for three days following the close of prosecution's case – no admonishment regarding media); RT 5329 (no admonishments prior to recess regarding media); RT 5423-5424 (no admonishments prior to recess regarding media); RT 5442 (court adjourned from Wednesday until following Monday – no admonishment regarding media prior to adjournment); RT 5551-5552 (court adjourns – no admonishment regarding media prior to adjournment); RT 5625 (at close of instructions, court does not admonish jurors not to view media during deliberations); RT 5659 (jury excused for a week – no admonishment regarding media prior to jury being excused); RT 5802 (court recesses for the day – no admonishment to jury regarding media); RT 5889 (recess with no prior admonishment about the media); RT 5914 (jury takes substantial recess for July 4th holiday – no admonishment about media prior to recess); RT 6026 (recess until next morning – no admonishment about media prior to recess); RT 6076 (recess

– no prior admonishment about the media); RT 6145 (recess at close of prosecution's closing argument – no admonishment not to discuss the case, and no admonishment about the media); RT 6200-6201(close of defense counsel's closing, jury recessed until the next day – no admonishments about the media.))

8. The trial judges' willful refusal to admonish jurors not to view the extensive, ongoing publicity and media during the case was highly prejudicial to petitioner. First, it reflected the wholesale bias of the trial judge. Further, it permitted the jurors to obtain information about the case. Such information could well have been obtained immediately prior to and directly impacted both the guilt and penalty phase deliberations. The court stated to the entire jury:

> You're going to hear at the end of every session what we call an admonition. I'm going to admonish you.
>
> It is not really an admonition, it just makes good sense.
>
> And the admonition is as follows: that is, you're instructed not to discuss the case among yourselves, with anyone else, or let anybody else talk to you about it.

(RT 3844.)

Legally, an admonition is an admonition, and violation of it is prejudicial and egregious, particularly where petitioner's life was at stake. By saying that it was just a statement that made "good sense" the judge severely curtailed the import and impact of that what little he did warn the jury not to do. Even in this discussion of admonition, however, the court did not even mention not viewing television, listening to the radio, or reading newspapers during the trial.

9. These omissions and commissions by the trial judge prejudicially denied petitioner the right to a trial judge who was unbiased and conducted

the proceedings with not only fairness, but an appearance of fairness; the right to an impartial tribunal; and due process.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 39: Judicial Bias – Misconduct: Prejudicial Orders Regarding Petitioner's Testimony and Orders Favoring Prosecution Witnesses

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because, over strenuous objection of defense counsel, and without a hearing on petitioner's competency, the trial judge ordered petitioner to take the stand. The court did so notwithstanding its earlier ruling that petitioner was incompetent to represent himself. Further, the trial judge curtailed crucial defense questioning of prosecution witnesses. These errors, inter alia, manifested the trial judge's overt and prejudicial bias, denied petitioner's right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; a fair trial; an impartial tribunal; due process; and fair and reliable guilt and penalty phase determination.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *In*

re Murchison (1955) 349 U.S. 133 (Constitution mandates both actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Ungar v. Sarafite* (1964) 376 U.S. 575 (Constitution mandates that trial judge not only be free of actual bias but also that there be no appearance of bias); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly and fairly confront adversarial evidence); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor any aspect of defendant's character or record and circumstances of offense proffered); *Fisher v. United States* (1976) 425 U.S. 391 (Fifth Amendment protects a person against being incriminated by his own compelled, testimonial communications); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to

trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing are presented in support of this claim,:

1. The trial judge found petitioner incompetent to represent himself. He specifically held:

> I find Mr. Welch is a defendant who does not appreciate the extent of his own disability and, therefore, cannot be fully aware of the risk of self-representation. I find the disability of Mr. Welch significantly impairs the capacity to function in a courtroom.
>
> . . .
>
> You have failed in your showing, and I have decided that a defendant facing the potential death sentence requires the assistance of competent counsel. You do not have the mental capacity to waive. Mr. Strellis and Mr. Selvin are your attorneys.
>
> (RT 84-86.)

2. At the close of petitioner's case in the guilt phase of his trial, petitioner's counsel informed the court that his client had made a request and wished a brief recess to discuss whether or not to take the stand to testify in his own behalf. (RT 4999-5000.) Petitioner stated he was prepared to proceed "with the cross-examination of the accused and the prosecution in this matter, Your Honor; and I'm suggesting that we proceed at this time period." *(Id.)*

3. Petitioner's counsel again suggested a recess, the least amount required considering the gravity of the decision petitioner was making. This was underscored by the express language of petitioner's stated request, which referenced cross-examination of the accused and prosecution. This statement makes clear that petitioner was not aware of the risks or consequences involved in his spontaneous decision to take the stand. This critical decision was subsequent to the day petitioner urinated in the well and engaged in other conduct that cast serious doubt on whether he was competent to stand trial. Petitioner incorporates by reference Claims 2 and 19.

4. Following those few minutes, petitioner's counsel stated, "I have a real problem and I would ask that we stand over until 2:00 o'clock." The court responded, "No." Mr. Strellis again asked, "Well, I'm making a request for the record that we go over until 2:00 o'clock . . . I think it's very important that we go over." The court stated petitioner was ready to proceed even if his counsel was not. The court then directed petitioner to immediately "Take the stand." (RT 5000-5001.) Ordering petitioner to take the stand, despite defense counsel's request for a brief, several-hour continuance, was highly prejudicial to petitioner's case. Petitioner's testimony was relied upon and consistently underscored in the prosecution's closing argument. (RT 5497, 5500-5501, 5563-5564, 5567.) The jury did in fact convict petitioner on all counts and sentence him to be executed. (RT 5648-5666, 6227-6229, 6268.)

5. Soon thereafter, the trial judge refused to permit defense counsel to question witness Roko Lucin whether or not drugs were taken at the Mabrey house. This information was clearly both relevant and critical to petitioner's case in chief. The court twice sustained the prosecutor's

objections to this line of questioning. Defense counsel then asked, "If nothing else, it goes to the issue of credibility." The court again sustained the objection. Petitioner's counsel then asked, "Was anyone else getting high at the time?" Again, Anderson objected, and again the court sustained the objection. (RT 5232; *see also* RT 5405-5406 (court again sustains prosecution's objections to questions posed by defense counsel regarding effects of drugs or alcohol on a pre-existing psychiatric condition).) The trail judge's pro-prosecution actions manifested his bias and highly prejudiced petitioner's case. These constitutional errors prejudicially denied petitioner his rights to an unbiased tribunal; a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; an impartial jury; due process; the prohibition against self-incrimination; and fair and reliable capital guilt and sentencing determinations.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 40: Judicial Bias-- Prejudicial Curtailment and Inadequate Voir Dire

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the trial judge failed to adequately voir dire jurors who had been exposed to extrinsic evidence. Further, the trial court curtailed voir dire of prospective

jurors, preventing petitioner from ascertaining bias, and ensuring a pro-prosecution bias within the jury. These errors prejudicially impacted petitioner's case and denied his right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; fair trial; due process; a fair and impartial tribunal; and a fair and reliable capital proceeding.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates both actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings; *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Mattox v. United States* (1892) 146 U.S. 40 (fundamental right to fair and impartial tribunal); *Parker v. Gladden* (1966) 385 U.S. 363; *Ungar v. Sarafite* (1964) 376 U.S. 575 (Constitution mandates that trial judge not only be free of actual bias but also that there be no appearance of bias); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly and fairly confront adversarial evidence); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove

beyond a reasonable doubt every element of the crime with which defendant is charged); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and circumstances of offense proffered); *Duncan v. Louisiana* (1968) 391 U.S. 145 (jury trial fundamental right); *Wainwright v. Witt* (1985) 469 U.S. 424 (constitutional standard re: excusing jurors); *Nebraska Press Assoc. v. Stewart* (1976) 427 U.S. 539 (judges have responsibility of protecting fundamental right to an impartial jury to ensure defendant receives a fair trial); *Remmer v. United States* (1954) 347 U.S. 227 (jury tampering and unapproved private communication presumptively prejudicial, and court is to investigate jurors exposed to extraneous influences to determine prejudicial impact); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling element as "sentencing factor" does not negate this right).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. During voir dire, it became apparent that prospective jurors (in at least two groups of 90 prospective jurors) had prior crucial information

about this case and communicated this information to other prospective jurors. Cora Staten, a prospective juror on the first panel of 90, stated on voir dire that she did not remember anything about petitioner's case. (RT 1263.) However, defense lead counsel Strellis elicited the following information from prospective juror John Banducci, who was voir dired shortly after Mrs. Staten:

> MR. STRELLIS: Incidentally, have you ever read anything about this case in the papers?
>
> MR. BANDUCCI: I didn't – I was trying to remember the first day we were here about hearing anything about this or reading. Not until someone out there explained to me – one of the ladies – that what the actual story was, and remember seeing it on the news but not until today.
>
> MR. STRELLIS: Some lady out there this afternoon –
>
> MR. BANDUCCI: Yeah.
>
> MR. STRELLIS: – told you about it?
>
> . . .
>
> Do you recall what she told you?
>
> . . .
>
> MR. BANDUCCI: She said – went through the case and just more or less said that the people that – or whatever went on regarding the house and everything and the gentleman coming into the home with an Uzi machine gun and something to do with the mother left through the window. She was very – wasn't very explicit about the whole thing.

MR. STRELLIS: She knew some details?

MR. BANDUCCI: Yes.

(RT 1294-1295.)

2. A discussion between Mr. Banducci, defense counsel, the prosecution and the court established that the prospective juror who had spoken to Mr. Banducci was Cora Staten. (RT 1294.) Of the 90 people comprising that first panel of prospective jurors, Grace Estarija, Carol Hayward and Timothy Parker were eventually seated as jurors; Bernard Wells was selected as an alternate juror.

3. There were 82 people voir dired on the second panel of prospective jurors. On March 22, 1989, Etta Goins, a nurse who worked for North County Jail, was the first prospective juror to be voir dired. Associate counsel Selvin asked her if she had heard or read anything about the case:

MISS GOINS: I didn't remember until the first day that I was summoned, and when we got out, I was walking to the parking lot, and I asked this lady that was with me – she was one of the prospective jurors. And I said: When did this happen because, you know, it was so gross. Seemed like I would have remembered.

MR. SELVIN: Yes.

MISS GOINS: And she said it was back in '87.

MR. SELVIN: That's correct.

MISS GOINS: Said it happened in East Oakland. She said the guy killed two kids and four adults.

(RT 2837.)

4. Although Mr. Selvin attempted to ask Miss Goins about the identity of the prospective juror she had talked to, the court cut him off without explanation and the woman's identity was not established. (RT 2846.) Later that day, prospective juror Sandra Williams was questioned about her prior knowledge of the case:

> MR. SELVIN: I was wondering whether you have heard anything about that?
>
> MISS WILLIAMS: No, not until the lady – the first lady that you interviewed was sitting in the waiting room, and she told me a little about it.
>
> . . .
>
> She was talking about it was in the papers in '87 I think she said. That's the first that I knew about it
>
> MR. SELVIN: She had mentioned that she had read about this case in the newspaper?
>
> MISS WILLIAMS: (Nods head.)
>
> . . .
>
> MR. SELVIN: What else do you remember that she told you about the case?
>
> MISS WILLIAMS: Just that there were murders and children involved . . .

(RT 2865-2866.)

5. Miss Williams later became an alternate juror who was in the jury room during deliberations. The "first lady that you interviewed"

referenced by Miss Williams was Etta Goins, who worked as a nurse at North County Jail and had a conversation regarding petitioner's case with an unknown, prospective juror. Of the 81 remaining prospective jurors in the second panel, Richard Mignola, Kim Secrease, Virgie Williams, Joanne Gonzales, Joseph Cruz, Howard McGee and Yvonne McGrew were seated as jurors; Brent Patterson and David Larson were alternate jurors.

6. Thus, there were at least 180 prospective jurors who may have been exposed to extrinsic, prejudicial information regarding petitioner. Under these circumstances, the trial court was required to inquire and specifically ascertain whether or not prospective jurors were contacted by other prospective jurors, had discussions with other prospective jurors, or gleaned any information from other prospective jurors. *Remmer v. United States, supra,* 347 U.S. 227.) Despite ample evidence indicating a need for such inquiry, the trial court never did this.

7. Petitioner stated he thought further voir dire was required to ascertain whether or not Mrs. Staten discussed the issue with prospective jurors. (RT 1377.) The court, however, declined to do so. Petitioner further objected that he felt the court had made gestures to counsel indicating that questions concerning previous news media accounts of the crime would be an inappropriate topic for voir dire. In fact, petitioner made a motion regarding this which the court denied. (RT 1378-1379).

8. On a number of occasions, the court went out of its way to restrict crucial defense voir dire regarding the juror's knowledge of extrinsic information. Prospective juror Leona Roumph stated that she heard and read about the case. As Mr. Selvin continued to probe into what she knew about the co-defendant, the prosecutor objected and the court stated, "Mr. Selvin,

I'm not going to let you go into that." (RT 1685-1688.) Prospective juror Robert Brannan also read about the case, and as Mr. Strellis began inquiring as to what facts he knew, the court stated:

THE COURT: You're not going to ask that question.

MR. STRELLIS: Just for the record, you asked me not to.

THE COURT: Sure have.

MR. STRELLIS: Or ordered me.

(RT 1713-1719.)

9. Mr. Strellis specifically insisted that there were more questions he wanted to ask regarding prospective juror Etta Goins' knowledge of crucial elements of the case, gleaned from another prospective juror. All of this was prior, extrinsic evidence which could well prejudicially taint the jury. (*Remmer v. United States, supra,* 347 U.S. 227; *Mattox v. United States, supra,* 146 U.S. 40; *Parker v. Gladden, supra,* 385 U.S. 363, *see also Jeffries v. Wood* (9th Cir. 1997) 114 F.3d 1484 (en banc), cert. denied, (1997) 522 U.S. 1007 (prejudicial extrinsic information imparted from one juror to another regarding defendant's prior convictions mandated reversal of sentence and aggravated murder conviction).) Defense counsel wanted to ask prospective juror Goins whether she knew the name of the juror who told her about the case, as well as the race of the juror who told her. The court curtailed this line of inquiry. At the same time, petitioner and his counsel asked that alternate juror Sandra Williams be excused "based on the fact that she has far too much familiarity with a variety of players in this little

melodrama." The court denied both of petitioner's motions. (RT 2912-2913.) Later, Mr. Strellis renewed the challenge to potential juror Cora Staten, and wished to probe both her knowledge about the case and with whom she spoke. The court stated, "I don't think we have to go that far." The court then denied a change of venue. (RT 3718.)

10. The unconstitutional conduct of the trial judge prejudicially impacted this case by creating a pro-prosecution jury, which ultimately convicted petitioner and sentenced him to death. (RT 5648-5656, 6227-6229, 6268.) These prejudicial errors denied petitioner's rights to a fair trial; an impartial tribunal; a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; due process; and the right to a fair and reliable capital proceeding.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

California Constitution because the trial judge made numerous disparaging comments on petitioner's character and conduct. Additionally, some of these disparaging comments were made by the trial judge in the context of instructions to the jury. By so commenting and instructing, the trial judge prejudicially violated petitioner's right to due process; to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; to an impartial tribunal; to a fair trial; and to a fair and reliable capital proceeding.

B. The following United States Supreme Court decisions, *inter alia,* in effect at the time the error occurred, are presented in support of this claim: *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates both actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Ungar v. Sarafite* (1964) 376 U.S. 575 (Constitution mandates that trial judge not only be free of actual bias but also that there be no appearance of bias); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly and fairly confront adversarial evidence); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and circumstances of offense proffered); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury

entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. The Constitution of the United States mandates that a trial judge not only be free of actual bias, but also that there be no appearance of bias. *(Ungar v. Sarafite* (1964) 376 U.S. 575, 588; *Taylor v. Hayes* (1974) 418 U.S. 488, 501.) Although such a rule may sometimes bar judges who have no actual bias "due process requires no less." *(Id.; In re Murchison* (1955) 349 U.S. 133, 136.) Where, as here, such bias has infiltrated the proceeding reversal of both the sentence and conviction is required. *(Berger v. United States, supra; People v. McNeer* (1935) 8 Cal.App. 2d 767.) In *McNeer,* this court reversed an order of conviction because the judge called the groaning from the defendant "theatricalism" and, after the defendant had been found sane, the trial judge said that he was "malingering or faking." The conviction was not saved by the judge telling the jury to disregard his remarks.

2. Here, the judge made consistent disparaging remarks to the petitioner throughout the trial. Such comments, completely unbefitting a trial judge in a capital case, demonstrate exceptional and unconstitutional bias towards petitioner.

3. Throughout the proceedings, Judge Golde made specific, denigrating and partial comments to or about petitioner. At one point, petitioner indicated that he wanted the motion in limine withdrawn. His trial

attorney stated that he felt the motion in limine would be beneficial and that he felt petitioner's concerns regarding the motion in limine did not necessitate withdrawing of this motion. This was a tactical, strategic disagreement between counsel and client, but also a decision of his counsel. (RT192-193.) However, the court took this opportunity to make a biased and disparaging comment about petitioner, thereby manifesting the court's lack of impartiality. The court stated: "It is merely another attempt by Mr. Welch to deliberately not cooperate, to stop the proceeding." (RT 193.)

4. During voir dire, there was a colloquy between petitioner and the court. Petitioner stated that he was specifically concerned about his mental state during trial. The court, however, again manifested overt bias by stating what it believed the petitioner's mental state to be:

> DEFENDANT: I'm – I'm questioning my own competency.
>
> THE COURT: No, I feel you're competent. I think you're deliberately attempting to thwart the trial. I think you're competent as can be. You're engaging in fraud and charade in an attempt to stop the trial.

(RT 1949-1950.)

5. The judge's bias was further demonstrated through the personal affront that he took from petitioner's innocuous and, in some cases, substantiated comments and observations. One example of such bias occurred when petitioner inquired why the court had curtailed an area of inquiry. The judge stated, "The court felt you were very insulting to the court . . . the only reason the court was insulted, Mr. Welch, when you indicated when I excused a woman because she was Japanese. I don't care about this at all." (RT 2216.) However, the issue of racial bias was a crucial area of

inquiry, not only with regard to prosecutorial misconduct, but with regard to judicial misconduct as well. Petitioner incorporates by reference Claims 9 through 14, 16, 33, 37, 39, 45, 48, 49, 50, 51, 55 and 78.

6. The trial judge's biased comments to and about petitioner and particularly on his mental state, which was at issue, continued throughout the trial. Petitioner attempted to explain to the court that on a previous day he was incompetent and incoherent when he was brought back to court. The trial judge stated: "No, you are just vicious and mean and causing trouble." (RT 3724.) That same day, petitioner, again pleaded with the court that he be given the opportunity for an adequate, independent psychiatric evaluation, in a forum in which an adequate evaluation could take place. The court instead again responded with derogatory and biased observations of petitioner's conduct. This is evidenced in the following colloquy:

DEFENDANT: I'm going to ask I receive psychiatric evaluation. That's what I'm asking. I – I believe I'm so upset, I am so humiliated –

THE COURT: I believe that you're deliberately trying to continue the case and stall it.

(RT 3728.)

Again, petitioner expressed doubt about his own mental state and ability to perceive. He informed the court, "I don't feel like I'm competent. I don't know what's going on in the proceedings." (RT 3729.) Instead of treating this with any type of neutral response, the court inserted its own subjective point of view which directly squared with that of the prosecution's. Specifically, the court informed petitioner, "You're competent, cunning, and wily." (RT 3729.)

7. The judicial bias and disparaging remarks about petitioner were express and put directly to and before the jury. This occurred in sarcastic comments to petitioner including, but not limited to the trial judge's admonishing petitioner not to comment on the evidence. Petitioner then pointed out that a screen was pointed the wrong way, and that spectators were unable to see it. The court responded, in front of the jury, "Your concern for the spectators fills my heart." (RT 3875-3876.) It further evidenced itself in specific directives and instructions to the jury, which were objected to by petitioner and/or his counsel. Later in the trial, the jurors apparently heard something outside the court. The court, *sua sponte*, stated:

THE COURT: This is not unusual. It's not unusual. He's yelling."

MR. STRELLIS: Your Honor, what happens speaks for itself.

THE COURT: You be still.

MR. STRELLIS: May my objection be noted for the record?

THE COURT: Your objection is noted. Don't you start blurting out.

(RT 4583.)

The court then discussed petitioner's behavior to the jurors:

I want to apologize twice, once for the delay this morning . . . And, secondly, I'm going to apologize for Mr. Welch.

As I told you in the beginning . . . I shall have him come down, ask him if he wishes to participate in the trial, behave, and follow the rules.

If he does, he's welcome here. If not, we may have to have a repetition of what occurred.

(RT 4593.)

8. During the actual instructions to the jury in the guilt phase, the court specifically directed the jury that petitioner was able to restrain himself and that his conduct in the courtroom was purposeful:

> Now, ladies and Gentlemen, we have seen Mr. Welch absent himself from the court. I want you to understand that we wanted him in court. We set down certain rules. He refused to obey them, and I know that is upsetting to you. It's, in candor, upsetting to me.
>
> (RT 5572.)

9. These errors, individually and cumulatively, significantly prejudiced petitioner's case. The judge was overtly biased towards petitioner, and the jury could not help being influenced by this bias, since it was not only continuous but also came in the form of instructions. Further, the trial judge's bias manifested itself not only in these overt comments, but also in highly partial rulings in favor of the prosecution and against petitioner; curtailment of constitutionally required voir dire; instructions which prejudiced voir dire; and leniency towards overt, continuing and substantial prosecutorial misconduct.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 42: Judicial Misconduct--Abdication of Duty--Misguiding and Leaving Jury During Deliberations

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution

and article I, sections 7, 15, 16 and 17 of the California Constitution because the trial judge left the court for the last two days of the guilty verdict deliberations, turned his courtroom over to another judge, and informed the jury that the other judge would not want to give them instructions about the law. Nonetheless, he permitted the jurors to continue deliberations. This wholesale abdication of duty, not only permitting but also directing the jury to deliberate without having a judge to which it could turn for legal guidance, violated petitioner's constitutional rights, including: the right to a fair trial; right to be tried by an impartial jury; the right to an impartial tribunal; the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; due process; and the right to fair and reliable capital proceedings and sentence.

B. The following United States Supreme Court cases, inter alia, in effect at the time the error occurred, are presented in support of this claim: *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates both actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings; *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding

where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Duncan v. Louisiana* (1968) 391 U.S. 145 (right to both trial and impartial jury conferred to prevent oppression by the government); *Nebraska Press Association v. Stewart* (1976) 427 U.S. 539 (judges have a constitutional responsibility to protect the right to an impartial jury and assuring fair trial).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. On Thursday, June 15, 1989 the jury was deliberating the guilt phase verdict of petitioner. On that day, Judge Golde informed the jury that he would not be in court the following day. Rather than releasing them from deliberations for the day he would be absent, the judge asked the jury to decide if they wished to keep deliberating in his absence. (RT 5645.)

2. The foreman for the jury stated that the jurors did want to keep deliberating, notwithstanding the judge's absence. Judge Golde informed them that there would be another judge "who could take the verdict from you." He then instructed the that with respect to the substitute judge:

> In terms of the law, he probably wouldn't want to instruct you as to the law.
>
> But in terms of receiving a verdict, he can do that.

(RT 5646) (emphasis added.)

The jury did continue deliberating through the entire day of Friday, notwithstanding Judge Golde's absence, and notwithstanding the directive not to ask the substitute judge for instructions "as to the law" which "he probably wouldn't want to instruct".

3. These proceedings and this abdication of constitutionally mandated duty to direct and guide the jury, occurred when neither petitioner nor his counsel were present. (RT 5646.) Neither petitioner nor his counsel had any idea this was occurring, and therefore had no opportunity to object to this unconstitutional procedure. They had no idea that Judge Golde informed the jury that the substitute judge would not want to instruct the jury as to the law, thereby leaving the jury unconstitutionally adrift. (RT 5645-564.).

4. The jury apparently did reconvene and deliberate for the working day when the judge was absent. At 2:21 p.m. on the afternoon of June 16, 1989 the petitioner and counsel were not present. At that time, the substitute judge introduced himself to the jury and such introduction occurred at the end of the day of their deliberations. His entire colloquy with the jury was as follows:

THE COURT: And my name is Judge Delucchi. I'm standing in for Judge Golde.

My understanding is you folks want to go home this afternoon until Monday?

JUROR NO. 9, MR. PARKER: Yes.

THE COURT: Let me just admonish you you're not to discuss this case among yourselves or with any other people or to form or express any opinion about ths case until all 12 jurors are present in the courtroom and – in the jury room, and then you can begin your deliberations at that time but not until all 12 jurors are present.

Have a nice weekend.

(RT 5647.)

5. During the final guilt phase deliberations in this capital case, the jury was left to function on its own. The jurors did not know who the judge was during their final deliberations, as he did not introduce himself until the close of that day. They were only informed and directed that the substitute judge would not want to answer questions of law. Therefore, any questions of law could not be answered. At 10:47 a.m. on June 17, 1989, the jury found petitioner guilty on all counts. (RT 5648-5658.)

6. This unreliable and unconstitutional deliberation violated petitioner's right to a fair trial; an impartial tribunal; to reliability in a capital proceeding; and to due process of law.

D. Each error in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 43: Judicial Misconduct--Instructional Error--Unconstitutionally Precluding Jurors' Consideration of Entire Testimony (Angela Payton)

A. Petitioner's conviction and sentence of death are violative of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the court, over defense objection, refused to read back the entire testimony of key prosecution witness Angela Payton. The jurors specifically asked for a statement from the witness's testimony, but the court ruled that there was no obligation for the jury to read the entire testimony. This preclusion unconstitutionally impacted the jury's deliberation, in violation of petitioner's rights to a fair trial; impartial judge, impartial jury, requisite degree of reliability in a capital proceeding, due process, the right of confrontation; and the right to a fair and reliable capital defense.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Mills v. Maryland* (1988) 486 U.S. 367 (death penalty invalid where jury may have believed that findings of mitigating circumstances must be unanimous); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and any circumstances of offense proffered); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial

has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Apprendi v. New Jersey* (2000) 530 U.S. 466

(Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt–labeling as "sentencing factor" does not negate this right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. During guilt phase deliberations the jurors specifically requested the re-reading of testimony. One of those requests was for the testimony of prosecution witness Angela Payton. (RT 5629.) Specifically, the foreman requested:

> The passage I believe we are concerned with concerns the statement that David Welch allegedly made at Walker's house to Angela Payton. She testified to that.
>
> (RT 5629-5630.)

The court, counsel and petitioner then discussed what information the jury was referencing. Prosecutor Anderson stated to the court that he could "pinpoint" the testimony. Petitioner objected to the prosecution's involvement in this search and read-back to the jury. (RT 5629-5630.)

2. The court clerk then apparently read only the direct testimony of Angela Payton to the jury. The record states: "The direct examination of Angela Payton, page 4528, line 18, through page 4539, line 27, was read." (RT 5630.) None of this read-back testimony was reported or recorded. (*Ibid.*)

3. The defense counsel strenuously objected to reading back only the direct testimony, and expressly requested that the cross-examination regarding that specific issue be read as well. The court repeatedly denied this request. (RT 5633-5634.) The pertinent colloquy between counsel and the court on the matter occurred as follows:

MR. STRELLIS: And the last point I will leave to Mr. Selvin because he raised it. And that has to do with whether or not we should read the cross-examination as well as the direct examination.

THE COURT: Let me see their note, please. They want Angela Payton's statement to Mr. Landswick. That didn't cover it. So, therefore, they wanted – I had him read her statement. Upon the completion of the cross, they said they had all that they wanted. You may say whatever you want for the record, Mr. Selvin.

MR. SELVIN: Yes. I'm going to have to find it, Your Honor. There was cross-examination with respect to Miss Payton's testimony about what she said that Mr. Welch had stated when he came back to Sherrie's house.

THE COURT: Perhaps over the noon hour – If you have a particular thing you want, I can ask the jury if they want it. We can discuss it then.

MR. SELVIN: I think if they ask for the statement, it's my understanding of the law that means the direct with respect to that statement plus the cross-examination.

THE COURT: They asked for a certain – they didn't ask for that at all, Mr. Selvin. They asked for the material given to Mr. Landswick, which I gave.

MR. SELVIN: Yes, Your Honor.

THE COURT: That didn't cover it, so we decided to read Angela Payton. Upon the completion of the direct, as we were going to take our noon recess, the juror says that's the point we're concerned with. There's no obligation to have the jury to read [sic] the entire testimony. However, if you want to do something over the lunch hour, that's fine. In the meantime, we'll be in recess.

(RT 5633-5634.)

4. There was no record as to what occurred during the lunch hour. The record indicates that defense counsel objected, but the judge's original ruling, precluding reading of the cross-examination testimony, followed. Accordingly, only the direct testimony of one of the prosecution's star witnesses was re-read to the jury during their deliberations. (RT 5648-5656.)

5. The testimony of Angela Payton was crucial to the prosecution's case. In his opening statement at the close of the presentation of evidence at the guilt phase, the prosecution specifically underscored Angela Payton's testimony and the statements contained therein, which were the subject matter of the jury's deliberation inquiry:

> Angela Payton testified next. She talks about the statement of the defendant at the time after the accident when he was getting ready to leave. You will recall that. "I'll be back and everybody in this", profanity used, "house is going to be dead".
>
> She saw him later at 12:30 in the morning after he told Dolores what he was going to do. And if you will recall what he said around 12:30, Dolores came around and said, "There is going to be some shit happening tonight".
>
> We heard from Beverly Jermany, the cousin of the defendant and she testified to the arrival of Moochie and the woman she did not know at 5 a.m. , 5 a.m., around 5 a.m. on the morning of December the 8th.

She testified about how Moochie was dragged in because he was wounded and Rita told that there was an accidental shooting. She accidentally shot David Welch in the leg. It was strange, and what she thought strange, nobody wanted medical attention. Nobody. In fact, Moochie asked for her to call a cab at that point, and she decided to get the child out of the house and worried about her being an accomplice by not telling anybody and went and sought out Officer Stevens and asked him what she should do and became suspicious when nobody wanted medical attention, and of course that led to the seige [sic] at 2116 103rd Avenue.

(RT 5481.)

6. The prosecution further underscored Angela Payton's testimony in his closing argument in the penalty phase of the case. He utilized this testimony not only for the statements she allegedly heard the petitioner make that night but also to undermine the credibility of petitioner's expert witnesses. At the penalty phase the prosecution argued:

Here is some more voodoo.

"Question: Okay. Doctor, when Mr. Welch made the comment in front of others that when the police are gone he will be back and kill everybody in the house, what did that indicate to you?

Answer: I, I don't know. It is taken out of context."

This guy is getting paid the bug bucks. He is a psychiatrist and he doesn't know what that meant?

"It is out of context."

Well, I'll tell you what, Angela Payton, the one who probably hasn't ever seen a college in her life, knew that when Moochie said he would be back and kill everybody in the house, she generally stayed in the house. She had no trouble knowing what Moochie meant because she didn't stay in the

house that night. But the $5,000 man says, "It was taken out of context". Come on. Give me a break. Give me a break.

(RT 6133.)

7. The cross-examination testimony, which should have been but was not re-read to the jury, explicitly and repeatedly impeached the testimony of Angela Payton. (RT 4540-4563.) This occurred, inter alia, through prior inconsistent statements to the police and the district attorney. (RT 4541.) Angela Payton's statement to Mr. Landswick, which was the precise information the jury requested, was reviewed in detail. Her statement to Mr. Landswick was crucial to petitioner's case because petitioner's counsel elicited a change in her testimony from immediately after the offense to the time she took the witness stand. After the offense, she stated that petitioner has a specific look when he's about to do something aberrant. That look is one that he has when he is "crazy". (RT 4559.) Angela Payton did not testify anything regarding petitioner's "crazy" state of mind in the prosecution's case in chief, and it was only through this crucial cross-examination that the truth of Ms. Payton's perceptions was elicited and presented to the jury. The area of cross-examination regarding statements to Landswick included the following colloquy:

Q: And you saw him, you saw that look in his eyes; right?

A: Correct.

Q: That look in his eyes which you have said time and time again is like he is crazy; right?

A: No, it was the look of violence.

MR. ANDERSON: Objection, Your Honor. The statement of –

THE WITNESS: It was the look of violence.

MR. SELVIN: Q. The look of violence?

A: Yes, it was the look of violence. It wasn't crazy.

Q: Okay. Let me ask you this: Do you remember giving the statement to Mr. Lanswick [sic]? That is the D.A.'s investigator.

MR. ANDERSON: No. Not a D.A.'s investigator.

MR. STRELLIS: D.A.

MR. SELVIN: I'm sorry.

Q. A D.A.. District attorney. I'm sorry. On the--

MR. ANDERSON: 13th.

MR. SELVIN: Of what, counsel?

MR. ANDERSON: April 13th of 1987.

MR. SELVIN: Q. Do you remember talking to Mr. Lanswick [sic] of the District Attorney's Office?

A. Yes.

Q. And he asked you some questions, and he asked you some questions about what happened on October 12th; right?

A. Correct.

Q. On October 12th, he asked you about whether you had seen David at that time when he driving [sic] the car and trying to run down Barbara; right?

A. Correct.

Q. And he asked you what did you see.
And on line 11, you said to him – line 12, you saw him smiling; right?

A. Correct.

Q. Then Mr. Landswick asked you: (Reading) Okay. And you say he has a certain posture when he driving [sic] that car?
And you say, answer: Yeah, when he, uh – when he's about to do something like that, he – he like squinches his eyeballs, looks at you, you know, crazy. (End reading)
Didn't you give that answer?

A. Correct.

(RT 4557-4559.)

8. It is well established that in giving additional instructions to a jury, particularly in response to inquiries from the jury, a court must be especially careful not to give an unbalanced charge. Where as here a jury has been unable to reach a decision on the basis of all it has heard up until that time, the Constitution demands an exacting sensitivity on the part of the court to give an accurate and complete instruction. *Bollenbach v. United States,* 326 U.S. 607; *United States v. Meadows,* (5th Cir. 1979) 598 F.2d 984, 988. In *Bollenbach,* the United States Supreme Court reversed a criminal conviction because the trial court did not give this requisite, complete guidance upon request for re-instruction by the jury. "The place of importance that trial by jury has in our Bill of Rights" demands no less. (*Id.* at p. 615.)

9. The judge's refusal to permit the jury to hear the crucial cross-examination of Angela Payton was highly prejudicial to petitioner. It clearly

and directly impacted both the guilt and penalty deliberations. The prosecutor specifically argued these statements in support of his contentions that petitioner was guilty on all counts, and in support of his contention that death was the appropriate punishment. The court did nothing to correct the misinformation provided in the direct testimony, which was expressly impeached in cross-examination. This error manifested the judge's bias, partiality, and prejudicially denied petitioner his rights to a fair trial; impartial jury; due process; confrontation, and the right to a reliable capital proceeding.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 44: Judicial Error--Misconduct--Court's Violation of Penal Code Section 190.4 and Constitutional Guarantees in Modification of Sentence

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7, 15, 16 and 17 of the California Constitution because the court improperly considered the probation officer's report in ruling on the Penal Code Section 190.4 Automatic Motion for Modification of Sentence. This report in and of itself was highly partial, unreliable, and prejudicial to petitioner. In so doing, the court violated California Penal Code Section 190.4(e) and violated the constitutional rights guaranteed to petitioner, including right to a fair trial; the right to a trial judge who was unbiased and conducted the proceedings not only with fairness, but with an appearance of

fairness; confrontation rights; due process of law and due process as violation of a state-created right; and the right to fair and reliable capital proceedings and sentence.

B. The following United States Supreme Court decisions, *inter alia,* in effect at the time the error occurred, are presented in support of this claim: *United States v. Tucker* (1972) 404 U.S. 443 (due process required that defendant not be sentenced on basis of misinformation of constitutional magnitude); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455(constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488(impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that

removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); and including *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607(completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Penal Code Section 190.4(e) provides that after the jury has rendered a verdict opposing the death penalty, court must rule on a convicted individual's automatic motion for modification of sentence. The trial court is commanded as follows:

> [T]he judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's finding and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.

(California Penal Code Section 190.4(e).)

2. The trial court failed to proceed in the manner required by law in denying petitioner's automatic modification motion. By its terms, Penal Code Section 190.4(e) limits the trial court's review of the evidence to the same evidence before the jury. In this case, rather than limiting its review to the evidence received by the jury, the trial court specifically and expressly considered the probation officer's report, prior to ruling on the automatic modification motion. Prior to ruling on the motion, the court stated that it was "in receipt of the probation report" and indicated later that it had read and considered the report of the probation officer in ruling upon the automatic modification motion. (RT 6235, 6236, 6256.) Page 14 of the probation report itself states: "I have read and considered the foregoing report" and is signed by Judge Stanley Golde in the Superior Court.

3. It is firmly established State law that the trial court should not consider the probation officer's report prior to ruling on the automatic modification motion. (*See People v. Wader,* 5 Cal.4th 610, 665-666 (error to consider probation report); *People v. Fauber* (1992) 2 Cal.4th 972, 866 ("consideration of the probation report . . . before ruling on the application for modification is . . . error").) This requirement is intended to ensure that the probation report does not influence the ruling on the automatic modification motion. *(People v. Lewis* (1990) 50 Cal.3d 262, 287.)

4. The probation report was highly partial and prejudicial. In the probation officer's report and recommendation, the probation officer expressly relied upon statements petitioner allegedly made to the media, without any justification thereof. (Exhibit ___, Presentencing Report.) The report sets forth the "circumstances in aggravation" and "circumstances in mitigation" as follows:

Rule 421: Circumstances in Aggravation:

(a)(1) The crimes involved extreme violence, great bodily harm, cruelty, viciousness and callousness.

(a)(2) The defendant was armed with two weapons at the time of the commission of the offenses.

(a)(3) The victims were particularly vulnerable in that the crime occurred at 4:30AM and most were asleep when they were killed. Two were young children and the remaining victims were cornered in a bedroom and killed or wounded.

(a)(4) The crimes involved multiple victims, six murdered, two wounded.

(a)(5) The defendant induced his girlfriend, Rita Lewis, to participate in the crime.

(a)(8) The planning and sophistication of the offense indicates premeditation.

(b)(1) The defendant has engaged in an almost lifelong pattern of violent conduct which indicates that he has been and continues to be a serious danger to society.

(b)(2) The defendant's prior convictions as an adult and adjudications of commission of crimes as a juvenile are numerous and of increasing seriousness.

(b)(3) The defendant has served prior prison terms.

Rule 423: Circumstances in Mitigation

There are no circumstances in mitigation that apply in this matter.

Rule 425: Circumstances Affecting Concurrent or Consecutive Sentences:

(a)(2) The crimes involved separate acts of violence.

(a)(4) The matter involved multiple victims (although charged as separate crimes).

(a)(5) The convictions for which sentences are to be imposed are numerous.

B. There are factors in aggravation listed above. There are no factors in mitigation.

(Probation Report at 12-13.)

This report wholly fails to reference any of the factors potentially in mitigation for petitioner, including but not limited to the extensive testimony of psychologists and psychiatrists in petitioner's half in the guilt and penalty phase of the trial.

5. Petitioner's counsel did not submit any written statement for the preparation of the report. (Exhibit __, Presentencing Report, p. 8.) Petitioner was denied the right to review or comment on the probation report by the trial judge. (RT 6241-6242.) Further, petitioner incorporates by reference Claims 31, 37, 45, 67 and 78..

6. These errors denied petitioner his constitutional rights, including the right to a fair and reliable sentencing proceeding in the motion for modification of sentence proceeding, Section 190.4; the right to due process in this proceeding; the right to due process of law for violation of the state-created right set forth in Section 190.4(e); the confrontation clause right for denying petitioner access to or opportunity to question the probation report; the Fifth Amendment right against self-incrimination for incorporating petitioner's non-participation and as a consideration in aggravation; and the right to a fair trial.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually

and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 45: Judicial Misconduct – Review Error: Constitutionally Erroneous Application of Penal Code Section 190.3 to Ruling on Automatic Modification Motion

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the trial court did not consider, take into account and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, did not understand the statutory scheme, and did not properly re-weigh independently the evidence of aggravating and mitigating circumstances. These errors denied petitioner the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; the right to fair and reliable capital proceedings and sentence; due process of law; due process of law encompassing a state-created right; and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *United States v. Tucker* (1972) 404 U.S. 443 (due process required that defendant not be sentenced on basis of misinformation of constitutional magnitude); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22

(constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-examination regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's

adherence to constitutional guarantees); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466.

C. The following facts, among others, to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. The trial court did not properly apply Penal Code sections 190.3(d) or (h). Rather, the court used the substantial evidence of defendant's pre-existing and longstanding mental illness as an aggravating circumstance. Subdivision (d) of Penal Code section 190.3 requires review of the following factor:

> Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

In a case eight years before petitioner's, this Court recognized that Penal Code section 190.3 "seems to have incorporated most of the factors set forth in the Model Penal Code." (*People v. Jackson* (1980) 28 Cal.3d 264, 316.)

2. Subdivision (d) of Penal Code section 190.3, is identical to Model Penal Code section 210.6, subdivision (4)(b). They identify the mitigating circumstance as a fact that "the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance." The Model Penal Code commentary states:

> [T]he Code recognized that, even where extreme emotional distress is not subject to reasonable explanation or excuse, it may be weighed against the imposition of the capital sanction. Generally speaking, one who killed in a state of extreme

> emotional disturbance is not as blameworthy as one who murders while in normal control of his faculties.

(Model Penal Code & Commentaries, com. to § 210.6, p. 138.)

> Subdivision (h) of Penal Code 190.3 requires review of:
>
> Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect, or the effect of intoxication.

This subdivision sets forth a factor that can only be considered mitigating. Moreover, the lack of mitigation under factor (h) cannot be considered as aggravation since its absence "would not automatically render the crime more offensive than any other murder of the same general character of people." *(People v. Davenport* (1985) 41 Cal.3d 247, 289.)

3. In considering these factors, the trial court concluded that petitioner did not suffer from any "extreme mental or emotional disturbance" and had the "capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of the law." (RT 6251, 6252, 6255.) The court totally discounted the substantial evidence of intoxication and drug use. (RT 6252.) The court also totally discounted the testimony of the experts and the underlying data which showed petitioner to be mentally ill. (RT 6253.)

4. It is clear that the court was not properly considering the substantial evidence regarding petitioner's mental state introduced during the guilt and penalty phases. The court, in ruling on the motion to reduce the penalty, found petitioner was not mentally incapacitated, despite its earlier ruling that petitioner, by virtue of his mental illness, was not competent to

waive his right to an attorney. (RT 75-77.) These rulings are entirely contradictory and cannot be reconciled. Therefore, the court arbitrarily ignored its own specific findings regarding petitioner's lack of capacity in considering subdivisions (d) and (h). Instead, the court focused on petitioner's conduct during trial. The court utilized such conduct to support its belief that petitioner feigned mental illness to stop the trial instead of finding such circumstances to be evidence of his "incapacity to waive." This erroneously, and unconstitutionally turned the petitioner's mental illness into an aggravating circumstance. (RT 6253-6254.)

5. The court's faulty interpretation of its mandatory duty in ruling on the modification motion violated the constitutional commands of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, abridged the directives of pertinent California statutes, Code, Constitution, and the death penalty scheme as a whole, and denied petitioner's rights to due process, due process as a violation of the state-created right, a fair and reliable capital sentencing proceeding, a fair judge, confrontation rights, and a fair trial.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 46: Judicial Error--Prejudicial Shackling

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution,

and article I, sections 7, 15, 16 and 17 of the California Constitution because during the trial the jury saw petitioner in shackles. This incident was highly prejudicial and impacted the decision to find petitioner guilty of the death-qualifying crimes charged. Permitting petitioner to appear in shackles violated his rights to a fair trial; due process of law; an impartial jury; the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but also an appearance of fairness; and the right to fair and reliable capital proceedings and sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Estelle v. Williams* (1976) 425 U.S. 501; *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400(confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-examination regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia*

(1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Jury must decide truth of sentencing factors.)

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner was heavily shackled when he was led to and from the courtroom.

2. The jury room was located on the floor above the trial court where petitioner's trial was taking place. The jury was specifically led past petitioner while he was heavily shackled during his transport from the

courtroom and their movements to the jury room. (Exhibit 8, Declaration of Joe Cruz; Exhibit 35, Declaration of Bernard Wells)

3. It would have been entirely possible for the jury and petitioner to have been led through this area at separate times. However, from the record, it is apparent that no effort was made to seperate the petitioner from the jury so that they would not see his heavy shackling during the guilt phase of his case.

4. No specific determination was made as to the need to transport petitioner and jurors in a manner which permitted jurors could clearly see and be impacted by petitioner's shackling. There was no hearing conducted on this matter, and no finding as to why any compelling security risks required the jurors to pass petitioner on his way to and from court. See *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633 (abuse of discretion to shackle defendant before jury without proper determination as to security need for shackles – state bears high burden to justify shackling.)

5. From the inception of his case, there was a history of excessive, unwarranted and prejudicial security measures used on petitioner. During the pretrial proceedings of September 30, 1987, petitioner's counsel stated:

> I've had situations where Mr. Welch has actually been brought to an interview room to interview with me, his lawyer, in chains. And I asked them, "Would you please take the chains off of Mr. Welch while we are in this locked room," inside of those additional three locked, sliding doors that you need someone to open to get through. And they say, "No, by order of the sergeant these chains are to stay on him at all times."

(CT 716.)

On December 21, 1987, petitioner's counsel requested the removal of his shackles for court appearances:

> [W]e are going to ask that the shackles be removed every time he comes in court . . . He is the only person I know that comes into this court shackled and there is no apparent basis for it as far as I know.
>
> (RT Misc. Vol. 1 at 24-25.)
>
> At the beginning of petitioner's trial, defense counsel requested:
>
> Your Honor, I would make a request that while my client is in a cell upstairs on the 10th floor he not be shackled. That seems a little bit of overkill once you got him in a jail cell being also shackled.
>
> (RT 12-13.)

6. This viewing had a prejudicial impact on the jury during the guilt phase and guilt phase deliberations of the case. The jury's viewing of petitioner in shackles reinforced and lent credence to the argument that petitioner would be dangerous, in the future prison settings if permitted to live. In addition, the shackling its self, and petitioner's knowledge that the jury had seen him in shackles, contributed to petitioner's deteriorating metal state and decompensation. (Exhibit 8, Declaration of Joe Cruz; Exhibit 35, Declaration of Bernard Wells.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 47: Judicial Error--Denial of Petitioner's Right to Expert Psychiatric, Psychological and Requisite Medical Assistance in the Guilt Phase

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution,

and article I, sections 7, 15, 16 and 17 of the California Constitution because in the guilt phase the petitioner was denied critical, psychiatric, psychological, and other medical experts to assist in the evaluation, preparation and presentation of the defense. This deprived petitioner of his rights to due process; a fair trial; an impartial jury; a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; and fair and reliable capital proceedings and a fair and reliable sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Ake v. Oklahoma* (1985) 470 U.S. 68 (constitutional right to competent, independent mental health experts who will assist in evaluation, preparation and presentation of defense); *Hitchcock v. Dugger* (1987) 481 U.S. 393 (sentencer cannot be precluded from considering any relevant mitigating evidence; *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings; *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Eddings v.*

Oklahoma (1982) 455 U.S. 104 (sentencer must be able to hear and give effect to mitigating circumstances); *Lockett v. Ohio* (1978) 438 U.S. 586 (constitutional requirement that sentencer hear, consider, and give effect to all relevant mitigating evidence); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (jury must determine sentencing factors.)

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Prior to voir dire, petitioner made a motion to represent himself at trial. (RT 9-10, 17-18. At this time, petitioner's competence even to stand trial was seriously in question. In support of this claim, petitioner incorporates by reference all of the facts and law set forth in Claim 2.

2. Several days thereafter, on November 16, 1988 the court, sua sponte, informed the petitioner it was appointing its own psychiatrist to examine petitioner. The court specifically stated as follows:

> Mr. Welch and Counsel, I just contacted Dr. Satten. It appears that in terms of interpreting Faretta, an issue, the main issue or the sole issue really to be determined is whether the defendant has the mental capacity and could waive his constitutional right to counsel with a realization of the probable risks and consequences of his action.
>
> Therefore, to assist the Court before the Court reaches its decision Monday, I'm appointing on the Court's own motion pursuant to Section 730 of the Evidence Code Dr. Joseph Satten, S-a-t-t-i-n (sic) who is a psychiatrist, Mr. Welch.
>
> (RT 59.)

3. The trial court's insistence on this non-neutral, psychiatric examination continued on the following day:

DEFENDANT: A competency hearing, wasn't that my understanding yesterday, the Court has ordered a court psychiatrist?

THE COURT: I have ordered a psychiatrist to examine you on the issue of whether or not you have the mental capacity to waive your right to counsel and proceed in pro per.

DEFENDANT: What Penal Code section was that? It's not 13 –

THE COURT: That's under the law of the Faretta case.

DEFENDANT: Your Honor, I'm going to argue that issue.

THE COURT: You're not going to argue that at all because we're not hearing that.

DEFENDANT: I'm going to state –

THE COURT: Mr. Welch, I've ordered the psychiatrist to see you.

(RT 66-67.)

4. The court underscored the purpose and scope of the court-ordered examination by a court-ordered psychiatrist, and informed petitioner of the court's absolute decision:

THE COURT: Mr. Welch, let's make it easy. I have a psychiatrist who is going to go to see you either Saturday or Sunday. You can talk to him or not. The choice is up to you. I can't force you to, but he's going to be available at my request to talk to you, and that's it. That's that.

DEFENDANT: It's still 1368 proceedings, Your Honor. I'm going to request to reinvoke my right to 170.6 on that grounds I believe is separate and independent.

THE COURT: Your motion for peremptory challenge under 170.6 is denied.

DEFENDANT: Your Honor, I'm going to state that I believe once the Court inquires about my mental capacity that all proceedings at that time are supposed to cease to my knowledge, Your Honor, and I shouldn't be before the Court

THE COURT: Your knowledge is incorrect.

(RT 67-68.)

5. Petitioner requested that he be given the time to hire his own experts to observe him so that he would be able to have psychiatric assistance to conduct an appropriate examination and assist in the evaluation, preparation, and presentation of a defense. He specifically requested such experts and a reasonable three-week continuance in order to obtain this assistance and permit the minimum time necessary to conduct the evaluation and prepare materials. The trial court, however, adamantly refused to give petitioner the requisite minimum time for such evaluation, even though petitioner's life was at stake in this proceeding. The court made its ruling on November 17th. The court stated that petitioner would have until Monday to hire, have an evaluation conducted by, and present the testimony of his experts. At best, petitioner had two working days to locate said experts, schedule the interviews and have the required evaluation conducted by the experts. In addition the experts would also been required to prepare their materials for presentation for hearing on Monday morning. This statement of the court was oppressive, arbitrary, and capricious and deprived petitioner of his right to competent and expert assistance. The following colloquy between

the trial judge and petitioner demonstrates the trial court's refusal to grant petitioner his constitutional right to adequate psychiatric assistance:

DEFENDANT: I'm going to request that I be entitled to retain my own personal experts to observe me, Your Honor.

THE COURT: Go ahead and hire them.

DEFENDANT: Huh? Before the proceedings that scheduled for Monday – I believe that's what, five days away.

THE COURT: The matter's on Monday for me to decide whether or not you should represent yourself.

DEFENDANT: I'm going to request that that hearing be delayed, Your Honor, and ask for a three-week continuance on that motion, Your Honor. It's in order that I can retain my own examine – psychiatrists to examine me, Your Honor. I'm entitled –

THE COURT: I hired Dr. Satten at the Court's expense to examine you.

Your motion for continuance on the Faretta will be denied. I'm going to decide it Monday morning.

DEFENDANT: Not to the Faretta, Your Honor. My request that – is that I be able to retain my own psychiatrists, experts to examine me and not accept the experts of the Court.

THE COURT: Your motion to have your own experts is denied.

(RT 68-69.)

6. Petitioner would not see the court-appointed psychiatrist, although he had specifically asked to see his own mental health expert regarding the issue of his competency. Without the benefit of expert mental

health evaluation, the court held its *Faretta* hearing on the following Monday and determined petitioner not mentally capable of self representation. However, the courtt refused to hold a hearing on the issue of petitioner's competence to stand trial. The actual findings by the trial court were set forth in an order denying petitioner's motion for self-representation:

> I find Mr. Welch is a defendant who does not appreciate the extent of his own disability and, therefore, cannot be fully aware of the risk of self-representation. I find the disability of Mr. Welch significantly impairs the capacity to function in a courtroom.

(RT 84-85.)

7. Notwithstanding this finding, the court did not hold a competency hearing, did not grant petitioner even the minimum time required to hire and permit his own psychiatrist to evaluate his mental health, and had no neutral psychiatric or psychological evaluations performed to aid the court prior to making its determination on petitioner's motion for self-representation.

8. From the court's own findings as well as the abundant record, it is clear that petitioner's mental condition was seriously in question. By restricting petitioner to only two days, to arrange and have evaluations performed, the court effectively foreclosed any opportunity he had to obtain the psychiatric assistance. Furthermore, the denial of expert assistance which could aid petitioner in the preparation of defense, deprived him of the effective assistance of counsel. Absent a mental health expert's report to the defense counsel, counsel could not adequately present material regarding petitioner's competency. "The attorney must be free to make an informed judgment with respect to the best course for the defense, without the inhibition of creating a potential government witness." (*Smith v. McCormick* (9th Cir.

1990) 914 F.3d 1153, 1160.) Because Dr. Satten was both court-appointed and ordered to report to the court, there was no opportunity for petitioner to exercise this constitutional right. (*Ake v Oklahoma, supra*, 470 U.S. at pp. 83-84.)

9. Petitioner's competency was fundamental to his entire case. This is underscored not only by the case in chief presented by defense counsel, but also petitioner's conduct throughout the trial and the sui generis hybrid representation unilaterally imposed upon the defense by the trial court. (RT 5921-6004 (mental health testimony of William D. Pierce, Ph.D.); RT 6005-6027, 6034-6103 (mental health testimony of Samuel Benson, Jr., M.D.); RT 5524-5552 (closing argument of defense counsel)). In further support of this claim, petitioner incorporates by reference all of the facts and law set forth in Claims w and 19. The prosecution argued that petitioner's mental state at trial was a reason the jury should find petitioner guilty on all charges. (RT 5513, 5520, 5565.)

10. Throughout the proceedings petitioner consistently and continually requested, to see a psychiatrist with whom he felt comfortable, in a prison setting which would foster confidentiality of those communications. (*Ake v. Oklahoma* , *supra*, 470 U.S. at pp. 83-84; *Smith v. McCormick, supra,* 914 F.3d at pp. 1159-1160.) He requested such psychiatric assistance not only in connection with the hearing sua sponte called for and scheduled on unreasonably short notice by the trial court, but also because he felt he was not getting the type of assistance critical to developing key aspects of his defense, including but not limited to the evaluation of his doubtful mental state during trial. (*See, e.g.*, RT Misc. Vol. 1, proceedings of October 4, 1988, p. 12 ("I'm looking at you, Your Honor. I feel real uncomfortable,

Your Honor. I haven't been able to talk to my psychologist. I feel intimidated every time I come in the courtroom."); RT Misc. Vol. 3, proceedings of November 8, 1988, p. 400 ("I'm requesting that I be allowed to request my attorneys to appoint expert psychologists – psychiatrists of my preference that I could deal with instead of what the Court had done last week.").)

11. The physical and emotional abuse petitioner suffered at the hands of sheriff's deputies and North County Jail staff necessitated petitioner's access to a neutral psychiatrist, psychologist and mental health expert. His mental state was a core element of the charged offenses, and significantly deteriorated throughout trial, in part because of the abuse and effects of this abuse inflicted by state actors. (Exhibit 6, Declaration of Thomas Broome; Exhibit 30, Declaration of Spencer Strellis.)

> I'm going to also state that because – because of the Court's clashing, my counsels clashing, and the sheriff deputies clashing out here in the jail, I haven't been able to have the type of private communications that I'm entitled to. I think it's going to violate my right to have any expert get up there on that witness stand. I haven't been able – psychologist testify on my behalf. Haven't properly given me no meaningful therapy at all.

(RT Misc. Vol. 3, proceedings of January 27, 1989, p. 3774.)

12. At the beginning of proceedings on May 8, 1989, petitioner stated:

> Before we get on the record this morning, I'm sure maybe the bailiffs already explained to you that there's been an altercation this morning. I was attacked by three sheriff deputies on my way to court again this morning. I've got bruises on my face, scratches on my face. My legs and my neck is hurt.

And I'm going to request that we continue this matter, give me – and request that the Court order that I be taken to Highland and be examined.

(RT 3704.)

The court expressly denied petitioner access to competent, neutral psychiatric and mental health experts regarding petitioner's mental state. This is apparent in the court's refusal to permit petitioner to be examined by neutral doctors and other experts in a recognized hospital facility outside of North County Jail:

DEFENDANT: I ask – the Court got proper, sufficient authority for me to be taken to Highland Hospital.

THE COURT: That's right. I have enough authority, but I'm not. I'm ordering you to see the doctor.

(RT 3707.)

13. In fact, the trial judge not only ordered that the medical report not be confidential, he demanded the report be provided directly to the court itself:

DEFENDANT: [North County Jail staff] don't give me sufficient treatment. They've intentionally neglected during numerous medical requests that I provide them to give any – any type of medical treatment at all.

THE COURT: *I want the doctor to see him, and have the doctor submit a report to me.*

(RT 3707 emphasis added.)

14. The trial court continually refused appointment of a neutral psychiatrist when petitioner's mental state, during trial, was seriously in

question. (RT 3719-3724.) In one instance petitioner was thrown out of the courtroom following an outburst. Petitioner had specifically informed the court that he was having difficulty attending the proceedings because he believed that he was incoherent and thereby clearly incapable of assisting in his defense at that time:

DEFENDANT: . . . I guess you could say I was incompetent, incoherent.

THE COURT: No, you are just vicious and mean and causing trouble.

DEFENDANT: I believe I was incompetent, incoherent, and gave the Court proper notice that my mental facilities [sic] was in question. I was emotionally hostile, and I have the Court notice of that and for my reason.

For the Court to order me back down in this courtroom to try to make a spectacle of myself and something like that there, I don't believe it's correct. I don't think it's proper.

I think the Court as well is trying to prejudice the outcome of my criminal disposition in this matter as well as intentionally try to attempt to coerce – coerce the jury as well as –

THE COURT: There's no jury yet.

DEFENDANT: – as well as – I'm talking about during the voir dire process, Your Honor, still pending. Those matters still pending.

THE COURT: I don't want to hear a speech. You have a motion to make, make it, file it, put it in writing.

DEFENDANT: I'm requesting a continuance –

THE COURT: Your motion for continuance is denied.

DEFENDANT: – proper medical facility. I'm going –

THE COURT: You don't need a doctor. We will have one look at you this afternoon.

DEFENDANT: I supposed to have a psychiatric as well on numerous occasions. I gave my counsel notice that on Thursday my psychiatrist came to the county jail and was again refused adequate private – private patient-client communications and stuff by the sheriff deputies looking straight through a window right down and watch my every reaction in the – in the interview room at that particular time.

THE COURT: You're going to have the same interview room as any other prisoner.

DEFENDANT: Well, I don't know of any other prisoner.

THE COURT: You don't have that; that's your decision.

DEFENDANT: I'm saying this is about the fourth or fifth time that county jail officials have refused me proper psychiatric evaluation.

THE COURT: They haven't refused you any psychiatric. When I sent the psychiatrist to see you, you won't even see him.

DEFENDANT: I haven't – I've got my own psychiatrist. I requested my own expert be appointed.

THE COURT: They already have one.

DEFENDANT: This Court's – I believe that's my constitutional right to defense experts and defense doctors to interview me and stuff.

THE COURT: You have your own.

DEFENDANT: No interview from the prosecution's experts or –

THE COURT: Come on. This is nonsense.

DEFENDANT: Anyhow, Your Honor, I'm going to further say that –

THE COURT: Come one. [sic] This is nonsense.

DEFENDANT: I'm going –

THE COURT: They have a psychiatrist.

DEFENDANT: I'm not in here on request. I think I've been denied due process of access to my physicians, my doctors and stuff.

I'm going to request that they be prohibited from testifying at any kind of proceeding or come in with reference to private and necessary communications or come in and testify on my behalf. I think the influence – hampered and tampered with, and I'm not getting the proper type of psychiatric treatment.

(RT 3724-3727.)

15. The court asked petitioner's defense counsel to comment on the issue of petitioner being prevented from having an adequate facility in which he could have the constitutionally mandated confidential and neutral psychiatric and medical expert evaluation:

MR. STRELLIS: We have retained a psychiatrist to see Mr. Welch. Apparently at the last interview – if he says Thursday, I'm sure that's the right day – the sheriff continually looked through the glass windows.

The interviews, as I understand it, take place in a medical office.

The psychiatrist has told me he doesn't need the guard to keep looking in. He is not concerned about his welfare. He happens, as a matter of incidental matter, to be someone bigger than Mr. Welch and is not worried. And –

DEFENDANT: He was –

MR. STRELLIS: – if the Court wants my candid opinion, I really think that the looking in is very much like a lot of the guarding of Mr. Welch, overzealous and maybe done for very mixed motives. But it does –

DEFENDANT: And I be in shackles. I was in shackles.

THE COURT: I heard enough. That's it. Let's start with the testimony [sic].

(RT 3727-3728.)

16. The court refused to appoint petitioner a psychiatrist with whom he could speak on issues that went to the core of the case in chief for the defense in both the guilt and penalty phases. This refusal was expressly based upon the court's own, subjective belief regarding petitioner's conduct at trial:

DEFENDANT: I'm requesting that I talk to my counsel, provide me adequate attention, that these proceedings cease, I can see my psychiatric – have my medical treatment.

THE COURT: Never mind. Let's proceed.

(RT 3730.)

Defense counsel asked for a continuance, so that petitioner could see his own expert psychiatrist, rather than the court-appointed doctor, who was delivering his diagnosis directly to the court itself. The court stated, "I think [petitioner] – I don't feel he's emotionally upset. I think it's a connive, attempt to delay the trial. Your motion is denied." (RT 3733.)

17. The trial court's denial of petitioner's right to neutral psychiatric and other medical experts wholly and prejudicially abridged petitioner's right to due process, a fair trial, and a fair and reliable capital sentencing proceeding. The trial judge's overt bias, in ordering that the psychiatric and medical reports be directed specifically to him, and specifically in predicating denial of petitioner's right to such assistance on the judge's own subjective opinions, further prejudiced petitioner's case. These opinions were evidenced by the court's comments throughout the case. (*Taylor v. Hayes*, *supra*, 418 U.S. 488; *In re Murchison, supra*, 349 U.S. at pp.136-139 (due process requires that judge possess neither actual or apparent bias).)

18. The court's errors in denying petitioner's right to a psychiatrist, psychologist and crucial mental health experts, able to work with petitioner in a confidential setting, and permitted to report to petitioner and his counsel rather than directly to the court, individually and collectively, violated petitioner's constitutional rights to due process of law, fair trial, fair and reliable capital sentencing proceedings, and the right to a trial judge who was unbiased and conducted the proceedings with not only fairness but an appearance of fairness. For the reasons set forth above, the errors were extremely prejudicial.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 48: Judicial Error--Denial of Petitioner's Right to Expert Psychiatric, Psychological and Requisite Medical Assistance in the Penalty Phase

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because in the penalty phase, the petitioner was denied crucial, psychiatric, psychological, and other medical experts to assist in the evaluation, preparation and presentation of his defense. This deprived petitioner of his right to due process; to a fair trial; to an impartial jury; to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; and to fair and reliable capital proceeding and sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Ake v. Oklahoma* (1985) 470 U.S. 68 (constitutional right to competent, independent mental health experts who will assist in evaluation, preparation and presentation of defense); *Hitchcock v. Dugger* (1987) 481 U.S. 393 (sentencer cannot be precluded from considering any relevant mitigating evidence); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v.*

Pennsylvania (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings; *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (sentencer must be able to hear and give effect to mitigating circumstances); *Lockett v. Ohio* (1978) 438 U.S. 586 (constitutional requirement that sentencer hear, consider, and give effect to all relevant mitigating evidence); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466.

C. The following facts, among others to be presented after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. In support of this claim petitioner incorporates by reference Claim number 47.

2. Denial of petitioner's right to adequate, neutral, psychiatric, psychological and crucial mental health experts, who could assist in preparing his case in chief in the penalty phase, was particularly prejudicial .

3. After the denial of the assistance requested by petitioner, it was impossible to:

> Offer a well-informed expert's opposing view, and thereby lose[] a significant opportunity to raise in the juror's minds

> questions about the state's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the state so slim, due process requires access to psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to the assistance at the preparation of the sentencing phase.
>
> (*Ake v. Oklahoma, supra,* 470 U.S. at p. 84-85.)

4. In the penalty phase, two mental health experts testified on behalf of petitioner. Dr. William D. Pierce, (RT 5921-RT 6004), and Dr. Samuel Benson, Jr., (RT 6005-7000).

5. However, there were no mental health experts, including psychiatrists or psychologists, assisting petitioner in other areas of his case. Petitioner was denied his rights to a psychiatrist, psychologist and other mental health experts who could have assisted him in preparing his defense with respect to his competency at trial, his competency to represent himself, and the egregious effects and impacts on his mental health of the physical and psychological mistreatment by sheriff's jail guards and other staff at the North County Jail facility. Petitioner incorporates by reference Claim 5.

6. The prosecution relied on petitioner's future dangerousness as a significant aggravating factor in the sentencing phase. He argued:

> This defendant, this horrible person has earned the death penalty. And for you not to give him death is to jeopardize the health and safety of any guards, visitors, social workers, inmates or clergy who may come into contact with him if he is given life without the possibility of parole.
>
> Now, you think about that.
> Supposing he is in the exercise yard with the other inmates and he gets one of his sodomy urges again.
> . . .

Suppose he gets one of his sodomy urges. There is a young inmate there who he feels he looks pretty good, or if he tells another inmate you have two minutes on deciding which way you are going to have sex with me.

You do have a responsibility to those other persons who may or may not deserve Moochie Welch.

(RT 6137-6138.)

A vicious killer of six who is dangerous to this day, even by both his witnesses. Who hates authority figures. Who will come into contact with guards and others for the rest of his life if you give him that benefit, if you excuse his conduct and not give him the death penalty.

(RT 6139.)

Death row is the only place for him and in your hearts you know that is true.

(RT 6140.)

And Ladies and Gentlemen, if ever a case called for the imposition of a death penalty, this is it. You should show no mercy to this miserable, miserable violent thug sociopath.

(RT 6142.)

7. The prejudice from this error further was exacerbated by the trial judge's negative comments on petitioner's conduct in the courtroom, and the fact that these comments were given to the jury within the context of instruction to that jury:

Ladies and Gentlemen. In the matter of People versus Welch.

The record will indicate the defendant is not present. The counsel are here and Ladies and Gentlemen of the Jury are here.

Ladies and Gentlemen, I indicated to you that the defendant cannot stop the proceedings by refusing to come to court. When John went up to get him today to come down for the session, he refused to come down and would not leave his cell. It would require forcing, gagging and shackling to get him down. I'm not going to do that.

The law permits him to be up in his cell if he doesn't want to hear it. The microphone will be piped up and he will find out what the testimony is. He can hear it up to the cell.

After the next recess if we get a recess this afternoon, again the law admonishes me that I must again ask him to see if he wants to come back down to bring him down.

(RT 5960-5961.)

Now, under the law, the defendant has a right to be present at all stages of the proceedings. On the other hand, if he chooses, he can absent himself by refusal to obey the court rules. We have been over this many, many times.

You are, frankly, the second panel who's been brought to court for possible voir dire examination.

I'll explain those terms to you in just a moment.

I'm going to ask you, and it may be somewhat upsetting to you, that you have to afford the defendant all the rights granted to him by the law of the State of California and the United States of America.

The fact that he has absented himself this morning is not a novel or new experience. He will be back this afternoon. He will be back many times. Occasionally then he does choose to absent himself.

He obviously could not stop the trial because, otherwise, a defendant could refuse to come back. Theoretically, he could never be tried.

So what we try and at each recess the law requires that I have him down. I explain to him his legal rights, and I tell him if he wants to sit

in court and obey the rules of court we would be delighted to have him. If you do not do so, then he has to be absented.

(RT 1917-1918.) (emphasis added.)

THE COURT: Ladies and Gentlemen, let me talk to you because you have the situation occur.

Now, a defendant has a right to be present at all stages of the proceedings. However, a defendant is obligated to conduct himself in a manner as to not disrupt the orderly process of the trial.

Mr. Welch has evidenced in the trial a history throughout voir dire –

MR. STRELLIS: Your Honor, I'm going to object to any statement about what has not happened in front of the jury for the record.

THE COURT: Fine. You just –

Secondly, he has acted out by refusing – he did not – either not to sit at the table or change his position, or he will not stop speaking.

. . .

A defendant cannot stop the trial. In other words, Jim, the reporter, has to take down the testimony. If I'm speaking or the lawyers are speaking or witnesses speaking and Mr. Welch interrupts, there's no way in the world the transcript can be taken down.

As I told you before, as a juror, you become really a judge. You decide the facts.

Now, there's one quality every judge has to have. You don't have to be that smart. You don't have to be that – you don't have to be that witty. But you do have to be patient.

And I beg you to please understand the proceeding and have patience because the law requires that at every recess I call Mr. Welch down. I have to ask him whether or not he wishes to remain in the trial. If he will sit and follow the rules, we want him to be at his trial.

So, again, I'm going to have him come down. If he acts out again, I appreciate your patience and understanding what is going on.

We have provided Mr. Welch who is being kept in a facility whereby everything that's said in the courtroom will be piped up to him, so where he is located now he can hear all of the discussion.

So, again, ladies and gentlemen, please bear in mind the attempt to remove him by me and the ultimate removal was only done when he was interrupting proceedings. A defendant cannot stop the case from going to trial.

(RT 3881-3883.) (emphasis added.)

Now, Ladies and Gentlemen, we have seen Mr. Welch absent himself from this court. I want you to understand that we wanted him in court. We set down certain rules. He refused to obey them, and I know that is upsetting to you. In candor it's upsetting to me.

(RT 5572.)

7. Had petitioner been granted his constitutionally guaranteed right to neutral, psychiatric assistance when it was imperative during these proceedings, he may well have been prepared and able to present a defense to the prosecution's case in chief. The impact of which was compounded by the judge's sua sponte prejudicial and biased instructions.

8. The trial court's denial of petitioner's right to a psychiatrist, psychologist and other crucial mental health experts, in the penalty phase, violated petitioner's constitutional rights to due process of law, fair trial, fair and reliable capital sentencing proceeding, and the right to a trial judge who was unbiased and conducted the proceedings with not only fairness but an appearance of fairness.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 49: Judicial Error--Trial Judge's Introduction of Prejudicial, Extrinsic Information Regarding Petitioner's Conduct

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the trial judge specifically gave the jury highly prejudicial information, which had not been admitted, tested or in any way deemed reliable, in open court, regarding petitioner's conduct. This information went directly to both key elements of the offense and aggravating factors. This court's egregious misconduct and/or reception of unreliable extrinsic evidence violated petitioner's rights to a reliable capital proceeding and sentence determination; a fair trial; an impartial jury; the right to confront witnesses against him; confront evidence against him; due process of law; and particularly to a trial judge who was unbiased and conducted the proceedings with not only fairness, but also an appearance of fairness.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *United States v. Burr* (1807) 25 Fed. Cas. 25, no. 14,692b CCD. Va. (fundamental right to impartial tribunal); *Mattox v. United States* (1892) 146 U.S. 40 (fundamental right to impartial tribunal); *In re Murchison* (1955) 349

U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes,* (1974) 418 U.S. 488 (denial of allocution in imposing sentence abridgement of core fundamental right – denial of such rights further constitutes unconstitutional appearance of impartiality); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400(confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S.

343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *and including Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) (451 U.S. 454 gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Jury to determine facts relevant to sentencing factors.)

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. In support of this claim, petitioner incorporates by reference as if fully set for the herein Claim 50. On various occasions throughout the guilt and penalty phase, petitioner was absent from the courtroom.

2. Instead of admonishing the jury not to take these absences into consideration in deciding guilt or the appropriate penalty, the trial court improperly and prejudicially instructed the jury on the impact of these absences and the motivation behind them. Significantly, the judge consistently, and sua sponte, referred to petitioner's "choosing" to act or not act in a certain manner, thereby informing the jury that petitioner had complete control over what he was doing. This informed the jury that petitioner specifically chose to disrupt the proceedings, to act out, and to become violent. These were key elements of the offense to be proved by the

prosecution. Moreover this instruction undermined the defense. The primary defense set forth by defense counsel was that petitioner did not have the requisite mental state to make rational choices.

3. During voir dire, the court admonished the jury as follows:

> Now, under the law, the defendant has a right to be present at all stages of the proceedings. *On the other hand, if he chooses, he can absent himself by refusal to obey the court rules. We have been over this many, many times.*
>
> You are, frankly, the second panel who's been brought to court for possible voir dire examination. I'll explain those terms to you in just a moment.
>
> I'm going to ask you, and it may be somewhat upsetting to you, that you have to afford the defendant all the rights granted to him by the law of the State of California and the United States of America.
>
> The fact that he has absented himself this morning is not a novel or new experience. He will be back this afternoon. He will be back many times. Occasionally then he does choose to absent himself.
>
> *He obviously could not stop the trial because, otherwise, a defendant could refuse to come back.* Theoretically, he could never be tried.
>
> So what we try and at each recess the law requires that I have him down. I explain to him his legal rights, *and I tell him if he wants to sit in court and obey the rules of court we would be delighted to have him. If you do not do so, then he has to be absented.*
>
> (RT 1917-1918, emphasis added.)

4. In the guilt phase, the trial judge informed the jury that it was not unusual that petitioner was raising his voice. (RT 4583.)

5. Petitioner was removed during prosecution's opening statement, for requesting to see the video being played during the opening. (RT 3876.) The judge not only so removed the petitioner, but took it upon itself to impart highly prejudicial information to the jury regarding petitioner's conduct. The court explained:

THE COURT: Ladies and gentlemen, let me talk to you because you have the situation occur [*sic*].

Now, a defendant has a right to be present at all stages of the proceedings. However, a defendant is obligated to conduct himself in a manner as to not disrupt the orderly process of the trial.

Mr. Welch has evidenced in the trial a history throughout voir dire –

MR. STRELLIS: Your Honor, I'm going to object to any statement about what has not happened in front of the jury for the record.

THE COURT: Fine. You just –

Secondly, he has acted out by refusing – he did not – either not to sit at the table or change his position, or he will not stop speaking.

. . .

A defendant cannot stop the trial. In other words, Jim, the reporter, has to take down the testimony. If I'm speaking or the lawyers are speaking or witnesses speaking and Mr. Welch interrupts, there's no way in the world the transcript can be taken down.

As I told you before, as a juror, you become really a judge. You decide the facts.

Now, there's one quality every judge has to have. You don't have to be that smart. You don't have to be

that – you don't have to be that witty. But you do have to be patient.

And I beg you to please understand the proceeding and have patience because the law requires that at every recess I call Mr. Welch down. I have to ask him whether or not he wishes to remain in the trial. If he will sit and follow the rules, we want him to be at his trial.

So, again, I'm going to have him come down. If he acts out again, I appreciate your patience and understanding what is going on.

We have provided Mr. Welch who is being kept in a facility whereby everything that's said in the courtroom will be piped up to him, so where he is located now he can hear all of the discussion.

So, again, ladies and gentlemen, please bear in mind the attempt to remove him by me and the ultimate removal was only done when he was interrupting proceedings. A defendant cannot stop the case from going to trial.

(RT 3881-3883, emphasis added.)

6. Incredibly, during the closing instructions of the guilt phase, the court advised the jury about petitioner's conduct in such a way that it clearly directed the jury to find that petitioner had a mental state capable of fully volitional, premeditated and deliberated conduct. Further, in so instructing, the court informed the jury petitioner's conduct was "upsetting" to the trial judge himself. Specifically, the court instructed the jury as follows:

> Now, Ladies and Gentlemen, we have seen Mr. Welch absent himself from this court. I want you to understand that we wanted him in court. *We set down certain rules. He refused to obey them, and I know that is upsetting to you. In candor it's upsetting to me.*

(RT 5572, emphasis added.)

7. In the penalty phase, the trial judge not only specifically informed the jury of his opinion about petitioner's mental state and conduct, but actually provided the jury with extrinsic evidence, the reliability of which had never been tested in court. The judge instructed the jury that:

> Ladies and Gentlemen. In the matter of People versus Welch.
>
> The record will indicate the defendant is not present. The counsel are here and Ladies and Gentlemen of the Jury are here.
>
> Ladies and Gentlemen, I indicated to you that the defendant cannot stop the proceedings by refusing to come to court. When John went up to get him today to come down for the session, he refused to come down and would not leave his cell. It would require forcing, gagging and shackling to get him down. I'm not going to do that.
>
> The law permits him to be up in his cell if he doesn't want to hear it. The microphone will be piped up and he will find out what the testimony is. He can hear it up to the cell.
>
> After the next recess if we get a recess this afternoon, again the law admonishes me that I must again ask him to see if he wants to come back down to bring him down.

(RT 5960-5961.)

8. By informing the jury that there was no way to control petitioner except by "forcing, gagging and shackling" petitioner, the court provided the jury with information which had not been admitted into evidence, and of which petitioner had no opportunity to cross-examine, deny, or test the reliability.

9. The Constitution of the United States mandates that a trial judge not only be free of actual bias but that there also be no appearance of bias. (*Ungar v. Sarafite* (1964) 376 U.S. 575, 588; *Taylor v. Hayes*, *supra*, 418

U.S. at p. 488, 501. Such a stringent rule may sometimes bar judges who have no actual bias. "Due process requires no less." (*Ibid.*); *In re Murchison* (1955) 349 U.S. 133, 136; *see Mayberry v. Pennsylvania, supra,* 400 U.S. at p. 464. These sua sponte, ad hoc instructions regarding petitioner's conduct were unequivocally prejudicial. The majority of them came at a time when the judge was actually instructing the jury, and the jurors are required to follow the judge's instructions. In the guilt phase, the judge's instructions regarding petitioner's willfulness and misconduct substantially supported the prosecution's case in chief regarding premeditation and deliberation. Furthermore, they directly undermined petitioner's case in chief regarding the state of mind of which petitioner was capable.

10. Thus, these instructions not only violated petitioner's right to an impartial judge, but also unconstitutionally deprived petitioner of due process of law undermined the defense and lessened the prosecution's burden of proving the offense beyond a reasonable doubt. *Sandstrom v. Montana, supra*, 442 U.S. 510; *In re Winship, supra*, 397 U.S. 358.)

11. The penalty phase instructions were additionally egregious because jury is expected to follow a judge's instructions. The petitioner, who was not even present when these instructions were given regarding his conduct, had no opportunity to cross-examine the judge, who turned himself into a key and crucial witness for the prosecution. Accordingly, petitioner's confrontation clause rights were wholly violated by these outrageous instructions. *Pointer v. Texas, supra*, 380 U.S. 400; *Loven v. Kentucky, supra*, 488 U.S. 227; *Davis v. Alaska, supra*, 415 U.S. 308)

12. Additionally, the judge's spontaneous and egregious instructions violated petitioner's due process rights in this capital proceeding where his

life was at stake. See, *e.g., Gardner v. Florida, supra*, 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information).) Further, the Eighth Amendment requires a higher degree of scrutiny and reliability in capital proceedings. (*Godfrey v. Georgia, supra*, 446 U.S. 420.) There was no such reliability in the trial judge's unilateral and wholly unconstitutional instructions on petitioner's conduct.

13. The judge's instructions to the jury regarding petitioner's conduct, bolstered the prosecution's assertion and argument regarding petitioner's future dangerousness. In fact, this is exactly what the prosecution argued.

> This defendant, this horrible person has earned the death penalty. And for you not to give him death is to jeopardize the health and safety of any guards, visitors, social workers, inmates or clergy who may come into contact with him if he is given life without the possibility of parole.
>
> Now, you think about that.
>
> Supposing he is in the exercise yard with the other inmates and he gets one of his sodomy urges again.
>
> . . .
>
> Suppose he gets one of his sodomy urges. There is a young inmate there who he feels he looks pretty good, or if he tells another inmate you have two minutes on deciding which way you are going to have sex with me.
>
> You do have a responsibility to those other persons who my or may not deserve Moochie Welch.

(RT 6137-6138.)

> A vicious killer of six who is dangerous to this day, even by both his witnesses. Who hates authority figures. Who will come into contact with guards and others for the rest of his life

> if you give him that benefit, if you excuse his conduct and not give him the death penalty.

(RT 6139.)

> Death row is the only place for him and in your hearts you know that is true.

(RT 6140.)

> And Ladies and Gentlemen, if ever a case called for the imposition of a death penalty, this is it. You should show no mercy to this miserable, miserable violent thug sociopath.

(RT 6142.)

14. The judge's unconstitutional instructions regarding petitioner's conduct individually and cumulatively were egregious and highly prejudicial to petitioner in both the guilt and penalty phase of his case. These instructions violated petitioner's right to confront witnesses against him, confront adversarial information, the right to due process for reducing the prosecution's burden of proving the element of intent beyond a reasonable doubt, the right to a fair and reliable sentencing determination, the right to a fair trial, the right to an impartial jury, and the right to an impartial judge who was unbiased and conducted the proceedings not only with fairness, but an appearance of fairness.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 50: Judicial Error – Petitioner's Fundamental Right To Be Present was Violated By His Absence During Key Portions of the Trial

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because on numerous occasions petitioner was not present in the courtroom during the trial. Further, he was unable to hear proceedings in the cell where he was held during those periods of absence, and many times was ejected from the courtroom simply for remarking on legal issues, which he was encouraged to do in the unique system of hybrid representation ordered by the trial court. The right of any criminal defendant to be present, particularly in capital proceedings, implicates numerous, fundamental rights. Petitioner's absence prejudicially violated his rights to confront witnesses against him; a fair trial; due process of law, an impartial jury; a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; and fair and reliable capital proceedings and sentence determination.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Illinois v. Allen* (1934) 291 U.S. 97 ("One of the most basic rights guaranteed by the confrontation clause is the accused right to be present in the courtroom at every state of his trial."); *Lee v. Illinois* (1986) 476 U.S. 530 (right to confront witnesses court constitutional safeguard); *Lewis v. United States* 146 U.S. 370, 372 ("After indictment found, nothing shall be done in the absence of the prisoner."); *United States v. Gagnon* (1985) 470 U.S. 522 (due process right to be present at trial); *Snyder v. Massachusetts* (1934) 291 U.S. 97(due

process right to be present at trial); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-examination regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created

right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); and including *Apprendi v. New Jersey,* (2000) 530 U.S. 466 (Jury must decide truth of sentencing factors.)

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner was absent from numerous proceedings throughout his trial and sentencing. At no time did the trial court secure a waiver of petitioner's right to be present at these proceedings.

2. Petitioner was either ejected from the courtroom or, on several occasions, absented himself during the trial. (RT 146-147, 210-211, 1858, 1917-1918, 3712, 3876, 4582, 4964-4965, 5472, 5489, 5557, 5659, 5950, 5960, 6213, 6229.)

3. Petitioner wished to be heard on issues he believed to be important, including numerous legal objections. (RT 146-147, 165, 191, 647, 1915, 1917-1918, 2264, 3128, 3279, 3876, 4527, 4959, 4984, 5002, 5470-5471, 5666, 5916, 5959, 6037, 6267.) The trial court specifically granted petitioner a unique form of "hybrid representation" wherein petitioner was expressly authorized to make legal motions once a week. However, the court

significantly expanded and encouraged petitioner's participation in trial, by ruling on numerous motions petitioner made which he presented on days other than Friday, the day originally designated by the court. Additionally, the court treated petitioner as if he was counsel many times during the trial. In support of this claim, petitioner incorporates by reference the entire claim on hybrid representation, Claim 3. Thus, although the trial judge repeatedly admonished petitioner to be quiet and keep his mouth shut (RT 2264, 2897, 4582, 4844, 4953, 4959), at other times he treated petitioner and petitioner's motions as if they were made by counsel, and ruled on them accordingly. *See, e.g.,* Claim 3.

4. Notwithstanding this authorization, petitioner was not present during at least several unreported, crucial chambers conferences. These trial proceedings are documented in the settled statement and are reflected as follows:

> Supplement P, 9-9-94, 9-16-94, RT 1-11, Unreported Chambers Conferences of (1) November 9, 1988; (2) December 16, 1988; (3) January 4, 1989; (4) June 8, 1989; (5) June 29, 1989 (morning session); (6) June 29, 1989 (afternoon session); and (7) July 7, 1989.

5. One conference actually concerned the petitioner's presence at trial and petitioner did not waive his presence at this conference. (RT 3-5 Settled Statement Supplement.) Two others dealt with crucial evidentiary matters. The conferences on June 8, 1989 and July 7, 1989 were in regard to the guilt and penalty phase instructions. Petitioner specifically objected to not knowing what those instructions were and what was agreed upon at the time they were issued to the jury. (RT 5603-5605, 6203.) Petitioner clearly

and concisely objected to his involuntary absence from those in chambers proceedings, on constitutional grounds:

DEFENDANT: One thing I like to request, Your Honor. I want to say that I objected to any submitting to the jury instructions without my previous notice or awareness. I didn't participate.

THE COURT: You are not the lawyer of record. You do not participate. I am giving the instructions, not you. Your lawyer offered one instruction which I just now refused.

DEFENDANT: I'm quite aware of that, but I think I have the right to participate in every critical stage of the prosecution.

THE COURT: You do not have the right to participate.

(RT 6203.)

6. The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." A similar provision is contained in the California Constitution. Article I, section 15 provides that "a defendant in a criminal cause has the right . . . to be confronted with the witnesses against the defendant." The confrontation clause includes not only the right to confront witnesses but also the right to confront evidence. It is well established that "one of the most basic rights guaranteed by the confrontation clause is the accused's right to be present in the courtroom at every stage of his trial." (*Illinois v. Allen, supra,* 397 U.S. at p. 338; *Lee v. Illinois* (1986) 476 U.S. 530 (right to confront witnesses court constitutional safeguard). In petitioner's case, this constitutional safeguard is woefully lacking. While a disruptive defendant may, in unique, specific circumstances waive his right to be present at trial, there is a vast difference between violently disruptive

conduct and that which is merely annoying, provocative or somewhat disruptive. (*Illinois v. Allen, supra,* 397 U.S. at p. 337; *People v. Carroll,* 140 Cal.App.3d 135, 142-143.) Petitioner was repeatedly admonished in front of the jury to keep quiet, and was removed on several occasions during critical proceedings. However, petitioner was primarily acting in the role expressly and explicitly authorized by the court, i.e., that encompassed within the hybrid representation system. Further, petitioner was mainly evidencing his frustration at not being able to participate in proceedings, which he felt was crucial. Many of his objections and questions were specifically related to legal issues then at issue in to his trial. Accordingly, his removal only diminished his ability to aid in his defense. His right to confront the witnesses against him was severely prejudiced by his removal from the courtroom.

7. Petitioner's absences further violated the due process clause of the Fourteenth Amendment. The right to be present at trial is "protected by the due process clause in some situations where the defendant is not actually confronting witnesses or evidence against him." (*United States v. Gagnon, supra,* 470 U.S. at p. 526.) Thus, the petitioner had a due process right to be present at his trial when his presence had "a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts, supra,* 291 U.S. at p. 105-106. Petitioner was absent in many crucial stages of his own criminal proceeding, in which he was ultimately sentenced to death.

8. During petitioner's guilt phase, an unreported discussion occurred at the bench between the court and counsel, following the issuance of unconstitutional reasonable doubt instructions. Petitioner was not present at

this conference and objected to the non-reporting. (RT 5607.) Petitioner incorporates by reference Claims 29 and 60 as if fully set forth herein.

9. During voir dire, petitioner was ejected from the courtroom when the second jury was brought in. (RT 1916.) He was also removed when the court remarked on the renewed defense motion to change venue. (RT 3712, 3718.) The entire panel was given its preliminary instructions while petitioner was absent. It was very important, for petitioner to have been present during these times in his trial. As Justice Cardozo stated, "If the accused is permitted to be present at the examination of jurors, . . . it will be in his power, if present, to give advice or suggestion or even supercede his lawyer altogether and conduct the trial himself." (*Snyder v. Massachusetts, supra,* 291 U.S. at p. 106. *See Lane v. State* (Fla. Dist. Ct. App. 1984) 459 So.2d 1145, 1146 (reversible error to exclude defendant from proceeding at which peremptory challenge is exercised); *Shoultz v. State* (Fla. 1958) 106 So.2d 424 (criminal defendant has right to an open, public trial, and to be present at every stage of the proceeding . . . it is "reversible error for a trial judge to examine and pass upon the qualification of a sworn juror when such is done . . . not in the presence of the defendant.").) Petitioner's absence during these crucial periods at trial regarding selection, impartiality and jury makeup was constitutional error.

10. Petitioner was excluded from proceedings at which evidentiary hearings were discussed. (RT 146-147, 210-211.) These proceedings were *in limine,* regarding the admissibility of aggravating circumstance evidence. "The defendant must be present . . . when any ruling is being considered on the admissibility of evidence." (3 Charles E. Torcia, Wharton's Criminal Procedure (13th ed. 1991) § 430, at p. 806.) Petitioner's absence from this

critical period in these capital proceedings was particularly egregious, in view of the prosecution's use of this evidence in urging the jury to sentence petitioner to death. (RT 6117-6122.)

11. Petitioner was absented from numerous crucial proceedings which involved the taking of testimony and discussion of legal and procedural issues. During the guilt phase, petitioner was absent during a portion of Oakland Police Technician Ng's testimony, who collected the weapons later determined to be the murder weapons. (RT 4582.) Petitioner was also absent during opening statements (RT 3876), the motions at the end of the prosecution's case in chief (RT 4964), the motions at the end of the defense case in chief (RT 5472), the prosecution's closing argument and rebuttal (RT 5557), and the polling of the jury after it returned a verdict in the guilt phase (RT 5657.) In the penalty phase, petitioner was absent during the testimony of the defense psychiatrist (RT 5950.), jury instructions (RT 5219), and the polling of the verdict after the return of the verdict of death (RT 6229).

12. The court attributed petitioner's removal to his conduct in court. However, as previously stated, much of that conduct was a result of petitioner's frustration about both various legal positions by his counsel, which he believed were not in his best interest, and the conduct of the court and prosecution. Moreover petitioner had been specifically granted the opportunity to partially represent himself, and act as counsel. Thus, it was not only confusing, but also wholly unlawful for the court to unilaterally and capriciously reject petitioner at times when he acted in this authorized capacity. One such example occurred at a crucial stage in the penalty phase instructions to the jury. The court instructed on the crime of assault, to be considered in the jurors' determination beyond a reasonable doubt as to an

aggravating factor. The court instructed the jury with respect to the alleged assault on petitioner's wife, Terry Welch. Petitioner calmly objected to this instruction. The colloquy, and resultant non-consensual removal of petitioner from the courtroom was as follows:

DEFENDANT: I'm going to object to that as a instruction, Your Honor.

THE COURT: One more interruption and you're going upstairs. In order to prove such crime –

DEFENDANT: I don't think the Court has to threaten me every time I state an objection for the record.

THE COURT: Excuse me, Ladies and Gentlemen. I've got to have you get these instructions properly. Incidentally, I will have then [sic] typed up for you. Okay. Let's go now. Let's move.

(The defendant is removed from the courtroom.)

(RT 6213.)

13. Petitioner's absence was a violation of the due process clause because his absence interfered with his right to conduct a defense. It is impossible to effectively provide a defense when your client is excluded from numerous proceedings. Petitioner could not meaningfully assist in his defense when he was excluded from proceedings that provided an important context for what transpired in his presence. "The right to be present at his trial stems in part from the fact that by his physical presence the defendant can hear and see the proceedings . . . and can participate in the presentation of his rights." (*Bustamante v. Eyman,* (9th Cir. 1972) 456 F.2d 269, 274-275.

14. Petitioner was further constitutionally absent because he could not see or hear the proceedings in the cell to which he was removed. (RT 5605.)

15. Petitioner was also constructively absent due to incompetence during crucial portions of his trial, at which time he was not able to assist in his defense or confront the witnesses against him. Petitioner hereby incorporates by reference Claim 2 in support of this claim.

16. Petitioner's absence violated law of the State of California. California's Constitution specifically guarantees that a "defendant in a criminal cause has the right . . . to be personally present with counsel." (Cal. Const., art. V, §15.) The constitutional right of presence has been statutorily implemented by the California legislature. At the time of the trial Penal Code section 977 subdivision (b) provided:

> In all cases in which a felony is charged, the accused must be present at arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial [at] which evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he shall, with leave of the court execute in open court, a written waiver of his right to be personally present . . .

The plain warning of Penal Code section 977 grants a defendant the right to be "personally present at all other proceedings" absent a waiver. Such a rule is particularly compelled in capital cases where the legislature has explicitly forbidden proceeding with trial even with the voluntary absence of the defendant. (Cal. Pen. Code, § 1043, subd. (b)(2). Here, petitioner's absence from the proceedings was never accomplished by the waiver required by Penal Code section 977. Rather, he strenuously objected to not being present at critical portions of the proceedings. This violation of petitioner's

right to be present accorded under the California Constitution and Penal Code section 977 violated his procedural due process rights under the Fourteenth Amendment. Furthermore, this state law was intended to protect the potential liberty interest guaranteeing federal due process; such guarantee was infringed upon by the continuous removal of petitioner from the courtroom in his capital proceedings. (*Hicks v. Oklahoma, supra,* 447 U.S. 343.) State law, and particularly Penal Code section 977, created a liberty interest in the petitioner to attend all court proceedings, including those involving issues of law. Petitioner was stripped of this liberty interest without any procedure comporting with due process. Rather, the state procedure of securing an explicit waiver was not followed. As a consequence, petitioner was denied his constitutionally guaranteed rights.

17. The rights violated by petitioner's absence included, inter alia, the right to a reliable and fair capital proceeding and sentencing determination, the right to a fair trial, the right to confront witnesses against him, all confrontation clause rights, the right to an unbiased judge, and one who conducted the proceeding with not only fairness, but an appearance of fairness, the right to an impartial jury, and the right to substantive and procedural due process of law. These were prejudicially violated by the court's removal of petitioner from the courtroom.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 51: Judicial Error--Pattern of Ex Parte Contact by the Court with the Prosecutor and Counsel

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because the court engaged in a pattern of ex parte contact with the prosecutor and, separately, with defense counsel, out of petitioner's presence, thereby permitting him to be tried and sentenced in part on the basis of information he had no opportunity to confront or explain. This pattern of ex parte contact deprived petitioner of his federal and state constitutional rights to confrontation, personal presence, due process of law, equal protection, the effective assistance of counsel, conflict-free counsel, a fair and reliable determination of guilt and penalty, trial by an unbiased tribunal, trial by jury, and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Gardner v. Florida* 430 U.S. 439 (1977) (due process violation in capital proceeding where petitioner sentenced on basis of information of which he was not aware and had no opportunity to confront); *Illinois v. Allen* (1970) 397 U.S. 337 (confrontation clause guarantee of right to personal presence); *United States v. Gagnon* (1985) 470 U.S. 522 (due process right to personal presence); *Pointer v. Texas* 380 U.S. 400 (1965) (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Douglas v. Alabama* (1965) 380 U.S. 415 (right to confront includes right to cross-examine adverse witnesses); *Loven v. Kentucky* 488 U.S. 227 (1988)

(confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause guarantees right to impeach credibility of adverse witness with proof of his prior crimes); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment requires heightened reliability in guilt determination in capital cases); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Hicks v. Oklahoma* 447 U.S. 343 (1979) (federal due process claim in state-created right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates by reference as if fully set forth herein the facts and law alleged in support of Claim 31.

2. Throughout the pretrial, guilt, penalty, and post-trial phases of this case, the trial judge engaged in a pattern of ex parte contacts and meetings with the prosecutor and, separately, with the defense attorneys.

(Exhibit 30, Declaration of Spencer Strellis; Exhibit 6, Declaration of Thomas Broome; Exhibit 7, Declaration of Robert Cross.) Petitioner was excluded from these meetings and was not informed of the content of the conversations.

3. The trial judge in this case, Stanley Golde, was a former law partner of defense counsel, Spencer Strellis, and a close friend of both prosecutor James Anderson and Strellis's co-counsel, Alexander Selvin.[19] Judge Golde operated very informally, and lawyers were in and out of his chambers all the time drinking coffee and chatting. According to Strellis, who had been Golde's close friend for decades:

> Everybody spoke to Judge Golde off the record about their cases, and that was true in this case as well. At the end of every day, Judge Golde told the lawyers to come into chambers, and we discussed the case. That was commonly done in those days. In addition, I had several private conversations with Judge Golde about the case; and although I don't know for a fact that Jim Anderson did too, I would be shocked if he didn't. That was just the nature of Judge Golde's chambers.

(Exhibit 30, Declaration of Spencer Strellis.)

4. In addition, it is clear that the prosecutor had ex parte contact with the bailiff, who informed the prosecutor that the jury was aware petitioner had urinated in the "well," the stairwell which connected the courtroom with both petitioner's holding cell and the jury assembly room. The prosecutor reminded the jurors of this fact during the closing argument.

5. In a criminal case, the accused has a Sixth Amendment right to confront his accusers and the evidence against him. In addition, he has a right to be present at trial, which is rooted in the confrontation clause of the Sixth

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[19] When Selvin got married, Golde performed the ceremony.

Amendment and the due process clauses of the Fifth and Fourteenth Amendments. (*Illinois v. Allen, supra*, 397 U.S. 337; *United States v. Gagnon, supra* 470 U.S. at p. 526.) Moreover, in a capital case, the state must conduct its sentencing proceedings with an even hand. (*Profitt v. Florida* (1976) 428 U.S. 242, 250-253), and may not sentence a defendant to death on the basis of information of which he was not placed on notice and to which he has not been given an opportunity to respond. (*Gardner v. Florida, supra*, 430 U.S. 349.)

5. The errors were prejudicial because these ex parte contacts were influential in petitioner's trial and sentencing. Petitioner believes that Judge Golde's plan to impose upon the defense an unprecedented form of hybrid representation in order to placate petitioner was hatched in chambers out of petitioner's presence and potentially out of the presence of his counsel. Moreover, the facts set forth in Claim 31, which is incorporated as if fully set forth herein, demonstrate that the prosecutor provided input into the sentencing process not provided by petitioner's counsel. Petitioner also believes that the prosecutor both discussed sentencing issues with the trial judge ex parte, and improperly influenced the court in its ruling on the new trial and verdict modification motions put forth by the defense.

7. Because much of the factual predicate upon which this claim relies rests in the exclusive control of the prosecution, petitioner requests that he be afforded use of this Court's subpoena power, provided adequate funding for investigation and experts, and granted an evidentiary hearing in order to develop this claim more fully.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict. To the extent that any errors included within this claim occurred following the jury's verdict, the error is prejudicial under any standard of review.

Claim 52: Judicial Error: Unconstitutional Venire and Panel--Excusing Jurors Who Were Not Clearly Pro-Life Without Parole

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7, 15, 16 and 17 of the California Constitution because the trial judge excused four, prospective jurors who, were not "automatic life"jurors and who stated on voir dire, that they could have voted to impose death. Further, the trial judge, *sua sponte,* took time and effort to "rehabilitate" prospective jurors who were clearly "automatic death" jurors and one such prospective juror was seated and voted to sentence petitioner to death. The unconstitutional excusing of the jurors and the partial and unreliable context within which these judicial errors occurred, violated petitioner's right to a fair trail; due process; an impartial tribunal; a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; and the right to reliable capital proceedings and sentence.

B. The following United States Supreme Court decisions, *inter alia,* in effect at the time the error occurred, are presented in support of this claim:

Wainwright v. Witt (1985) 469 U.S. 424 (constitutional standard re: excusing jurors); *Duren v. Missouri* (1979) 439 U.S. 357 (fair cross-section of the community representational requirement fundamental Sixth Amendment guarantee); *Batson v. Kentucky* (1986) 476 U.S. 79 (prosecutor's use of peremptory challenges violation of equal protection); *United States v. Burr* (1807) 25 Fed. Cas. 25, no. 14,692b CCD. Va. (fundamental right to a fair tribunal); *Mattox v. United States* (1892) 146 U.S. 40 (fundamental right to a fair tribunal); *Parker v. Gladden* (1966) 385 U.S. 363 (bailiff's subjective statement on defendant's guilt to a juror violated right to impartial jury necessitating reversal of murder conviction); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (denial of allocution in imposing sentence abridgement of core fundamental right – denial of such rights further constitutes unconstitutional appearance of impartiality); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where

petitioner sentence partially based on unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C The following facts, among others, are presented in support of this claim, after adequate funding, discovery, investigation, and an evidentiary hearing:

1. The judge excused 75 jurors during voir dire because of their pro-life responses. (RT 1062, 1064, 1093, 1143, 1234, 1278, 1310, 1326, 1397, 1425, 1442, 1468, 1469, 1478, 1488, 1501, 1532, 1533, 1563, 1580, 1595, 1598, 1611, 1695, 1837, 1853, 1899, 2027, 2051, 2128, 2180, 2228, 2275, 2277, 2301, 2506, 2508, 2528, 2622, 2702, 2755, 2851, 2897, 2924, 2931, 30;18, 3040, 3069, 3070, 3092, 3114, 3127, 3130, 3169, 3271, 3273, 3288, 3296, 3298, 3328, 3340, 3341, 3380, 3384, 3427, 3475, 3526, 3536, 3549, 3552, 3571, 3608, 3631, 3695, 3701.)

2. The court, however, liberally excused these jurors without trying to rehabilitate those who gave an equivocal response. Ms. Dorris J. Grady, when asked if she could vote to put somebody to death, stated: "It would be the right decision, but I think it would be a hard decision." (RT 2027.) Another juror, Mr. Martin Gilens, was excused for being pro-life, even though when asked if he could vote for the death penalty, he replied: "I suppose if I felt it was appropriate, yes." (RT 3526.) Dr. Howard S. Gruber was excused only because he had reservations about the death penalty. (RT 3552.) Ms. Victoria Brown, when asked whether or not she could impose the death penalty, simply stated, "I'm not sure," and was excused. (RT 2508.)

3. The court further unconstitutionally excused a juror after extensive voir dire by defense and prosecution evidenced that this juror was not automatic pro-life. (RT 2119-2128.) Prospective juror Patti Ahuna specifically testified:

A. I don't think I'm against the death penalty in all cases.

Q. You do not think you're against –

A. I do not think I'm against it across the board in all cases.

Q. In a case involving six murders, do you think you could ever vote to impose death? I'm not asking how you would vote.

A. Yes, I think you could.

Q. You think you could?

A. Right.

(RT 2121-2122.)

Nonetheless, the prosecution submitted and the court excused her pursuant to *Wainwright v. Witt*. Petitioner immediately objected to excusing this jury on these grounds:

THE COURT: All right. I think I'm going to excuse you under Wainwright versus Witt. Thank you, Miss Ahuna. You're excused, but you got to go back downstairs to the jury assembly room.

DEFENDANT: Well, Your Honor, I'm going to object to that.

THE COURT: Fine. Just –

DEFENDANT: I don't think –

THE COURT: Just wait. Okay. The record will note your objection. The record will note your objection.

(RT 2128.)

4. The trial judge, however, took pains to rehabilitate jurors who admitted they would always vote for death. Ms. Virgie Williams, who eventually sat on the jury, initially admitted that she would always vote for the death penalty. (RT 2316-2322.) After the judge *sua sponte* questioned

her further on her views, she stated she could consider both penalties. (RT 2322.) Ms. Joanna S. Collins was similarly questioned by the judge during her voir dire by defense counsel Strellis:

MR. STRELLIS:	Assuming you find him guilty of the murders, find the aggravation outweighs the mitigation, am I having a real trial; or do you really know in your heart of hearts that while you're going to sit here through the second phase –
MS. COLLINS:	If I –
MR. STRELLIS:	– your mind, in effect, would be made up?
MS. COLLINS:	If I thought that the aggravation outweighs the mitigation, I would vote for the death penalty.
MR. STRELLIS:	Okay. I'll submit it, Your Honor.
THE COURT:	Well, no, no. Would you always vote for death? Could you listen to all the aggravation –
MS. COLLINS:	I could –
THE COURT:	Wait. Listen to all the aggravation, mitigation, and then decide which punishment you feel – you find appropriate?
MS. COLLINS:	I'd listen, yes, before –
THE COURT:	In other words, there could be ten factors of aggravation and one of mitigation. If the mitigation appeals to you, you could vote for life without possibility of parole.
MS. COLLINS:	Yes.

(RT 3439-3440.)

5. These jurors were excused in violation of *Wainwright v. Witt* (1985) 469 U.S. 412 and *Witherspoon v. Illinois* (1968) 391 U.S. 510. The judge's rehabilitation of these stringently pro-death jurors violated minimal due process requirements of fairness and impartiality in imposing the verdict

and sentence of death. Their view substantially prevented or impaired the performance of their duties in accordance with the instructions and their oaths. *Witt,* 469 U.S. at 424; *People v. Gent* (1987) 43 Cal.3d 739.

6. The judge's unconstitutional exclusion of these jurors who were not automatic pro-life, was part of a continuing pattern and practice throughout the trial of bias and prejudicial rulings and conduct against petitioner. *In re Murchison, supra.* Petitioner incorporates by reference Claims 34 through 45.

7. These jurors should not have been excused on *Witherspoon* and *Witt* grounds and their exclusion denied petitioner a fair trial. The court could not reasonably have concluded that jurors Gilens, Gruber and Brown's views on capital punishment would "prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and their oaths." *Witt* at 424. Rather, these jurors had an open mind regarding the penalty determination.

8. This error is compounded by the fact that petitioner was already being tried by a jury which did not constitutionally reflect the representative cross-section of the community. Petitioner made several challenges to the venire, and not several numerous challenges to the venire, claiming that African-Americans were under represented. (RT 1854, 1964, 1973, 2578, 2950-2951, 3093, 3804-3805.) The court, in denying petitioner's challenges to the composition of the jury panel, took judicial notice of the census and determined that Blacks constituted 18.2 percent of the population of Alameda County. (RT 3797.) However, of the 264 jurors called up to that point, 41 were Black, constituting only 15.4 percent of the venire. (RT 3799.) Given the low percentage on the venire, the exclusion of five Black jurors for their

pro-life responses had a prejudicial impact upon available Black jurors. (RT 2027, 2275, 3298, 3536.) The lack of meaningful attempt to question the jurors as to whether they could follow their instructions and their oaths had the individual and net effect of reducing Black jurors and denying petitioner a representative jury.

9. Excusing the jurors who were not automatic pro-life denied petitioner's rights to due process, fair and reliable capital proceedings and sentence, a fair trial, an impartial tribunal, confrontation clause rights, and his right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but also an appearance of fairness.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 53: Judicial Error: Failure to Change Venue

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7, 15, 16 and 17 of the California Constitution because the trial court denied petitioner's request to change venue. The extensive prejudicial pretrial publicity and publicity during trial, and the circumstances of the trial itself compelled this venue changed to a forum where petitioner could have received a fair trial by an impartial tribunal. The decision not the change venue violated petitioner's rights to a fair trial; a fair and impartial

jury; due process; right to confront witnesses and evidence against him; the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; and the right to fair and reliable capital proceedings and sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Chandler v. Florida* (1981) 449 U.S. 560 (highly publicized criminal trial presents risk of compromising right to fair trial); *Shepard v. Maxwell* (1966) 384 U.S. 333 (external publicity and circumstances deprive defendant right of fair trial); *Estes v. Texas* (1965) 381 U.S. 532 (prejudice presumed where significant media on court proceedings during trial); *Rideau v. Louisiana* (1963) 373 U.S. 723 (prejudice presumed due to crucial pretrial publicity); *Batson v. Kentucky* (1986) 476 U.S. 79 (prosecutor's use of peremptory challenges violation of equal protection); *Caldwell v. Mississippi* (1985) 472 U.S. 320 (prosecutorial misconduct); *Mattox v. United States* (1892) 146 U.S. 40 (fundamental right to impartial jury): *United States v. Burr,* (1807) 25 Fed. Cas. 25, no. 14,692b CCD. Va. (fundamental right to fair and impartial tribunal); *In re Murchison*, (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Gardner v. Florida,* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v. Georgia,* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Beck v. Alabama,* (1980) 447 U.S. 625 (constitutional requirements in capital proceeding apply to guilt phase); *Hicks v. Oklahoma,* (1979) 447 U.S. 343 (federal due process claim in state-

created right); *Parker v. Gladden* (1966) 385 U.S. 363 (bailiff's subjective statement on defendant's guilt to a juror violated right to impartial jury necessitating reversal of murder conviction); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others, are presented in support of this claim, after adequate funding, discovery, investigation, and an evidentiary hearing:

1. Prior to petitioner's trial, he requested a change of venue. (RT 993.) This motion was renewed after voir dire of the prospective jurors. (RT 3715, 3717.) The trial court denied the motion, finding that petitioner could get a fair trial in Alameda County. (RT 1051, 3717.)

2. Petitioner introduced the testimony of Joie B. Hubbert, venue specialist, who testified that 65 percent of the eligible jury in Alameda County recognized the case, and 78 percent of these polled individuals prejudged the petitioner as guilty. (RT 998, 1007, 1009, 1011, 1015.) Of those who were aware of the case and who read Alameda County, San Franciso or San Jose newspapers, 91 percent prejudged petitioner as guilty. (RT 1011.) The venue specialist found that approximately the 80 percent prejudgment rate was among the highest in all her cases. (RT 1037.)

3. In denying the motion to change venue the court recognized that there was "sensationalism" to the nature and extent of news coverage,

"particularly in the last six months." (RT 1049-1050.) The trial judge held that the nature and extent of the news coverage was not that inflammatory however, and that Alameda County was a large county, that the status of petitioner and victims was not such to warrant a change of venue. (RT 1049-1051.) With respect to the final factor, the court reasoned: "I'm not trying to belittle the lives of these people taken, but they really do not fall into that status of the victim they're concerned about." (RT 1050.) The court reviewed the materials of the jury venue expert and stated: "Frankly, I am impressed with the recognition factor. I agree with her that that does concern me." The court reasoned that the venue expert did not conclude that petitioner could not get a fair trial. However, as she expressly stated in her testimony, her role of the expert, as that of all venue experts, was not to form a specific conclusion but rather to conduct a scientific survey which would set forth the facts upon which the venue decision should reasonably be predicated. (RT 1009-1015.)

4. On this basis, the court denied the motion for a change of venue. The court, however, informed the defense counsel it was possible that the motion would be renewed after voir dire. Significantly, the court expressly and explicitly informed counsel and petitioner as to what the court's conduct would be during this voir dire:

> However, at some point we are going to conduct the voir dire of jurors. *And I think probably a proper question at least in part would be what extent, if any, publicity has upon them; and I will ask that question to them.*

(RT 1051, emphasis added.)

Petitioner's counsel specifically requested the that the jurors not excused be admonished by the court not to discuss the case or read anything

about it. He underscored that, "There's likely to be more publicity as we go forward." (RT 1502.) However, notwithstanding the trial judge's express representation, this crucial issue was not fully explored. In fact, of the 82 jurors who subsequently qualified on voir dire, the trial judge asked only two if they had heard or read anything about the case. (RT 1070, 2998.)

5. At the conclusion of primary voir dire, the court denied the renewed motion for a change of venue. The court reasoned: "It's my understanding that your expert did not say we could not get a fair trial, the statistics were inconclusive." (RT 3716.) The trial judge further stated: "It is shocking that so few people have heard of [the case]." (RT 3717.)

6. Petitioner was denied the right to a fair trial by trying the case in Alameda County. Petitioner's motion for a change of venue should have been granted if it is determined that because of the dissemination of potentially prejudicial material, there was reasonable likelihood that in the absence of such a change of venue, a fair trial cannot be had in the county. *(Williams v. Superior Court* (1983) 34 Cal.3d 585; *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 579.) A "reasonable likelihood" requires a lesser standard of proof than "more probable than not". A reasonable likelihood is determined by examination of several factors: (1) The gravity of the nature of the crime; (2) the extent and nature of the publicity; (3) the size and nature of the community; (4) status of the victim and (5) the status of the accused. (*Id.* at 595.) Here, the standard of reasonable likelihood was clearly met.

7. Further, neither the court nor petitioner's counsel adequately conducted voir dire or uncovered the actual knowledge of the prospective

jurors in this case. In support of his claim, petitioner incorporates by reference Claim 26.

8. Further, underlying the problem in this case is that voir dire is often ineffective in uncovering bias. "In an antagonistic atmosphere 'there will remain the problem of obtaining accurate answers on voir dire – is the jury consciously or subconsciously harboring prejudice against the accused resulting from widespread news coverage in the community?'" *(Main v. Superior Court* (1968), 68 Cal.3d 375, 380.) Even where all the jurors selected claim the ability to sit impartially, such a claim is, of course, not conclusive. *(People v. Tidwell* (1970) 3 Cal.3d 82.)

> Questioned on voir dire as to the effect of the media's evidentiary disclosures, one prospective juror may deny or admit prejudgment. One may falsely deny both knowledge and prejudice for the sake of a place on the jury. An honest juror may admit knowledge or tentative prejudgment and find himself excluded. Many will sincerely try to set aside their preconceptions and give assurance of impartiality, yet unconsciously bend to the influence of initial impressions gained from the news media . . . Authoritative decisions now recognize the lack of realism inherent in expectations that jurors can insulate their verdict from inadmissible knowledge. When prejudicial publicity has been injected into jurors' consciousness, the courts do not give dispositive effect to jurors' assurances of impartiality. "To expect a juror to confess prejudice is not always a reliable practice. A juror can be completely honest in denying prejudice. In the words of Alexander Pope, 'All looks yellow to the jaundiced eye.'"

(*Corona v. Superior Court* (1972) 24 Cal.App 3d 872, 881.)

9. The voir dire in this case demonstrated this principle. Only 29 of the 264 jurors directly admitted to having heard of the case. (RT 3715, 1251-1252, 1263, 1295, 1303-1304, 1366, 1373, 1518, 1590, 1657, 1719,

1774-1775, 1836, 1884, 1989, 2166, 2335, 2421, 2464, 2570, 2668, 2696, 2730, 2742, 2865, 2877, 2902, 2927, 3187, 3207, 3253, 3310, 3495, 3645.) However, the newspaper coverage was extensive and focused upon petitioner's status as a mass murderer. Further, it is probably that jurors who disclaimed any knowledge about the case had earlier read or heard about it in the local media.

10. Petitioner showed, prior to voir dire, a reasonable likelihood that a fair trial could not be had in Alameda County. The nature and the gravity of the offense, the nature and extent of the news coverage, the size of the community and the status of petitioner in the community all pointed to the fact that the petitioner could not receive a fair trial in Alameda County. This was reputed to be a "mass murder" which received extensive press coverage, and allegedly done by an ex-felon who had numerous prior encounters with law enforcement. Two of the victims were young children. Voir dire in this case did not uncover the extent of the prejudice and bias against petitioner, which was clearly shown by expert testimony and scientific polling techniques.

11. The pretrial publicity was highly prejudicial and, in fact, supplied the jurors with information they did not get during the trial.

12. At least one prospective juror, Cora Staten, knew significant information about the case and informed other jurors about this. In fact, more than one entire panel may have been apprized of extrinsic information gleaned from the media. Defense counsel Strellis elicited the following from prospective juror John Banducci, a member of the first jury panel, on voir dire:

MR. STRELLIS: Incidentally, have you ever read anything about this case in the papers?

MR. BANDUCCI: I didn't – I was trying to remember the first day we were here about hearing anything about this or reading. Not until someone out there explained to me – one of the ladies – that what the actual story was, and remember seeing it on the news but not until today.

MR. STRELLIS: Some lady out there this afternoon –

MR. BANDUCCI: Yeah.

MR. STRELLIS: – told you about it?

. . .

Do you recall what she told you?

. . .

MR. BANDUCCI: She said – went through the case and just more or less said that the people that – or whatever went on regarding the house and everything and the gentleman coming into the home with an Uzi machine gun and something to do with the mother left through the window. She was very – wasn't very explicit about the whole thing.

MR. STRELLIS: She knew some details?

MR. BANDUCCI: Yes.

(RT 1294-1295.)

A discussion between Mr. Banducci, defense counsel, the prosecution and the court established that the prospective juror who had spoken to Mr. Banducci was Cora Staten, who stated during her voir dire that she did not remember anything about petitioner's case. (RT 1263, 1294.) Of the 90

people comprising that first panel of prospective jurors, Grace Estarija, Carol Hayward and Timothy Parker were eventually seated as jurors; Bernard Wells was selected as an alternate juror.

13. There were 82 people voir dired on the second panel of prospective jurors. On March 22, 1989 Etta Goins, a nurse who worked for the North County Jail, was the first prospective juror to be voir dired. Defense counsel Selvin asked her if she had heard or read anything about the case:

> MISS GOINS: I didn't remember until the first day that I was summoned, and wen we got out, I was walking to the parking lot, and I asked this lady that was with me – she was one of the prospective jurors. And I said: When did this happen because, you know, it was so gross. Seemed like I would have remembered.
>
> MR. SELVIN: Yes.
>
> MISS GOINS: And she said it was back in '87.
>
> MR. SELVIN: That's correct.
>
> MISS GOINS: Said it happened in East Oakland. She said the guy killed two kids and four adults.

(RT 2837.)

Although defense counsel attempted to ask Miss Goins about the identity of the prospective juror she had talked to, the court cut him off without explanation and the woman's identity was not established. (RT 2846.) Subsequently, prospective juror Sandra Williams was questioned about prior knowledge of the case:

MR. SELVIN: I was wondering whether you have heard anything about that?

MISS WILLIAMS: No, not until the lady – the first lady that you interviewed was sitting in the waiting room, and she told me a little about it.

. . .

She was talking about it was in the papers in '87 I think she said. That's the first that I knew about it

MR. SELVIN: She had mentioned that she had read about this case in the newspaper?

MISS WILLIAMS: (Nods head.)

. . .

MR. SELVIN: What else do you remember that she told you about the case?

MISS WILLIAMS: Just that there were murders and children involved . . .

(RT 2865-2866.)

Miss Williams later became an alternate juror who was in the jury room during deliberations. The "first lady" interviewed that day and referenced by Miss Williams on voir dire was Etta Goins, who worked as a nurse at the North County Jail and had a conversation regarding petitioner's case with an unknown, prospective juror. Of the 81 remaining prospective jurors in the second panel, Richard Mignola, Kim Secrease, Virgie Williams, Joanne Gonzales, Joseph Cruz, Howard McGee and Yvonne McGrew were seated as jurors; Brent Patterson and David Larson were alternate jurors.

14. Petitioner specifically requested that the trial court instruct jurors to refrain from reading or viewing any publicity during the trial. (RT 1502.) The trial court, however, refused to instruct the jury and in fact did

not admonish the jury during the trial, during the deliberation, in between the guilt and penalty phase, or during the penalty phase, not to look at any press or television.

15. The court issued an unequivocal gag order at the inception of the trial, and at no point was such order withdrawn. (RT 36-37.) The court expressly informed the prosecutor, "You are not to open your mouth, except in court." (RT 37.) The prosecutor, however, did violate that gag order, repeatedly. Following the guilty verdict, the prosecution gave extensive interviews. Petitioner specifically objected to these continuing violations:

> I'm going to also request, it was my understanding we had a gag order in this court and it applied to both counsel and the prosecution.
>
> Numerous times the prosecution made statements to the newspaper reporters. He thinks he is above the law and he don't have to abide by this gag order. I didn't understand the court to make any type of limitations or time periods on how long this gag order was going to be in effect, Your Honor, and I'm saying, I'm saying now that concerning hm making all these statements and stuff outside of the court, I think it is totally unfair, Your Honor. I think it is again, it goes to show that the prosecution is going to go to any means beyond limits to try to get a conviction and if that means grandstanding up before the newspaper media, he didn't have no comments whatsoever to say about my motion to vacate the verdict right here in open court. He has to go outside the courtroom and discuss with newspaper reporters. I think it is totally inappropriate.

(RT 5725-5726.)

16. During deliberations, the jurors, alternates and bailiff left the jury room, went out to meals and shopping, frequenting public places where there was extensive publicity about what was perceived as a notorious case

in that venue. (Exhibit 8, Declaration of Joseph Cruz; Exhibit 11, Declaration of Joanne Gonzales; Exhibit 35, Declaration of Bernard Wells.)

17. Certain specific jurors were aware of and influenced by information in the media. (Exhibit , Declaration of Joseph Cruz.)

18. The commissions and omissions by the trial judge, including but not limited to failure to admonish jurors regarding publicity throughout the trial, exacerbated this error, and necessitated a change of venue. Petitioner incorporates by reference Claims 34 through 45.

19. The publicity in this case actually prejudiced individual jurors and/or so pervaded the proceedings that it raised a presumption of inherent prejudice. *(Murphy v. Florida* (1975) 421 U.S. 794; *Shepard v. Maxwell* (1986) 384 U.S. 333.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 54: Judicial Error--Constitutionally Inadequate Record--Failure to Keep and Provide Petitioner Transcripts of Significant Proceedings and Essential Elements of Record

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because on numerous occasions separate proceedings or conferences in this case went unreported and/or non-transcribed in full, and cannot be recalled by the parties or adequately reconstructed by settled statement. This

constitutionally inadequate record deprived petitioner his rights to due process; a fair trial; fair and reliable capital sentencing determinations; and the right to an appearance of fairness in the judge presiding over both the guilt and penalty phase proceedings in his case.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Griffin v. Illinois* (1956) 351 U.S. 12 (due process guarantees criminal appellant a record of proceedings adequate to permit effective appellate review); *Draper v. Washington* (1963) 372 U.S. 487 (due process guarantee); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates both actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-examination regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentence partially based on unreliable information); *Godfrey v.*

Georgia (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interprétation that removed prosecution's burden of proving element of intent beyond a reasonable doubt); *In rè Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Fourteenth Amendment right to due process and Sixth Amendment right to trial by jury entitle criminal defendant to a jury determination that he is guilty of every element of the crime with which is he charged, beyond a reasonable doubt – labeling as "sentencing factor" does not negate this right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. The right to a complete record in capital cases is now codified in Penal Code sections 190.6 through 190.9. These sections, enacted in 1996 and taking their current form on January 1, 1997, expressly provide that a capital defendant is entitled to have the "entire record" prepared and certified for this Court to review. In a capital case, the "entire record" consists of a complete transcript of *all* proceedings in the trial court, including those conducted in chambers. (Pen. Code §§ 190.7, 190.9 subd. (a).) This case was tried prior to the enactment of these sections and rules and was thereby governed by former Penal Code §190.6 and former California Rules of Court, 39.5(c). Both of these provisions also require the "entire record." Section 190.6, enacted in 1977, required this Court to decide the appeal within one hundred fifty days of certification of the "entire record" by the sentencing court. Rule 39.5 expressly required that "[w]hen a judgment of death has been rendered, the entire record shall be prepared." The phrase "entire record" was defined to include the normal record specified in subdivision (a) of Rule 33; all items which are to be requested for inclusion in the record specified in subdivision (b) of Rule 33; any other paper or record filed or lodged with the Superior Court pertaining to the case including, but not limited to, transcripts of proceedings in the municipal or justice courts and; a transcript of other proceedings recorded in the Superior Court pertaining to the trial of the case. Former Cal. Rules of Court, rule 39.5. Rule 33 considers a Reporter's Transcript of "the oral proceedings taken on the trial of the cause, including motions *in limine* heard by the trial judge, jury instructions, and proceedings at the time of sentencing, granting of probation, or other dispositional hearing, but excluding the voir dire of jurors and opening statements part of the normal record."

2. The right to an adequate appellate record is specifically guaranteed in capital cases by the Eighth Amendment, which requires a record sufficient to ensure there is no risk that the death sentence has been arbitrarily imposed. This is particularly true regarding omissions involving the appellate record. "Since the state must administer its capital sentencing procedures with an even hand, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it imposed. [Otherwise, the] capital sentencing procedures would be subject to the defects which resulted in the holding of unconstitutionality." *(Furman v. Georgia* (1972) 408 U.S. 238; *Gardner v. Florida, supra,* 430 U.S. at p.361.)

3. The United States Supreme Court has consistently underscored the crucial role the complete record in capital proceedings:

> If the state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. *Spaziano v. Florida,* 468 U.S. 447, 460 (1984). The constitution prohibits the arbitrary or irrational imposition of the death penalty. *Id.* at 466-467. We *have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. See, e.g., Clemmons, supra* at 749 (citing cases); *Gregg v. Georgia,* 428 U.S. 153 (1976) . . . *It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record.* "What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Zandt v. Stephens,* 462 U.S. 1862, 879 (1983). *See also Clemmons, supra* at 749, 752; *Barkley v. Florida,* 463 U.S. 939, 958 (1983) (plurality opinion).
>
> Parker v. Dugger (1991) 498 U.S. 308, 322, emphasis added)

4. This Court and the United States Supreme Court have recognized the need for an adequate record as a constitutional requirement. Thus, the Sixth Amendment's guarantee of competent counsel on appeal imposes on that counsel both the obligation to brief all arguable issues (citing the appellate record and appropriate authority), and the preliminary obligation to ensure that there is an adequate record before the appellate court to resolve those issues. *(People v. Barton* (1978) 21 Cal.3d 513, 518-520.) When the record is missing or incomplete, "counsel must see that the defect is remedied . . . or counsel will fail to provide a competent level of advocacy. (*Ibid.* at 520.) Further, the right to a meaningful review, and a commensurate record on appeal is guaranteed in all criminal cases by the due process clause of the Fourteenth Amendment. (*Griffin v. Illinois, supra, 351 U.S. 12; Draper v. Washington, supra, 372 U.S. 487.*) A record which permits a meaningful and effective presentation of appellant's claims is a "basic tool" for adequate appeal in all criminal cases. (*Britt v. North Carolina* (1971) 404 U.S. 226, 227.) The Fourteenth Amendment due process clause also protects the right of a criminal appellant to consistent application of procedural protections provided by state law. *(Hicks v. Oklahoma, supra, 447 U.S. 343.)* Such state guarantee is embodied in the provisions that were in effect at the time of petitioner's trial sentencing and direct review. (Former Pen. Code, § 190.9; Cal. Rules of Court, rule 39.51; former Cal. Rules of the Court, rule 39.5.)

5. It was a standard practice and procedure in Judge Golde's chambers at the time of petitioner's trial and sentence to conduct substantial and important proceedings, not only off record, but also ex parte. In support

of this, petitioner hereby incorporates by reference Claim 3, 20, 41 through 45, 50, and 51.

6. The inadequacy of the record is facially apparent. The example below is in relation to the penalty phase instructions. There simply is no record of any proceeding regarding the decision as to what instructions should or should not be issued, and what instructions were or were not proffered by the parties. No precise recollection even exists of the content of the proceeding. Instead, the prosecution, defense counsel, and judge relied upon recollection of other proceedings before Judge Golde, but could not specifically recollect what had happened:

THE COURT: As to number four, this conference dealt with the Court's interrogation of the parties to any proposed special instructions.
Mr. Anderson.

MR. ANDERSON: Yes, Your Honor.
Having tried many cases in this court and know the Court's habit and custom as to what it does at that particular phase of the trial and watching you talk to other attorneys at that particular phase of the trial, I think I could quote fairly accurately. We went into chambers. You said if you gentlemen want any special instructions, I want them in writing by whatever date you gave. And I've seen you do that innumerable times, so I know that was said at that particular point because of your habit in doing so. And I don't know exactly what happened, if counsel did have any special instructions or not, but I know that's what you normally do and what you did do in this particular case. That was the extent of the conversation.

THE COURT: Mr. Strellis.

MR. STRELLIS: I don't recall if we – I talked to Mr. Selvin by the way, and neither of us recall submitting any special instructions.

THE COURT: We're not there yet.

At this point, I ask you whether or not you were going to file any special instructions, if you were to do it before we had the conference.

MR. STRELLIS: What I am saying, neither of us recall submitting any special instructions. I don't believe there are any in the record, and had at that time we said we were going to submit any, we would have done it in writing. We both understand that. My guess is we had no request for special instructions.

THE COURT: My recollection is I ask you to put any special instructions in writing. Any of the general instructions I was not concerned about.

MR. STRELLIS: Yeah.

THE COURT: And I don't – And that's all this conference dealt with.

(Supplemental TX P, Proceedings September 9, 1994, pp. 5-6.)

7. At another unreported conference, the court gave a sequence of penalty phase instructions:

THE COURT: The other – we'll go back to number seven. This conference dealt with sequence of jury instructions and if the defense seeks lesser included instructions of the People's 190.3 evidence. It's acts of violence.

Mr. Anderson.

MR. ANDERSON: Yes, Your Honor.

I remember fairly well that you give your sequence of penalty phase instructions in a certain way, you know, dealing with what segments you want to give

them in. I remember you specifically mentioning the sequence of how you're going to give them.

And also what I recall at this particular point in time was, as the Court remembers, there was a lot of penalty phase evidence, including, you know, acts of violence and threatened acts of violence such as that one rape where we had to read the transcript of that one girl who couldn't testify and other crimes which if standing by themselves would be subject to having lesser included instructions given of them in a regular jury trial were they being tried in a criminal case standing alone.

You posed a query, do you have to give lesser included instructions on these. You threw it out for whatever thoughts we would have, and that's what I recall at that particular time, that I do have to give lesser included instructions of what crimes Mr. Anderson proved in the penalty phase.

THE COURT: Mr. Strellis.

MR. STRELLIS: My recollection would be that, again, we discussed the proposed instructions, what you were going to give. We may well have talked about whether you had to give necessarily included instructions.

Had you chose not to give anything that I felt was appropriate, I would have submitted in writing such a request in order to preserve my record. I'm fully aware that's something I would have had to do.

My recollection is there is no such thing in the record, which would lead me to believe I did not ask for anything special.

THE COURT: The Court's recollection concurs with counsel but with one other exception. What I did, I not only dealt with sequence of jury instructions, I indicated to you what instructions I was going to give.

MR. STRELLIS: The contents.

THE COURT: I dictated the instructions verbatim to Jim. Every instruction I was going to give was dictated in the presence of you, Mr. Selvin and Mr. Anderson, Mr. Strellis. I then had them typed up. A copy of those instructions were given to you before you argued.

Before argument, I ask whether there were any objections, and the record will then reflect whether or not you made any objections. I can't honestly recall whether you did or didn't.

. . .

THE COURT: Yes, those would have to be in writing.

All right. Jim, you'll supplement the proposed settlement to show it not only dealt with sequence of jury instructions, but the actual text of the jury instructions was totally and completely dictated to you, and copy of the instructions given to counsel prior to argument, and we then before argument went on the record to see if there was any objection to the proposed instructions I had dictated.

MR. STRELLIS: I suspect you asked if there were any objections, and I said my understanding of the law, the duty to instruct is yours, and they're all deemed objected to, since I hate to have judges try to put me in the position of approving the instructions in advance.

THE COURT: My recollection is you offered no objection. Whether you approved or not, the transcript will say.

All right. Jim, you'll supplement the Proposed Settled Statement in that manner.

MR. BOISSEAU: Your Honor, can I at least ask questions for clarification?

Mr. Strellis mentioned the fact that his position, all instructions were deemed objected to.

THE COURT: I'm sorry. I didn't hear you.

(Supplemental TX P, Proceedings September 9, 1994, pp. 6-9.)

7. The constitutional inadequacy of the record, as well as the need for an adequate record, is evidenced in the vain attempts to reconstitute what did and did not occur. Nothing less than wholesale judicial error and constitutionally ineffective assistance of counsel are manifest by the in-chamber conferences and failure to describe same. With respect to defense counsel's position on objections to instructions, counsel stated at the settlement proceeding:

MR. STRELLIS: I probably misstated that. What I meant, it is my understanding of the law in the State of California that the obligation to instruct is the judge's and not mine and that therefore the judge cannot ask me do I approve of the instructions and somehow get my –

THE COURT: However, I did ask you.

MR. STRELLIS: You probably asked me, and I probably said much the same thing I'm saying.

THE COURT: I may have. There were no objections to them.

MR. STRELLIS: But I did not specifically object to anything, that is correct.

THE COURT: Yeah. What your motive was, Mr. Strellis, I'm not concerned with.

MR. BOISSEAU: Of course, I would ask that that part of the record also, Mr. Strellis' –

THE COURT: What part?

MR. BOISSEAU: That Mr. Strellis has already said it's Mr. Strellis' belief that he doesn't have to object to the instructions I suppose.

THE COURT: If he had any objections to the instructions, they would be shown in the record. My independent recollection, he did not object to the instructions.

MR. STRELLIS: I would have objected to any instruction I found objectionable. I just am not ready to give my stamp of approval on the record to the instructions.

THE COURT: My recollection is there was no objections. I also put that in the record. My recollection is he did not object.

(Supplemental TX P, Proceedings September 9, 1994, pp. 9-10.)

8. Another crucial area in which no record was made, kept, or given to petitioner on appeal concerned counsel and the judge's decisions regarding petitioner's presence in the courtroom. This issue, which occurred on the 22nd day of the jury trial, was explained by the prosecution as follows:

MR. ANDERSON: We took a recess, and the court was – went into chambers and indicated to defense counsel, both Mr. Strellis and backup counsel, Mr. Selvin, that you're not going to tolerate this kind of conduct, and either if you can't control your client, he will be banished, or words to that effect, to an upstairs holding cell.

I believe I indicated I think he should be shackled and gagged, and the Court indicated it wasn't going to do that.

But, in any event, that conversation in chambers dealt with defense counsel totally controlling their client in the open court with no more scurrilous remarks being hurled and any other type of disruptive conduct or the Court would take matters into its own hands.

MR. STRELLIS: From the context of the record, that seems absolutely correct. I mean there was an outburst on the record. We went into chambers. We came out. And

while I don't recall the specific conversation, it seems to me that's clearly what was done.

THE COURT: The Court agrees. The Court does recall generally the conversation, which was what he was doing primarily, Mr. Anderson, was starting to yell out, wants to ask questions. This is the kind of thing he did. He didn't fight or anything. He was just yelling. He was not violent in any way.

MR. STRELLIS: No, he never the entire period of time.

THE COURT: I told Mr. Strellis he had two choices. Either he could control his client or that I would send him upstairs and testimony would be piped up to him.

At some point during the trial he did. He was very upset because he didn't want the other prisoners to hear what was said.

(Supplemental TX P, Proceedings September 9, 1994, pp. 3-5.)

9. It is apparent from the record that other significant discussions and determinations, in accordance with the habit and custom of Judge Golde to conduct substantial proceedings in chambers and off-record, were not recorded, and such record was not available to petitioner on appellate review.

10. The jurors specifically requested that substantial testimony of the prosecution's key witnesses be re-read to them. (RT 5628-5634; RT 5639-5642.) The judge was actually absent during some of this crucial re-reading. The court stated, "There's also a possibility that during the reading I may excuse myself for a few moments to take a couple of long distance calls that are being put through, but the reading will just go on. It is just no questions. We will just go on as if I were here." (RT 5639.) Under these circumstances, the court reporter may have re-read portions of the testimony of Stacey Mabrey and Barbara Mabrey. (RT 5640.)

11. There is absolutely *no* transcript or record of the words that were actually re-read to the jury. Rather, the record provides as follows:

> "(Page 4763, line 28, through page 4767, line 5, and page 4790, lines 3 through 14 of the testimony of Beverly Jermany were read.);
> (Page 5199, lines 1 through 21, from the testimony of Theodore Thomas Landswick was read.)"

(RT 5629.)

> "(The direct examination of Angela Payton, page 4528, line 18, through page 4539, line 27, was read.)"

(RT 5630.)

> "(The following testimony of Stacey Mabrey was read: Page 4125, line 18, through page 4136, line 10; page 4172, line 1 through line 10; page 4172, line 21, through page 4180, line 7; page 4182, line 5, through page 4183, line 11; page 4187, line 27, through page 4188, line 18; page 4189, line 21, through page 4190, line 21. The following testimony of Barbara Mabrey was read: Page 4227, line 2 through page 4244, line 26; page 4245, line 14, through page 4248, line 24; page 4344, line 7, through page 4348, line 11; page 4349, line 18, through page 4367, line 5.)"

(RT 5639-5640.)

> "(The following testimony of Barbara Mabrey was read: Page 4372, line 22, through page 4374, line 27; page 4374, line 18 through page 4400, line 6; page 4405, line 11, through page 4406, line 1. The following testimony of Leslie Morgan was read: Page 4459, line 22, through page 4479, line 4; page 4502, line 28, through page 4515, line 4; page 4518, line 25, through page 4521, line 4; page 4522, line 1 through line 13.)"

(RT 5641-5642.)

12. Failure to record this read-back was particularly egregious because the jury required this clarification in order to determine whether or not petitioner was guilty of first degree murder. There is absolutely no way of telling what the jury was read. The judge's absence from the courtroom manifests the acute prejudice suffered from the lack of record keeping in these capital proceedings.

13. The dearth of constitutionally inadequate record keeping and failure to provide petitioner and this Court with an adequate record on review constituted errors in violation of petioner's rights to a fair trial, due process of law, an impartial judge, adequate assistance of counsel, and both reliable proceedings and review in a capital case. These errors were highly prejudicial, particularly since the record is missing substantial proceedings and essential elements in both the guilt and penalty phases of petitioner's case.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 55: Insufficiency of Evidence – Insufficient Evidence of Premeditation and Deliberation to Sustain Conviction

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the evidence in this case was insufficient to prove the elements of

premeditation and deliberation. The court's failure to find the evidence insufficient violated petitioner's rights to due process; a fair trial; the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; right to confrontation; and the right to fair and reliable capital proceedings and sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *United States v. Tucker* (1972) 404 U.S. 443 (due process required that defendant not be sentenced on basis of misinformation of constitutional magnitude); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-examination regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable

information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Jury must determine truth of sentencing factors.)

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner moved for a judgment of acquittal after the presentation of the prosecution's case in chief. (RT 4936.) Although petitioner made the motion initially, defense counsel stated he would do so after the evidence was introduced. The parties discussion of the issue follows:

PETITIONER: Yes, Your Honor. I'm going to request a motion for acquittal, a direct motion for acquittal under Penal Code Section 1118.1 of the Penal code, Your Honor. I believe counsel, the prosecution has failed to make a sufficient – try me on sufficient –

MR. SELVIN: Mr. Welch –

PETITIONER: Excuse me.

MR. SELVIN: Mr. Welch –

PETITIONER: Counsel wait until I finish.

MR. SELVIN: Your Honor, because at some point – some point it's a point. Mr. Welch, that motion will be made. Let's get – finish the prosecution's case, and that's the proper time to make the motion. You can make the motion, but let's get –

PETITIONER: The prosecution has rested its case.

MR. SELVIN: No. The evidence is not in, Your Honor.

PETITIONER: I don't know about the evidence.

MR. SELVIN: That's why we're here today.

PETITIONER: I still stating for the record, Your Honor, I'm seeking a direct motion of acquittal under Penal Code Section 1118.1. If you want to deem it timely at this particular time, that's on the Court.

. . .

MR. STRELLIS: Might I suggest to the Court that we hear the presentation now but that the Court rule on it at a timely time?

THE COURT: First of all, he doesn't have any right to make this motion. If you want to make it, you might as well finish it now. You already started it, so why don't you go ahead?

(RT 4935-4937.)

Thus, notwithstanding defense counsel's objection that this motion was not timely, and the court's statement that petitioner should not be raising the motion, the court nonetheless not only permitted petitioner to raise the motion himself, but also ruled on it conclusively. (RT 4937-4940.)

2. At the close of petitioner's discussion on the motion for acquittal, his counsel again stated his belief that the appropriate time to make the motion was after the prosecution rested. (RT 4940.) The court nonetheless expressly ruled on petitioner's motion, stating, "Motion denied." (RT 4940.) It does not appear that this motion was made again at the close of the prosecution's case. However, the court had before it a sufficient record to find that there was insufficient evidence premeditation and deliberation to sustain a conviction for first degree murder.

3. In determining the issue of whether there was sufficient evidence of premeditation, the court must determine whether there was evidence of (1) petitioner's planning activity prior to the homicide; (2) his motive to kill as gleaned from his prior relationship or conduct with the victim; and (3) the manner of killing, from which may be inferred that petitioner had a preconceived design to kill. This Court "sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of: (1) or evidence of (2) in conjunction with either (1) or (3)." (*People v. Nicolaus* (1991) 54 Cal.3d 551, 576 *quoting People v. Anderson* (1978) 70 Cal.2d 15, 27.)

4. The evidence in this case is insufficient to support petitioner's conviction for first degree murder based upon premeditation and deliberation. All the evidence points to an impulsive act with no advanced planning by the petitioner. Petitioner was in a highly agitated, delusional, and paranoid state, obsessed with the loss of his puppy. (RT 4226, 4233, 4342, 4538, 4539.) Petitioner, who witnesses testified would do bizarre things (RT 4286), appeared under the influence of drugs and alcohol. (RT 4187.)

5. Nor could it be inferred from petitioner's past relationship with the Mabreys that he had any motive to kill. His past relationship with Barbara Mabrey was poor and his relationship with Dellane Mabrey was troubled. However, the reported motive for killings in this case--the lost puppy--obsessed with the loss of his puppy, does not support an inference that there was any advanced planning or deliberation prior to the killing. Petitioner's behavior was so irrational as to preclude any finding of deliberation. Further, it cannot be inferred from the manner of the killing that the murders were premeditated. There was no evidence of a preconceived plan; instead the evidence all pointed to impulsive acts committed without any prior consideration or weighing of alternatives.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

laim 56: Instructional Error--Improvised, Egregious Murder Instructions

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the trial court issued numerous improvised instructions. These instructions, individually and collectively, failed to distinguish adequately between second and first degree murder and manslaughter; specifically misguided the jury on deliberation, thereby prejudicially misleading the jury on the distinction between first and second degree murder; erroneously prevented the jury from returning a verdict of manslaughter if it found petitioner was intoxicated; failed to inform the jury that intoxication could negate premeditation and deliberation; and failed to inform the jury that evidence that may not satisfy the requirements of manslaughter may nonetheless be considered on the question of first or second degree murder. These errors prejudicially violated petitioner's protection against self-incrimination; petitioner's right to a fair trial; the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; petitioner's right to be tried by an impartial jury; the right to fair and reliable capital proceedings and sentencing; the rights guaranteed by the confrontation clause; right to due process in jury instructions in a criminal proceeding; and the right to the due process requirement allocating the burden to the prosecution of proof beyond a reasonable doubt.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *In*

re Murchison (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625

(reversible error in capital case not to instruct on lesser included offense); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Jury must decide facts relevant to sentencing factors.)

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. The trial court modified the CALJIC 8.11 definition of express malice by instructing that "Malice is express where there is manifested an intention to unlawfully kill a human being" and repeated"In other words, express malice is where the activity shows an intent to kill." (RT 5589.) Further, the court explained, "Again, express malice is manifested an intention to unlawfully kill. The act, itself, the activity, itself, shows the intent to kill." (RT 5589.)

2. This instruction wholly fails to distinguish between second degree murder and manslaughter. The judge's improvisations focus on the lethal act without sufficient recognition of the accompanying subjective mental state. An "intent to kill" is not the same as an "intention unlawfully to kill." (*People v. Johnson* (1989) 210 Cal.App.3d 870; *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 823.) Defining express malice merely as an intent to kill, which is also an element of manslaughter, undermines the difference between the two crimes. The evidence in this case of petitioner's intoxication at the time of the offense exacerbated this error.

3. Particularly, in the context of this case this instruction created an impermissible presumption of malice and unconstitutionally attenuated the state's burden of proof.

4. These are very similar to the errors committed by Judge Golde in the cases of *People v. Lee* (1979) 92 Cal..App.3d 707 and *People v. Kelly* (1980) 113 Cal.App.3d 1005. In *Lee,* the Court of Appeal held that it was compelled to reverse the conviction because of Judge Golde's "erroneous extemporaneous comment and informal jury instructions." *People v. Lee, supra*, 92 Cal. App. 3d.at 710. Judge Golde was reversed for almost identical error in *People v. Kelly ,supra*, 113 Cal.App.3d 1005.

5. Despite these reversals, Judge Golde committed substantially the same error in the present case. These errors deny petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

6. The trial court's erroneous instruction on deliberation further blurred the distinction between first and second degree murder, and specifically misled the jury. In defining deliberation, the court elaborated as follows:

> In other words, Ladies and Gentlemen, a deliberate – deliberation means that you think about it. It's a reasoning process. It can either be good or bad reasoning. You think of what you're going to do before you do it instead of acting upon a sudden impulse or something else which precludes the idea of thought.

(RT 5591.)

7. This elaboration on deliberation misled the jury in two respects. First, it blurred the distinction between first and second degree murder by making first degree virtually tantamount to pre-formed intent to kill, which is only second degree murder. Additionally, these instructions were misleading in this case where there was evidence that petitioner's "bad reasoning" was

the product of alcohol, cocaine, heroin or some other mental condition. Accordingly, this should have been considered as a defense to the charge of deliberate murder, not evidence supportive of that charge. Premeditation and deliberation require substantially more reflection and comprehension of the character of the act than the mere amount of thought required to form the intent to kill. (*People v. Van Ronk* (1985) 171 Cal.App.3d 823; *In re Thomas C.* (1986) 183 Cal.App.3d 786, 798 ("the use of the term deliberate intention and malice aforethought is not synonymous with the term deliberate as used in defining first degree murder.").)

8. The constitutional violations emanating from this error were particularly egregious in this case because there was significant evidence that petitioner's "bad reasoning" was a product of severe mental impairments and/or significant intoxication/substance effects. The instruction based on CALJIC 4.21 did not vitiate the error because, inter alia, the jury was never instructed on which particular mental state it could consider evidence, and was not specifically instructed that it could consider this evidence to determine whether petitioner "deliberated." Accordingly, the trial court's erroneous instruction not only permitted, but also directed, the jury to consider such evidence as supporting the charge of deliberate murder.

9. The jury was understandably confused and specifically requested the following clarifications during its deliberations:

JUROR NO. 9, MR. PARKER: I wonder if you could explain to us again in the context of the difference between first and second degree the concept of deliberation, deliberate?

(RT 5642.)

The trial court's clarifications compounded the constitutional errors already committed in the issuance of the first instructions. The court gave an

extemporaneous instruction on what it perceived as the difference between first and second degree murder. (RT 5642-5645.) The court states as follows:

> When you deliberate, what you do, you think what you're going to do before you do it. You don't act on impulse. You act on reason.
>
> Now, your reasoning may be bad. Don't have to have the reasoning of a rocket scholar, but you have to reason rather than act by impulse.
>
> It's a process – it's a thought process rather than an impulsive act. It can be a good choice. It can be a bad choice.

(RT 5645.)

These instructions are wholly inadequate as a matter of law.

10. The trial court gave a modified version of CALJIC 4.21, directing the jury to consider intoxication on the question of whether the petitioner actually formed the necessary mental state which was an element of the crime. (RT 5598.) After admonishing the jury that no act committed by a person while in state of voluntary intoxication by either drugs or alcohol is less criminal by reason of his having been in such condition, the court directed the jury in mandatory language with the extemporaneous instruction: "You can't go out and get drunk or shoot up with drugs and say I'm not responsible for the crime..." (*Ibid.*)

11. This mandatory directive relieved the prosecution of the burden of proving the mental state element of the offense beyond a reasonable doubt, and further misdirected the jury on the elements of the offense. "Responsible is not an element of any of the crimes of which petitioner was charged and ultimately convicted. Nor does the word "responsible" equate in any way to

having or not having the requisite mental state or committing or not committing the acts which are necessary elements of the offense. In view of this highly prejudicial error, the court should have explained fully the mental elements of murder in its instructions, and how intoxication or substance ingestion were relevant in determining whether petition actually formed express malice and whether he premeditated, a necessary element of first degree murder.

12. The court gave no further explanation whatsoever of its statement that "You can't go out and get drunk or shoot up with drugs and say I'm not responsible for the crime." Instead, the court instructed:

> In the crime of murder, however, a necessary element is the existence in the mind of the defendant of the specific mental state which we just talked about it.
>
> If the evidence shows the defendant was intoxicated at the time of the offense, you may consider his state of intoxication, if any, in determining if the defendant had such required mental states.
>
> If from all the evidence you have a reasonable doubt whether the defendant formed such mental states, you must give to the defendant the benefit of that doubt and find that he did not have such mental states.

(RT 5598.)

This did nothing to remedy the error in the mandatory conclusive presumption instruction that "You can't go out and get drunk or shoot up with drugs and say I'm not responsible for the crime."

13. Further, these instructions on intoxication impermissibly limited consideration of the evidence to the issue of malice. The court stated that voluntary intoxication was generally not a defense, but that murder required

in the mind of the petitioner "the specific mental state which we just talked about it [sic]." (*Ibid.*) Under Penal Code section 22, subdivision (b), however, evidence of intoxication is admissible "on the issue whether or not the defendant actually formed a required specific intent, premeditation, deliberation or malice aforethought."

14. These instructions not only denied petitioner's right to due process of law, a fair trial, and reliability in his capital proceedings, but also denied petitioner's right to due process based upon substantive state rights. Petitioner was prejudiced by these unconstitutional errors and was found guilty on all counts. (RT 5648-5656.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 57: Instructional Error--Judicial Bias: Instruction on Petitioner's Conduct

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 15, 16 and 17 of the California Constitution because the trial court, in its formal instructions, directed the jury to conclusively believe aspects of petitioner's conduct during trial and further instructed the jury that such conduct was "upsetting" to the court. These instructions manifested bias and antagonism of the judge towards the petitioner, unconstitutionally misdirected the jury, introduced a crucial

element in the instructions not introduced as evidence at trial, and directed the jury to conclude a highly impartial and prejudicial finding on petitioner's mental state. These errors violated petitioner's protection against self-incrimination; petitioner's right to a fair trial; petitioner's right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; petitioner's right to be tried by an impartial jury; petitioner's right to fair and reliable capital proceedings and sentence; and petitioner's rights as guaranteed by the confrontation clause and the due process requirement allocating the burden to the prosecution of proof beyond a reasonable doubt.

B. The following United States Supreme Court decisions, *inter alia,* in effect at the time the error occurred, are presented in support of this claim: *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates both actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings; *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Coy v. Iowa* (1988) 487 U.S. 1012; *Pointer v. Texas* (1965) 380 U.S. 400 (right to confront adverse evidence) *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis

of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (jury, judge, must make determination of sentencing factors); *Duncan v. Louisiana* (1968) 391 U.S. 145 (jury must be instructed to find facts beyond reasonable doubt); *Nebraska Press Association v. Stewart* (1976) 427 U.S. 539 (judges have a constitutional responsibility of protecting right to an impartial jury and assuring fair trial).

C. The following facts, among others, are presented in support of this claim after adequate funding, discovery, investigation, and an evidentiary hearing:

1. At the conclusion of the trial and closing arguments in the guilt phase of petitioner's case, the court stated, "All right, Ladies and Gentlemen, I'm now going to formally instruct you." (RT 5570) . . . "Okay. It now becomes my duty to state to you the law which applies in this case; . . . You should receive the law as I state it to be . . . " (RT 5570-5571.)

2. The court then instructed the jury regarding petitioner's absence from the courtroom, further instructed them about defendant's mental state during those absences, and the court's personal belief as to defendant's mental state during those absences. Specifically, the court instructed as follows:

> Now, ladies and Gentlemen, we have seen Mr. Welch absent himself from the court. I want you to understand that we wanted him in court. We set down certain rules. *He refused to obey them*, and I know that is upsetting to you. *It's, in candor, upsetting to me.*
>
> But, nonetheless, you cannot take that into consideration, for in determining the guilt or innocence of the defendant you are to be governed solely by the evidence presented upon the trial and the law as stated to you by me.

(RT 5572, emphasis added.)

Thus, the court underscored that the jury was to be governed by the law stated to them by the judge. The law stated by the judge was that petitioner "refused" to obey rules, and that petitioner's conduct was "upsetting" to the court.

3. There was no testimony during the trial that petitioner was removed from the court because he refused to obey rules. There were no prosecution witnesses who testified that petitioner's absence from the courtroom occurred because of refusal or any other reason.

4. Because there was no evidence introduced or admitted at trial that petitioner was removed from the courtroom because he "refused to obey" certain rules, there was no opportunity to test the reliability of such conclusive mental state evidence. This instruction by the judge came at the conclusion of the trial, after all witnesses for both the prosecution and defense had testified, and after any opportunity by the defense to correct this

statement through witnesses, introduction of any other evidence, or through closing argument in the guilt phase.

5. A core issue in petitioner's case in chief was his mental state. (RT 5545-5550.) His lack of ability to make coherent, conscientious decisions and choices was the cornerstone theory of his defense as presented through defense witnesses. (RT 5334-5370, 5383-5440 and directly through the arguments of defense counsel to the jury. The gravamen of the prosecutions' case in chief, was that petitioner did have the requisite mental state to make conscientious choices and decisions. (RT 4402-4403, 4555, 4559, 5519-5521, 5559-5562, 5564-5565.) By instructing the jury that petitioner "refused to obey" rules, the judge violated many of petitioner's constitutional rights.

6. By so instructing the jury the judge violated petitioner's right to confront the witnesses against him in a capital trial, as guaranteed by the Sixth and Eighth Amendments to the United States Constitution. There was no opportunity to cross-examine the court to explain, refute or deny this conclusive instruction regarding petitioner's refusal "to obey" certain rules.

7. This error is exacerbated by the court's continuing instruction that the jury was to be "governed solely by the evidence presented upon the trial *and the law as stated to you by me.* (RT 5572, emphasis added.) By issuing these instructions the judge assumed the role of a principal and highly damaging witness for the prosecution, wholly supporting the prosecution's theory of the case and similarly undercutting petitioner' theory without permitting petitioner any opportunity to confront, deny or test the reliability of these egregious, conclusive directives. *Pointer; Coy supra,* 380 U.S. 400; *Coy v. Iowa*, supra, 487 U.S. 1012..

8. These conclusive directives further violated the constitutional guarantee of due process of law. The court issued a conclusive instruction regarding the core issue of petitioner's mental state; i.e., that he "refused to obey" "certain rules." Due process mandates that the prosecution prove every element of the offense beyond a reasonable doubt. Any directive or instruction which litigates this burden is a constitutional violation. The "law" as instructed by the judge to the jury included this mandatory conclusive presumption on petitioner's mental state, regarding his refusal to obey rules. There was no option instructed to the jury regarding any potential evidence which could rebut this conclusive mandatory presumption by the judge that petitioner did refuse to obey certain unspecified rules. Moreover, the judge instructed that this refusal was personally "upsetting" to the judge, and that such refusal and its consequences to the judge were "the law." (RT 5572.) Such burden shifting is wholly infirm as a matter of longstanding United States Supreme Court law. (See e.g. In re *Winship, supra* 397 U.S. 358; *Sandstrom v. Montana, supra,* 442 U.S. 510; *Carella v. Californnia, supra* 491 U.S. 263.

9. Additionally, The judge's sua sponte instructions, in violation of governing authority, manifested his express bias against petitioner. This partiality not only can be inferred from the judge's issuance of these egregious sua sponte instructions, but also is expressly evidenced in the judge's own comment as to his subjective view of petitioner's conduct. Without having evidence introduced on petitioner's conduct, the Court decided on its own to instruct the jury about what it perceived as petitioner's deliberate rule-breaking. As set forth *supra,* this was highly prejudicial to petitioner's case. Further, the judge instructed the jury that such conduct was

"upsetting" to the judge, and this subjective prejudicial point of view was set forth in that portion of the trial wherein the judge instructed the jury as to "the law." The Constitution requires a fair trial and a fair tribunal, and that "justice . . . satisfy the appearance of justice." (*In re Murchison* (1955) 349 U.S. 133.) The judge's unsolicited instructions violated this cornerstone, constitutional mandate. (*People v. McNeer* (1933) 8 Cal.App.2d 676 (judge's disparaging comments on defendant required reversal of murder conviction, and such reversal not saved by judge telling jury to disregard his remarks.)

10. Capital proceedings must be conducted fairly, non-capriciously and reliably. The heightened guarantees for reliable testing of evidence against one facing sentence of death, as well as reliability and fairness in the proceedings, are compelled by the Eighth and Fourteenth Amendments to the United States Constitution. *Gardner v. Florida, supra*, 430 U.S. 439; *Godfrey v. Georgia, supra*, 446 U.S. 420. The judge's biased, sua sponte conclusive presumption, which petitioner had no opportunity to explain, rebut or deny, was error pursuant to these guiding precepts.

11. These errors were unconstitutionally prejudicial.

D. Each error in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

laim 58: Instructional Error–Constitutional Error in Instructing Jury That They Must Accept Prior Felonies As Conclusively Proved

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the sentencing court instructed that the jury must accept three of petitioner's prior convictions as having been "conclusively proved." This specific directive to accept convictions as "conclusively proved" negated the constitutional requirements that prior crimes must be proved beyond a reasonable doubt, and that the jury must be able to make this determination. Principles of due process, the right to a fair trial, and the requirement of heightened reliability in capital proceedings require that the jury, not the judge, make the determination of proof beyond a reasonable doubt. The instruction not only permitted, but also unconstitutionally directed, the jury to attribute sufficiency and weight to the testimony of prosecution witnesses. Morever, the directive that the prior convictions had been "conclusively proved" violated the Eighth Amendment guarantee of the petitioner's right to proffer, and particularly the jury's right to receive and consider, all relevant mitigating evidence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and any circumstances

of offense proffered); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adverse evidence; *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama*

(1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (sentencing factors must be determined by jury).

C. The following facts, among others, are presented in support of this claim, together with additional evidence to be developed after adequate funding, discovery, investigation, and an evidentiary hearing:

1. The court instructed the jury that, in determining the penalty, they were to take into account the presence or absence of any prior felony convictions. (RT 6217.) The court further instructed that, in fact, the defendant had three previous felony convictions: assault with force likely to produce great bodily injury on Rosemary Dixon; battery of peace officer Harry Lord; and receiving stolen property. (RT 6217-6218.) The court further directed that the jury accept these convictions as having been "conclusively proved." (RT 6218.)

2. The instruction negated the requirement that a factor in aggravation be proved beyond a reasonable doubt, and that the jury, not the judge, must make such a determination. The trial court took this crucial decision away from the jurors, ruling that the prior convictions had been conclusively proved, and commanding them to accept this conclusion. In so doing, the court failed to distinguish between the fact of these convictions and the underlying circumstances to which Dixon and Lord testified. The jurors were not instructed they were free to disbelieve these officers as to the underlying fact of the assaults. Significantly, the jurors were not instructed

that they should or even could consider any defenses, including mental state defenses. 3. Petitioner was prejudiced by the testimony of witnesses Dixon and Lord. The error was prejudicial because it effectively directed the jurors to accept as proved three separate aggravating circumstances. Moreover, because the judge instructed that these convictions were "conclusively proved," petitioner had no opportunity to rebut, explain, or deny the underlying predicates and defenses, including substantial mitigation evidence. *(Skipper v. South Carolina, supra,* 476 U.S. 1*; Gardner v. Florida, supra,* 430 U.S. 439.

4. These constitutional errors were compounded because the jury was never told why the convictions were conclusively proved, when they were conclusively proved, or by what evidence they were conclusively proved. Rather, the jurors were left to surmise that the judge was making a credibility finding of the witness's testimony, and that the judge was making the finding of proof beyond a reasonable doubt of every element in the offense. This instruction denied petitioner a fair penalty trial, a reliable penalty phase trial, non-capricious imposition of the sentence of death, and due process of law.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 59: Instructional Error--Erroneously Directing Jurors to Agree Unanimously on a Sentence Less Than Death

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution, because the court specifically instructed the jury that all twelve must agree as to which penalty to fix in this case. This occurred during their penalty phase decision on whether to impose life without parole or death. This erroneous instruction deprived petitioner of his right to fair and reliable capital proceedings and sentencing; due process of law; an impartial jury; the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; the right to confrontation; and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Mills v. Maryland* (1988) 486 U.S. 367 (death penalty invalid where jury may have believed that findings of mitigating circumstances must be unanimous); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and any circumstances of offense proffered); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial

has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-examination regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be precluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions);

and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Jurors must make determination of sentencing factors.)

C. The following facts, among others, are presented in support of this claim, after adequate funding, discovery, investigation, and an evidentiary hearing:

1. The court issued instructions generally following CALJIC 8.85 regarding the jury's mandated duty to determine whether petitioner should be sentenced to death or sentenced to life without possibility of parole. (RT 6218-6222.) The court specifically set forth a unanimity requirement, requiring all 12 jurors to agree, and so specified with respect to aggravating factors. (RT 6220.) The court then specifically stated: "*And obviously all twelve of you must agree as to which penalty you fix in the case.*" (*Id.* at 6220, emphasis added.)

2. The court never informed the jury that it did not need to find mitigating factors unanimously, that if one juror believed that life without parole was the appropriate sentence, life without parole would be imposed. (*Mills v. Maryland, supra*, 486 U.S. 367 (death penalty invalid where jury may have believed that findings of mitigating circumstances must be unanimous); *McCoy v. North Carolina, supra*, 494 U.S. at p., 444 (invalidating statute that required jury to unanimously find existence of a mitigating factor before giving it effect); *Frey v. Flucomer* (3rd Cir. 1997) 132 F.3d 916, 922-925 (sentence vacated because of possibility jury misled into believing unanimity required a mitigating circumstance); *Kubat v. Thieret* (7th Cir. 1989) 867 F.2d 351, 373 (sentence vacated because of possibility that

reasonable jury could interpret instruction to require unanimity finding on sufficiency of mitigating circumstances).)

3. Here, the error was far more egregious than in the cases cited above. The jury was not inadvertently misled into believing unanimity on mitigating circumstances was required. Rather, it was expressly and explicitly told that all 12 jurors must agree as to the penalty. There is a substantial probability that a reasonable juror would have followed these instructions. By its terms, the court's instructions meant that all 12 jurors must agree to life without parole.

4. There is no requirement in the California Constitution or death penalty scheme that all 12 jurors must find for life without parole prior to affixing the penalty in the sentencing phase of a capital case. Such a requirement would wholly violate the Constitution of the United States. (*Mills v. Maryland, supra*, 486 U.S. 367; *McCoy v. North Carolina, supra*, 494 U.S. at p. 443.) Further, the United States Supreme Court has made it clear that it is reversible error to have any type of unanimity finding imposed on either mitigating circumstances or the sentence of life without possibility of parole. The instruction given in the instant case was not simply an instruction requiring a unanimous finding of aggravating factors outweighing mitigating factors. Rather, it was an express directive that all 12 jurors must agree on the penalty. There were only two penalties at issue: life without parole or death. This highly improper instruction denied petitioner's rights to a reliable sentencing determination guaranteed by the Eighth Amendment, due process of law, a fair trial, a fair tribunal and a fair and impartial judge.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 60: Instructional Error--Constitutionally Inaccurate and Confusing Special Circumstance Instruction

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution because the trial court, in its formal instruction, explained that in determining the special circumstance beyond a reasonable doubt, it was the jury's duty to adopt an interpretation of circumstantial evidence "which points to untruth, reject that pointing to truth." This constitutionally infirm directive was set forth in confusing and contradicting special circumstance instructions. These errors violated petitioner's rights to a fair trial; the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; petitioner's right to be tried by an impartial jury; the right to fair and reliable capital proceedings and sentencing; the rights guaranteed by the confrontation clause; right to due process in jury instructions in a criminal proceeding; and the due process requirement allocating the burden of proof beyond a reasonable doubt to the prosecution

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality

and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-examination regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Jury must decide facts relevant to sentencing factors).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. The trial court instructed the jury to consider "circumstantial evidence" to support a finding of the special circumstance beyond a reasonable doubt. However, its instructions to the jury, expressly misdirected the jury, requiring them to adopt an interpretation which pointed to falsity, and reject that which pointed to veracity. Specifically, the judge instructed:

> And, again, as you heard before, if the circumstantial evidence is susceptible of two reasonable interpretations, one pointing to the truth of the special circumstance and the other to the untruth, *it is your duty to adopt that which points to the untruth* [*sic*], *reject that pointing to the truth* [*sic*].

(RT 5607, emphasis added.)

2. These legally infirm instructions were provided in the framework of special circumstance instructions which in themselves were confusing:

> And, again, you are not permitted to find the special circumstance, the same as any other offense charged in this case, to be true based upon circumstantial evidence unless –
>
> In other words, let me back up. I told you you take into account circumstantial evidence as to intent. And, again, as to the special circumstance, you cannot find the special circumstance to be true based upon circumstantial evidence again unless the proved circumstances are not only consistent with the theory that the special circumstance is true but cannot be reconciled with any other rational conclusion.

(RT 5606.)

3. The trial court never corrected these errors. Instead the court actually compounded the confusion in the instructions with its ostensible

clarification of the jury's duty duties in evaluating evidence of special circumstance:

> And, again the same, you do that the same way you do anything else. You will look at the intent with which an act is done. That's shown by a statement of intent made by the defendant, by the circumstances attending the act, the manner in which it is done, and the means used.
>
> *And not to repeat for any emphasis but just to underscore to you that basically the special circumstance is very true – very easy to understand*, you start off if you find the defendant's guilty of at least one murder and it's murder of the first degree and if you find the defendant's guilty of any other murder, be it either first or second degree, then the special circumstance is true.

(RT 5608, emphasis added.)

4. By so instructing, the judge underscored his personal belief that the special circumstance was "very true" and "very easy to understand." These directives, standing alone, and in addition to the remaining instructions, including but not limited to the incorrect instruction on circumstantial evidence, were manifestly prejudicial to petitioner. Members of the jury are expected to follow a court's instructions. In this instance the court's instructions directed them to search for "untruth" and to conclusively presume that "the special circumstance is very true."

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 61: Instructional Error--Erroneous Directive on the Meaning of "Aggravating" and "Mitigating" Evidence

A. Petitioner's sentence of death is a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution, because the court failed to give any definition to an aggravating factor. However, during the voir dire the judge instructed every juror as to what an aggravating factor was. These earlier instructions to the jury, defining and explaining aggravating factors as "bad" and mitigating factors as "good" evidence, in combination with the failure to later correctly instruct and guide the jury, violated petitioner's right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; an impartial jury; a fair trial; the right to fair and reliable capital proceedings and sentence; and due process of law.

B. The following United States Supreme Court decisions, *inter alia*, in effect at the time the error occurred, are presented in support of this claim: *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and any circumstances of offense proffered); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22

(constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); and including *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466.

C. The following facts, among others to be presented after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. In its concluding instructions in the penalty phase, the court instructed the jury as follows:

> Now, again, Ladies and Gentlemen, in determining which penalty you shall impose upon the defendant, you shall consider, you shall take into account and be guided by the following factors in aggravation and mitigation, if applicable:
>
> A mitigation factors is, one, whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effect of intoxication.
>
> In determining penalty, you may consider, take into account, and be guided by the following factors in aggravation, mitigation:
>
> Any other circumstance which extenuates the gravity of the crime even though it's not a legal excuse for the crime.
>
> In other words, in determining penalty, as mitigation you may consider, take into account any other circumstance which extenuates the gravity of the crime even though it may not be and is not a legal excuse for the crime.
>
> You further may consider any other aspect of the defendant's character, his background, his history or record that he offers as a basis of a sentence less than death.

> Ladies and Gentlemen, you may consider sympathy, you may consider compassion for the defendant
>
> It is now your duty to determine which of the two penalties, death or confinement in the state penitentiary for life without the possibility of parole, shall be imposed upon the defendant.
>
> After having heard and considered all the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which I have just finished instructing.

(RT 6218-6220.)

2. However, during voir dire the judge repeatedly issued moral, personal definitions of a aggravating factor. While his subjective instructions of "aggravating" and "mitigating" varied, each essentially contained language to the effect that aggravation was "bad" and mitigation was "good". (RT 1183; 1422; 1440; 1475; 1817; 1869; 1973; 2006; 2271; 2409; 2607; 2628; 2653; 2733; 2918; 2979; 3176; 3240; 3357; 3375; 3420; 3470; 3485; 3518; 3603; 3633.) The court instucted:

> Now, what kind of evidence do you hear in the second trial?
>
> There may be evidence of what we call aggravation; for example, bad things about the defendant, previous violence in his background. That points toward the imposition of death.
>
> There will be evidence of mitigation, good things in his background, evidence of his mental condition. That points to life without possibility of parole.

(RT 2919.)

3. There is nothing in the California Penal statute, the California Death Penalty scheme, the mandatory CALJICs, the California Constitution or the Constitution of the United States which permits a judge in a capital case to so direct the jury. His definitions of aggravation as "bad" and mitigation as "good" specifically and expressly permitted the jury to consider mitigating evidence as aggravating evidence, and further precluded them from considering substantial evidence in mitigation. For example "previous violence" in the background of an individual could be deemed "bad", but is often considered a profound and weighty factor in mitigation. *Skipper v. South Carolina, supra* 476 U.S. 1.

4. Neither any provision of the Constitution of the United States, nor the Constitution of the State of California, authorizes or permits a judge in a capital proceeding to conjecture that some evidence is "bad" and other evidence is "good," in the penalty phase of a capital case. The court's failure to specifically define aggravating or mitigating in his penalty phase instructions in conjunction with the subjective and erroneous definitions provided to the jury during voir dire, violated petitioner's rights to an impartial jury, fair trial; the right to an impartial judge who was unbiased and conducted a proceeding not only with fairness, but also an appearance of fairness, reliable capital sentencing determination, confrontation of witnesses and due process of law. .

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 62: Instructional/CALJIC Error--CALJIC 8.85 Misled the Jury to Double Count the Circumstances of the Crime in Violation of the Prohibition Against Double Jeopardy

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7, 15, 16 and 17 of the California Constitution because the jury was instructed that it could consider, during the penalty phase, circumstances of the crime and the existence of special circumstances in such a manner that double counting would unconstitutionally result. This instruction violated petitioner's rights to a reliable sentencing determination, one which demands that the jury's discretion be guided by clear and objective standards; due process of law; a fair trial; the right to a trial judge who is unbiased and conducts the proceedings with not only fairness, but an appearance of fairness; confrontation rights; defendant's right not to be subjected to double jeopardy for the same offense; and the right to a fair and reliable capital proceeding and sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Mills v. Maryland* (1988) 486 U.S. 367 (death penalty invalid where jury may have believed that findings of mitigating circumstances must be unanimous); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and any circumstances of offense proffered); *In re Murchison* (1955) 349 U.S. 133 (Constitution

mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-examination regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government to prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be precluded from giving effect to finding

of lesser offense); and including *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Ohio v. Johnson* (1994) 467 U.S. 493, 499 (double jeopardy bar); *United States v. Blockburger* (1932) 284 U.S. 299, 304 (double jeopardy bar); *Apprendi v. New Jersey* (2000) 530 U.S. 466 (jury must determine all sentencing factors).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim,

1. In accordance with CALJIC 8.85 the jury was instructed that it could consider, during the penalty phase, "[t]he circumstances of the crime of which the defendant was convicted in the proceeding and the existence of any special circumstances found to be true." (RT 6209-6210.) This instruction is based on language found in Penal Code Section 190.3(a).

2. The California Supreme Court has recognized that instructions based on language of Penal Code section 190.3 presents a danger that the jury could double count the aggravating evidence:

> Of course, the robbery and the burglary may not each be weighed in the penalty determination more than once for exactly the same purpose. The liberal language of subdivision (a) presents a theoretical problem in this respect, since it instructs the penalty jury to consider the "circumstances" of the capital crime and any attendant "statutory circumstances." Since the latter are a subset of the former, the jury given no clarifying instructions might conceivably double count any "circumstances" which were also "special circumstances". On defendant's request, the trial court should admonish the jury not to do so.

(*People v. Melton* (1988) 44 Cal.3d 713, 768; see *People v. Bean,* 46 Cal.3d 919, 955 (1988) ("multiple felony-murder special circumstances might artificially inflate the weight to be given the underlying offenses as aggravating factors if considered more than once for exactly the same purpose.")

3. Jurors are expected to follow the instructions given. The jury, accordingly, understood subdivision (a) and the instruction given to mean exactly what was said, and to accord the words their literal meaning. The jury was invited to weigh both six murders *and* the multiple murder special circumstances. The failure of the court to avoid this double counting violated due process of law and the Eighth Amendment guarantee of reliable penalty determination.

4. These instructional errors precluded a reliable sentencing determination, a finding of proof beyond a reasonable doubt and due process of law, the right to a fair trial, and the right to an impartial tribunal and judge. The double jeopardy clause of the Fifth Amendment to the United States Constitution and article I, section 15 and 24 of the California Constitution protect against double jeopardy. Prohibition against double jeopardy clearly applies to impermissibly enhanced sentences. *Ohio v. Johnson* (1994) 467 U.S. 493, 499. Double jeopardy will further prescribe when the acts in question require proof of the same elements. *United States v. Blockburger* (1932) 284 U.S. 299, 304. Here, this double counting constituted double jeopardy.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually

and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 63: Instructional Error--Failure to Instruct Jury of Prosecution's Burden to Prove Other Criminal Activity Beyond a Reasonable Doubt

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the trial court failed to instruct the jury that the prosecution bears the burden of proving other criminal activity beyond a reasonable doubt. This permitted jurors to find the other criminal activity where the prosecution did not meet this burden, and denied petitioner his guaranteed rights to a fair trial; impartial jury; the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; due process of law in the sentencing phase of a capital case; due process of law for violation of a state-created right; and the right to fair and reliable capital proceedings and sentence.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Mills v. Maryland* (1988) 486 U.S. 367 (death penalty invalid where jury may have believed that findings of mitigating circumstances must be unanimous); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and any circumstances

of offense proffered); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-exam regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama*

(1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); and including *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Apprendi v. New Jersey* (2000) 530 U.S. 466.

C. The following facts, among others, are presented in support of this claim, after adequate funding, discovery, investigation, and an evidentiary hearing:

1. During the penalty phase, and in accordance with CALJIC 8.87 the trial judge instructed the jury as follows:

> Now, evidence has been introduced for the purpose of showing that the defendant has committed the following criminal activity which involved the express or implied use of force or violence or the threat of force or violence. Before you may consider any such criminal acts or activity as an aggravating factor in this case, you must be satisfied beyond a reasonable doubt that defendant did, in fact, commit such criminal activity or acts.

(RT 6210.)

2. The penalty phase instructions included CALJIC 2.90, defining reasonable doubt. Although CALJIC 2.90 was given during the guilt and penalty phases, the penalty phase instructions did not direct who had the burden of proof, or whether any or all of the instructions given to the jury at the guilt phase applied. Rather, the court advised the jury that:

> Ladies and Gentlemen, it now again becomes my opportunity, my obligation to instruct you as to the law. As I did in the first case, I always start with some preliminary instructions as to how you review the evidence. *I'm not going to repeat them all to you. I know you still remember them, but*

I'm going to repeat just a couple which apply more peculiarly to the testimony here.

(RT 6203, 6204, emphasis added.)

3. It cannot be disputed that "in the penalty trial the same safeguards should be accorded a defendant as those which protect him in the trial in which guilt is established." (*People v. Terry* (1964) 61 Cal.2d 137, 149; *Specht v. Patterson* (1967) 386 U.S. 605 (due process protections available at sentencing hearing to determine new facts).) Petitioner further incorporates Claim 63.

4. In the present case, the jury was given a constitutionally defective instruction on reasonable doubt. An integral part of any instruction concerning the standard of proof is information concerning the burden of proof. Cal. Evidence Code section 502. However, CALJIC 8.87 as written and as instructed only addresses standard of proof and says nothing about the government's obligation to place before the jury evidence sufficient to satisfy its burden of proof.

5. The mandate that other crimes be proved beyond a reasonable doubt during the penalty phase necessarily mirrors its guilt phase counterpart, with the exception that the standard of proof is elevated in the light of the gravity of the decision. In *People v. Poke* (1965) 63 Cal.3d 443 this Court stated:

> Generally, the standard of competency of the evidence at the trial on the issue of penalty is the same as the standard required at the trial on the issue of guilt. Since evidence of other crimes, however, may have a particularly damaging impact on the jury's determination whether the defendant should be executed, we recognize . . . that there should be an exception to the normal standard of proof at the trial on the issue of penalty.

(*Ibid.* at pp. 450-451 (citations omitted).)

6. Although the standard of proof may be different, the burden of proof remains with the prosecution. CALJIC 8.87 is fatally defective and the instructions similarly infirm, by failure to inform the jury that the prosecution must prove the crimes beyond a reasonable doubt. A bedrock principle consistently underscored by the United States Supreme Court is that, integral to any reasonable doubt instruction, is the requirement that the government bear the burden of proof. The due process clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. at 364. The state may not give instructions that result in "dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams* (1976) 425 U.S. 501, 503. Likewise, having determined that proof beyond a reasonable doubt is a proper standard for determining the existence of other crimes during the penalty phase, neither the state nor the court may dilute this requirement by failing to require or provide the complete instruction. The reasonable doubt standard is not phase-determinative, but rather, the "applicability of the reasonable doubt standard . . . has always been dependent on how a state defines the *offense* that is charged in any given case. (*Patterson v. New York* (1997) 432 U.S. 197, 211.)

7. Here, the reasonable doubt instruction and the commensurately requisite burden of proof was fatally undercut by the trial court's giving of CALJIC 8.87. All this instruction does is inform a juror that he or she must be satisfied beyond a reasonable doubt that the defendant did in fact commit

such criminal acts. However, due process demands that this satisfaction be based upon proof by the prosecution rather than some other factor.

8. The judge's improvised, *sua sponte* directive as to what the jury should and should not consider in the penalty phase exacerbated the reasonable doubt instruction error. The court informed the jury that it was not going to repeat all of the preliminary instructions as to how to review the evidence, but did direct the jury that "I'm going to repeat just a couple which apply more peculiarly to the testimony here." (RT 6204.) This directive specifically steered the jury away from equally considering all instructions in the guilt phase with the same weight as they were in the guilt phase. The jury instead was specifically told that there were certain instructions which "apply more peculiarly" to the penalty phase. These instructions did not include the prosecution's burden of proof beyond a reasonable doubt.

9. The error in issuing the defective reasonable doubt instruction deprived petitioner of his right to due process of law in the sentencing phase of this case, to have the prosecution prove other crimes beyond a reasonable doubt, and to have the jury determine that the prosecution has satisfied this burden. This error further undermines the reliability of the penalty phase decision in this capital case.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

laim 64: Instructional Error--Instruction Permitting Consideration of Criminal Acts Not Involving Violence as Aggravating Circumstances

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the court improperly modified CALJIC 8.87 to admit evidence of other criminal acts not involving violence to be used as aggravating circumstances. This violated petitioner's constitutional rights to due process in the capital sentencing proceeding; due process as a violation of a state created right; the right to fair and reliable capital proceedings and sentence; a fair trial; a fair tribunal; the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; and the right to confrontation.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Mills v. Maryland* (1988) 486 U.S. 367 (death penalty invalid where jury may have believed that findings of mitigating circumstances must be unanimous); *Eddings v. Oklahoma* (1982) 455 U.S. 104 (jury must consider all relevant mitigating evidence in a capital case); *Skipper v. South Carolina* (1986) 476 U.S. 1 (sentencer shall not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and any circumstances of offense proffered); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial

has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927) 273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-examination regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt; *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be precluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions);

and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (Jury must decide truth of sentencing factors.).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Throughout the penalty phase, the prosecution brought out significant incidents of unadjudicated criminal activity not involving violence, as well as information concerning various juvenile adjudications. As this court has recognized, it is improper to introduce evidence of non-statutory aggravation or juvenile adjudications. (*People v. Boyd* (1985) 38 Cal.3d 762; *People v. Burton* (1989) 48 Cal.3d 483.)

2. The instruction given by the court regarding consideration of criminal acts as aggravating circumstances was a version of CALJIC 8.87. This provided, in part:

> Now, evidence has been introduced for the purpose of showing the defendant has committed the following criminal activity which involved the express or implied use of force or violence or the threat of force or violence. Before you may consider any such criminal act as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts.
>
> (RT 6210.)

3. The court did not instruct the jury that it must not consider any evidence of other nonviolent criminal acts as an aggravating circumstance. The trial court's failure to add this language significantly altered the meaning of CALJIC 8.87. The instruction did not clearly prescribe the consideration

of "evidence of any other criminal acts as an aggravating circumstance" other than the violent acts discussed in the instructions. (RT 6210-6213.) Failing to instruct the jury that they could not consider petitioner's uncharged acts led the jury to erroneously believe that other criminal acts could be considered in determining which sentence was appropriate.

4. The trial court invited and encouraged the improper consideration of "other crimes" evidence as a factor in aggravation. The Eighth Amendment limits the use of these types of improper and unreliable aggravating factors in death decisions. (*Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-585.) Permitting the prosecutor to urge and the jury to consider, among other things, petitioner's nonviolent juvenile conduct, interjected "a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." (*Beck v. Alabama, supra,* 447 U.S. at p. 643.) The trial court's action undermined the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (opinion of Stewart, Powell, and Stevens, JJ.).) Additionally, because the petitioner had a protected liberty interest under the due process clause of the Fourteenth Amendment to have the jury consider of only statutory aggravation, his constitutional rights were further violated by the arbitrary deprivation of his state law rights. (*Hicks v. Oklahoma* (1979) 447 U.S. 343.)

5. Definitions of the criminal acts or activity proffered as aggravating factors in the penalty phase of petitioner's case also failed to include critical mental state elements which the jury was legally required to find beyond a reasonable doubt. Criminal activity, other than strict liability

offenses, must have a mens rea. This is an absolute and unequivocal constitutional requirement. (*In re Winship, supra*, 397 U.S. 358; *Sandstrom v. Montana, supra*, 442 U.S. 510.) Failure to set forth this mental state precludes a jury from finding this necessary element of a criminal act. (*Ibid.*)

6. An aggravating factor proffered and found in support of imposing death on petitioner was the "crime of rape" upon Juanell Turner. The court instructed the elements of rape as follows:

> Every person who engages in an act of sexual intercourse with a female person who is not the spouse of the perpetrator, accomplished against such person's will by means of force, violence, or fear of immediate and unlawful bodily injury, is guilty of the crime of rape.
>
> You need four elements to prove a rape.
>
> One, a male and female person engaged in an act of sexual intercourse.
>
> Two, they were not married to each other.
>
> Three, the act of intercourse was against the will of the female.
>
> And, four, such act was accomplished by means of force, violence, or fear of immediate and unlawful bodily injury to such person

(RT 6210-6211.)

7. The foregoing definition included no mental state. The elements of an act performed against a person's will defines the mental state of the victim, not the mental state of the perpetrator. The means by which the act is accomplished describes the actus reas, not the mens rea.

8. The jury therefore was not instructed or required to find any mental state to conclude that the crime of rape occurred, and therefore find this to be an aggravating factor beyond a reasonable doubt. This instruction unconstitutionally shifted the burden of proof to the petitioner and precluded a *mens rea* finding "beyond a reasonable doubt" of this crime.

9. Petitioner was also accused of having committed the crime of unlawful sodomy upon Juanell Turner. The court defined sodomy as follows:

> Every person who engages in an act of sodomy when the act is accomplished against the victim's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the alleged victim is guilty of the crime of unlawful sodomy.
>
> You need two elements to prove a sodomy.
>
> One, that a person engaged in an act of sodomy with another, that the sodomy occurred.
>
> Two, that the act, the sodomy, was accomplished against the alleged victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim.
>
> Now, an act of sodomy is sexual conduct which consists of any penetration, however slight, of the anus of one person by the penis of another. Again, proof of ejaculation is not required.
>
> And, further, the words "against the will" mean without the consent of the alleged victim.

(RT 6211-6212.)

10. There is no mens rea element in the definition of this crime. As in the crime of rape, the terms "force" or "violence" describe the actus reas, not the mens rea. The term "against the will" describes the mental state of the victim, not the mental state of the perpetrator.

11. Thus the jury was precluded from finding the requisite mens rea "beyond a reasonable doubt" as is constitutionally required. (*In re Winship, supra,* 397 U.S. 358 ; *Sandstrom v. Montana, supra,* 442 U.S. 510.)

12. The court's failure to include these crucial elements in the definitions of these crimes was particularly egregious in this capital case because it undermined the reliability of the entire sentencing proceeding in violation of the Eighth Amendment

13. These instructional errors precluded a reliable sentencing determination and a finding of proof beyond a reasonable doubt and due process of law, the right to a fair trial and petitioner's rights to an impartial tribunal and judge.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 65: Failure to Instruct on the Presumption of Life

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the trial judge failed to instruct the jury at the penalty phase on the presumption of life. The court's failure to order such proceedings violated petitioner's rights to a fair trial, due process of law, trial only while competent, an impartial jury, the right to a trial judge who was unbiased and conducted the

proceedings with not only with fairness but also with an appearance of fairness, and the right to reliable capital proceedings.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Estelle v. Williams* (1976) 425 U.S. 501 (presumption of innocence is core constitutional value); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be concluded from giving effect to finding of lesser offense); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); and including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (jury determination required for sentencing factors).

C. The following facts, among others, are presented in support of this claim, after adequate funding, discovery, investigation, and an evidentiary hearing:

1. In non-capital cases, the presumption of innocence acts as a core constitutional and adjudicative value to protect the accused and is a basic component of a fair trial. (*Estelle v. Williams*, *supra*, 425 U.S. at p. 503.) Paradoxically, at the penalty phase of a capital trial, where the stakes are life or death, the jury is not instructed as to the presumption of life, the penalty phase correlate of the presumption of innocence. (Note, *The*

Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.)

2. The court's failure to instruct that the presumption favors life rather than death violated appellant's right to due process of law under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable determination of the penalty and to be free of cruel and unusual punishments, and his right to equal protection under the Fourteenth Amendment.

3. In *People v. Arias* (1996) 13 Cal.4th 92, this court rejected the contention that a "presumption of life" instruction must be given on the grounds that the United States Supreme Court decisions have held that as long as a state's law properly limits death eligibility, "the state may otherwise structure the penalty determination as it sees fit." (*Id.*, at p. 190.)

4. However, California's death penalty scheme does not properly limit death eligibility. Among other serious defects, the current law gives prosecutors unbridled discretion to seek the death penalty, fails to narrow the class of death-eligible murderers, fails to require written findings regarding aggravating factors, and fails to require proportionality review. Accordingly, a presumption of life instruction is constitutionally required at the penalty phase.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 66: Cumulative Errors--Ruling on Automatic Modification Motion

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the trial court failed to follow the law in ruling on petitioner's automatic motion for modification. The court considered the probation report prior to ruling on the motion, applied constitutionally infirm legal standards, refused to permit petitioner the opportunity to review the probation report, and committed all the other errors enumerated in this section. These errors, individually and cumulatively, denied petitioner his liberty interest protected by the Fourteenth Amendment; a fair trial; the right to a trial judge who was unbiased and conducted the proceedings with not only fairness, but an appearance of fairness; due process of law; confrontation rights; and the right to fair and reliable capital proceedings and sentence as required by the Eighth Amendment. These errors, cumulatively, prejudiced petitioner.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *United States v. Tucker* (1972) 404 U.S. 443 (due process required that defendant not be sentenced on basis of misinformation of constitutional magnitude); *In re Murchison* (1955) 349 U.S. 133 (Constitution mandates actual impartiality and appearance of impartiality); *Mayberry v. Pennsylvania* (1971) 400 U.S. 455 (constitutional impartiality lacking); *Taylor v. Hayes* (1974) 418 U.S. 488 (impartiality where conduct during trial has left personal stings); *Berger v. United States* (1921) 255 U.S. 22 (constitutional mandate proscribing all judicial bias); *Tumey v. Ohio* (1927)

273 U.S. 510 (due process mandates impartial tribunal); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Coy v. Iowa* (1988) 487 U.S. 1012; *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Davis v. Alaska* (1974) 415 U.S. 308 (confrontation clause violation where no timely cross-examination regarding possible bias and prejudice); *Ohio v. Roberts* (1980) 448 U.S. 56 (confrontation clause violations may occur through introduction of hearsay); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Sandstrom v. Montana* (1979) 442 U.S. 510 (denial of due process where instruction susceptible to an interpretation that removed prosecution's burden of proving element of intent beyond a reasonable doubt); *In re Winship* (1970) 397 U.S. 358 (due process clause requires government prove beyond a reasonable doubt every element of the crime with which defendant is charged); *Carella v. California* (1989) 491 U.S. 263 (instruction unconstitutionally foreclosed independent jury consideration of facts); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); *Beck v. Alabama* (1980) 447 U.S. 625 (jurors cannot be precluded from giving effect to finding of lesser offense); *Johnson v. Mississippi* (1988) 486 U.S. 578 (Eighth Amendment limits use of unreliable aggravating factors in death decisions); *Bollenbach v. United States* (1946) 326 U.S. 607 (completeness in supplemental instruction constitutionally required); *Estelle v. Smith* (1981) 451 U.S. 454 (gravity of decision made at penalty phase mandates state's adherence to constitutional guarantees); and including

Apprendi v. New Jersey (2000) 530 U.S. 466 (Jury to determine facts relevant to sentencing factors.)

C. The following facts, among others, are presented in support of this claim, after adequate funding, discovery, investigation, and an evidentiary hearing:

1. Petitioner incorporates by reference Claims 44, 45, 51, 54, and 66.

2. In *Pulley v. Harris* (1984) 465 U.S. 37, the Supreme Court rejected an argument that the Eighth Amendment required a proportionality review. In making this finding, the Court relied in part on California inclusion of the automatic motion for modification of sentence. This serves as a critical check on the arbitrary and capricious imposition of the death penalty. Here however, the Section 190.4 hearing as flawed, and the death sentence was unreliable. This constitutional infirmity further adds to the cumulative errors set forth in this claim.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 67: Cumulative Judicial Error

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7, 15, 16 and 17 of the California Constitution because the

cumulative effect of the judicial errors alleged in this petition and in petitioner's direct appeal deprived him of his federal constitutional rights, including, but not limited to, his rights to due process of law, equal protection, confrontation, the effective assistance of counsel, an impartial judge and jury, reliable capital proceedings and sentence, and a fair trial.

B. The following United States Supreme Court decisions, *inter alia,* in effect at the time the error occurred, are presented in support of this claim: *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15 (cumulative effect of errors may violate due process); *Strickland v. Washington* (1984) 466 U.S. 668 (criminal defendant has right to effective assistance of counsel at all stages of proceedings); *Brady v. Maryland* (1963) 373 U.S. 83 (withholding of evidence favorable to accused violates due process); *Pointer v. Texas,* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Gardner v. Florida,* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia,* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Hicks v. Oklahoma,* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among others to be discovered, after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates as if fully set forth herein Claims 34 through 45.

2. In this petition and in the briefing on direct appeal, petitioner has set forth separate post-conviction claims and arguments regarding the numerous judicial errors occurring during the pretrial, guilt, penalty, and post-trial phases, and he submits that each one of these errors independently compels reversal of the judgment or alternative post-conviction relief. However, even in cases in which no single error compels reversal, a defendant may nevertheless be deprived of due process if the cumulative effect of all the errors in the case denied him fundamental fairness. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459; see also, *People v. Ramos* (1982) 30 Cal.3d 553, 581, revd. on other grounds in *California v. Ramos* (1985) 463 U.S. 992; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 388; *People v. Buffum* (1953) 40 Cal.2d 719, 726; and *see Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 791.)

3. Petitioner submits that the judicial errors in this case require reversal both individually and because of their cumulative impact. As explained in detail in the separate claims set forth above, the errors in this case individually and collectively violated federal constitutional guarantees under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence on the judgment and sentence and are moreover prejudicial under any standard of review.

Claim 68: Ineffective Assistance of Appellate Counsel

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because appellate counsel performed ineffectively in failing to allege numerous errors in the direct appeal filed in this court on petitioner's behalf. (Case Number S013323.) Counsel's unprofessional errors violated petitioner's rights to due process of law, the effective assistance of counsel on appeal, meaningful review on appeal, and the right to reliable capital proceedings and sentencing.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *Evitts v. Lucey* (1985) 469 U.S. 387 (right to effective assistance on appeal); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful

adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *California v. Trombetta* (1984) 467 U.S. 479; *Arizona v. Youngblood* (1988) 488 U.S. 51 (bad faith destruction of material evidence by prosecution); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence; *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right); and including *Apprendi v. New Jersey,* (2000) 530 U.S. 466. (Jury must determine truth of sentencing factors).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates as if fully set forth herein all facts and law set forth in all other claims in this petition.

2. To the extent this Court may find that any of the claims raised in this petition should have been, but were not raised, in the direct appeal in this case, the failure was the result of the ineffective assistance of appellate counsel. (*Evitts v. Lucey, supra*, 469 U.S. 387.) Any error of appellate counsel in failing to raise the above claims that should have been raised on appeal was prejudicial because it deprived petitioner of his rights to effective

assistance of counsel on appeal, due process, and meaningful appellate review of his conviction and sentence of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. For that reason, petitioner must be allowed to raise those claims herein or in a new or supplemental appellate proceeding.

3. Petitioner submits that appellate counsel's omissions were not tactical in nature but rather were caused by inadvertence, negligence, and/or a conflict of interest. As set forth in the portion of this petition entitled "Timeliness Facts" together with the exhibits referenced or incorporated therein, counsel's other workload and domestic problems prevented him from performing competently on direct appeal and contributed to the affirmance of the judgment.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence on the judgment and sentence and are moreover prejudicial under any standard of review.

Claim 69: Ineffective Assistance/Conflict of Counsel--California System of Dual Representation Results in Conflict of Appellate Counsel

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because he was deprived of the effective assistance of counsel and conflict-free counsel on appeal as a result of this state's procedure for appointing the same attorney to represent the defendant both on direct appeal and in related habeas

corpus proceedings. Counsel's unprofessional errors deprived petitioner of his federal and state constitutional rights to the assistance of counsel, conflict-free counsel, confrontation, due process of law, and a fair and reliable determination of guilt and penalty.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Powell v. Alabama* (1932) 287 U.S. 45 (indigent capital defendant has right to have effective counsel appointed and to be heard through counsel); *McMann v. Richardson* (1970) 397 U.S. 759, 771, n.14 (constitutional right to counsel is right to effective assistance of counsel); *Strickland v. Washington* (1984) 466 U.S. 668 (counsel has duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal; prejudice shown if there is a reasonable probability, less than a preponderance, that counsel's errors affected the outcome; these principles apply equally to guilt and sentencing phases of capital trial); *United States v. Cronic* (1984) 466 U.S. 648, 659 (Sixth Amendment violated, and prejudice need not be shown, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing); *Cuyler v. Sullivan* (1980) 446 U.S. 335 (prejudice from ineffective assistance presumed when counsel labors under conflict of interest); *Hill v. Lockhart* (1985) 474 U.S. 52 (*Strickland* standards apply to representation provided prior to trial, such as during plea proceedings); *Douglas v. California* (1963) 372 U.S. 353 (right to effective assistance of counsel extends to counsel first appeal of right); *Evitts v. Lucey* (1985) 469 U.S. 387 (minimum safeguards necessary to make appeal effective and reliable

required on first appeal of right); *Ake v. Oklahoma* (1985) 470 U.S. 68 (defendant entitled to expert assistance, including mental health expert assistance, to prepare for and testify at trial); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Loven v. Kentucky* (1988) 488 U.S. 227 (confrontation clause violation where defendant not permitted to cross-examine complainant); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Petitioner's conviction, death sentence, and confinement violate the state and federal constitutions in that he has been represented on appeal by counsel burdened by an unconstitutional conflict of interest. (U.S. Const. Fifth, Sixth, Eighth, and Fourteenth Amends; Cal. Const., art. I, §§7, 15, 16, 17, & 24.) That conflict was created by the State of California appointing the same attorney to represent the petitioner both in his direct appeal and in related habeas corpus proceedings.

2. Petitioner has a general due process and equal protection right to an appeal, a protected state liberty interest in such an appeal (*Hicks v. Oklahoma, supra*, 447 U.S. 343; see also Pen. Code, §§ 1235, 1237, and 1239), and in this capital case, an Eighth and Fourteenth Amendment right to

appeal. (See *Campbell v. Blodgett* (9th Cir. 1992) 997 F.2d 512, 522; *Pulley v. Harris* (1984) 465 U.S. 37, 53; *Clemons v. Mississippi* (1990) 494 U.S. 738, 749.) In addition, petitioner has a Sixth and Fourteenth Amendment right to effective assistance of counsel on an appeal of right. (*Penson v. Ohio* (1988) 488 U.S. 75; U.S. Const., Sixth and Fourteenth Amends.)

3. Petitioner also has a federal and state right to counsel unburdened by conflicts of interests. (U.S. Const., Sixth Amend.; Cal. Const., art. I, § 15; *Wood v. Georgia* (1981) 450 U.S., 261, 271; *People v. Bonin* (1989) 47 Cal.3d 808, 833.) For purposes of conflict analysis, it is irrelevant whether counsel was retained or appointed. (*People v. Bonin, supra*, 47 Cal. 3d at p. 834.) "It is settled that an indigent charged with committing a criminal offense is entitled to legal assistance unimpaired by the influence of conflicting interests." (*People v. Rhodes* (1974) Cal.3d 180, 183.)

4. Although conflicts of interest may be created by the actions of the attorney, they may also be created by the policies of the state or entity employing counsel to represent indigent defendants. (*Strickland v. Washington, supra*, 466 U.S. at p. 686, and cases cited therein.) The Supreme Court has stated that the government violates the Sixth Amendment right to counsel when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. (*Ibid.*) This Court has also held that governmental interference with the attorney-client relationship may deprive a defendant of the effective assistance of counsel. Thus, in *People v. Barboza* (1981) 29 Cal.3d 375, this Court created a judicially declared rule of criminal procedure, announced in an opinion authored by Justice Richardson, prohibiting public contracts with counsel for indigent defendants which "contain inherent and irreconcilable conflicts of interest." (*Id.*, at p. 381.)

5. An attorney cannot competently represent a client in a capital appeal if he is required to discover and disclose his own errors, because such a requirement creates an inherent conflict of interests. The Code of Professional Responsibility indicates that a conflict of interests exists when "the exercise of [an attorney's] professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." (DR 5-101(A); accord, American Bar Association Model Rules of Professional Conduct, Rule 1.7(b).)

6. The courts of this state have held that an "inherent conflict" arises when appointed trial counsel also acts as counsel on appeal because "[c]ounsel is in the untenable position of urging his own incompetency." (See *People v. Bailey* (1992) 9 Cal.App.4th 1252, 1254-1255.) Petitioner submits that a similar conflict arises when the same attorney acts as appellate counsel and habeas counsel. The appointment of counsel to represent petitioner in his automatic appeal also obligated counsel to investigate all potential claims to be raised in a petition for writ of habeas corpus. (*In re Clark* (1993) 5 Cal.4th 750; Supreme Court Policies Regarding Cases Arising from Judgments of Death, Standard 1-1.) Because habeas counsel must evaluate and, if necessary, investigate appellate counsel's performance, this dual representation system creates an inherent conflict of interests. In his role as appellate counsel for petitioner, counsel must raise potentially meritorious claims. In his role as habeas counsel for petitioner, counsel must investigate, assess, and raise issues of ineffective assistance of appellate counsel. (See *In re Benoit* (1973) 10 Cal.3d 72, 78"habeas corpus lies to correct the erroneous denial of a right to an effective appeal".) These conflicting duties place capital appellate counsel and his client in an untenable position.

7. Prejudice from this error is manifest under the circumstances of this case. Petitioner's dually appointed appellate lawyer, George C. Boisseau, proved ineffective in failing to raise several issues included as claims in the petition and did not file a habeas corpus petition, as this Court's policies and guidelines permit him to do. Counsel's failure to file a petition raising these issues is at least partly attributable to the conflict of interests in which appellate counsel was ineluctably placed. Counsel's own interests would have been disserved by the preparation and filing of a habeas corpus petition in which he was obliged to raise his own ineffectiveness. Accordingly, it is at least reasonably probable that a more favorable result would have been obtained in this case had petitioner's counsel not been burdened by the inherent conflict created by this state's procedure for appointing counsel in post-conviction capital cases. (*Strickland v. Washington, supra*, 466 U.S. 668.)

8. Because the California system of appellate review creates an inherent conflict of interests, violates petitioner's right to effective assistance of counsel, due process, and equal protection. A death judgment may not be imposed unless the process which produced it satisfies heightened levels of due process and reliability. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Beck v. Alabama, supra*, 447 U.S. at pp. 637-638 & fn. 13.) California's appellate process fails these tests, and the death judgment in this case cannot stand.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 70: Disproportionate Sentence

A. Petitioner's conviction, judgment, and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because the death sentence imposed is grossly disproportionate to the offense. Petitioner's judgment and sentence are particularly disproportionate because this Court affirmed the judgment and death sentence in this case while the Court of Appeal for the First Appellate District reversed the judgment in *People v. Hightower* (1996) 41 Cal.App.4th 1108 decided only three years earlier on the basis of the identical erroneous *Faretta* ruling made by the same judge who tried petitioner's case. This disproportionate sentence and disparate treatment deprived petitioner of his federal and state constitutional rights to due process, equal protection of the laws, freedom from ex post facto application of the laws, a fair and reliable determination of guilt and penalty, a fair and reliable appeal, and proceedings before an unbiased tribunal.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Weems v. United States* (1910) 217 U.S. 349 (Eighth Amendment prohibits punishments which are "greatly disproportioned to the offense"); *Mullaney v. Wilbur* (1975) 421 U.S. 684 (defendant's intention, and therefore his moral guilt, are critical to the degree of his criminal culpability); *Coker v. Georgia* (1977) 433 U.S. 584 (death penalty for certain offenses is disproportionate and therefore violates Eighth Amendment); *Godfrey v. Georgia* (1980) 446 U.S. 420 (death sentence reversed because defendant's crime did not reflect

a consciousness more depraved than that of any person guilty of murder); *Lockett v. Ohio* (1978) 438 U.S. 536 (individualized consideration is a constitutional requirement in imposing the death penalty); *Woodson v. North Carolina* (1976) 428 U.S. 280 (courts must focus on relevant factors of the character and record of the individual offender); *Enmund v. Florida* (1982) 458 U.S. 782 (proportionality determined by reference to such factors as contemporary values, individualized considerations, and climate of international opinion); Tuilaepa V. California (1994) 512 U.S. 967 (same); *Parker v. Duke* (1991) 498 U.S. 308 (due process requires meaningful appellate review); *Bouie v. Columbia* (1964) 378 U.S. 347 (due process denied by unforseeable court ruling applying law retroactively to criminal defendant); and *Hicks v. Oklahoma*, 447 U.S. 343 (due process error in deprivation of state right).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates by reference as if fully set forth herein the facts and law alleged in support of Claims 2 through 5 and 18 through 24.

2. The federal constitution and the constitution and laws of this state require proportionality review in death penalty cases. "The California Constitution (art. 1, section 17) prohibits imposition of a punishment disproportionate to the defendant's individual culpability." (*People v. Crew* (1991) 1 Cal.App.4th 1591, 1602, citing *People v. Hamilton* (1989) 48 Cal.3d1142, 1189.) At the federal level, "[t]he cruel and unusual punishments clause of the Eighth Amendment prohibits the imposition of a penalty that is disproportionate to the defendant's personal responsibility and

moral guilt." (*People v. Padilla* (1995) 11 Cal.4th 891, 962 (disapproved on a different point in *People v. Hill* (1998) 17 Cal.4th 800, 823).)

3. "[T]rial courts have the discretion to determine intracase proportionality--i.e., to determine whether the sentence imposed is proportionate to the individual culpability of the defendant, irrespective of the punishment imposed on others." (*People v. Lan* (1989) 49 Cal.3d 991.) In petitioner's case, the court found that the sentence imposed was appropriate considering appellant's crime and background. However, the court's ruling "is subject to independent review: it resolves a mixed question that implicates constitutional rights and hence must be deemed predominantly legal." (*People v. Marshall* (1990) 50 Cal.3d 907, 938.)

4. In analyzing a sentence to determine whether it is disproportionate under the circumstances of the individual case, the court should examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*People v. Dillon* (1983) 34 Cal.3d 441, 479, citing *In re Lynch* (1972) 8 Cal.3d 410, 425-429.) With respect to the nature of the offense, the court should consider both the severity of the crime in the abstract and the facts of the crime in question. (*People v. Dillon, supra*, 34 Cal.3d, at p. 479.) With respect to the second factor, the nature of the offender, the court must ask "whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*) This requirement follows from the principle that "a punishment which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability." (*Id.*, at p. 480.) This requirement is also mandated by the U.S. Constitution, because "individualized considerations [are] a constitutional

requirement in imposing the death sentence, which means that we must focus on relevant factors of the character and record of the individual offender." (*Id.*, at p. 481, citing *Enmund v. Florida* (1982) 458 U.S. 782, 798 [73 L.Ed.2d 1140, 102 S.Ct. 33681].)

5. In *People v. Dillon*, a 17-year-old boy was convicted of murder during an incident in which he and six other youths had conducted a well-planned invasion of a marijuana plantation they intended to rob. The defendant fired nine rifle shots into the victim, who was merely attempting to protect his property. Like petitioner, Dillon was convicted of murder, and there was little dispute that the crime of which he was convicted was tragic. (*People v. Dillon, Supra*, 34 Cal. 3d, at p. 483.) Nevertheless, this Court reduced Dillon's conviction to second degree murder, primarily because of his individual background. In that case, the court focused primarily upon the defendant's youth, the fact that he lacked the intellectual and emotional maturity of an average 17 year-old, his lack of a prior record, and the petty chastisements given to the other six youths involved in the incident. (*Id.*, at pp. 483-488.)

6. Application of the *Dillon* analysis to this case compels the conclusion that the death penalty is a disproportionate punishment for petitioner. As set forth in Claims, at the time of the offenses in this case petitioner suffered from debilitating brain damage and other mental disorders, a low IQ, drug and alcohol intoxication, and [A HOST OF OTHER PROBLEMS]. Also as in *Dillon,* petitioner's co-defendant, Rita Lewis, was given leniency, while petitioner was given the death penalty. Moreover, while the crimes in *Dillon* were motivated by personal greed, the crimes in this case were without any coherent motive and were instead the product of petitioner's mental impairments and illness.

7. In addition to the authority of this Court's decisions in *Dillon*, *Lynch*, and numerous other cases cited therein, statutory law of this state provides both trial and appellate courts with the power to reduce the punishments imposed on criminal defendants. For example, California Penal Code section 1181, subdivision (7), provides:

> When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed.

California Penal Code section 1260 similarly provides:

> The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

8. Under the terms of these statutes, any defendant is entitled to have this Court consider reducing his punishment. Petitioner submits that the foregoing statutes establish a procedural entitlement that is protected by the due process clause. (*Hicks v. Oklahoma* (1980), 447 U.S. 343 [65 L.Ed.2d 175, 100 S.Ct. 2227]; see also *Ford v. Wainwright* (1986) 477 U.S. 399, 428 [91 L.Ed.2d 335, 358, 106 S.Ct. 2595] (conc. opin. of O'Connor, J.) ("Where

a statute indicates with language of an unmistakable mandatory character that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause.").) Petitioner submits that were this Court to fail to acknowledge or employ its power under Penal Code section 1181, subdivision (7), and Penal Code section 1260, petitioner would be arbitrarily deprived of his constitutionally-protected expectation in violation of the Due Process Clause of the Fourteenth Amendment.

9. It should also be noted that capital defendants possess the right, under the Eighth Amendment and the Due Process Clause, to meaningful appellate review. (*Parker v. Duke* (1991) 498 U.S. 308, 321 ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.").) Petitioner respectfully submits that this Court's refusal to employ its statutory right of review deprives capital defendants of that entitlement, as well as increasing the risk that California's capital charging and sentencing system, already unable to separate defendants deserving of death from those who are not (*Tuilaepa v. California* (1994) 512 U.S. 967 [129 L.Ed.2d 750, 767-774, 114 S.Ct. 2630] (diss. opin. of Blackmun, J.)), will randomly condemn even more defendants.

10. The judgment and sentence in this case are particularly disproportionate and violate fundamental principles of due process and equal protection because the same judge committed the same constitutional error in two cases involving similarly situated defendants. However, while this Court affirmed the judgment in petitioner's case, the Court of Appeal for the First Appellate District, Division Four, reversed the judgment in *People v.*

Hightower, supra, 41 Cal.App.4th 1108. There is no principled basis for distinguishing these two cases.

11. In petitioner's case, the trial judge, Hon. Stanley Golde, improperly found petitioner competent to stand trial but incompetent to represent himself as counsel. (RT 75-86.) This Court held that Judge Golde's ruling on the issue was error because the standards of competence to stand trial and competence to represent oneself are the same. (*People v. Welch* (1999) 20 Cal.4th 701, 732; *Godinez v. Moran* (1993) 509 U.S. 389.) However, this Court held the judge did not abuse his discretion in denying the *Faretta* motion because petitioner had exhibited "disruptive behavior in the courtroom" prior to making his *Faretta* motion. (*Id.,* at p. 735.)

12. However, in 1996, three years prior to this Court's decision in this case, the Court of Appeal for the First Appellate District, Division Four, reversed the judgment in *Hightower, supra,* on the grounds that Judge Golde incorrectly ruled that the defendant, Felix Hightower, was competent to stand trial but incompetent to represent himself as counsel. (*People v. Hightower* (*supra* 41 Cal.App.4th at p. 1108, 1116.) Moreover, *Hightower* actually conceded on appeal that he had engaged in "disruptive behavior in the courtroom" and had numerous "disputes with defense counsel." (*Id.*, at p. 1112.) Indeed, Hightower was so disruptive that Judge Golde ordered him kept in shackles throughout the trial, a condition Judge Golde did not impose in this case. (*Id.*, at p. 1112, n.3.) The Court of Appeal found this error to be prejudicial per se under this Court's decision in *People v. Ortiz* (1990) 51 Cal.3d 975. This Court denied review on March 27, 1996.

13. Plainly, apart from the fact that petitioner's is a death penalty case, there is no meaningful, principled basics upon which to explain the disproportionate treatment of the two defendants. In *Hightower*, the judgment

and sentence of a more disruptive defendant were reversed due to an erroneous ruling that the court found prejudicial per se. However, in petitioner's case, a capital case in which the Eighth Amendment requires heightened due process, greater reliability, and proportionality review, the same error by the same judge in the case of a less disruptive defendant resulted in an affirmance.

14. Moreover, the decision in this case violated petitioner's right to be free of ex post facto application of the law. A court's unforeseeable retrospective application of a new rule of law to a criminal defendant violates the ex post facto component of federal due process. (*Bouie v. Columbia, supra*, 378 U.S. at pp. 354-355.) The Court of Appeal applied the correct rule of law and reversed the judgment in *Hightower*. This court then acquiesced in that ruling by denying review. Three years later, this Court affirmed the judgment and death sentence in an indistinguishable case where the trial had occurred two years *before* the trial in *Hightower*. This holding deprived petitioner of the ex post facto component of due process, equal protection of the laws, meaningful appellate review, and the proportionality review guaranteed by the Eighth Amendment.

D. The error in this case was prejudicial under any standard of review.

Claim 71: California Death Penalty Statutes are Unconstitutional Because They Fail to Perform the Constitutionally Mandated Narrowing Function

A. Petitioner's conviction, judgment, and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California

Constitution because California's sentencing scheme does not sufficiently narrow the class of persons eligible for the death penalty. The California capital statutory scheme is overly broad and inclusive because it contains so many special circumstances that it fails to perform the constitutionally required narrowing function. The statutory scheme therefore violates the Eighth Amendment prohibition against cruel and unusual punishments and the Fifth and Fourteenth Amendment requirement of due process of law.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Zant v. Stephens* (1983) 462 U.S. 862, 877 ("To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty'"); *Furman v. Georgia* (1972) 408 U.S. 238, 313 (a death penalty law violates Eighth Amendment unless it provides meaningful basis for distinguishing the few cases in where death penalty is imposed from the many in which it is not); *Arave v. Creech* (1993) 507 U.S. 463 (scheme not contra to the Eighth Amendment where all first-degree murders and many second-degree murders are death-eligible, and narrowing for selection provided by further aggravating circumstances); *Enmund v. Florida* (1982) 458 U.S. 782 (proportionality determined by reference to such factors as contemporary values, individualized considerations, and climate of international opinion); *Tuilaepa v. California* (1994) 512 U.S. 967 (same); *California v. Ramos* (1983) 463 U.S. 992 (a capital murder statute must take into account the concepts that death is different be in accord with Eighth Amendment);

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. As this Court has recognized: "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not.'" (*Furman v. Georgia* (1972) 408 U.S. 238, 313, 92 S.Ct. 2726 (conc. opn. of White, J.); *accord, Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759 (plur. opin.).) (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023 [254 Cal.Rptr. 586].)

However, California's death penalty statute, enacted by initiative, has ignored the Eighth Amendment by multiplying the "few" into the many. It is difficult for the perpetrator of a first degree murder in California *not* to be eligible for the death penalty. Indeed, because of the breadth of California's definition of first-degree murder, nearly all murders committed in California can be capitally charged. At the time of the homicides in petitioner's case, there were 26 "special" circumstances in existence under Penal Code section 190.2, effectively embracing every likely type of murder. There were only eight fact situations possible where a defendant could have been guilty of first degree murder and actually not be death-eligible. (Exhibit 25, Declaration of Steven F, Shatz.)

2. It appears the proponents of Proposition 7, the initiative enacted into law as section 190.2, contemplated an unconstitutionally over-broad purpose in drafting and advocating such expansive special circumstances. In their "Argument in Favor of Proposition 7" in the 1978 Voter's Pamphlet,

they described certain murders not covered by the then-existing death penalty statute, and then stated:

> "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.*"

(1978 Voter's Pamphlet, p. 34 (emphasis added).)

3. Although the Supreme Court has held that a state's sentencing scheme is not contra the Eighth Amendment where all first-degree murders and many second-degree murders are death-eligible with the narrowing for selection provided by further aggravating circumstances, California's scheme does not have these features. The premise of our capital sentencing scheme is that the narrowing function is supposed to be provided by *eligibility* factors, not selection factors; the latter simply provide the jury with discretion without specific instruction. (*Tuilaepa v. California, supra*, 512 U.S. 967.) Where, as here, the selection factors do not provide a genuine narrowing function, and the eligibility factors also fail to do so, the capital sentencing scheme as a whole fails to pass constitutional muster.

4. The problem of over-inclusiveness affects nearly all murders in California. In California, death eligibility is the rule, not the exception. Professor Steven Shatz determined that from 1988-1992, a four-year period encompassing this case, 83 percent of first-degree murderers convicted in California were death-eligible. (Exhibit 25, Declaration of Steven F. Shatz.) Through his careful statistical studies Shatz has concluded that California's statutorily defined death-eligible class is so large, and the imposition of the death penalty on members of the class so infrequent, that the statute performs

no narrowing of the death-eligible class as mandated by *Furman.* In fact, it creates a greater risk of arbitrary death sentences than the pre-*Furman* death penalty schemes. While the Court did not indicate in *Furman v. Georgia* (408 U.S. 238), or later in *Gregg v. Georgia, supra,* 428 U.S. 153, what death sentence ratio (actual death sentences per convicted death-eligible murderers) a state scheme would have to produce to satisfy its meaningful basis demand, plainly any scheme producing a ratio of less than 20% would not. The Court's central concern was that arbitrary administration of the death penalty was inevitable when too few murderers were being selected for death from too large a death-eligible class. (*Id.* at p. 1286.)

Plainly, the California scheme provides no meaningful basis for distinguishing cases in which the death penalty will be imposed.[20]

5. In *Godfrey v. Georgia, supra,* 446 U.S. 420, the Supreme Court reversed a sentence of death obtained under a Georgia capital murder statute that permitted such a sentence for an offense that was found beyond a reasonable doubt to have been "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" under the Eighth Amendment. (*Id.* at p. 422.) Despite the prosecution's claim that the Georgia courts had applied a narrowing construction to the statute (*id.* at pp. 429-430), the plurality opinion recognized this death-eligibility statute was over-broad because it could encompass almost every murder:

[20/] Even if the base against which one is to measure the constitutional adequacy of the narrowing effect of a capital sentencing scheme were broader than all first degree murders--*e.g.*, all persons guilty of murder of whatever degree, or all those guilty of murder with sufficient personal culpability to satisfy Eighth Amendment proportionality concerns (*see Tison v. Arizona* (1987) 481 U.S. 137), California's statutory scheme fails to adequately narrow the class subject to the death penalty.

"In the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as outrageously or wantonly vile, horrible and inhuman

(Id., at pp. 428-429.)

No less is true of a death-eligibility scheme that permits virtually any murder to be one with "special circumstances" and therefore death-eligible. To be consistent with the Eighth Amendment, a capital murder statute must take into account the concepts that death is different (*California v. Ramos*, *supra*, 463 U.S. at pp. 998-999), and that the death penalty must be reserved for those killings which are considered the most "grievous . . . affronts to humanity." (*Zant v. Stephens*, *supra*, 462 U.S. at p. 877, fn. 15 (citing *Gregg v. Georgia, supra,* 428 U.S. at p. 184).) Across-the-board eligibility for the death penalty also fails to account for the differing degrees of culpability attendant to different types of murder, enhancing the possibility that sentences will be imposed arbitrarily without regard for the blameworthiness of the defendant or his act. Further, it fails to provide legislative guidelines governing the selection of death eligible defendants.

6. The *Furman* principle has resulted in a statutory narrowing requirement with two components: (1) the death-eligible class of convicted murderers must be small enough that a substantial percentage are in fact sentenced to death; and (2) the states, through their legislatures, must decide the composition of the death-eligible class. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for* Furman? (1997) 72 N.Y.U.L. Rev. 1283, 1295.) In other words, *Furman* is satisfied if, and only if, the

legislature, by defining categories of murderers eligible for the most severe penalty, genuinely narrows the death-eligible class. (*Ibid.*)

7. In the quarter of a century since the *Furman* decision, the Court has repeatedly reaffirmed that the *Furman* principle is the cornerstone of its death penalty jurisprudence. (Shatz, *supra,* at p. 1286, citing *Maynard v. Cartwright* (1988) 486 U.S. 356, 362 [100 L.Ed.2d 372, 108 S.Ct. 1853].) Plainly, there is no meaningful narrowing of the class of death eligible murders when a statutory scheme defines the class of death-eligible murders so broadly that it excludes very few murderers or categories of murders from being death-eligible. (Exhibit 25, Declaration of Steven Shatz.) Such a statutory scheme cannot possibly satisfy the *Furman* principle.

8. The narrowing effect, if any, of section 190.2 can be tested by measuring the special circumstances against the section 189 factors that defined first degree murder. (Shatz, *supra,* p. 1318.) A comparison of the two statutes leads to the conclusion that while 26 categories of first degree murders were made death eligible, only eight categories of first degree murders were not. (Exhibit 25, Declaration of Steven Shatz.)

9. However, it is not the number of categories alone, but the comparative breadth of the "special circumstances" and "excluded" categories which determines whether the scheme genuinely narrows. (Shatz, *supra,* p. 1318.) The breadth of "special circumstances" is extraordinary, encompassing so many murders, that when compared with the breadth of the "excluded" categories, which encompass very few non-death eligible murders, it is obvious that the California scheme does not genuinely narrow the death-eligible class. California has one of the broadest death penalty schemes in the country. (*Id.* at p. 1307.)

10. With the exception of the "heinous, atrocious or cruel" special circumstance already held unconstitutional (*Id.* at p. 1318 (citing *People v. Superior Court* (Engert) (1982) 31 Cal.3d 797, 800-802)), any of the 26 individual special circumstances, when viewed in isolation, may have been sufficiently objective and narrow to satisfy *Furman*. (Shatz, *supra,* at p. 1318.) However, given the number and breadth of the special circumstances, the scheme as a whole does not genuinely narrow the death-eligible class.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 72: International Law--Numerous Due Process Violations Violate Treaties and Principles of International Law

A. Petitioner's conviction and sentence of death violate the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man (American Declaration), the International Convention Against All Forms of Racial Discrimination, the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and other treaties which are co-equal to the United States Constitution and constitute the supreme law of the land. Petitioner's conviction and sentence of death also violate Article VI of the United States Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as article I, sections 7, 15, 16, and 17 of the California Constitution.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *The Paquette Habana* (1900) 175 U.S. 677 ("international law is part of [federal] law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are presented for their determination"); *Murray v. The Schooner, Charming Betsy* (1804) 6 U.S. (2 Cranch) 64 (courts must construe federal law consistently with international law); *Weinberger v. Rossi* (1982) 456 U.S. 25 (state and federal law "ought never to be construed to violate the law of nations, if any possible construction remains...."); *Trans World Airlines, Inc. v. Franklin Mint Corporation* (1984) 466 U.S. 243 (courts must look to customary international law and conventional treaties, in interpreting domestic law); *Asakura v. Seattle* (1924) 265 U.S. 332 (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").

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. For the reasons set forth in this petition and in the briefing in the related direct appeal, petitioner was denied his right to a fair trial by an independent tribunal and his right to minimum guarantees for the defense under principles established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). Petitioner contends that violations of his rights under the state

and federal constitutions also constitute violations of international law. Accordingly, these contentions are being raised here as the first step in exhausting administrative remedies in order to bring petitioner's claim in front of the Inter-American Commission on Human Rights on the grounds that the defects in the judgment are violations of the American Declaration of the Rights and Duties of Man.

2. The two principal sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with the constitution and federal statutes as the supreme law of the land.[21] Customary international law is equated with federal common law.[22] International law must be considered and administered in United States courts whenever questions of a right which depends upon it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700 [44 L.Ed. 320, 20 S.Ct. 290].) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner, Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102, 118 [2 L.Ed 208].) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains...." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33.) 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.

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[21] Article VI, section 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."

[22] Restatement Third of the Foreign Relations Law of the United States (1987), p. 145, 1058. See also *Eyde v. Robertson* (1884) 112 U.S. 580.

Const. Article I, section 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 Corporation* (1984) 466 U.S. 243, 252.)[23]

3. 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 between nations and did not govern rights of individuals within those nations.[24] 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.[25]

4. This doctrine was further developed in 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

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[23] See also *Oyama v. California* (1948) 332 U.S. 633 [92 L.Ed 249, 68 S.Ct. 269], 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 UN 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* (1949) 185 Or. 579, 204 P.2d 569, 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 principles (Article 55, subd. C, and see 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.)" (*Id.* At 604.)

[24] See generally, Sohn and Buergenthal, International Protection of Human Rights (1973) p. 137.

[25] Buergenthal, International Human Rights (1988) p. 3.

Nations was also instrumental in developing an international system for the protection of minorities.[26] 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 violations of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect the individual human rights of nationals as well.[27] 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 of nationals, such that each party could no longer assert that such subject-matter fell exclusively within domestic jurisdictions.[28]

5. 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 United Nations 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."[29]

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[26] *Id.*, pp. 7-9.

[27] Restatement Third of the Foreign Relations Law of the United States. (1987) Note to Part VII, vol. 2 at 1058.

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

[29] Article 1(3) of the UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, became effective 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 cannot have permanent peace and security in the world."

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

6. In 1948, the United Nations drafted and adopted both the Universal Declaration of Human Rights[30] and the Convention on the Prevention and Punishment of the Crime of Genocide.[31] The Universal Declaration is part of the International Bill of Human Rights,[32] which also includes the International Covenant on Civil and Political Rights,[33] the Optional Protocol to the ICCPR,[34] the International Covenant on Economic, Social and Cultural Rights,[35] and the human rights provisions of the United Nations 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.

Robertson, Human Rights in Europe, (1985) 22, n.22 (quoting President Truman).

30 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).

31 Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, became effective 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*, p. 48.

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

33 International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, became effective March 23, 1976 (hereinafter ICCPR).

34 Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, became effective March 23, 1976.

35 International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, took effect January 3, 1976.

7. The Organization of American States, which consists of thirty-two member states, 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 distinction as to race, nationality, creed or sex."[36] 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.[37]

8. 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.[38] Because the Inter-American Commission, which relies on the

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[36] OAS Charter, 119 U.N.T.S. 3, took effect December 13, 1951, amended 721 U.N.T.S. 324, took effect February 27, 1970.

[37] Buergenthal, International Human Rights, *supra*, pp. 127-131.

[38] Buergenthal, International Human Rights, *supra*. As previously indicated, this appeal is a necessary step in exhausting petitioner's administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations petitioner

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.[39]

9. 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 United Nations 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.[40] Though the 1950s was a period of isolationism, the United States renewed its commitment in the late 1960s and through the 1970s by becoming a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[41]

10. Recently, the United States stepped up its commitment to international human rights by ratifying three comprehensive multilateral 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,[42] and the International

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has suffered are violations of the American Declaration of the Rights and Duties of Man.

[39] Buergenthal, International Human Rights, *supra*.

[40] Sohn and Buergenthal, International Protection of Human Rights (1973) pp. 506-509.

[41] Buergenthal, International Human Rights, *supra*, p. 230.

[42] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, took effect January 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[43] 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.[44]

11. United States courts generally do not give retroactive ratification to a treaty; the specific provisions of a treaty are therefore enforceable from the date of ratification onward.[45] 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.[46] Though the United States courts have not

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on October 20, 1994. (See, http://www.hri.ca/ fortherecord1997/documentation/reservations/cerd.htm.) More than 100 countries are parties to the Race Convention. (*Ibid.*)

[43] 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, became effective 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 21, 1994. (See http://www.un.org/Depts/Treaty/ final/ ts2/newfiles/part_boo/iv_boo/iv_9.html.)

[44] Buergenthal, International Human Rights, *supra*, p. 4.

[45] Newman and Weissbrodt, International Human Rights: Law, Policy and Process (1990) p. 579.

[46] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), took effect 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 current treaty law and practice." S. Exec.Doc. L., 92d Cong., 1st Sess.

strictly applied Article 18, they have looked to signed, unratified treaties as evidence of customary international law.[47]

12. 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.[48] 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

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(1971) at 1. Also, the Restatement Third of the Foreign Relations Law of the United States cites the Vienna Convention extensively.

[47] See, for example, *Inupiat Community of the Arctic Slope* v. *United States* (9th Cir. 1984) 746 F.2d 570 (citing the International Covenant on Civil and Political Rights); *Crow* v. *Gullet* (8th Cir. 1983) 706 F.2d 774 (citing the International Covenant on Civil and Political Rights); *Filartiga* v. *Pena-Irala* (2nd Cir. 1980) 630 F.2d 876 (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* (1992) 25 Geo.Wash.J.Int'l.L. & Econ. 71 Ms. Charme argues that Article 18 codified the existing interim (pre-ratification) obligations of parties who are 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."

[48] Restatement Third of the Foreign Relations Law of the United States, section 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.

international law and thus bind our government. When the United States has signed or ratified a treaty it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution.[49]

13. Customary international law is "part of our law." (*The Paquete Habana, supra*, 175 U.S., at p. 700.) According to 22 U.S.C. section 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."[50] 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.[51] These sources confirm the validity of custom as a source of international law.

14. The provisions of the Universal Declaration are accepted by United States courts as customary international law. In *Filartiga* v. *Pena-Irala* (2d Cir. 1980) 630 F.2d 876, the court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights ...." (*Id.* at 882.) The United States, as a member state 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

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

[50] 22 U.S.C. section 2304(a)(1).

[51] *Statute of the International Court of Justice*, art. 38, 1947 I.C.J. Acts and Docs 46. This statute is generally considered to be an authoritative list of the sources of international law.

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.[52] 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.[53]

15. 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 human rights. Though President Bush vetoed this legislation,[54] 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.[55]

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[52] American Declaration of the 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).

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

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

[55] 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.

16. 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 United States may not say: "Your government is bound by ceratin clauses of the covenant though we in the United States are not bound."

17. The factual and legal issues presented in this petition and the related direct appeal 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[56] as well as Articles 1 and 26 of the American Declaration.

18. The United States deposited its instruments of ratification of the ICCPR on June 8, 1992 with five reservations, five understandings, four declarations, and one proviso.[57] Article 19(c) of the Vienna Convention on the Law of Treaties declares that a party to a treaty may not formulate a

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See Orentlicher and Gelatt, *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.

[56] 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.

[57] 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.

reservation that is "incompatible with the object and purpose of the treaty."[58] The Restatement Third of the Foreign Relations Law of the United States echoes this provision.[59]

19. 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.[60] The United States declared that the articles of the ICCPR are not self-executing.[61] 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-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."[62]

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[58] Vienna Convention, *supra*, 1155 U.N.T.S. 331, took effect January 27, 1980.

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

[60] Newman and Weissbrodt, International Human Rights: Law, Policy and Process (1990) p. 579. See also, *Sei Fujii* v. *California* (1952) 38 Cal.2d 718, 242 P.2d 617, where the California Supreme Court held that Articles 55(c) and 56 of the UN Charter are not self-executing.

[61] 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.

[62] Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep.

20. 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* (1924) 265 U.S. 332, 341 [68 L.Ed. 1041, 44 S.Ct. 515].)[63] Moreover, treaties designed to protect individual rights should be construed as self-executing. (*United States v. Noriega* (1992) 808 F. Supp. 791.) In *Noriega*, the court noted, "It is inconsistent with both the language of the [Geneva III] treaty and with our professed support of its 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 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 to serve State interests ....Even if Geneva III is not self-executing, the United States is still obligated to honor its international commitment.'" (*Id.* at 798.)

21. 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.

22. Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against

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No. 23, 102d Cong., 2d Sess. at 19.

[63] Some legal scholars argue that the distinction between self-executing and non self-executing treaties is patently inconsistent with express language in Article 6, section 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'l L. 760.

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."[64] 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.[65]

23. In cases where the United Nations 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.[66] 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 defense, and the right to review of conviction and sentence by a higher tribunal.'"[67]

24. Further, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life")

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

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

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

[67] Id.

is allowed.[68] 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 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."[69] 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.[70]

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

[69] 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).

[70] 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 United States death penalty reservation is impermissible because it is incompatible.

25. 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.

26. The due process violations 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. 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.

D. Further, these errors, in violation of the aforementioned International Laws and the Supremacy Clause of the United States Constitution individually and/or collectively had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 73: Systematic Error--Unbridled Prosecutorial Discrimination in Charging

A. Petitioner's conviction, judgment, and sentence of death violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution because defects in the state's statutory scheme introduce arbitrary and capricious elements into the decision-making process. Under California law, the prosecutor in a special circumstances case has the unbridled discretion to determine whether a penalty trial will be held to determine whether the death penalty should be imposed. The arbitrary and

capricious exercise this unbridled power deprived petitioner of his federal and state constitutional rights to due process, equal protection of the laws, a fair and reliable determination of guilt and penalty, and a fair and reliable appeal.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Eddings v. Oklahoma* (1981) 455 U.S. 104, 112 ("Capital punishment [must] be imposed . . . with reasonable consistency, or not at all."); *Zant v. Stephens* (1983) 462 U.S. 862, 885 (seeking the death penalty on the basis of "factors that are constitutionally impermissible . . . such as . . . race" violates the Fifth, Eighth, and Fourteenth Amendments); *Woodson v. North Carolina* (1976) 428 U.S. 280, 303 ("arbitrary and wanton" jury discretion condemned); *Furman v. Georgia* (1972) 408 U.S. 238 (principled decision-making in charging, prosecuting, and deciding whether to submit a case to a penalty phase jury mandated by the Fifth, Eighth, and Fourteenth Amendments.)

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Giving prosecutors unbridled power to determine whether a penalty trial will be held to determine whether the death penalty should be imposed without provisions guiding their discretion creates a substantial risk of county-by-county arbitrariness.

2. This concern is particularly grave in the petitioner's case. Statistics compiled by the California Department of Corrections demonstrate a marked disparity in the number of African-Americans convicted and

sentenced to death in Alameda County. As of January 1, 2001, there were 35 inmates on Death Row in California as a result of convictions and death sentences imposed in the Alameda County Superior Court. Of those 35 inmates, 18 were African-Americans, 11 were Caucasians, three were Hispanic, one was Native American, and two were listed as "Other." (Exhibit 42, California Department of Corrections Condemned Inmate List.)

3. This means that 51.4% of all persons sentenced to death in Alameda County and currently awaiting execution are African-Americans. According to statistics compiled by the California Department of Finance, African-Americans comprise only 18% of the population of Alameda County. (Exhibit 41, California State Department of Finance, Official State Estimates, Race/Ethnic Population Estimates.)

4. The charging and trial practices of the Alameda County District Attorney's office therefore have resulted in the imposition of death sentences upon African-American defendants at a rate three times higher than would be expected based upon the percentage of the African-American population of the county.

5. Unquestionably, under the existing statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor in one county while other offenders with similar or even greater qualifications in other counties will not. Moreover, the absence of any standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, including race and economic status. Furthermore, under this Court's expansive interpretation of the lying-in-wait theory of first-degree and special circumstance murder (see *People v. Morales* (1989) 48 Cal.3d 527, 557-558), and due to the statutory inclusion of most felony murder categories as

first-degree and special circumstance murders, prosecutors are free to seek the death penalty in the vast majority of murder cases. This fact enhances the potential for abuse of the unbridled discretion conferred on prosecutors under the law.

6. The arbitrary and wanton prosecutorial discretion– in charging, prosecuting, and deciding whether to submit the case to a penalty phase jury-- allowed by the California scheme is contrary to the principled decision-making mandated by the Fifth, Eighth, and Fourteenth Amendments. The judgment of death in this case is the product of that unconstitutional system and for that reason may not stand.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 74: California's Death Penalty Scheme is Unconstitutional Because it Fails to Require Written Findings With Respect to Aggravating Factors

A. California's death penalty scheme fails to require that the jury make written findings regarding the aggravating factors it selects in imposing the death penalty. Petitioner submits that the failure to require written findings deprives him of his due process and Eighth Amendment rights to meaningful review of his case.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim:

California v. Brown (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153; *Caldwell v. Mississippi* (1985) 472 U.S. 320 (cannot be found that failure to correctly instruct on the need for unanimity regarding aggravating circumstances had "no effect" on the penalty verdict); *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (explicit findings in penalty phase of a capital case are especially critical because of magnitude of the penalty involved); *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15 (Maryland's written finding requirement in capital cases enabled U.S. Supreme Court not only to identify the error that had been committed under prior state procedure, but also to gauge the beneficial effect of the newly implemented state procedure); *Townsend v. Sain* (1963) 372 U.S. 293 (Appellate court cannot reconstruct findings of trier of fact).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. First, the importance of explicit findings has long been recognized– and emphatically so, by this court. (*People v. Martin* (1986) 42 Cal.3d 437, 449.) Thus, in a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, §1170, subd. (c).) Under the Fifth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants (see *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment. I follows that the sentencer in a capital case is constitutionally required to identify for the record the aggravating and mitigating circumstances found and rejected.

2. Explicit findings in the penalty phase of a capital case are especially critical because of two factors: (1) the magnitude of the penalty involved and (2) the need to address error on review (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305). With respect to the latter factor, it should be noted that

Maryland's written finding requirement in capital cases enabled the United States Supreme Court not only to identify the error that had been committed under prior state procedure, but also to gauge the beneficial effect of the newly implemented state procedure. (*Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Moreover, this court itself has stated that written findings are "essential" to meaningful review:

> In *In re Podesto* [(1976)] 15 Cal.3d 921, we emphasized that a requirement of articulated reasons to support a given decision serves a number of interests: it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring that the judge himself analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned and equitable.
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> (*People v. Martin* (1986) 42 Cal.3d 437, at pp. 449-450.)

3. The lack of a written finding requirement with respect to aggravating factors renders meaningful review impossible. California juries have absolute discretion and are provided virtually no guidance on how they should weigh aggravating and mitigating circumstances. Without some memorialization of the basis for the jury's exercise of its discretion, this court cannot "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain*, *supra*, 372 U.S. at pp. 313-316; *contra, People v. Rodriguez* (1986) 42 Cal.3d. 730, 777-779.)

4. The unavailability of meaningful review which results from the lack of written findings is amply demonstrated by the circumstances of this case. For example, petitioner was convicted of six counts of murder

and special circumstances were found true for all six of these crimes. Without written findings from the jurors, this court cannot determine whether the jury counted two or three aggravating factors for this conduct.

5. The failure to provide written findings also makes it extremely difficult to assess the prejudice which results at the penalty phase when a special circumstance is invalidated on appeal. For example, the murder special circumstance was not supported by substantial evidence and is therefore invalid. This special circumstance was also an aggravating factor, but without written findings it is impossible to know whether the jury considered it a significant or even determinative factor in imposing the death penalty.

6. It is both reasonably possible (*Chapman v. California* (1967) 386 U.S. 18, 24) and reasonably probable (*People v. Watson* (1956) 46 Cal.2d 818, 836) that the failure to correctly instruct on the need for unanimity regarding aggravating circumstances contributed to the verdict of death. It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.)

D. The failure to require written findings with regard to aggravating factors deprived petitioner of his Eighth Amendment right to meaningful appellate review and his Fifth and Fourteenth Amendment right to due process of law.

Claim 75: Appellate Delay Has Denied Petitioner His Right to Counsel, His Right to Due Process, and His Right to Be Free of Cruel and Unusual Punishment

A. Petitioner's conviction and sentence of death are violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the extraordinary delay in execution of sentence violate the state and federal constitutions. This extraordinary delay in the appellate and post-conviction process has denied petitioner his right to counsel, his right to meaningful appellate review, his right to due process of law, and his right to be free of cruel and unusual punishment. (U.S. Const. Amends., 5, 6, 8 and 14; Cal. Const., art. 1, §§ 1, 7, 9, 15, 17, 24, and 27.)

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Mempa v. Rhay* (1967) 389 U.S. 128, 134 (criminal defendant is entitled to counsel at all critical stages of a proceeding when his or her substantial rights may be affected); *Douglas v. California* (1963) 372 U.S. 353 (appeal of right from a felony conviction is a critical stage at which the right to counsel attaches, and an indigent appellant is entitled to appointed counsel at this stage); *Coleman v. Thompson* (1991) 501 U.S. 722, 742 (right to counsel so important that the state may not enforce its procedural rules and appellate deadlines if these cannot be met without depriving a criminal defendant of his right to counsel on appeal); *Chessman v. Teets* (1957) 354 U.S. 156 (full and fair review of the trial court proceedings necessitates a complete record); *Barker v. Wingo* (1972) 407 U.S. 514, 531 (failures of court-appointed counsel and delays in the appellate process are attributable to the state, not

to the defendant); (*Moore v. Nebraska* (1999) 528 U.S. 990, 993, Breyer, J., dissenting from denial of certiorari (court should hold delay in post-conviction process is cruel and unusual punishment).

C: The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Petitioner was convicted in 1989. Counsel was not appointed to represent him on appeal until 1992, three years later. Counsel did not file the brief until 1998, nine years later, and this court did not decide the case until 1999, a full ten years after petitioner's conviction.

2. As this petition is being written, petitioner has already spent 13 years on death row. Petitioner will certainly remain on death row for many years to come while he pursues his post-conviction remedies. Indeed, if relief is not granted on any of the many meritorious claims raised in this habeas petition, it is quite likely that appellant will serve 15 years on death row before California's post-conviction processes are concluded, plus many more years before the federal post-conviction process is completed.

3. The long delay in obtaining appellate counsel and deciding petitioner's appeal has severely prejudiced petitioner's ability to discover and present exculpatory evidence in his habeas corpus proceedings. Many witnesses to the events of December 8, 1989, and to a broad range of mitigation issues, are now deceased, and the memories of many others have faded. Moreover, as indicated in Claims 1 and [BLOOD], the state has engaged in a pattern of suppression and tampering with critical evidence, and the investigation of this pattern of state misconduct has been severely prejudiced by the passage of time.

4. Petitioner bears no responsibility for failure to appoint counsel to represent him and should not be forced to bear the burden that the deprivation. Petitioner's ability to meaningfully challenge his imprisonment and death sentence has been devastated by the state's delay in obtaining counsel, a matter over which he has exercised no discretion or control whatsoever.

5. Petitioner submits that excessive delay in the process has denied him due process of law. The delay of 13 years for appointment of competent habeas counsel, the fact that petitioner asserted his right to be represented in a habeas appeal, require that this court apply the four-part analysis drawn from *Barker v. Wingo* (1972) 407 U.S. 514 and conclude that post-conviction delay have indeed violated the defendant's due process rights. In addition, petitioner submits that the extraordinary delay in this state's process also compels relief under the Eighth Amendment as cruel and unusual punishment. (*Moore v. Nebraska* (1999) 528 U.S. 990, 993, Breyer, J., dissenting from denial of certiorari.)

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence in determining the jury's verdict.

Claim 76: Cruel and Unusual Punishment – Lethal Injection

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California

Constitution because California's method of execution constitutes cruel and unusual punishment and was adopted by means which violate fundamental principles of procedural and substantive due process. These errors deprived petitioner of his federal and state constitutional rights to due process, to be free of cruel and unusual punishment, meaningful appellate review, equal protection of the laws, a fair and reliable determination of guilt and penalty, and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *In re Kemmler* (1890) 136 U.S. 436 (Eighth Amendment prohibits methods of punishment which inflict torture or a lingering death or involve the wanton infliction of pain); *Gregg v. Georgia* (1976) 428 U.S. 153 (same); *Hudson v. McMillian* (1992) 503 U.S. 1 (same); *Estelle v. Gamble* (1976) 429 U.S. 97 (Eighth Amendment embodies concepts of dignity, civilized standards, humanity and decency against which a court must evaluate penal measures); *Trop v. Dulles* (1958) 356 U.S. 86 (Eighth Amendment prohibits punishments that are incompatible with "evolving standards of decency that mark the progress of a maturing society"); *Coker v. Georgia* (1977) 433 U.S. 584 (to discern the "evolving standards of decency," courts look to objective evidence of how society views a punishment *today*); *Furman v. Georgia* (1972) 408 U.S. 430 (no court should approve any method of implementation of the death sentence found to involve cruelty in light of presently available alternatives); *Lehr v. Robertson* (1983) 463 U.S. 248 (to establish a violation of the right to procedural due process, the complaining party must show: (1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional

inadequacy of procedures accompanying the deprivation); *Ohio Adult Parole Authority v. Woodward* (1998) 523 U.S. 272 (capital appellant facing execution has a constitutionally protected due process interest in life that is not extinguished by his judgment and sentence); *Hicks v. Oklahoma,* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among others to be developed after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim:

1. Death by lethal gas has been ruled cruel and unusual punishment. (*Fierro v. Gomez* (N.D. Cal. 1994) 865 F.Supp.1387.) This judgment was affirmed on appeal. (*Fierro v. Gomez* (9th Cir. 1996) 77 F.3d 301, 309.) On October 15, 1996, the judgment of the Ninth Circuit was vacated in light of amendments to section 3604. (*Gomez v. Fierro* (1996) 519 U.S. 918 [136 L.Ed.2d 204, 117 S.Ct. 285].) The 1996 amendment provided that in default of an election by the inmate, the execution would be by lethal injection. However, lethal injection also results in precisely the kind of painful, agonizing, and lingering death prohibited by the Eighth Amendment.

2. In examining whether a method of execution is "unconstitutionally cruel," the court must examine the "degree of risk" involved in its a administration. (*Fierro v. Gomez, supra*, 865 F.Supp. at p. 1411 (discussing *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662).) Factors to be considered include the amount of pain involved and the immediacy of unconsciousness. (*Id.*, at pp. 1410-1411 [interpreting the authorities cited in Campbell].) The *Fierro* court interpreted *Campbell* as suggesting "the persistence of consciousness 'for over a minute' or for 'between a minute and

a minute-and-a-half but no longer than two minutes' might be outside constitutional boundaries." (*Id.* at p. 1411.)

3. There have been many instances where execution by lethal injection has been prolonged, extending the amount of psychological pain inflicted. (See *In re Carpenter*, Petition for Writ of Habeas Corpus, S083246.)

4. In Oklahoma in 1992, for example, Robyn Lee Parks finally died after gasping, coughing and gagging for eleven minutes after the drugs were administered. One reporter who witnessed Parks' death wrote that the execution looked "painful and ugly and scary." "It was overwhelming, stunning, disturbing -- an intrusion into a moment so personal that reporters, taught for years that intrusion is their business, had trouble looking each other in the eyes after it was over." (*11-Minute Execution Seemingly Took Forever*, Tulsa World, March 11, 1992; p. A13.)

5. Stephen Peter Morin's execution technicians were forced to probe both of Morin's arms and one of his legs with needles for nearly 45 minutes before they found a suitable vein because of Morin's history of drug abuse. (*Murderer of Three Women is Executed in Texas*, New York Times (Mar. 14, 1985); p. 9.)

6. After repeated failurestrying to find a suitable vein, Randy Wools, a drug addict, eventually helped the execution technicians find a useable vein. (*Killer Lends a Hand to Find a Vein for Execution*, Los Angeles Times (Aug. 20, 1986); p. 2.) It took nearly an hour to complete the execution of Elliot Rod Johnson due to collapsed veins. (*Addict is Executed in Texas for Slaying of 2 in Robbery,* New York Times (June 25, 1987); p. A24.)

7. Death was pronounced 40 minutes after Raymond Landry was strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. (*Drawn-out Execution Dismays Texas Inmates*, Dallas Morning News (Dec. 15, 1988); 29A.) Two minutes after the drugs were administered, the syringe came out of Landry's vein, spraying the deadly chemicals across the room toward witnesses. (*Landry Executed for '82 Robbery-Slaying*, Dallas Morning News (Dec. 13, 1988); 29A.) The curtain separating the witnesses from the inmate was then closed, and not reopened for fourteen minutes while the execution team reinserted the catheter into the vein. (*Ibid.*) A spokesman for the Texas Department of Correction, Charles Brown [sic], said, "There was something of a delay in the execution because of what officials called a 'blowout.' The syringe came out of the vein, and the warden ordered the (execution) team to reinsert the catheter into the vein." (*Ibid.*)

8. It took medical staff more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm. Witnesses were kept behind a drawn curtain, but reported hearing Rector utter eight loud moans. During the ordeal Rector helped the medical personnel find a vein. The administrator of Arkansas' Department of Corrections Medical Programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein." The difficulty in finding a suitable vein was later attributed to Rector's bulk and his regular use of anti-psychotic medication. (*Rector, 40, Executed for Officer's Slaying*, Arkansas Democrat Gazette (Jan. 25, 1992); p. 1; *Rector's Time Came, Painfully Late*, Arkansas Democrat Gazette (Jan. 26, 1992); p. 1B; Frady, *Death in Arkansas*, The New Yorker, (Feb. 22, 1993); p. 105.)

9. Billy Wayne White was pronounced dead some 47 minutes after being strapped to the execution gurney. (*Another U.S. Execution Amid Criticism Abroad*, New York Times (Apr. 24, 1992); p. B7.) The delay was caused by difficulty finding a vein; White had a long history of heroin abuse. (*Ibid.*) During the execution White also attempted to assist the authorities in finding a suitable vein. (*Ibid.*)

10. The execution of John Wayne Gacy provides a similar example. After the execution began, the lethal chemicals unexpectedly solidified, clogging the IV tube that led into Gacy's arm and prohibiting any further passage. Blinds covering the window through which witnesses observed the execution were drawn, and the execution team replaced the clogged tube with a new one. Ten minutes later, the blinds were reopened and the execution process resumed. It took 18 minutes to complete. Anesthesiologists blamed the problem on the inexperience of the prison officials who were conducting the execution, saying that proper procedures taught in "IV 101" would have prevented the error. (*Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction*, Chicago Sun-Times (May 11, 1994); p. 5; *Witnesses Describe Killer's 'Macabre' Final Few Minutes*, Chicago Sun-Times (May 11, 1994); p. 5; *Gacy Execution Delay Blamed on Clogged IV Tube*, Chicago Tribune (May 11, 1994); p. 1 (Metro).)

11. Seven minutes after the lethal chemicals began to flow into Emmitt Foster's arm, the execution was halted when the chemicals stopped circulating. (*Witnesses to a Botched Execution*, St. Louis Post-Dispatch (May 8, 1995); p. 6B.) With Foster gasping and convulsing, the blinds were drawn so the witnesses could not view the scene. (*Ibid.*) Death was pronounced 30 minutes after the execution began, and three minutes later

the blinds were reopened so the witnesses could view the corpse. (*Ibid.*) Because they could not observe the entire execution procedure through the closed blinds, two witnesses later refused to sign the standard affidavit that stated they had witnessed the execution. (*Ibid.*) In an editorial, the St. Louis Post-Dispatch called the execution "a particularly sordid chapter in Missouri's capital punishment experience." (*Ibid.*) According to the coroner who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney; it was so tight that the flow of chemicals into the veins was restricted. (*Too-Tight Strap Hampered Execution*, St. Louis Post-Dispatch (May 5, 1995); p. B1; *Execution Procedure Questioned*, Kansas City Star (May 4, 1995); p. C8.)

12. Richard Townes, Jr.'s execution was delayed for 22 minutes while medical personnel struggled to find a vein large enough for the needle. After unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Mr. Townes' right foot. (*Store Clerk's Killer Executed in Virginia*, New York Times (Jan. 25, 1996); p. A19.)

13. It took one hour and nine minutes for Tommie J. Smith to be pronounced dead after the execution team began sticking needles into his body because of unusually small veins. (*Doctor's Aid in Injection Violated Ethics Rule: Physician Helped Insert the Lethal Tube in a Breach of AMA's Policy Forbidding Active Role in Execution*, Indianapolis Star (July 19, 1996); p. A1.) For 16n minutes, the execution team failed to find adequate veins, and then a physician was called. (*Ibid.*) The physician made two attempts to insert the tube in Smith's neck. (*Ibid.*) When that failed, an angiocatheter was inserted in Smith's foot. (*Ibid.*) Only then were witnesses permitted to view the process. (*Ibid.*) The lethal drugs were finally injected

into Smith 49 minutes after the first attempt, and it took another 20 minutes before death was pronounced. (*Problem with Veins Delays Execution*, Indianapolis News (July 18, 1996); p. 1.)

14. It took nearly an hour to find a suitable vein for the insertion of the catheter into Michael Eugene Elkins. ("Killer Helps Officials Find a Vein at his Execution," *Chattanooga Free Press* (June 13, 1997) at p. A7.) Elkins tried to assist the executioners, asking "Should I lean my head down a little bit?" as they probed for a vein. (*Ibid.*) After numerous failures, a usable vein was finally found in Elkins' neck. (*Ibid.*)

15. The risk of such prolonged administration of lethal injection is increased by California's lack of comprehensive standards in defining procedures. In *McKenzie v. Day* (9th Cir 1995) 57 F.3d 1461, 1469, the Ninth Circuit held that execution by lethal injection under the procedures which had been defined in Montana was constitutional. The Court of Appeals explained that those procedures passed constitutional muster because they were "reasonably calculated to ensure a swift, painless death." (*Ibid.*) Such a statement cannot be made about the procedures in California. A swift, painless death cannot be guaranteed without standards in place to insure the lethal chemicals will be administered to petitioner in a competent, professional manner by someone adequately trained to do so.

16. Similarly, in *LaGrand v. Lewis* (D.Ariz. 1995) 883 F.Supp. 469, aff'd. 133 F.3d 1253 (9th Cir. 1998), the district court upheld Arizona's written Internal Management Procedures prescribing standards for the administration of lethal injection because "they clearly indicate that executions are to be conducted under the direction of the ASPC-Florence Facility Health Administrator, knowledgeable personnel are to be used, and the presence of a physician is required." Such procedures are not found in

the California Code of Regulations or in documents released by the California Department of Corrections.

17. At the time of the offenses in this case, lethal gas was the sole means of execution under California law and therefore was the method of execution imposed by the court at judgment and sentencing. (CT 2526-2530.) In 1992, California added as an alternative means of execution "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." (Pen. Code, § 3604, subd. (a).)[71] The 1992

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[71] In its entirety, this section now provides as follows:

> (a) The punishment of death shall be inflicted by the administration of a lethal gas or by an 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.
>
> (b) Persons 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. This choice shall be made in writing and shall be submitted to the warden pursuant to regulations established by the Department of Corrections. If a person under sentence of death does not choose either lethal gas or lethal injection within 10 days after the warden's service upon the inmate of an execution warrant issued following the operative date of this subdivision, the penalty of death shall be imposed by lethal injection.
>
> (c) Where the person sentenced to death is not executed on the date set for execution and a new execution date is subsequently set, the inmate again shall have the opportunity to elect to have punishment imposed by lethal gas or lethal injection, according to the procedures et forth in subdivision (b).

legislation allowed the inmate to select either lethal gas or lethal injection, and provided that if the inmate made no selection, execution would be by lethal gas. However, the state has failed to comply with the statutory requirement that standards for lethal injection be established by the Department of Corrections. (Pen. Code, § 3604, subd. (a).)[72]

18. When a statute requires a regulatory agency to adopt standards to guide the performance of specified actions, the agency's failure to adopt such standards or comply with the procedures required for adoption of standards prior to taking those actions violates the guarantee of procedural due process. (See, e.g., *Marshall v. Union Oil* (9th Cir. 1980) 616 F.2d 1113, 1116.) In California, all regulations and other standards of general application employed by a governmental agency must be adopted pursuant to the procedures set forth in the state Administrative Procedures Act (hereinafter, "the Act.") (Gov. Code, §11342, subd. (g).) The Act mandates that rigorous procedures be observed prior to the adoption of regulations,

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> (d) Notwithstanding subdivision (b), if either manner of execution described in subdivision (a) is held invalid, the punishment of death shall be imposed by the alternative means specified in subdivision (a).

(Pen. Code, § 3604.)

[72] To date, petitioner has not made an election to be executed by lethal gas. Consequently, the only method available to the State for executing petitioner is by lethal injection. Petitioner therefore has standing to challenge his impending execution by this method as a violation of his rights under the Federal Constitution. The fact that petitioner has the option to choose lethal gas is legally irrelevant. The state may not cloak an unconstitutionaly cruel and unusual punishment in the mantle of "choice." (*Dear Wing Jung v. United States* (9th Cir. 1962) 312 F.2d 73, 75-76.)

including public notice and hearings, legal review, and a public comment period, followed by filing of the regulation with the Secretary of State. (See, e.g., Gov. Code, §11346.4 et seq.) Rules adopted without complying with the Act are invalid and may not be enforced. (Gov Code, §11340.5.)

19. To appellant's knowledge, the Department of Corrections has not complied with the mandate of section 3604, subdivision (a), to establish standards for the administration of lethal injections or with the provisions of the Administrative Procedures Act. The only regulation in the California Code of Regulations which even mentions the words "lethal injection" is 15 C.C.R. §3349. This section merely sets forth the procedures and departmental forms required for a Death Row inmate's request for either lethal injection or lethal gas and therefore does not comply with the requirements of section 3604, subdivision (a). The only other information available from the Department of Corrections is a brief document, dated March, 1996, which merely provides a vague description of the Department's lethal injection procedures. The document, similar in tone to a press release, neither states the source of the information it contains nor refers to any official regulations or rules. In pertinent part, this document states as follows:

> The inmate is connected to a cardiac monitor which is connected to a printer outside the execution chamber. An IV is started in two usable veins and a flow of normal saline solution is administered at a slow rate. [One line is held in reserve in case of a blockage or malfunction in the other.] The door is closed. The warden issues the execution order.
>
> In advance of the execution, syringes containing the following are prepared:

> • 5.0 grams of sodium pentothal in 20-25 cc of diluent
> • 50 cc of pancuronium bromide
> • 50 cc of potassium chloride
>
> Each chemical is lethal in the amounts administered.
>
> At the warden's signal, sodium pentothal is administered, then the line is flushed with sterile normal saline solution. This is followed by pancuronium bromide, a saline flush, and finally, potassium chloride. As required by the California Penal Code, a physician is present to declare when death occurs.

(See Appendix 124, *In re Mendoza*, Petition for Habeas Corpus, S083246.)

20. This document obviously does not comply with the provisions of the Administrative Procedures Act. No notice appears to have been given to the public prior to its adoption, nor is petitioner aware that any hearing or public comment period preceded its adoption. The document does not appear to have been published or filed with the Secretary of State, nor does it appear to have been vetted by the Office of Administrative Law. In addition, the document itself does not even purport to be a regulation. By its own terms, it does not prescribe the procedures that must be used during an execution, but rather appears to describe for the press or public in general terms the procedures the department uses.

21. Moreover, the foregoing document fails to establish any coherent standards for administering lethal injections. The document is extremely vague and general in its description. For example, it is not clear

from the document how far "in advance of the execution" the drugs are prepared. No physical restraints are described. It is not clear how many people are present, who these people are, what qualifications they must have, or what training they must have undergone.

22. Most significantly, the document does not define a set of procedures that will ensure that a condemned prisoner will be free from unnecessary suffering. The document's failure to prescribe even a minimal level of training for the personnel involved in administering the lethal injection raises a substantial and unnecessary risk that the subject will undergo extreme pain and suffering before and during his execution. If inadequately trained personnel were to improperly insert the catheter, the chemicals could be inserted into appellant's muscle or other tissue rather than directly into his bloodstream, causing extreme pain in the form of a severe burning sensation. Furthermore, a failure to inject the chemicals directly into the bloodstream will cause the chemicals to be absorbed far more slowly, and the intended effects will not occur. Improper insertion of the catheter could also result in its falling out of the vein, resulting in a failure to inject the intended dosage of chemicals. There is also the risk that the catheter will rupture or leak as pressure builds up during the administration of the chemicals unless the catheter has adequate strength and all the joints and connections are adequately reinforced.

23. The document does not mandate that a physician or other trained medical expert be present to render treatment or assistance to a prisoner in the event of an emergency; instead, the document mandates only that a physician be present to declare death. In fact, medical doctors are prohibited from participating in executions pursuant to the ethical principles set forth in the Hippocratic Oath. The American Nurses Association also

forbids members from participating in executions. This increases the chances of improper administration which could result in pain, an air embolism, the clotting of the catheter which would prevent injection, and heart failure. Furthermore, the document sets out specific dosages of three drugs to be administered to all subjects, but different dosages affect different people in different ways, depending upon individual body weight, metabolism, and other medical conditions. Accordingly, there is a risk that the listed dosages may be inadequate for the purposes for which they were selected, may result in unanticipated or inappropriate effects in a particular individual for medical or other reasons, and may inflict unnecessarily extreme pain and suffering.

24. The document does not outline proper guidelines for storage or handling of the chemicals involved. Improperly stored and/or handled chemicals may cause unnecessary suffering. Sodium pentothal wears off quickly; and if not enough is given, it may paralyze the muscles of the prisoner and render him incapable of breathing while still conscious, causing panic and an excruciatingly arduous death.

25. Plainly, the procedures outlined in the document discussed above were not properly adopted as required by the statute and the Administrative Procedures Act. They are constitutionally inadequate under the Fourteenth Amendment as a violation of appellant's right to procedural due process and may not be enforced under state law. (Gov. Code, § 11340.5.)

D. The constitutional error complained of in this claim is prejudicial under any standard of review.

Claim 77: Cruel and Unusual Punishment – Execution of Mentally Retarded or Impaired

A. Petitioner's conviction and sentence of death are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution because petitioner is mentally impaired to such an extent that his execution is prohibited by the Eighth Amendment. Petitioner's profound brain damage deprives him of the level of moral culpability requisite for execution. This error deprives petitioner of his federal and state constitutional rights to due process, to be free of cruel and unusual punishment, equal protection of the laws, a fair and reliable determination of guilt and penalty, and a fair trial.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the errors occurred, are presented in support of this claim: *Atkins v. Virginia* (2002) DJDAR 6937 (Eighth Amendment violation to execute mentally retarded persons); *In re Kemmler* (1890) 136 U.S. 436 (Eighth Amendment prohibits methods of punishment which inflict torture or a lingering death or involve the wanton infliction of pain); *Gregg v. Georgia* (1976) 428 U.S. 153 (same); *Hudson v. McMillian* (1992) 503 U.S. 1 (same); *Estelle v. Gamble* (1976) 429 U.S. 97 (Eighth Amendment embodies concepts of dignity, civilized standards, humanity and decency against which a court must evaluate penal measures); *Trop v. Dulles* (1958) 356 U.S. 86 (Eighth Amendment prohibits punishments that are incompatible with "evolving standards of decency that mark the progress of a maturing society"); *Coker v. Georgia* (1977) 433 U.S. 584 (to discern the "evolving standards of decency," courts look to objective evidence of how society

views a punishment *today*); *Furman v. Georgia* (1972) 408 U.S. 430 (no court should approve any method of implementation of the death sentence found to involve cruelty in light of presently available alternatives); *Lehr v. Robertson* (1983) 463 U.S. 248 (to establish a violation of the right to procedural due process, the complaining party must show: (1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation); *Ohio Adult Parole Authority v. Woodward* (1998) 523 U.S. 272 (capital appellant facing execution has a constitutionally protected due process interest in life that is not extinguished by his judgment and sentence); *Harmelin v.Michigan* (1991) 501 U.S. 857 (Eighth Amendment requires proportionality in sentencing) ; *Hicks v. Oklahoma,* 447 U.S. 343 (1979) (federal due process claim in state-created right).

C. The following facts, among other to be developed after adequate funding, discovery, investigation, and evidentiary hearing, are presented in support of this claim:

1. Petitioner incorporates as if fully set forth herein the facts and law set forth in Claims 2, 4, 5, 18, 19, 24, 47, 48, 77, and 78.

2. Throughout his life, petitioner has suffered from organic brain damage primarily affecting the frontal lobes of his brain. As a result of these impairments, petitioner's behavior "in all areas of life and under all domains places him well within the range consistent with mental retardation." (Exhibit 28, Declaration of Pablo Stewart.) Petitioner exhibits "significant subaverage intellectual functioning," and his "adaptive functioning falls well below the retarded range." (*Ibid.*) Accordingly, petitioner is mentally

retarded and his execution would violate the Eighth Amendment. (*Atkins v. Virginia* (2002) 02 Daily Journal D.A.R. 6937.)

3. Apart from the technical definition of mental retardation, petitioner's deficits in intellectual and adaptive functioning render him legally and morally indistinguishable from a mentally retarded person. As is the case with mentally retarded persons, petitioner has a diminished capacity "to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." (*Atkins v. Virginia, supra,* (2002) 02 Daily Journal D.A.R. 6937.) Like mentally retarded persons, petitioner's organic and mental impairments prevent him from comprehending the supposed deterrent purpose of the death penalty, meaningfully assisting counsel in presentation of a defense, or comprehending and presenting evidence in mitigation. Accordingly, petitioner's execution is prohibited under the Eighth Amendment.

D. These errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, give rise to a reasonable probability of a more favorable outcome in the absence of the error and are moreover prejudicial under any standard of review.

Claim 78: Cumulative Error

A. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because

the cumulative effect of the errors alleged in this petition and in petitioner's direct appeal deprived him of his federal constitutional rights, including, but not limited to, his rights to due process of law, equal protection, confrontation, the effective assistance of counsel, and the right to reliable capital proceedings and sentencing.

B. The following United States Supreme Court decisions, inter alia, in effect at the time the error occurred, are presented in support of this claim: *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15 (cumulative effect of errors may violate due process); *Strickland v. Washington* (1984) 466 U.S. 668 (criminal defendant has right to effective assistance of counsel at all stages of proceedings); *Brady v. Maryland* (1963) 373 U.S. 83 (withholding of evidence favorable to accused violates due process); *Pointer v. Texas* (1965) 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Gardner v. Florida* (1977) 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Hicks v. Oklahoma* (1979) 447 U.S. 343 (federal due process claim in state-created right).

C. The following facts, among others to be developed, after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim

1. Petitioner incorporates as if fully set forth herein all facts and law set forth in all other claims in this petition.

2. In this petition and in the briefing on direct appeal, petitioner has set forth separate post-conviction claims and arguments regarding the numerous guilt phase and penalty phase errors, and he submits that each one of these errors independently compels reversal of the judgment or alternative post-conviction relief. However, even in cases in which no single error compels reversal, a defendant may be deprived of due process if the cumulative effect of all errors in the case denied him fundamental fairness. (*Taylor v. Kentucky, supra*, 436 U.S. At p. 487, and fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459; see also *People v. Ramos* (1982) 30 Cal.3d 553, 581, revd. on other grounds in *California v. Ramos* (1985) 463 U.S. 992; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 388; *People v. Buffum* (1953) 40 Cal.2d 719, 726; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 791.)

3. Petitioner submits that the errors in this case require reversal both individually and because of their cumulative impact. As explained in detail in the separate claims and arguments on these issues, the errors in this case individually and collectively violated federal constitutional guarantees under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

D. Each of these errors, in violation of the Fifth and/or Sixth and/or Eighth and/or Fourteenth Amendments to the United States Constitution, individually and/or collectively, had a substantial and injurious effect or influence on the verdict, judgment and sentence and are moreover prejudicial under any standard of review.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

1. Order respondent to show cause why petitioner is not entitled to the relief sought;

2. Grant petitioner a reasonable opportunity within which to amend this petition to include claims which become apparent from further investigation or from allegations made in the return or informal opposition to the Petition;

3. Grant petitioner sufficient funds and opportunity to secure investigation and expert assistance as necessary to fully develop and prove the facts alleged in this petition;

4. Take judicial notice of the record on appeal, all briefs and pleadings filed in this Court in *People v. Welch*, S011323, and all other matters and documents of which petitioner has requested this Court to take judicial notice in the present petition;

5. Request that original exhibits referred to in this petition be transmitted to this Court by the clerk of the superior court (Cal. Rules of Court, rule 10(d));

6. Permit petitioner, who is indigent, to proceed without prepayment of costs and fees and grant him authority to obtain subpoenas without fee for witnesses and documents necessary to prove the facts alleged in this petition;

7. Grant petitioner the right to conduct discovery, including the right to take depositions, request admissions, and propound interrogatories and the means to pursue the testimony of witnesses;

8. Permit petitioner a reasonable opportunity to supplement the petition to include claims which may become known as a result of further investigation and information which may hereafter come to light;

9. Appoint a special master or referee to conduct an evidentiary hearing at which proof may be offered concerning the allegations in this petition, or any amended or supplemental petition, and appoint counsel to represent petitioner for such hearing;

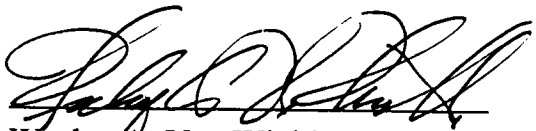
10. After full consideration of the issues raised in the petition, considered cumulatively and in light of the errors alleged on direct appeal, order that petitioner's conviction and death judgment be set aside;

11. Issue a writ of habeas corpus to have petitioner brought before it to the end that he might be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death; and

12. Provide such other and further relief as the Court may find appropriate in the interests of justice.

Dated: June 24, 2002

Respectively submitted,



Wesley A. Van Winkle
for Stephanie Ross, Esq. and
Wesley A. Van Winkle, Esq.

Attorneys for Petitioner,
DAVID ESCO WELCH

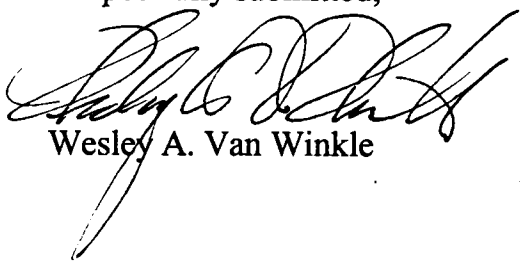
VERIFICATION

I am an attorney at law duly licensed to practice in all courts of the State of California. My office is in Alameda County. I am counsel for Petitioner in this action, who is restrained of his liberty and confined in a California State Prison at San Quentin, California, a county different from the county in which counsel practices. I am authorized to file this petition.

All facts alleged in the above petition, not otherwise supported by citations to the record, exhibits, or other documents are true of my own personal knowledge.

I declare under penalty of perjury the above is true and correct. This declaration was executed on June 24, 2002, at Berkeley, California.

Respectfully submitted,



Wesley A. Van Winkle

CERTIFICATE OF SERVICE BY MAIL

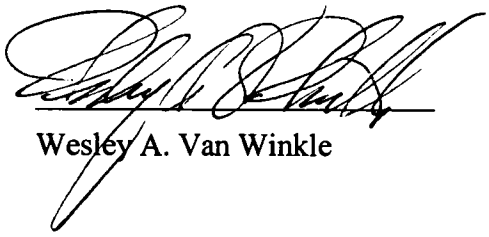
I declare that I am over the age of eighteen years and am employed in a law office in the City of Berkeley, County of Alameda, State of California. On this date, I personally filed this Petition for Writ of Habeas Corpus and ____ volumes of exhibits, together with ten copies thereof, at the California Supreme Court. I also served the parties in said cause either by personal service or by placing true and correct copies thereof in envelopes or packages with postage thereon fully prepaid in the United Sates mail at Berkeley, California, addressed as follows:

Catherine Rivlin, Esq.
Supervising Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

I have further arranged to make personal service on my client at the following address on or before July 24, 2002:

Mr. David Esco Welch
P.O. Box E-25702
San Quentin State Prison
San Quentin, CA 94974

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 24, 2002.



Wesley A. Van Winkle