IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

VICENTE BENAVIDES FIGUEROA

On Habeas Corpus

Case No. S111336

(Kern County Superior Court
Case No. 482661)

CORRECTED AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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In re VICENTE BENAVIDES FIGUEROA On Habeas Corpus	)	Case No. S111336 (Kern County Superior Court Case No. 48266)

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner, Vicente Benavides Figueroa,[1] through his counsel, the Habeas Corpus Resource Center ("HCRC"), petitions this Court for a writ of habeas corpus and by this verified petition sets forth the following facts and causes for the issuance of the writ:

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[1] Petitioner's name is incorrectly recorded in the Superior Court caption as "Vicente Figueroa Benavides." Petitioner's correct name is Vicente Benavides Figueroa, Benavides being his father's surname, and Figueroa his mother's. Petitioner is referred to as Mr. Benavides in this amended petition.

I. PROCEDURAL HISTORY AND BACKGROUND

A. Petitioner is unlawfully imprisoned under a judgment of convictions and sentence of death at San Quentin State Prison, San Quentin, California, by Robert Ayers Jr., Warden, and James E. Tilton, Secretary of the California Department of Corrections and Rehabilitation.

B. The court entering judgment of the convictions and sentences challenged by this corrected amended petition is the Superior Court of Kern County (Kern County Superior Court Case No. 48266).

C. The date of the judgment challenged by this corrected amended petition is June 11, 1993. (1 Clerk's Transcript ("CT") 873-74, 905.)

D. On November 20, 1991, a complaint was filed in the North Kern Municipal Court of Kern County. (1 CT at 57.) On November 27, 1991, a change of venue was granted from North Kern Municipal Court to Bakersfield Municipal Court. (CT 94.) On December 2, 1991, an amended complaint was filed in Bakersfield Municipal Court. (1 CT at 64-67, 94.) On December 12, 1991, a Preliminary Hearing was held before the Honorable Sharon Mettler in Bakersfield Municipal Court. (1 CT at 110.)

E. On December 19, 1991, the Kern County District Attorney filed a six-count Information in Superior Court charging petitioner Vicente Benavides Figueroa with the following offenses against Consuelo Verdugo: Count 1, murder (Penal Code § 187); Count 2, rape (Penal Code § 261, subd. (2)); Count 3, lewd and lascivious act on a child (Penal Code § 288, subd. (a)); Count 4, sodomy (Penal Code § 286, subd. (c)); Count 5, aggravated mayhem (Penal Code § 205); and Count 6, child endangerment (Penal Code § 273a, subd. (1)). (1 CT at 253-58.) Count 1 also alleged as special circumstances that the murder was committed while petitioner was engaged in the commission of rape, sodomy, and a lewd and lascivious act

on a child within the meaning of former Penal Code section 190.2, subdivisions (a)(17)(iii), (a)(17)(iv) and (a)(17)(v). (1 CT at 253-54.) Counts 2, 3 and 4 also alleged that petitioner inflicted great bodily injury on the victim within the meaning of Penal Code section 12022.8. (1 CT at 254-55.)

F. On motion of the district attorney, Count 6 was dismissed on April 17, 1993. (2 CT at 467.) Pursuant to Penal Code section 1118.1, the Court entered a judgment of acquittal as to Count 5 on April 15, 1993. (2 CT at 524.)

G. Petitioner was arraigned on December 20, 1991, before the Honorable Stephen P. Gildner, in Department Ten of the Kern County Superior Court. Petitioner entered a plea of not guilty on all counts and denied all allegations. (1 CT at 259-60.)

H. The defendant filed a Motion to Set Aside the Information pursuant to Penal Code section 995 on April 29, 1992. (1 CT at 269-73.) The district attorney filed its Opposition to Defendant's Motion on May 13, 1992. (1 CT at 279-96.) The court denied the motion as to all counts on May 15, 1992. (1 CT at 297.)

I. On February 23, 1993, the defendant filed a Motion to Change Venue. (2 CT at 342-87.) On March 3, 1993, the district attorney filed its opposition to the motion. (2 CT at 393-405.) On March 15, 1993, the court denied the defendant's venue motion. (2 CT at 453-56.)

J. On March 1, 1993, the district attorney filed a Motion In Limine to Admit Photographs of Victim Consuelo Verdugo. (CT 388-92.) The defendant filed his Motion to Limit Photographic Evidence on March 10, 1993. (2 CT at 432-38.) On March 15, 1993, the court ruled that no live photos of the victim are to be shown at guilt phase. (2 CT at 457.)

K. The defendant filed a Motion In Limine to Exclude Evidence of Any Uncharged Acts and for an Evidentiary Hearing on March 10, 1993. (2 CT at 409-31) On March 15, 1993, the court granted the defense motion, but the prosecution was permitted to present testimony about what Cristina Medina saw and heard with respect to petitioner's prior conduct with Consuelo. (2 CT at 459.)

L. On March 10, 1993, the court denied a defense motion to exclude cameras in the courtroom; but limited the media to one camera and required the stations to pool the footage. (2 CT at 440.) The court granted the district attorney's motion to exclude cameras during the testimony of the victim's ten-year-old sister. (2 CT at 440.)

M. On March 15, 1993, the defendant filed a Motion for Attorney Conducted Sequestered Individual Voir Dire and Motion In Limine to Insure a Fair and Impartial Trial. (2 CT at 441; 449-50.) The court granted both defense motions on March 15, 1993. (2 CT at 459.) The court also granted the district attorney's motion to ask special questions of the jurors. (2 CT at 457.)

N. On March 15, 1993, the defendant filed a Motion In Limine to Prohibit Prosecutorial Discovery of Defense Penalty Phase Evidence Prior to the Start of the Penalty Phase Trial. (2 CT at 443-48.) Granting the motion in part, the court ruled the defense was not required to disclose witness names and identifying information at that time. (2 CT at 458.)

O. On March 15, 1993, the prosecution's motion in limine to admit defendant's untaped, un-Mirandized statements to Detective Valdez and the taped and Mirandized statements, both of which were custodial interrogations was argued. (2 CT at 458.) The court scheduled a hearing pursuant to Evidence Code section 402 for the presentation of evidence

regarding the motion for March 16, 1993. (2 CT at 459.) Detective Al Valdez of the Delano Police Department testified. Following his testimony, the court found that the defendant's statements were made freely and voluntarily and therefore, would be admissible at trial. (2 CT at 461.)

P. Jury selection began on March 17, 1993, and a jury was impaneled and sworn on April 1, 1993. The guilt phase of trial began with the district attorney's opening statement the same day. Defense counsel reserved opening statement. (2 CT at 489-90.) Guilt phase evidence was concluded and jury deliberations began on April 19, 1993. (2 CT at 533; 3 CT at 740.) The following day, the jury returned guilty verdicts on four substantive counts and found each special circumstance allegation and each great bodily injury enhancement allegation true. (3 CT at 727-42.)

Q. The penalty phase began on the morning of April 22, 1993. (3 CT at 787.) Within hours, the penalty phase was completed, and the jury began deliberations at 11:35 a.m. that same day. (3 CT at 788.) At 4:40 p.m. that afternoon the jury reached a verdict of death. (3 CT at 789.)

R. The defendant filed a Motion For New Trial and Motion to Reduce Penalty to Life Imprisonment Without the Possibility of Parole on June 2, 1993. (3 CT at 807-18.) The prosecution filed its Opposition on June 8, 1993. (3 CT at 819-31.) On June 11, 1993, the day for sentencing, the defendant filed Letters In Support Of Defendant to be considered prior to sentencing. (3 CT at 832-67.) The court denied the defense motion for a new trial and declined to modify the sentence to life without the possibility of parole. A judgment of death was imposed. (3 CT at 873-74; 905-11.)

S. At trial, petitioner was represented by Donnalee Huffman and Jeffrey Harbin.

T. Pursuant to Penal Code section 1239(b) petitioner's automatic appeal

to this Court followed.

1. On July 1, 1998, this Court appointed the Office of the State Public Defender, to represent Mr. Benavides on his automatic appeal.

2. On March 18, 1999, this Court appointed the Habeas Corpus Resource Center ("HCRC") to represent Mr. Benavides in habeas corpus and executive clemency proceedings.

3. On January 25, 2001, appellate counsel filed Appellant's Opening Brief. Respondent's Brief was filed on September 27, 2001, and on May 16, 2002, Appellant's Reply Brief was filed. On February 17, 2005, this Court affirmed the judgment.

4. On November 12, 2002, petitioner filed a Petition for Writ of Habeas Corpus in this Court. Respondent filed an Informal Response on July 15, 2003, and petitioner filed an Informal Reply on February 20, 2004, and Supplemental Allegations on November 30, 2004.

5. In February 2006, the media reported that Kathleen Culhane, a former HCRC investigator who had worked on Mr. Benavides's case, had submitted declarations in another capital case that were alleged not to have been signed by the witnesses. As a result of these accusations, the HCRC began to review the work that Ms. Culhane had been assigned in Mr. Benavides's case to verify its accuracy and reliability. After reviewing a portion of her work, the HCRC determined that all of Ms. Culhane's assigned work needed to be redone and on August 29, 2006, the HCRC requested an extension of time from this Court in which to amend the Petition for Writ of Habeas Corpus with accurate and reliable information.

On November 1, 2006, this Court granted petitioner an extension of time to file an amended petition until September 1, 2007.

6. On September 4, 2007, petitioner filed a timely Amended Petition for Writ of Habeas Corpus and an application for leave to file under seal certain portions of the supporting exhibits.

7. On October 16, 2007, respondent filed a motion opposing petitioner's request to seal some of the exhibits and petitioner responded to the opposition on November 17, 2007. This Court denied petitioner's application for leave to file the exhibits under seal and ordered the exhibits publicly filed on December 12, 2007. Justice Kennard opined that the application should be granted.

8. On November 8, 2007, respondent filed a request for a more definite statement of the modifications made to the amended state habeas petition. On November 20, 2007, petitioner filed an opposition to the request. On January 23, 2008, this Court granted respondent's request for a more definite statement and ordered petitioner to file a corrected amended petition by April 22, 2008. This Court ordered petitioner to not include references to the Informal Response, Informal Reply or the opinion on direct appeal in the corrected amended petition. This Court further ordered that petitioner seek permission to file a supplemental petition if petitioner wishes to present additional material unrelated to the fraudulent investigation of Kathleen Culhane to supplement existing claims. This Court held that any corrected amended petition or supplemental petition filed by permission of this Court by April 22, 2008, would be deemed presumptively timely filed.

II. STATEMENT OF FACTS

Vicente Benavides Figueroa, a forty-two year old Mexican national with no criminal record, was arrested and charged with the death of twenty-one-month-old Consuelo Verdugo in November 1991. Law enforcement immediately accused Mr. Benavides of raping and sodomizing his girlfriend's daughter while he was alone with her during a fifteen-minute period on the evening of November 17, 1991. When police questioned him in Spanish,[2] Mr. Benavides insisted that he was innocent, he had found the child unconscious, and could not explain the cause of her injuries. The officers viewed his answers as evasive and inconsistent. The prosecution at trial used his statements and inability to explain her injuries as proof of his guilt.

What the prosecution, the jury, and his own lawyers did not know is that Mr. Benavides was and is functioning at the mental level of a child just over seven years old. Moreover, the officer who questioned Mr. Benavides and elicited the damaging statement was incapable of communicating in Spanish given his own language deficiency. As a result, the officer, who concluded that Mr. Benavides was lying, repeatedly asked him whether the child was "shaved clean" instead of whether he sodomized her. Mr. Benavides fared no better in his attempts to understand the proceedings at trial. Mr. Benavides's interpreter – who interpreted the witnesses' testimony for him and Mr. Benavides's testimony to the court – was an uncertified and unqualified interpreter who had failed the state's certification examination at least three times. His incompetent translation of Mr. Benavides's testimony materially changed his words in a manner that

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[2] Mr. Benavides was, and is, a monolingual Spanish speaker.

allowed the prosecutor to substantially mischaracterize Mr. Benavides's testimony on cross-examination. Further, the incompetent translation of the police detective's interrogation of Mr. Benavides on the day he was arrested, which was given to the jury, presented a completely distorted and materially false rendition of Mr. Benavides's statements.

The prosecution, on the other hand, had no difficulty understanding how to obtain a conviction and death sentence in the case. Virtually every medical observation and conclusion that the prosecution presented – from the cause of death to the "evidence" of rape and sodomy – was manufactured and false. The indisputable evidence presented in this petition – provided by world-renown medical authorities, the medical personnel who observed Consuleo Verdugo immediately upon her arrival at the hospital, and the doctors who testified on behalf of the prosecution – disproves each and every element of the prosecution's case. The jury did not learn or know that the pathologist's cause of death – anal penetration that severed her pancreas – is medically impossible. The jury did not learn or know that the numerous medical personnel who administered to Consuelo's care immediately upon her arrival at the hospital emphatically deny that she had such injuries. Indeed, the jury did not hear that the injuries used to support the charges resulted not from criminal conduct, but rather from the invasive and sustained medical efforts to address Consuelo's increasingly deteriorating medical condition.

One reason why the jury was not presented with an accurate picture of her medical condition and injuries is that the prosecution did its best to conceal the truth from petitioner, the court, and the jury. But another reason is that Mr. Benavides's trial attorneys failed to undertake any investigation of Consuelo's medical treatment. Indeed, although Consuelo was

hospitalized for eight days prior to her death, trial counsel did not interview any of the dozens of nurses and doctors who observed her medical condition and treated her injuries. The two defense experts she contacted on the eve of and during trial were provided with inadequate information about Consuelo's medical history and injuries, insufficient time to review and analyze the complicated medical issues presented by the case, and little or no guidance as to even the questions to which counsel sought answers.

The quality of the penalty phase development and presentation was similarly deficient. Although defense counsel informed the court that he was prepared to present the testimony of seventy-seven friends, family, and co-workers on behalf of Mr. Benavides, only four witnesses testified in the guilt phase and only two witnesses testified in the penalty phase. Their testimony about Mr. Benavides's character and background was only minutes long. Trial counsel conducted no investigation in Mexico, notwithstanding the repeated efforts of Mr. Benavides's friends and family who tried to contact counsel to offer their support and assistance. The courthouse hallways were filled with family, friends, and co-workers willing to testify about Mr. Benavides's mental impairments, impoverished and traumatic background, and admirable character. Included among these individuals were people who trusted their children's lives to Mr. Benavides, and his mother, who traveled from Mexico to help her son a year before the trial, but were never given the opportunity to testify.

A. Evidence Presented at Trial

Estella Medina worked as a nurse's aide at Delano Regional Medical Center ("DRMC"). On November 17, 1991, she left her apartment at approximately 6:40 p.m. to report to work at DRMC by 7:00 p.m. She left

her children, nine-year-old Cristina and twenty-one-month-old Consuelo, in the care of Mr. Benavides, who often stayed with her and her daughters. Cristina and Consuelo were watching television and coloring when Ms. Medina left. Cristina asked if she could visit her friend, Maribel, who lived in the same apartment complex, and she was given permission to go. Approximately fifteen minutes later, Mr. Benavides called for her to return home. When Cristina returned to the apartment, Mr. Benavides was holding Consuelo. Mr. Benavides had Cristina call her mother at the hospital. Ms. Medina returned home and she and Mr. Benavides immediately took Consuelo to the emergency room at DRMC.

Dr. Ann Tait, the emergency room physician at DRMC, and the emergency room nurses, were the first to observe and treat Consuelo on the night of November 17, 1991. Dr. Tait began treating Consuelo for a head injury, but soon realized that Consuelo required a higher level of care than DRMC was equipped to provide and arrangements were made to transfer her to Kern County Medical Center ("KMC") in Bakersfield. At this time, Consuelo's abdomen began distending, indicating internal bleeding and a worsening of her condition. Consuelo was then transferred to Kern Medical Center for surgery and a higher level of care. On November 19, 1991, she was transferred to UCLA Medical Center, where she underwent further surgery. She died on November 25, 1991 as a result of her internal injuries.

The prosecution persuaded the jury, through medical testimony, that petitioner beat, shook, suffocated, squeezed, raped and sodomized Consuelo Verdugo to death. The prosecution asserted that Consuelo sustained injuries to her abdomen, head, genitalia and anus. Through the testimony of Dr. Jess Diamond, a pediatrician specializing in child abuse at Kern Medical Center ("KMC"), the prosecution claimed the alleged injuries that

Dr. Diamond observed during his limited examination of Consuelo on November 18, 1991, were attributable to sexual assault.

Dr. Bloch, a surgeon at KMC, performed surgery on Consuelo on November 18, 1991. He testified that he observed blood in her abdomen; a severed pancreas and duodenum; and old scarring and adhesions between the colon and liver. Dr. Bloch concluded that these injuries were indicative of some form of blunt force trauma to the abdomen.

Dr. Bentson, chief of neuroradiology at UCLA Medical Center ("UCLA"), testified to his findings on a Computerized Tomography (CT) scan taken on November 21, 1991, of Consuelo's brain. Dr. Bentson observed bilateral watershed brain infarcts of the parietal occipital area of Consuelo's brain. He concluded that these infarcts were attributable to the child being suffocated. Dr. Bentson's conclusion was based solely on his review of the CT scan. He never reviewed any medical records or medical history of Consuelo and her hospital treatment prior to the CT scan.

The prosecution called Dr. James Dibdin, a forensic pathologist, who conducted the autopsy of Consuelo on November 26, 1991. Dr. Dibdin testified that during the autopsy he had observed evidence of injuries to the genitalia and anus, rib fractures, and a subdural hematoma. Based upon his findings during the autopsy, Dr. Dibdin testified that the cause of death was blunt force penetrating injury of the anus. He opined that Consuelo's internal injuries were the result of sodomy. Dr. Dibdin concluded that the subdural hematoma and rib fractures he observed were a direct result of squeezing and shaking. He opined that the pattern of injuries that the child displayed was indicative of Shaken Baby Syndrome.

To further bolster the case against petitioner, the prosecution elicited testimony from Dr. Diamond, Dr. Dibdin and Dr. Bentson, that the injury to

Consuelo's inner lip and bridge of her nose was a direct result of a hand being placed over her mouth. The prosecution argued this scenario was the method of suffocation used.

Criminalist Jeanne Spencer testified that no vomit was found outside in the doorway but was found on some tissue in the kitchen garbage can. She found that carpet fibers in the vomit were consistent with the carpet in the apartment. The prosecution argued the lack of dirt in the vomit discredited petitioner's testimony regarding how and where he found the child.

The prosecution presented lay witness observations of alleged prior illnesses and injuries of Consuelo. Despite any possible connection of these prior illnesses and alleged injuries to petitioner, the prosecution argued to the jury that petitioner was the perpetrator. In addition, the prosecution presented a significant amount of evidence relating to Estella Medina's character and background.

During its case, the defense presented two doctors – Dr. Nat Baumer and Dr. Warren Lovell – to dispute the alleged injuries and to theorize a motor vehicle accident as the likely cause. Petitioner testified to the events leading up to the discovery of the child outside. Several character witnesses were called to attest to petitioner's honesty and good character.

The prosecution, during his closing argument, assured the jury that all of the medical experts presented were percipient witnesses whose qualifications were superior to those called by the defense. The prosecution argued that all medical personnel who had seen the child agreed that all of the injuries were attributable to physical and sexual abuse. The prosecution challenged the defense to come forward and tell the jury about one witness who saw Consuelo and did not find the injuries that all of the other

witnesses catalogued.

During the penalty phase, the prosecution presented victim impact testimony of three of Consuelo's relatives – her Aunt Diana Alejandro, and two cousins, Darlene and Vicki Salinas.

The defense penalty phase of the trial consisted solely of the testimony of two witnesses – Dionicio Campos, a lifelong friend and Delfino Trigo, petitioner's employer. Each testified to petitioner's good character. Only at the court's suggestion did the prosecution and defense stipulate to the fact that petitioner had no prior felony convictions and no prior acts of violent conduct. The entire penalty phase, including opening statements and closing arguments, lasted less than two hours.

B. Evidence Presented in this Petition

The emergency room staff at DRMC was the first medical personnel to treat Consuelo on November 17, 1991. All of the DRMC staff who observed Consuelo in the first two hours following the incident, affirmatively and emphatically stated to law enforcement, that they had not seen any injuries to Consuelo's genitalia or anus. Had Consuelo been raped and sodomized the injuries to her genitalia and anus would have been grossly obvious.

The observations of these critical percipient witnesses to Consuelo's condition were never presented at trial. Significantly, the jury did not hear any testimony about the invasive medical treatment undertaken of Consuelo that produced the "signs" of sexual abuse used to convict Mr. Benavides. The jury similarly never heard that the cause of death about which Dr. Dibdin testified -- blunt force penetrating injury of the anus -- is anatomically impossible. In addition, contrary to the prosecution's

assertion that there was no evidence Consuelo suffered a seizure, the medical records from UCLA Medical Center are replete with notations of seizure activity observed in Consuelo.

The prosecution and law enforcement officials withheld evidence, reports, interviews and exculpatory material from the defense throughout the investigation and provided and elicited false testimony and argument throughout the prosecution of petitioner. The state withheld evidence of concerted efforts of law enforcement, the prosecution and Child Protective Services ("CPS"), to coerce Estella Medina and her daughter, Cristina Medina, to cooperate with the prosecution of petitioner. Family members were used as agents of law enforcement to extract information from witnesses to use against petitioner. Lay witnesses and medical personnel were tainted with the state's theories of rape and sodomy during interviews and investigation. Law enforcement reports and notes, withheld from the defense, confirmed the existence of dirt and debris in the vomit found in the kitchen garbage can, lending credence to petitioner's version of events and directly undermining the prosecutor's argument.

Although the prosecution presented the jury with a myriad of prior injuries that Consuelo suffered at the hands of Mr. Benavides, the truth is that the prosecution was well aware that Mr. Benavides had nothing to do with those injuries.

The jury never heard from Mr. Benavides's family and friends who had known him throughout his life in Mexico and the United States. The jury never learned that, despite a childhood plagued by severe physical abuse, extreme malnutrition, and poverty, Mr. Benavides was a kind, caring man who hurt no one. The jury did not hear that he suffers from major depression, alcoholism, post-traumatic stress disorder, and significant

cognitive deficits.

Mr. Benavides was born into a family whose history included mental illness, alcoholism, extreme poverty, malnutrition, and horrific physical and psychological abuse. Mr. Benavides's genetic legacy is one of generations of poor peasants, initially enslaved to work the haciendas of wealthy landowners and condemned to poverty to work as *campesinos*, or peasants, in a system of sharecropping under which few families were able to thrive. Attempts by the *campesinos* to organize and better their conditions were met with violence and death. As a result, Mr. Benavides's parents, like their ancestors, began and ended their lives in extreme hardship.

Throughout his childhood, Mr. Benavides suffered continuous physical abuse at the hands of his father. His father was a physically, emotionally and verbally abusive, mentally ill, alcoholic who abused petitioner, his siblings and his mother on a regular basis. Mr. Benavides attempted to defend his mother from the beatings meted out by his father. His developmental well-being was at risk even before his birth because his father beat and whipped his mother while she was pregnant. Mr. Benavides's mother lost at least one child as a result of his father's beatings. From birth, Mr. Benavides's world consisted of relentless and inescapable trauma, abuse, alcoholism, mental illness and severe poverty and malnutrition.

Mr. Benavides grew up in an extremely poor farming settlement, where there was no running water, no electricity, and insufficient food. As a baby, food and water were often not available to him and throughout his youth. Mr. Benavides and his family were often forced to live off of hard tortillas and water and went to bed hungry, including during a period of particularly severe drought when Mr. Benavides was a toddler. His father

isolated the family and deprived them of food, compounding the poverty and misery Mr. Benavides suffered to levels far more severe than were common in the already poor area in which they lived.

At the age of four or five, Mr. Benavides began working grueling hours in the fields. Exposed to pesticides and other poisons, Mr. Benavides toiled on the barren land for the meager products it generated. Forced to work in the fields by his father, Mr. Benavides was severely beaten and whipped if his father felt he was not working hard enough.

Mr. Benavides was fed at a very young age and he suffers from a multigenerational predisposition to alcoholism. As a infant, Mr. Benavides's parents gave him *leche caliente*, a regional drink made of fresh cow's milk, sugar, chocolate, and alcohol. A number of Mr. Benavides's relatives, including his father and several of his uncles, are alcoholics.

Mr. Benavides's life was shaped by violence, poverty, emotional abuse and a genetic predisposition towards depression and alcoholism. He has suffered from significant depression and post traumatic stress disorder from early childhood on through his adulthood. Mr. Benavides has also demonstrated significant cognitive deficits throughout his life from the time he was a young boy, when his mental limitations became abundantly clear to his teachers and his peers, into his adulthood, where he made every effort to surround himself with others who cared for him and handled the larger decisions and responsibilities in his life.

Despite his father's attacks, Mr. Benavides was quiet and extremely hardworking as a child, a young man, and as an adult. Mr. Benavides has a long history of being a caring and loving father to several children, some of whom were not his own, taking on the role of father for his nieces after his brother-in-law passed away and left Mr. Benavides's sister with two

daughters under the age of three. Having twice suffered the tragic loss of a newborn child due to bronchopneumonia and complications related to premature birth, Mr. Benavides was left profoundly and traumatically affected in a way that played a significant role in Mr. Benavides's case.

The wealth of information regarding Mr. Benavides's background and upbringing, as well as the numerous relatives and friends willing to testify on behalf of petitioner at his trial, was never introduced to the jury.

Throughout the court proceedings and throughout Mr. Benavides's representation and attorney-client relationship, he was deprived of competent and certified interpreters. The interpreters provided by the state and present in court, before and during trial, to assist him and any monolingual Spanish-speaking witnesses, were extraordinarily deficient. As a result, Mr. Benavides was not fully informed of the happenings in the courtroom because there was no competent interpreter available to him throughout the proceedings. Likewise, the interpreter who was the main conduit between Mr. Benavides's Spanish-speaking friends and family and who interpreted some of their testimony had very poor Spanish language skills which hindered communication and led to very poor interpretation of their court testimony.

III. BASIS FOR JURISDICTION

This Court affirmed petitioner's conviction and sentence on February 17, 2005. Pursuant to this Court's order of January 23, 2008, this corrected amended petition is timely filed. This petition is necessary because petitioner has no other plain, speedy, or adequate remedy at law for the substantial violations of his constitutional rights as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution, the California constitutional analogues and Penal Code Section 1473, in that the bulk of the factual bases for these claims lies outside the record developed on appeal.

IV. JUDICIAL NOTICE AND INCORPORATION

Petitioner hereby incorporates all exhibits filed with this petition as if fully set forth herein. Petitioner requests that this Court take judicial notice of the certified record on appeal and all pleadings on file in this Court in the cases of People v. Benavides, Case No. 48266, to avoid duplication of those voluminous documents.

V. SCOPE OF CLAIMS AND EVIDENTIARY BASES

Because a reasonable opportunity for full and factual investigation and development through access to this Court's subpoena power and other means of discovery, interview material witnesses without interference from State actors, and an evidentiary hearing have not been provided to petitioner or his habeas corpus counsel, the full evidence in support of the claims which follow is not presently reasonably obtainable. Nonetheless, the evidentiary bases that are reasonably obtainable and set forth below, adequately support each claim and justify issuance of the order to show cause and the grant of relief.

VI. CLAIMS FOR RELIEF

A. CLAIM 1: THE STATE PRESENTED FALSE AND MISLEADING TESTIMONY THAT PETITIONER CAUSED CONSUELO VERDUGO'S INJURIES[3]

The convictions and sentence of death were rendered in violation of petitioner's rights to fair, reliable, rational, nonarbitrary and accurate determinations of guilt and penalty, to a fair trial free from false and misleading evidence, to an opportunity to confront and refute adverse evidence, to compulsory process, to the disclosure of all material exculpatory evidence, to the assistance of competent experts, and to the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and Penal Code Section 1473 because the prosecution introduced, and trial counsel unreasonably and prejudicially failed to exclude or refute, false testimony about the nature and extent of the injuries to the victim, rape, and sodomy.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

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[3] This Claim qualifies as a Category 2 claim as described in this Court's November 1, 2006 Order. Modifications made in each claim are fully described in the Declaration of Michael Laurence, filed separately with the Court in support of this Corrected Amended Petition.

1. The State's case against petitioner was premised upon the unreliable and professionally irresponsible autopsy conducted by Dr. James Dibdin.

a. The Kern County Coroner's Office, with which Dr. Dibdin was affiliated, had a history of falsifying evidence in criminal cases in order to assist prosecutors in securing convictions, and similar allegations of misconduct continue to the present. Recently, Kern County forensic pathologist Donna L. Brown was found to have deliberately omitted information from her autopsy report in the 1998 death of a two-year-old child in order to help prosecutors secure a conviction against her parents.

b. Dr. Dibdin had a reputation for incompetence and unprofessionalism. His history included the following incidents of misconduct and incompetence: (1) Dr. Dibdin was fired from the Oklahoma City Medical Examiner's Office for the poor quality of his autopsies and for rendering erroneous causes of death. (2) He was fired from his post as a Medical Examiner in Tasmania, Australia for unacceptable practices and giving erroneous causes of death. (3) He was fired from the San Bernardino County, California, Coroner's Office for the poor quality of his forensic practices and for the poor quality of his causes of death. (4) He was fired from the Brown County, Wisconsin, medical examiner's office for marking on death certificates that autopies had been performed in cases when they had not, and for offering questionable causes of death. (5) He was fired by the Kern County Coroner for questionable practices as a pathologist and for refusing to correct erroneous causes of death. He had heated disagreements with staff in the Coroner's Office over

causes of death because other staff members believed his findings were unsupported. (6) His contract with Nevada County, California, was terminated after he made incorrect and misleading cause of death determinations in several cases and refused to revise them when requested to do so by the County Coroner. (Exh. 47 at 4770-82 [*James D. Dibdin, M.D. v. County of Nevada, State of California, et al.*, Sacramento County Superior Court, Case No. 96-AS-01697].)

c. Dr. Dibdin had incorrectly determined the cause of death in other cases involving children. He erroneously attributed the August 31, 1992, death of an 8-month-old boy to violent shaking. The boy's father told police he had attempted to resuscitate the boy by pressing on his chest and abdomen after he inexplicably stopped breathing. Dr. Dibdin concluded that this explanation was inconsistent with the injuries he observed at autopsy. He testified at the father's trial that it would have taken 25 to 30 minutes for the boy to die as a result of his injuries. Witnesses testified that the father had been alone with the boy for no more than 15 minutes. In light of Dr. Dibdin's false testimony, the judge made the unusual move of dismissing the case prior to closing arguments for lack of evidence.

d. Dr. Dibdin's autopsy report concerning Consuelo Verdugo's death fits into this pattern of unprofessionalism and is fundamentally unreliable, as he did not prepare it until January 21, 1992, nearly two months after November 26, 1991, the date on which he had conducted the autopsy. (Exh. 8 at 3561 [Autopsy Protocol in Autopsy of Consuelo Verdugo].) Rather than a direct record of his observations, this

report is a reconstruction based upon Dr. Dibdin's memory of the autopsy, and as such is unreliable. (Exh. 77 at 5452 [Declaration of Jack H. Bloch, M.D.].)

2. The State denied petitioner a fundamentally fair trial when it delayed creation of the autopsy report until after the preliminary hearing in order to manufacture medical evidence. Because petitioner's counsel did not have an autopsy report at the preliminary hearing, they were not able to challenge the validity of the cause of death offered by Dr. Dibdin.

a. Dr. Dibdin delayed preparation of the report in order to manufacture evidence. The prosecution developed its theory that Consuelo was raped and sodomized to the point of causing abdominal injury and death, on November 18, 1991. (Exh. 4 at 1913 [Delano Police Report, November 19, 1991].) Even though this cause of death was medically impossible, the prosecution requested that Dr. Dibdin provide support for this cause of death in the autopsy report. Dibdin therefore completed the autopsy report not from his findings, or from what he saw, but according to the research and necessity of the prosecution.

b. Detective Bresson testified at the preliminary hearing that Dr. Dibdin had told him the cause of death was "blunt force penetrating injury to the anus." (1 CT at 212.) Dr. Dibdin's theory that anal penetration also caused the injury to the upper abdominal contents was manufactured after the preliminary hearing when the autopsy report was prepared on January 21, 1992. (Exh. 8 at 3561 [Autopsy Protocol].)

3. The State presented false testimony that Consuelo Verdugo had genital injuries that were caused by rape.

a. The State presented testimony from Dr. Jess Diamond that Consuelo had injuries to her genitalia resulting from rape, even though these injuries were more likely the result of trauma from medical interventions administered after her arrival at the hospital. Dr. Diamond, a pediatrician who conducted sexual abuse examinations for Kern County, testified that in conducting his examination of Consuelo, he had observed a laceration of her hymen and a bruise on her perineum. He testified that these injuries were the result of penetration of the vagina. (10 RT at 2064.)

b. The prosecution knew that this testimony was false. The prosecution had in its possession records demonstrating that, prior to Dr. Diamond's examination, medical personnel at DRMC and KMC had repeatedly and unsuccessfully attempted to insert a catheter into Consuelo's bladder to draw urine. (Exh. 1 at 5 [Nursing Notes of Linda Roberts, R.N., November 17, 1991]; Exh. 2 at 59 [Nursing Notes of Betsie Lackie, R.N., November 18, 1991].) In some of these attempts a catheter that was too large for her urethra was used. (Exh. 72 at 5420 [Declaration of Anita Caraan Wafford, L.V.N.].) These repeated and unsuccessful attempts to insert catheters, along with the intensive digital manipulation of the genitalia that catheterization requires, most likely were the cause of the genital injuries he observed. (Exh. 83 at 5497-99 [Declaration of William A. Kennedy, II, M.D.]; Exh. 79 at 5470 [Declaration of Anthony Shaw, M.D.]; Exh. 78 at 5458 [Declaration of Rick Harrison, M.D.].)

c. Had these injuries been the result of sexual assault prior to her arrival at the hospital, the staff at DRMC would have observed bleeding, lacerations, bruises, or other evidence of injury in Consuelo's

genitalia. They did not observe any evidence of injury despite having ample time and opportunity to do so. (Exh. 76 at 5442 [Declaration of Anne E. Tait, M.D.]; Exh. 74 at 5432 [Declaration of Linda Roberts, R.N.]; Exh. 75 at 5437 [Declaration of Faye Van Worth, R.N.]; Exh. 72 at 5420 [Declaration of Anita Caraan Wafford, L.V.N.].) Their observations of Consuelo's genitalia and anus were the first to be made and were made before Consuelo underwent repeated unsuccessful attempts at catheterization, extensive efforts at resuscitation at DRMC and KMC, and major abdominal surgery. These observations are, therefore, the most reliable available evidence of the state of Consuelo's genitalia and anus prior to medical intervention. (Exh. 83 at 5499 [Declaration of William A. Kennedy, II, M.D.]; Exh. 77 at 5450 [Declaration of Jack H. Bloch, M.D.]; Exh. 79 at 5467 [Declaration of Anthony Shaw, M.D.].)

d. Dr. Diamond testified falsely that Consuelo's genitalia and anus were the only parts of her body in which he observed edema, or swelling, and that the swelling was a result of trauma to these areas. (10 RT at 2077.)

(1) The prosecution knew that the swelling was the result of Consuelo's medical condition at the time of his examination. Her edema was caused by her disseminated intravascular coagulation (DIC), a condition in which the blood loses the ability to clot, leading to uncontrolled bleeding and edema. Edema that affects the entire body will manifest more dramatically in areas where the fluid settles due to gravity, including the genital and

anal areas. (Exh. 83 at 5502 [Declaration of William A. Kennedy, II, M.D.]; Exh. 82 at 5493 [Declaration of Dale S. Huff, M.D.].)

(2) The prosecution presented inflammatory photos of Consuelo's swollen body to the jury. They argued that Consuelo's genitalia were the only portions of her body that were swollen and that this was due to injuries inflicted by petitioner. (11 RT at 2155.) In fact, the prosecution knew that these photos were falsely presented and inflammatory, that Consuelo's body was swelling due to her medical condition, and that this swelling affected her entire body, not just her genitalia.

e. Dr. Dibdin falsely attributed the injuries of the genitalia he observed during the autopsy to rape and mischaracterized the severity of the injuries. (11 RT at 2143.) He noted in his autopsy report a one-half inch laceration of the "posterior wall of the vaginal opening" and an abrasion of the skin between the vagina and anus. (Exh. 8 at 3557 [Autopsy Protocol].) He cited this injury in his testimony as evidence of vaginal penetration, and characterized it as "quite a large laceration." (11 RT at 2123.) The tear is in fact relatively small and entirely inconsistent with penetration of the vagina by a penis or similarly sized object, which would have resulted in extensive laceration of the vagina and external genitalia. It was most likely caused by a catheter during the repeated attempts at catheterization at DRMC and KMC. (Exh. 83 at 5510-11 [Declaration of William A. Kennedy, II, M.D.].)

f. Dr. Dibdin's use of the phrase "posterior wall of the vaginal opening" to describe the location of the tear he observed in her

genitalia is inconsistent with accepted medical terminology and was intended to obscure the exact the location of the tear. It is impossible to determine from this description whether this tear is in the external genitalia or inside the vagina. (Exh. 83 at 5509-10 [Declaration of William A. Kennedy, II, M.D.].)

g. Dr. Didbin falsely testified that he observed swelling only around Consuelo's genitalia and anus (10 RT at 2055), when in fact she had severe swelling over her entire body. (Exh. 3 at 1002 [Extended Critical Care Examination Note, Rick Harrison, M.D., November 20, 1991].) Edema of the entire body would be more pronounced in areas such as the genitalia and anus due to gravity. (Exh. 83 at 5502 [Declaration of William A. Kennedy, II, M.D.].)

4. The State manufactured medical testimony that Consuelo had internal tears of her vagina and rectum that indicated she had been vaginally and anally penetrated with a penis or similar size object.

a. The State presented the testimony of Dr. Diamond that there was a tear to the anterior wall of Consuelo's vagina, when in fact none existed nor was documented in the autopsy report or in the records of any of the medical personnel who treated her. He offered the existence of this tear as support of his contention that she had been raped. (10 RT at 2060.)

b. Dr. Dibdin testified that Consuelo had tears in her anus, vagina, and urinary bladder of up to four weeks in age. Dr. Dibdin testified that he saw these injuries in the microscopic slides he reviewed during the autopsy. These tears "weren't in one particular area," according to Dibdin, but "were depicted in several areas" in the anus, vagina and

urinary bladder. (11 RT at 2140.) Dr. Dibdin attributed these tears to anal penetration, which caused the internal abdominal injuries. (11 RT at 2166-67.)

c. The prosecution knew that no such injuries existed. Tissue slides of Consuelo's perineum, cut by the Kern County Coroner's Office, contain no evidence of tears or scarring, either new or old. (Exh. 82 at 5489-90 [Declaration of Dale S. Huff, M.D.].) The slides have evidence of hemorrhage. In some areas, this hemorrhage was up to two days of age, and in another area was no more than ten days old. This older hemorrhage present in the slides was most likely the result of massive bleeding in Consuelo's abdomen during her eight days of hospitalization and her acute state of DIC. The hemorrhage that is present is not evidence of penile penetration and is most likely the result of internal bleeding from her abdominal injuries and DIC. (Exh. 82 at 5490-92 [Declaration of Dale S. Huff, M.D.].)

d. Testimony by Dr. Diamond directly contradicted Dr. Dibdin's testimony that tears to the anus could account for anal penetration with a penis causing damage to upper abdominal organs. He testified that he had revised his opinion of the abdominal injuries after he learned that there was no tear of the rectum:

> At that time [i.e. of the Preliminary Hearing] it was my opinion [that the abdominal injuries were caused by penetration of the rectum]. At this time I understand there was no tear to her rectum, which I was told at the time there was. (RT 2085.)

5. The State presented false testimony that Consuelo Verdugo had anal injuries that were the result of sodomy.

a. The State presented the testimony of Dr. Diamond that the lacerations of the anus he observed were the result of sodomy, when in fact they were most likely caused by the extensive medical intervention she had undergone prior to his examination. (10 RT at 2052.) He failed to record the size or severity of these injuries. Prior to his examination, Consuelo had undergone numerous invasive procedures as part of efforts at resuscitation. Among these were multiple insertions of rectal thermometers to measure her body temperature. (*See, e.g.*, Exh. 1 at 5 [Nursing Notes of Linda Roberts, R.N., November 17, 1991].) She had also undergone digital manipulation of her anus as part of prior physical examinations. (*See, e.g.*, 13 RT at 2690.) The tears Dr. Diamond observed were not noted earlier at either the DRMC or KMC emergency rooms, and were not subsequently observed by Dr. Anthony Shaw of the University of California, Los Angeles Medical Center ("UCLA") on November 20, 1991, when he conducted an examination of Consuelo's anus and lower rectum. (Exh. 3 at 961 [Operative Report of Anthony Shaw, M.D., November 20, 1991].) Nor are they apparent in photographs taken at UCLA on November 21, 1991. (Defendant's Exhibits Z and AA, April 13, 1993.) Had these tears been present at the time of Dr. Diamond's examination, they would have been superficial, since they were not visible to Dr. Shaw two days later. Severe lacerations of the anus would not have healed between Dr. Diamond's examination and Dr. Shaw's. They were therefore most likely caused by insertions of rectal thermometers and digital examinations into her anus by medical personnel. (Exh. 83 at 5505 [Declaration of William A. Kennedy, II M.D.].)

b. The lacerations of the anus observed by Dr. Diamond were not present when Consuelo arrived at DRMC. The staff at the DRMC emergency room saw no evidence of injury to Consuelo's anus despite ample time and opportunity to do so. (Exh. 83 at 5498 [Declaration of William A. Kennedy, II, M.D.]; Exh. 76 at 5442 [Declaration of Anne E. Tait, M.D.]; Exh. 74 at 5432 [Declaration of Linda Roberts, R.N.]; Exh. 75 at 5437 [Declaration of Faye Van Worth, R.N.]; Exh. 72 at 5420 [Declaration of Anita Caraan Wafford, L.V.N.].) Had there been tears resulting from a sodomy prior to her arrival at the hospital, these tears would have been actively bleeding and clearly visible upon her arrival. There would have been blood in her diaper and covering her genital and anal areas. (Exh. 83 at 5509 [Declaration of William A. Kennedy, II, M.D.].)

c. Dr. Diamond testified falsely that the blood he observed in Consuelo's rectum was evidence of injury due to sodomy. (10 RT at 2050.) The prosecution knew when it presented this testimony that the blood was a result of Consuelo's compromised medical condition. Reports indicated that Consuelo was in a state of DIC prior to Dr. Diamond's examination. (Exh. 2 at 78 [Progress Record, Jack H. Bloch, M.D., November 18, 1991].) She was oozing blood from her nose, mouth, vagina, and rectum when Dr. Diamond arrived to conduct his examination. (Exh. 2 at 154 [Nursing Notes, K. Holloway, R.N., November 18, 1991].) This blood was all the result of DIC. (Exh. 83 at 5503 [Declaration of William A. Kennedy, II, M.D.]; Exh. 79 at 5468 [Declaration of Anthony Shaw, M.D.].) Dr. Diamond's testimony makes clear that he was aware of

her critical medical condition but did not reveal its significance for his diagnosis of sexual abuse. (10 RT at 2048-49.)

d. Dr. Diamond testified falsely that the laxity of Consuelo's anal sphincter muscle was due to sodomy, when it was most likely caused by the administration of paralytic agents by medical personnel prior to his examination. Laxity of the anal sphincter is a well-known side effect of paralytic agents. Given the course of her medical treatment prior to Dr. Diamond's examination, which included prolonged life-saving efforts and extensive surgery, it was improper and medically unsound for him to take the laxity of the anus as evidence of penetration. (Exh. 83 at 5503 [Declaration of William A. Kennedy, II, M.D.]; Exh. 77 at 5450 [Declaration of Jack H. Bloch, M.D.]; Exh. 79 at 5470 [Declaration of Anthony Shaw, M.D.].)

e. Dr. Diamond testified falsely that Consuelo's genitalia and anus were the only parts of her body in which he observed edema, or swelling, and that the swelling was a result of trauma to these areas, when he knew that the swelling was the result of her medical condition at the time of his examination and involved her entire body. (10 RT at 2076-77.) Her edema was caused by her DIC. Edema that affects the entire body will manifest more dramatically in areas where the fluid settles due to gravity, including the genital and anal areas. (Exh. 83 at 5502 [Declaration of William A. Kennedy, II M.D.]; Exh 82 at 5493 [Declaration of Dale S. Huff, M.D.].)

f. Dr. Dibdin testified falsely that he had observed severe lacerations of the anus that were evidence of sodomy. He stated that these

lacerations were so severe as to have cut completely through the anal sphincter muscle. The staff in the DRMC and KMC emergency rooms did not note these tears, despite ample time and opportunity to do so. When Dr. Shaw examined Consuelo's anus at UCLA on November 21, 1991, he did not observe any tearing of her anus. (Exh. 3 at 961 [Operative Report of Anthony Shaw, M.D., November 20, 1991].) Had tearing been present, lacerations of the severity Dr. Dibdin describes would have been observed in these examinations. (Exh. 83 at 5505 [Declaration of William A. Kennedy, II, M.D.]; Exh. 77 at 5451 [Declaration of Jack H. Bloch, M.D.].)

g. Dr. Shaw may have inadvertently caused or contributed to the injury of the anus while performing an anoscopy on November 21, 1991. An anoscopy involves examination of the rectum by means of an instrument that is inserted into the anal opening. An anoscope is too large to have been used on the rectum of a child Consuelo's age, and its insertion could have lead to lacerations, particularly in light of her comprised medical condition at that time. (Exh. 77 at 5451 [Declaration of Jack H. Bloch, M.D.].)

h. Dr. Dibdin falsely attributed the laxity of the anal sphincter he observed on autopsy to traumatic injury of the anus as a result of sodomy. He testified that the lacerations went completely through the sphincter muscle, causing the anus to become lax. (11 RT at 2119) These lacerations were not noted by Dr. Shaw when he conducted his examination on November 20, 1991. (Exh. 3 at 961 [Operative Report of Anthony Shaw, M.D., November 20, 1991].) Laxity of the anal sphincter after death is a well known post mortem change. It was inappropriate and misleading

of Dr. Dibdin to attribute this change to sodomy. (Exh. 79 at 5471 [Declaration of Anthony Shaw, M.D.].)

6. The State presented false testimony that Consuelo Verdugo's internal injuries, and ultimately her death, resulted from sodomy.

a. The State presented the testimony from Dr. Dibdin concerning the cause of Consuelo's abdominal injuries and her death that are anatomically impossible. Dr. Dibdin testified that Consuelo's internal injuries, including her transected pancreas, duodenum, and transverse mesocolon, were caused by "blunt force penetrating injury of the anus which caused lacerations of the anus together with injury to multiple organs including the bowel and pancreas." (Exh. 8 at 3561 [Autopsy Protocol].) It is not possible for an object entering the rectum to cause injury to the abdominal contents without also causing a rupture of the wall of the rectum. (Exh. 83 at 5511 [Declaration of William A. Kennedy, II, M.D.]; Exh. 77 at 5449 [Declaration of Jack H. Bloch, M.D.]; Exh. 79 at 5466-7 [Declaration of Anthony Shaw, M.D.].) It is also not possible for an object entering the rectum to cause injury to the pancreas, duodenum, and transverse mesocolon, which are located in the upper abdomen, without also causing injury to the organs located between them, including the sigmoid colon. (Exh. 83 at 5511 [Declaration of William A. Kennedy, II, M.D.]; Exh. 77 at 5449 [Declaration of Jack H. Bloch, M.D.]; Exh. 78 at 5456-7 [Declaration of Rick Harrison, M.D.]; Exh. 79 at 5465-66 [Declaration of Anthony Shaw, M.D.].)

b. The State had evidence from the medical reports that directly contradicted this cause of death.

(1) The DRMC emergency room medical personnel were adamant in interviews with police that they saw no evidence of injury to the anus when they examined Consuelo on November 17, 1991. (Exh. 4 at 1692-93 [Delano Police Interview with Linda Roberts]; Exh. 4 at 1746 [Delano Police Interview with Faye Van Worth].) Had Consuelo been injured by penetration of the rectum with sufficient force to cause injury to her internal organs, both lacerations of the anus and bleeding would have been noted by DRMC personnel. (Exh. 83 at 5498 [Declaration of William A. Kennedy, II, M.D.]; Exh. 77 at 5450 [Declaration of Jack H. Bloch, M.D.]; Exh. 78 at 5457[Declaration of Rick Harrison, M.D.].)

(2) Dr. Bloch at KMC noted on November 18, 1991, after performing abdominal surgery, that Consuelo's colon was intact. (Exh. 2 at 128 [Operative Report by Dr. Jack H. Bloch, M.D.].)

(3) On November 20, 1991, Dr. Shaw at UCLA performed surgery on Consuelo's abdomen. In doing so, he examined her colon and also found it intact. (Exh 3 at 961 [Operative Report of Anthony Shaw, M.D., November 20, 1991].) He also performed an anoscopy and found that Consuelo's rectum and anus had no signs of lacerations.

7. The State presented false testimony that Consuelo Verdugo's rib fractures and abdominal injuries were caused by petitioner squeezing her.

a. Dr. Dibdin testified falsely concerning the location of the rib fractures. The description of the location of the acute and healing fractures is not supported by the reports or testimony of any of the radiologists who examined Consuelo while she was hospitalized. The prosecution knew that the radiologists who examined Consuelo at DRMC, KMC, and UCLA had identified rib fractures inconsistent with Dr. Dibdin's testimony.

(1) Dr. Dibdin testified that Consuelo had acute rib fractures of ribs 6-10 on both sides of the body near the spine, as well as of ribs 6-10 on the right in the front. He also testified that she had older healing rib fractures on ribs 8 and 9 on the left in the back. (11 RT at 2125.)

(2) Dr. Seibly, a radiologist at KMC, testified that the radiographs from KMC depicted fractures showing signs of healing in ribs 8-10 on the right rear, a location where Dr. Dibdin had seen recent fractures that were not yet healing. He noted also an acute displaced fracture of the left 8th rib in the front, where Dr. Dibdin had not seen any sign of fracture. (12 RT at 2514.)

(3) Dr. Dibdin's evaluation of Consuelo's bone injuries is superficial and incomplete. Not only did he miss the displaced fracture of the left front 8th rib described by Dr. Seibly, but he failed to note the healing fracture of Consuelo's left wrist which was radiographed on September 24, 1991. (Exh. 1 at 24 [Radiology Report of Dr. MacLennan, September 24, 1991].)

(4) Radiologist Dr. Chabra at DRMC noted healing fractures of the right front ribs 8-10, a location where Dr. Dibdin had observed acute fractures, and a recent displaced fracture of the 8th rib on the right, either on the front or back. (Exh. 1 at 20 [Addendum Radiology Report of Dr. J. Chabra, M.D., December 4, 1991].)

(a) The prosecution and law enforcement deliberately fabricated Dr. Chabra's radiologic findings in an attempt to make them more consistent with Dr. Dibdin's findings. Dr. Chabra first dictated his report on November 18, 1991, after reviewing a radiograph of Consuelo's chest taken on November 17. He saw no evidence of rib fractures. (Exh. 1 at 19 [Radiology Report of Dr. J. Chabra, November 18, 1991].)

(b) On December 2, 1991, he placed an Amended Report in the medical chart, in which he identified healing fractures of the 8th through 10th ribs on the right. He estimated that these fractures were 2 to 3 weeks old. (Exh. 1 at 21 [Amended Radiology Report of J. Chabra, December 2, 1991].)

(c) Two days later, he added an Addendum Report which added mention of a recent fracture of the left 8th rib with displacement of the fragments. (Exh. 1 at 20 [Addendum Radiology Report of Dr. J. Chabra, December 4, 1991].) Dr. Chabra added this Addendum Report at the prompting of Delano Police

Detectives Valdez and Nacua, who although not medically trained, purported to conduct their own review of the radiographs and identified additional rib fractures not noted in Dr. Chabra's original and amended reports. (Exh. 5 at 2607 [Delano Police report, Det. J. Nacua, December 4, 1991].)

b. Based upon of the location of these fractures, Dr. Dibdin testified that the mechanism of injury was gripping of the torso and squeezing.

(1) According to Dr. Dibdin, Consuelo's assailant held her with his hands on either side of her torso and squeezed, compressing her rib cage and causing symmetric fractures of her ribs near the spine with his fingers. (11 RT at 2128-29.)

(2) Research conducted since the 1980s and existing at the time of trial demonstrates that this is not the mechanism of injury for this pattern of posterior rib fractures. Posterior rib fractures occur as a result of a compressive force applied from front to back which forces the ribs to bend backward past the spinal column. When a child is gripped – with the thumbs in front and fingers in back near the spine – and squeezed, the ribs are forced backward against the vertebrae, which act as levers against which the ribs fracture. The force exerted by the fingers themselves does not directly cause the ribs to fracture.

(3) Squeezing is only one means by which compressive force can be applied to the chest. Compression can also

be applied as a result of blunt force to the chest or deceleration, as when a child accelerates face-forward into a solid object or face-down to the floor. The resulting deformation of the rib cage results in the same pattern of rib fractures as in squeezing.

8. The State presented false and misleading testimony that Consuelo Verdugo's rib injuries occurred on November 17, 1991, and not before that date.

a. Dr. Dibdin testified that the rib fractures occurred less than 7 days prior to death. (11 RT at 2158.)

b. Dr. Lovell testified that the acute rib fractures occurred "within a week or two" prior to death. (16 RT at 3102.)

c. The State falsely presented evidence that the acute rib fractures were less than seven days in order to limit their causation to petitioner's agency on the night of the incident.

9. The State presented false evidence that the healing fractures were three to four weeks old and tried to link the fractures to prior incidents. The State falsely insinuated that petitioner was responsible for the prior incidents and healing rib fractures.

a. Dr. Dibdin testified that the healing rib fractures were 3-4 weeks old. (11 RT at 2128.) Dr. Lovell testified that the healing fractures were up to two months old.

b. Diana Alejandro testified that around Halloween, Consuelo had a fever and was crying and in pain. (14 RT at 2731-32.)

c. The prosecution knew that Consuelo had many other injuries that could have accounted for the healing fractures which were

totally unrelated to petitioner. Estella Medina testified that Consuelo had once fallen from a recliner and landed on her head on the ground outside the apartment. (13 RT at 2558-59.) Consuelo broke her wrist in September 1991 while in the care of Estella's sister. (13 RT at 2552-53.)

10. The State manufactured false medical evidence that Consuelo had been suffocated.

a. Dr. John Bentson falsely testified that the bilateral watershed occipital parietal brain infarcts he observed in a CT scan performed on Consuelo on November 21, 1991, were caused by suffocation and not caused by trauma to the head. (12 RT at 2406.) By his own testimony Dr. Bentson admitted that he did not look at any of Consuelo's medical history or medical records; he relied solely on the CT scan. (12 RT at 2414.) Had he reviewed Consuelo's medical records he would have found that all of the brain injuries documented in Consuelo's medical records after November 17, 1991, were secondary to the loss of oxygenated blood supply resulting from the injuries to the organs in her abdomen. (*See* Exh. 84 at 5517 [Declaration of Aaron Gleckman, M.D.].)

b. He testified that the CT scan showed an abnormality in the parietal occipital area of the brain. (12 RT at 2405-06; *see* Exh. 3 at 1059 [UCLA Radiological Sciences Diagnostic Report of Dr. John Bentson].) Dr. Bentson testified that this particular infarct is due to a drop in the amount of oxygenated blood that goes to the brain, which can be a result of suffocation. (12 RT at 2406.) Brain infarcts are associated with blood loss and the focal occlusion of a blood vessel; brain infarcts are not caused by suffocation or smothering. (*See* Exh. 81 at 5487 [Declaration of

Vincent J.M. Di Maio, M.D.].) The large areas of brain infarcts were most likely secondary to hypotension, hypoxia and cardiac arrest causing loss of oxygenated blood supply to the brain. The infarcts were not likely caused by suffocation prior to her arrival at the hospital because she arrived at DRMC with a relatively normal Glascow Coma Scale somewhere between 11 and 14. This would not have been the case had her brain already been infracted. (*See* Exh. 78 at 5459 [Declaration of Rick Harrison, M.D.].)

c. Dr. Bentson opined that it would take several minutes in order to get that type of infarct with suffocation; one doesn't get brain damage until six, seven, eight minutes go by. (12 RT at 2412.) In fact, a child who is smothered will develop bradycardia, or a slowness of the heartbeat, in approximately 30 seconds, and a flat electroencephalogram ("EEG") and cessation of respiration in 90 seconds. (*See* Exh. 81 at 5487 [Declaration of Vincent J.M. Di Maio, M.D.].) Respiration will not return spontaneously if the smothering is stopped; the child will die unless immediately resuscitated. (*See* Exh. 81 at 5487 [Declaration of Declaration of Vincent J.M. Di Maio, M.D.].)

11. The State presented false testimony that Consuelo Verdugo suffered multiple head traumas.

a. Dr. Bentson falsely testified that the scalp edema, swelling of the scalp, seen mostly on both sides in the back of the head, seemed to be from different traumas. (12 RT at 2417.) Had Dr. Bentson reviewed Consuelo's medical history of hospitalization after November 17, 1991, he would have found that there is no evidence to support a finding of blunt head trauma resulting in brain injury. Dr. Dibdin's autopsy report

described a blunt force injury to the head as an area of acute contusion measuring half an inch in the left anterior scalp. (*See* Exh. 8 at 3557 [Autopsy Protocol].) A blow to the head that can cause brain damage will typically cause bleeding in the subgaleal area, located between the scalp and the skull, and may also cause the skull to fracture. (*See* Exh. 84 at 5523 [Declaration of Aaron Gleckman, M.D.].) The contusion of the scalp is not related to the cause of death and does not support a finding of major head injury given the lack of subgaleal hemorrhage. (*See id.* at 5523.)

12. The State presented false testimony that Consuelo Verdugo's head injuries were caused by shaken baby syndrome.

a. Dr. Dibdin falsely testified that the pattern of injuries Consuelo had, namely the subdural hematoma and rib fractures, were indicative of shaken baby syndrome. (11 RT at 2135-36.) In his autopsy report Dr. Dibdin notes that upon opening the cranial cavity, there is a fresh subdural hemorrhage of approximately 5 ml on the left in the occipital and posterior parietal regions. (*See* Exh. 8 at 3558 [Autopsy Protocol].) Dr. Dibdin opined in his autopsy report that multiple rib fractures together with acute subdural hemorrhage and generalized swelling of the brain suggested that the child was gripped around the chest during the course of the assault and shaken. (*See id.* at 3561.)

b. Dr. Dibdin's opinion regarding Consuelo's pattern of injuries as indicative of Shaken Baby Syndrome is false. Shaken Baby Syndrome occurs when a child is violently shaken back and forth resulting in rapid repeated severe acceleration and deceleration of the head. (*See* Exh. 84 at 5518 [Declaration of Aaron Gleckman, M.D.].) The shaking typically

causes extensive bilateral retinal hemorrhages, subdural hematomas and cerebral edema. (*See* Exh. 84 at 5518 [Declaration of Aaron Gleckman, M.D.]; Exh. 78 at 5458 [Declaration of Rick Harrison, M.D.].) There were no noted retinal hemorrhages in the autopsy report. (*See* Exh. 8 at 3555-61 [Autopsy Protocol].) The first notation of any type of retinal hemorrhage was made in Dr. Kevin Miller's ophthalmology report dated November 21, 1991, four days after Consuelo was admitted. Dr. Miller noted an intraretinal hemorrhage just outside the inferotemporal arcade of the right eye which was approximately $3/4^{th}$ of a disk diameter in size; there was no preretinal hemorrhage overlying this. (*See* Exh. 3 at 991 [Ophthalmology Report of Dr. Kevin Miller].) The preretinal hemorrhage observed by Dr. Miller is not the type typically found in cases of Shaken Baby Syndrome. Shaken babies typically display a pattern of extensive multiple bilateral retinal hemorrhages distributed throughout the retina to the periphery of the eye. (*See* Exh. 84 at 5519 [Declaration of Aaron Gleckman, M.D.].) The minimal retinal damage observed in the right eye with no damage to the left eye is inconsistent with the extensive retinal injury usually present in cases of Shaken Baby Syndrome. (*See id.* at 5520.)

13. The prosecution presented false testimony that Consuelo was in good health prior to November 17, 1991, and failed to disclose information that indicated possible causes of her injuries other than abuse by petitioner.

a. At trial the prosecutor informed the jury that Consuelo was a "completely normal" twenty-one-month-old who was harmed by petitioner on November 17, 1991. (10 RT 2024.) He argued that the

injuries inflicted by petitioner that night were connected to old injuries that were also inflicted by petitioner.

b. The prosecutor was aware of numerous statements by Consuelo's caretakers making clear that she had significant, chronic health problems prior to November 17, 1991 which had no connection whatsoever to petitioner.

(1) Delia Salinas, Estella Medina's sister, told district attorney investigator Ray Lopez on May 14, 1992, that Consuelo was a "smart and lovable child who was clumsy and fell down a lot. She was an active child who bruised herself often, mostly on her legs." (Exh. 4 at 2051 [District Attorney Case Report, May 21, 1992].)

(2) Diana Alejandro, Estella Medina's other sister, also told Lopez on May 11, 1992, that Consuelo "was always rashed [i.e. she always had a rash] when she was living down ... on 1313 Albany." (Exh. 4 at 2254 [Transcript of Interview with Diana Alejandro, May 11, 1992].) Diana explained that Consuelo always had a rash because her diaper was not changed at night by members of the Alejandro family. (Exh. 4 at 2287 [Transcript of Interview with Diana Alejandro, May 11, 1992].)

(3) Estella Medina, Consuelo's mother, told the Delano Police and district attorney investigator Bresson that Consuelo was "always falling down, she's always getting into things. Even at my mom's house, you know, she's always bumping, she falls." (Exh. 4 at 2209 [Transcript of Interview with Estella Medina,

July 9, 1992].) Estella also told district attorney investigator Lopez that "ever since she was, you know, a baby she, she got diaper rash. She would always have diaper rash. I would always have Desitin, you know, to put on her or something. One time I had to take her to the doctor because she got a real bad rash." (Exh. 4 at 2422 [Transcript of Interview with Estella Medina, July 9, 1992].)

(4) None of the above statements was introduced at trial.

c. Relying on this false, contrived foundation, the prosecution argued that Consuelo's injuries on November 17 were not typical of her physical limitations and chronic illness, but rather were the culmination of petitioner's violent tendencies that began when petitioner met Consuelo. During his questioning of Estella, the prosecutor implied that Consuelo began to get injuries only after petitioner came to live with Estella and her daughters, thereby implying that petitioner had been the cause of all of Consuelo's past injuries and illnesses:

> Carbone: Mrs. Medina, isn't it true that you knew what was happening with this man but you weren't reporting it? (RT 2587-88.)

14. Petitioner was, has been, and continues to be denied access unlawfully to exculpatory material evidence proving that no semen was ever found on or in Consuelo.

a. Prevailing practice in Kern County in 1991 was for law enforcement to obtain samples of fluids from suspected sexual assault victims using what is termed to be a rape kit.

b. Remarkably, although Consuelo was hospitalized within minutes of the alleged rape and sodomy and examined by the County's sex abuse expert, the prosecution asserted at trial that no such sampling was performed. Dr. Diamond testified that he did not perform a rape kit to test for the presence of semen in Consuelo's vagina and rectum because the blood oozing from them would have washed away any traces of semen that had been present. (10 RT at 2083.)

c. Given the prevalence of the practice and the immediate determination of law enforcement that Consuelo had been the victim of a sexual assault, the prosecution's statements are incredible. Moreover, in light of the prosecution's callous disregard for fundamental fairness with respect to withholding *Brady* and *Giglio* material, manufacturing testimony, and presenting false evidence, the prosecution's statement is not supportable.

d. On this record, petitioner alleges that sufficient facts exist to believe that the prosecution did obtain a rape kit and withheld the results from the defense because they were exculpatory. In the alternative, petitioner alleges that the prosecution presented false testimony to justify the absence of a rape kit, which was not obtained because the prosecution knew the kit would produce exculpatory evidence.

15. The prosecution presented the false testimony of William Esmay of the California Highway Patrol that Consuelo could not have been the victim of a pedestrian automobile accident.

a. Officer Esmay testified that because her clothing did not have evidence of contact with the ground, such as grass stains,

Consuelo could not have been hit by a car. (15 RT at 2932.) In fact, Kern County Criminalist Jeanne Spencer identified plant material on Consuelo's sweatshirt. (Exh. 7 at 3506 [General Stereo Exam of Child's Clothing, Jeanne Spencer].) This was not disclosed to the defense at trial.

b. According to Officer Esmay's testimony, Consuelo could not have been hit by a car because he had never heard of injuries to the genitalia and anus resulting from a pedestrian automobile accident. (15 RT at 2938-39.) However, medical records and the statements of DRMC personnel indicated that Consuelo did not have genital and anal injuries prior to arrival at in the hospital.

c. This false testimony affected the outcome of the trial. Had the prosecution not presented this testimony, the jury would have considered an automobile accident to be an alternative and equally reasonable explanation for Consuelo's injuries. There is a reasonable likelihood the validity of this alternative would have changed the verdict, as the jury would have had to acquit petitioner.

B. CLAIM 2: THE STATE PREJUDICIALLY COERCED THE TESTIMONY OF ESTELLA MEDINA AND CRISTINA MEDINA.[4]

Petitioner's conviction and sentence of death were unlawful and rendered in violation of his rights to a fundamentally fair and reliable determination of guilt and penalty, to a trial free of materially false and misleading evidence, to confront and cross-examine witnesses, to a trial by a fair and impartial jury, to a conviction beyond a reasonable doubt, to effective assistance of counsel, to the disclosure of all materially favorable evidence including impeachment evidence, and to a determination of punishment that is not based on passion, prejudice or materially false information, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law, when the prosecution manufactured and suggested prejudicial and false testimony to Cristina Medina and Estella Medina, created an atmosphere designed to coerce Cristina and Estella into adopting the prosecution's theory of the case, withheld information about the statements made by, and coercion applied to, these witnesses, and presented their materially false, misleading, and prejudicial statements at trial.

Throughout the prosecution of petitioner, law enforcement and the district attorney's office sought to alter, shape, and manipulate the testimony of two critical witnesses, Cristina Medina, Consuelo Verdugo's sister, who was nine years old at the time of the incident, and her mother Estella Medina so as to inculpate petitioner. Immediately after Consuelo's death, law enforcement personnel interviewed both witnesses in isolation.

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[4] This Claim qualifies as a Category 2 claim.

Estella repeatedly stated her conviction that petitioner had not harmed Consuelo. At this point, investigating officers immediately removed Cristina from Estella's care despite no evidence that Cristina faced any harm. This tactic – depriving Estella and Cristina of each other's support – was designed to punish Estella for her refusal to adopt the prosecution's theory as her own and to isolate Cristina to permit law enforcement officials to shape her testimony without her mother's protection.

As to Estella, the prosecution repeatedly told her that if she continued to state her belief that petitioner was innocent, she would not regain custody of her daughter. With respect to Cristina, the prosecution used family members and repeated coercive and suggestive interviews to modify Cristina's statements and coerce her false trial testimony. As a result of the manipulation, coercion, and deprivation producing conditions, both witnesses – at the direction of the prosecution – provided materially false testimony.

In support of this claim, petitioner alleges the following facts, in addition to those to be presented after full investigation, discovery, access to this Court's subpoena power and an evidentiary hearing:

1. Law enforcement agents, the district attorney's office, and Department of Human Services caseworkers coerced the testimony of Estella Medina by removing her daughter from her home and informing her that Cristina would remain out of her custody as long as she affirmed petitioner's innocence and refused to testify against him. After orchestrating the removal, the prosecution lied to the court and petitioner about its involvement in Cristina's dependency proceeding. Acquiescing to

the prosecution's threats, Estella testified falsely at trial that she feared and mistrusted petitioner as he cared for her children.

a. By November 18, 1991, police officers investigating Consuelo Verdugo's death formulated the theory that petitioner had raped and sodomized her. (Exh. 4 at 2331 [Delano Police Department Supplemental Report].)

b. The day after Consuelo died, on November 26, 1991, Detective Al Valdez of the Delano Police Department and District Attorney's Investigator Gregg Bresson interviewed Estella Medina. They sought Estella's corroboration of their theory that petitioner had sexually abused Consuelo prior to her death and directly caused her death. Instead, Estella told police that she did not know what had happened to her daughter, Consuelo, but that she did not believe petitioner had harmed her. Estella refused to testify in court that petitioner had in any way hurt her child, because she did not believe he ever had:

> She's my baby. I never saw him do anything to her. Never.... I would never protect him in that--, in that situation, I would never protect him. But I never, I swear to God, I never saw him do anything to my daughters like that. He loved her, he loved my baby. I don't, that's why I can't get it through my head, if he did it, why he did it. I'm not saying he did because I wasn't there to see it.... And I'm not gonna say in court either that he did it. (Exh. 4 at 2214-15 [Transcript of Interview of Estella Medina].)

c. Shortly thereafter, in response to Estella's statements and to punish her for her refusal to testify that petitioner had harmed her daughter, Officer Valdez and Investigator Bresson decided to remove

Cristina from her custody without consulting Child Protective Services. Valdez and Bresson made this decision alone, failing to consult any social worker, child protective services worker, Department of Health Services caseworker, or psychologist. They told Estella that the decision was "just one we [Valdez and Bresson] are making, it's a tough one and until our investigation is concluded, we will have Cristina in a protective custody situation." (Exh. 4 at 2225 [Transcript of Interview of Estella Medina].) District Attorney Investigator Lopez later affirmed law enforcement's sole responsibility for removing Cristina. (Exh. 61 at 5202 [Transcript of Interview of Nancy Hayes, September 23, 1992] ("Well you know ... the Delano Police detectives had her removed from Estella's custody when this first happened....").)

d. At the conclusion of Estella's interview, just days before Thanksgiving, Detective Valdez and Investigator Bresson, accompanied by Cristina's aunt Diana Alejandro, took Cristina to Jamison House, a facility for children in the county's care. (Exh. 4 at 1917-18 [DA Case Report].) That was the last time Cristina was allowed to see anyone in her family, including her mother, until January 1992. Estella was prohibited from seeing her child for Thanksgiving or Christmas that year. (Exh. 66 at 5378-80 [Declaration of Estella Alejandro Medina].)

e. At the preliminary hearing, on December 12, 1991, District Attorney Robert Carbone falsely represented to the court and petitioner that his office had not orchestrated Cristina's removal. He stated that Cristina's removal "has absolutely nothing to do with my office." (1 CT at 143-45.)

f. Law enforcement agents and district attorney investigators told Estella, at the time Cristina was removed and thereafter, that Cristina was taken from her because she did not accuse petitioner of harming Consuelo. (Exh. 66 at 5379-80 [Declaration of Estella Medina Alejandro].)

g. State and law enforcement agents placed Cristina with cousins Darlene and Reynaldo Salinas, despite knowing that the placement jeopardized Cristina's welfare. The Department of Health Services/Child Protective Services ("DHS/CPS") workers, and the prosecution, knew they both had extensive criminal histories that included possession, transport, and sale of PCP; possession of marijuana; theft; and receiving stolen property. (See, e.g., Exh. 9 at 3766 [Juvenile Records].) Despite this knowledge, the district attorney's office worked with DHS/CPS to place Cristina in their custody. (See *id.* at 3766, 3687, 3690.) No evidence of Darlene's and Reynaldo's criminal history was disclosed to petitioner.

h. On April 16, 1992, the State returned Cristina to Estella's home.

i. Estella's niece, Virginia (Vicki) Salinas Alejandro; Estella's sister, Diana Alejandro; and Estella's nephew's wife, Darlene Salinas, investigated Estella at the direction of District Attorney Investigator Ray Lopez and continually provided Lopez with information about Estella's life, actions, and whereabouts. (Exh. 4 at 2047-53 [Delano Police Interview with Virginia Salinas, May 21, 1992]; Exh. 4 at 2071-73 [Delano Police Interview with Virginia Salinas, July 1, 1992]; Exh. 4 at 2092-93 [Delano Police Interview with Virginia Salinas, July 7, 1992]; Exh.

4 at 2084-89 [District Attorney Case Report, Interview with Darlene Salinas, June 10, 1992]; Exh. 57 [Transcript of Interview of Darlene Salinas by District Attorney Investigator Ray Lopez, June 10, 1992].)

j. On July 9, 1992, the district attorney's office again interviewed Estella regarding this case. District Attorney Investigator Lopez once more asked Estella if petitioner had ever mistreated her daughters, showed signs of molesting or abusing them, or did anything to them that bothered or upset her. Estella affirmed that petitioner never mistreated her girls, that there was no indication whatsoever that they were molested, and that he never did anything to the girls that bothered her or upset her. Despite Estella's repeated statements, Investigator Lopez repeatedly attempted to change her answer. (Exh. 4 at 2419-20, 2478, 2481 [Interview of Estella Medina, July 9, 1992].) She stated that no one, including her sister who babysat the girls regularly, told her that they had seen signs of molestation, and that neither she, Cristina, nor her sister had ever seen discharge, tearing, or bleeding when changing Consuelo's diaper. (*Id.* at 2421-25.) Estella further stated that she did not see any discharge, blood, or injury to Consuelo's genitalia or anus the night she went to the hospital. (*Id.* at 2469-71.) When asked again whether she believed petitioner had abused her daughter and caused her death, she said she still did not believe that he did it. (*Id.* at 2485.) When asked if she suspected someone had hurt Consuelo when she broke her arm or when she hit her head, Estella said she did not; she told him that her sister had been with Consuelo when she hurt her arm and that she herself had seen Consuelo fall. (*Id.* at 2495-96.) Unsatisfied with Estella's steadfast protestations of

petitioner's innocence, Lopez decided to remove Cristina immediately and for the second time from Estella's care. (*Id.* at 2303; Exh. 9 at 3698-70 [Juvenile Case Report]; Exh. 61 at 5201 [Transcript of Interview of Nancy Hayes, September 23, 1992].) Prosecution investigators and Department of Human Services/CPS caseworkers again told Estella that her daughter was removed because she failed to accuse petitioner of harming her daughter. (Exh. 4 at 2409-10 [Transcript of Interview with Estella Medina July 9, 1992].)

k. Throughout the pendency of petitioner's case, District Attorney Investigator Lopez interceded in Cristina's juvenile case so as to prevent the court from awarding Estella Medina custody and to preserve the coercive conditions of control inherent in Cristina's placement. (Exh. 9 at 3687-90 [Juvenile Records].)

l. Estella learned through the repeated removal of her daughter from her home that her statements regarding petitioner's guilt or innocence, regardless of when or to whom they were made directly affected the juvenile court's determination of whether she obtained custody or visitation with Cristina. In light of repeated law enforcement statements, Estella finally realized that the only way she could obtain custody of Cristina was to attest to petitioner's guilt and demonstrate that she had tried to protect her daughters from petitioner. (Exh. 4 at 2409-10, 2411-12 [Transcript of Interview with Estella Medina, July 9, 1992].)

m. Estella succumbed to the coercion, and, as a result, when the district attorney asked her at trial about Cristina's statement that petitioner had taken Consuelo into their bedroom while he was babysitting,

Estella testified that she "always told [petitioner] if anything – if you would injure my kids in any way, I would have you locked up." (13 RT at 2562.) Similarly, when the prosecutor asked if she told Cristina to lock the door when she went to bed and Estella was not home, but petitioner was there, Estella testified she told her daughter to close the door when petitioner was there. (13 RT at 2652.) These statements indicated her mistrust of petitioner's care of her children, and led the jury to conclude that Estella believed petitioner was guilty. Estella said nothing about her belief that petitioner was innocent.

n. By threatening to take Cristina away permanently and by telling Estella they would prevent her from having custody of or contact with her child unless she accused petitioner, the prosecution knowingly and substantially interfered with Estella's testimony, intentionally encouraged Estella to provide materially false testimony, and knowingly elicited false testimony.

o. Estella's false testimony was material to the prosecution's theory that petitioner was a child molester because her testimony suggested that his actions created unease and were suspect. With Estella's testimony that she distrusted petitioner, the prosecution was able to argue a motive – that petitioner was a child molester. Without it, the prosecution had no explanation as to why petitioner would commit such a crime. As a result of Estella's untrue testimony, the jury falsely believed that petitioner had in the past committed some act -- likely one of physical or sexual abuse -- that led Estella not to trust him with her daughters. If Estella's testimony had not been coerced, and she had testified in

accordance with her interview statements, the jury would have believed that petitioner did not molest or abuse Consuelo Verdugo on November 17, 1991, and would not have found him guilty or sentenced him to death.

2. Law enforcement agents, the district attorney's office, Department of Human Services caseworkers, and their agents coerced and manufactured false testimony of Cristina Medina by removing her from her home, isolating her from her mother and family, repeatedly questioning her about sex abuse after she stated that neither she nor her sister had been abused, and suggesting information to her during interviews.

a. Detective Al Valdez of the Delano Police Department first interviewed Cristina on November 18, 1991.

b. During the November 18, 1991 formal interview, Detectives Jeff Nacua and Al Valdez used coercive and formulaic tactics designed to interrogate a suspect and ensure a confession. But, as Cristina was only nine years old and not a suspect, these tactics resulted only in eliciting false facts and unreliable statements. The detectives used such devious and inappropriate methods as accusing Cristina of lying and pressuring her to make specific statements by using suggestive and leading questions. (See, e.g., Exh. 89 [Declaration of James M. Wood, Ph.D.].) Dr. James Wood, a leading expert and consultant to law enforcement agencies on developing appropriate techniques for eliciting reliable information from children, opines that this "is one of the worst interviews of a child I have ever encountered." (*Id.* at 5544.)

(1) Cristina informed the officers that she believed petitioner was telling the truth. (Exh. 4. at 1818 [Interview with

Cristina Medina, November 18, 1991].) In response, the officers told her that, "as police officers," they thought she was wrong and suggested that she did not even believe herself. They repeatedly asked the same question: whether she believed petitioner. Finally, Cristina said she did not know whether she believed him, and then ultimately said "No? No." (*Id.* at 1830.) Through these coercive and suggested tactics, the officers altered her recollections and beliefs. (See, e.g., Exh. 89 at 5545-55 [Declaration of James M. Wood, Ph.D.].)

(2) During the November 18, 1991 interview, Cristina said that she asked petitioner if she could play with her friend for fifteen minutes, and that she stayed out just about fifteen minutes on the evening of November 17, 1991, before petitioner came to get her. She said petitioner did not seem nervous when he came to get her to come home. (Exh. 4 at 1814, 1824 [Interview with Cristina Medina, November 18, 1991].)

(3) Cristina further stated in this interview that petitioner had never touched her; never touched her and told her not to say something about it; never touched her "where he shouldn't... in the private parts;" and never tried to touch her. She said that she liked petitioner, that he bought her things, that he was nice to her, and that she was not scared of him. She also stated that he had never touched her sister. (Exh. 4 at 1820-21 [Interview with Cristina Medina, November 18, 1991].)

(4) At the end of this interview, the officers told Cristina to "think about [what really happened]," to think about her answers and think about the truth, because they would be coming back to question her again to find out what happened "for sure." (Exh. 4 at p. 1846 [Interview with Cristina Medina, November 18, 1991].) They conveyed to Cristina that she had given incorrect answers in failing to implicate petitioner, and that they would give her a second chance to get the "correct" answers in the next interview.

c. Cristina was removed from her home on November 26, 1991, the day after her sister died, because her mother told the police and the district attorney's office that she did not believe petitioner was guilty of hurting her daughter or causing her death. (Exh. 4 at 1920 [Kern County District Attorney Case Report, dated December 3, 1991, by Gregg Bresson].) At the preliminary hearing, on December 12, 1991, District Attorney Robert Carbone untruthfully disavowed his office's involvement in Cristina's removal. (CT 143-45.)

d. Cristina lived at Jamison House, a temporary center for children, for close to six weeks, until January 2, 1992. She spent Thanksgiving, Christmas, and New Years Eve alone at the Center. A child taken to Jamison rarely spent more than one week there, because according to Child Protective Services, it is important that a child be placed with a family or foster home as soon as possible. On January 2, 1992, Cristina was housed temporarily with her cousin, Darlene Salinas. (Exh. 9 at 3731 [Dispositional Report, CPS Records].)

e. During Cristina's stay at Jamison, Department of Health Services caseworkers repeatedly questioned her about the events leading up to petitioner's arrest. They encouraged her to talk about petitioner's abuse of herself and her sister. When Cristina denied suffering abuse and denied her sister suffering abuse -- even if the social worker believed Cristina was telling the truth -- the office policy was to continue questioning her about possible experiences of sex abuse. (Exh. 9 at 3703-30 [Alice Thompson interviews, Dispositional Report, CPS Records].)

f. On April 16, 1992, on the recommendation of Jane Canning, a caseworker for Child Protective Services, Cristina was returned to the custody of her mother. (Exhibit 9 at 3703-30 [Supplemental Report of Social Service Worker Jane Canning, dated April 6, 1992].)

g. The prosecution withheld evidence that Vicki Salinas and others acted as state agents, obtaining information and coercing testimony of witnesses. Specifically, Lopez asked Vicki to help him change Cristina's mind about petitioner and incriminate him. (Exh. 4 at 1674 [Transcript of Interview with Vicki Salinas by Ray Lopez].)

h. Detective Ray Lopez attempted to interview Cristina at Vicki's house on May 14, 1992, while Vicki, Cristina's aunt Delia, and Cristina's uncle Javier were present. Lopez spent half an hour with Cristina, but stated he was unable to interview her. He did not report on what was discussed during that contact. (Exh. 4 at 2074-82 [Kern County District Attorney Case Report, dated July 2, 1992].)

i. On May 22, 1992, after spending the day with Darlene and Vicki Salinas, Cristina suddenly stated to her mother that she

remembered a time that petitioner took Consuelo into his room for the night. (Exh. 4 at 1869-74 [Transcript of Interview with Cristina Medina, June 12, 1992]; Exh. 4 at 2493-98 [Transcript of Interview with Estella Medina, July 9, 1992].)

j. On June 11, 1992, Vicki Salinas telephoned Lopez and told him that Cristina had "changed her mind and was now willing to talk to [Lopez] about this case" at Vicki's home. Vicki scheduled the interview for a day and time when Estella would not be present. (Exh. 4 at 2074-82 [Kern County District Attorney Case Report, dated July 2, 1992].)

k. On June 12, 1992, Lopez interviewed Cristina at Vicki's house, and tape-recorded this interview. When Lopez asked Cristina if she knew what rape was, Vicki reminded her of a recent conversation Cristina had with Vicki regarding rape. Cristina then described rape for Investigator Lopez. Cristina repeated her statements that petitioner had taken Consuelo into his room one night and locked the door. In the morning, Cristina said, Consuelo did not look like anything had happened to her. (Exh. 4 at 1871 [Transcript of Interview with Cristina Medina, June 12, 1992; Exh. 4 at 2076 [Kern County District Attorney Case Report, dated July 2, 1992].)

l. At the recorded interview, after Cristina had been removed from her home and away from her mother, she said that she did not believe petitioner. (Exh. 4 at 1866 [Interview with Cristina Medina, June 12, 1992].) Cristina's change in her opinion was the result of the officers' coercive and suggestive interview techniques. (*See, e.g.*, Exh. 89 at 5549 [Declaration of James M. Wood, Ph.D.].)

m. Lopez coerced Cristina into stating that this incident occurred in September or October 1991. Cristina told Lopez four times during the interview that she did not remember when the incident occurred. (Exh. 4 at 1872-73, 1882 [Transcript of Interview with Cristina Medina, June 12, 1992].) She also said it happened a "long time" before Consuelo broke her arm. (*Id.* at 1873.) Lopez then asked Cristina four times whether the incident occurred near Halloween, or in the months of September and October. (*Id.* at 1872-74, 1882.) He finally asked her if it happened before November, the month in which her sister died. She agreed that it did. She also stated that school was in session at the time, and that she thought it was a weekend. After that, Lopez imposed a conclusion: "So we boiled it down as sometime between September and October," and Cristina agreed. (*Id.* at 1882.) Thus, Cristina's belief that this incident happened, and that it happened in September and October, were the result of coercion and suggestive questioning by the police officers and district attorney. (Exh. 89 at 5553 [Declaration of James M. Wood, Ph.D.].)

n. On July 9, 1992, Lopez questioned Estella about Cristina's statements. Estella explained that she and petitioner often took the children into their room when they were scared or could not sleep, or when Consuelo was crying or sick. She stated that therefore petitioner's actions did not worry her, or seem out of the ordinary. (Exh. 4 at 2475-2476 [Interview of Estella Medina, July 9, 1992].) Estella believed that Cristina must have been misled to believe that these actions, which were perfectly normal in her house, were abnormal and dangerous. (Exh. 66 at 5382-83 [Declaration of Estella Alejandro Medina].)

o. Cristina repeated her statements when she testified at trial. She testified that the "first night" petitioner was alone with her and her sister, he would not let the children sleep together. He took Consuelo into his bedroom for the night. When Cristina got up to go to the bathroom, she noted that the door to the bedroom where petitioner and her mother slept was locked. The next morning, Consuelo was "okay." (11 RT at 2187-95.) She testified that this occurred before Consuelo broke her arm on September 24, 1991. (11 RT at 2200.)

p. The district attorney's office substantially interfered with, coerced, and changed Cristina Medina's accurate and exculpatory potential testimony to false and inculpatory testimony. Lopez specifically coerced Cristina into setting the date as sometime in September or October in order to manufacture a link between petitioner and the prior injuries found on Consuelo. (*See, e.g.*, Exh. 89 at 5551, 5553-4 [Declaration of James M. Wood, Ph.D.].)

q. Cristina's statements at trial materially affected the verdict and prejudiced petitioner. The prosecution used Cristina's story to support its theory that Consuelo died from injuries that were part of an ongoing pattern of abuse that began when petitioner began babysitting for Estella's daughters. The prosecutor relied upon Cristina's statement in his closing argument when he urged the jury to find that "not only does it show us that the child was previously abused, both physically and sexually, but it shows that it happened over a period of time." (18 RT at 3660.) If Cristina's false and unreliable testimony had not been introduced, the jury

would not have believed petitioner was the cause of Consuelo's ongoing injuries, or caused her injuries on November 17, 1991.

3. The State prejudicially interfered with defense's access to prosecution witnesses by threatening Estella with losing custody of her daughter and telling Cristina not to speak to the defense. (Exh. 106 at 5896 [Declaration of Jon B. Purcell] ["The instructions that [Cristina] not talk to the defense came directly from the District Attorney's Office."].)

4. The State withheld from the defense Cristina Medina's Department of Human Services and Child Protective Services (DHS/CPS) and juvenile court records that demonstrated the coordinated and concerted efforts of DHS/CPS workers and law enforcement involved in petitioner's case to keep Cristina Medina from her mother in order to coerce the testimony of these two witnesses.

a. The State had in its possession communications between the district attorney's office, the police department, DHS/CPS, and the juvenile court demonstrating that the agencies coordinated their efforts to ensure that Cristina remained out of Estella's custody and testified against petitioner.

b. Material documents unlawfully withheld from petitioner included, but are not limited to the following: (1) a list of persons who obtained the police reports in petitioner's case, which stated juvenile court worker Alice Thompson obtained petitioner's police reports "to determine if sister should be released or held" (Exh. 9 at 3761-75 [Juvenile Records]); (2) the juvenile court minute orders which listed District Attorney Investigator Ray Lopez as a witness in the juvenile case (Exh. 9 at

3686-88 [Juvenile Records]); (3) documentation of phone contacts between Lopez and Cristina's caseworkers David Chenault (Exh. 4 at 1664-76 [Recording of Telephone Call between Ray Lopez and Virginia Salinas]), Jennifer Sookne (Exh. 6 at 2941-42 [DA Records]), and Jane Canning (Exh. 6 at 2934 [DA Records]); (4) documentation of interviews of Cristina, and of Cristina's family members, conducted by DHS/CPS workers (Exh. 9 at 3761-75 [Juvenile Records]); (5) documentation that Cristina was receiving counseling at Henrietta Weill Memorial Center and Tulare Youth Services that showed she was having trouble remembering important aspects of the event surrounding her sister's death (Exh. 9 at 3628 [Juvenile Records, Letter from Terry McCauley]); (6) and a juvenile court report that indicated Cristina had received a sex abuse exam from Dr. Jess Diamond before the preliminary hearing in petitioner's case that demonstrated she had not been sexually abused. (Exh. 9 at 3703-30 [Juvenile Records].)

c. The withheld documents contained material information necessary for the defense to impeach Cristina's and Estella's false statements and to demonstrate the state misconduct in coercing their false testimony.

(1) The documents demonstrated the coordinated strategy of the district attorney's office, police department, and DHS/CPS to prevent Estella from obtaining custody of Cristina so that she would testify against petitioner, and to isolate Cristina from her mother and use coercive and suggestive questioning tactics to modify her beliefs and statements about petitioner so that she would incriminate him at trial.

(2) Documentation of interviews of Cristina, and of Cristina's family members, conducted by DHS/CPS workers contained statements made by Cristina's family that could have been used to impeach their statements at trial.

(3) Documentation that Cristina was receiving counseling at Tulare Youth Services that showed she was having trouble remembering important aspects of the event surrounding her sister's death contained statements that would have been used to impeach Cristina's testimony at trial.

(4) The juvenile court report that indicated Cristina had received a sex abuse exam from Dr. Jess Diamond before the preliminary hearing in petitioner's case that demonstrated she had not been sexually abused undermined the prosecution's theory and trial argument that petitioner had abused and molested Cristina Medina as well as her sister Consuelo.

5. The State unlawfully failed to disclose to the defense material CPS records that demonstrated Cristina Medina's memory regarding the events of the case was poor, and then vouched for Cristina's credibility at trial.

a. A letter in the prosecution's file from Terry McCauley, Cristina's counselor in March 1993, states that Cristina "has trouble recalling important aspects" of the events of November 17, 1991, and "persistently avoids her thoughts and feelings about it." (Exh. 9 at 3628-29 [Juvenile Records, Letter from Terry McCauley].) Neither this letter nor its contents was disclosed to the defense.

b. Counselor McCauley's letter was material to petitioner's defense. It demonstrated that Cristina's memory regarding the facts of November 17, 1991 was not reliable, and it could have been used to impeach Cristina's statements regarding the details of that evening's events such as how much time she was allowed to play, whether petitioner had been nervous that night, whether petitioner stated that he found Consuelo outside or inside, and what petitioner told Cristina he believed happened to Consuelo that evening.

c. Knowing that Cristina was having trouble recalling important aspects of the events of November 17, 1991, the prosecution falsely argued that she was more credible than petitioner and vouched for her version of events. The prosecution opined during closing argument that where petitioner's and Cristina's statements conflicted, Cristina's statements were more credible, because they "have been consistent throughout" and because an eleven year old "has no reason to lie." (15 RT at 3590.) He also stated that "Anytime we corroborate anything Christine (sic) tells us, it comes out true." (18 RT at 3656.)

(1) Not only were these statements false in light of Counselor McCauley's letter, but also they falsely described Cristina's statements as consistent. In fact, Cristina's interview statements, preliminary hearing statements, and trial testimony conflicted in significant respects, such as what she was doing that night before she left the house; where and when petitioner told Cristina what he thought happened to Consuelo; whether petitioner was nervous when he came to get her that night; whether she

believed petitioner; how she knew what rape was; and whether she knew petitioner was in jail at the time he telephoned her home in May 1992. (See, e.g., Exh. 89 at 5551, 5553-55 [Declaration of James M. Wood, Ph.D.].)

6. Kern County law enforcement and the prosecutor's office have a history of using DHS/CPS to violate the constitutional rights of criminal defendants, manufacture false evidence, and coerce testimony.

a. Beginning in 1982, and continuing into the 1990s, Kern County prosecutors and DHS/CPS workers investigated and prosecuted dozens of molestation cases based on incredible, and often disprovable, allegations of sex abuse, rape, sodomy, and ritual abuse. The Kern County District Attorney's Office obtained over three dozen convictions in these molestation cases by: (1) withholding evidence of sex abuse exams in which no evidence of abuse was found or using false medical evidence (*Jeffrey B. Modahl v. County of Kern* (Super. Ct. Kern County, 1999, No. 99-6463); *People v. Kniffen, et al.* (West Kern Muni. Ct. Kern County, 1982, Nos. 33610, 33614, 33624); *Larry McCuan, et al. v. County of Kern, et al.* (Super. Ct. Kern County, 1989, No. 194695); *People v. Pitts* (1990) 223 Cal. App. 3d 606 (1990)); (2) using coercive interviewing techniques that involved removing children from their homes such as communicating to the children that they could not return home until they incriminated individuals in their molestation (*Modahl, supra*, No. 99-6463; *Kniffen, supra,* Nos. 33610, 33614, 33624; *McCuan, supra,*, No. 194695; *Pitts, supra*, 223 Cal. App. 3d 606; *People v. Stoll* (1989) 49 Cal.3d 1136; *Hazel Wong, et al. v. County of Kern* (Super. Ct. Kern County,

1986, No. 195381); *Betty Palko et al. v. County of Kern, et al.* (Super. Ct. Kern County, 1986, No. 194286); (3) manufacturing statements of abuse by suggesting to children that they were abused and masking this in reports (*Modahl, supra*, No. 99-6463; *Kniffen, supra,* Nos. 33610, 33614, 33624; *McCuan, supra*, No. 194695; *Pitts, supra*, 223 Cal. App. 3d 606; *Stoll, supra,* 49 Cal.3d 1136; *Wong, supra,* No. 195381) (4) withholding audiotapes and transcripts of interviews in which children stated they had not been abused (*Modahl, supra*, No. 99-6463; *Kniffen, supra,* Nos. 33610, 33614, 33624; *McCuan, supra,*, No. 194695); and (5) refusing to allow sex abuse exams of alleged victims when they knew these exams would produce exculpatory evidence (*Pitts, supra*, 223 Cal. App. 3d 606; *Michael J. Nokes, et al. v. County of Kern, et al.* (Super. Ct. Kern County, 1988, No. 20313). As a result, of the forty convictions obtained as of 1998, only six were upheld. One of these six remains on appeal.

b. The prosecution of alleged child molesters in Kern County was so replete with gross prosecutorial misconduct that the Attorney General's office stepped in to investigate child abuse prosecutions in the county. (See John Van de Kamp, California Attorney General, "Report on the Kern County Child Abuse Investigation," September 1986, and supplementary reports and data.) A Grand Jury Investigation was also conducted. (See Final Report of the 1985-1986 Kern County Grand Jury, Carleen A. Radanovich, foreman, released July 2, 1986; see also Edward Humes, Mean Justice (1999).) The report condemned a "presumption of guilt" applied by officers in the district attorney's office, DHS/CPS agencies, and police and sheriff's agencies in their pursuit of molestation

suspects. It found that, instead of relying upon legally acceptable evidence, investigators were removing children from homes, denying family visitations, and arresting parents based on nothing more than "gut feelings," even where medical evidence demonstrated that alleged victims had not been abused.

7. The unconstitutional coercion of false statements from two key witnesses, Consuelo's mother Estella and her sister Cristina, deprived petitioner of a fundamentally fair and reliable determination of guilt and penalty. The defense was unprepared to challenge this misconduct due to the numerous documents withheld by the prosecution in its attempt to cover up its use of coercion with the two most important witnesses in its case. These coercive tactics represent customary techniques used for years in suspected molestation cases in Kern County, techniques that have been repeatedly exposed and discredited. These errors had a substantial and injurious effect or influence on the jury's determination of the verdicts at both the guilt and penalty phase.

C. CLAIM 3: THE STATE PRESENTED FALSE TESTIMONY REGARDING THE FACTS THAT OCCURRED ON NOVEMBER 17, 1991.[5]

The convictions and sentence of death were rendered in violation of petitioner's rights to a fair, reliable, rational, nonarbitrary and accurate determination of guilt and penalty, to a fair trial free from false and misleading evidence, to an opportunity to confront and refute adverse evidence, to the disclosure of all material exculpatory evidence, and to the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law because the prosecution introduced, and trial counsel unreasonably and prejudicially failed to exclude or refute, false and misleading testimony about the timing of the events on November 17, 1991, alleged misstatements by petitioner, and petitioner's demeanor.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The State manufactured inconsistent statements by confusing petitioner, using the hearsay statements of his mother, who did not testify, and by focusing on irrelevant information.

a. The prosecution cross-examined petitioner using the statements of his mother, Maria Figueroa Benavides, without calling Maria as a witness, even though she was available. The prosecution asked

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[5] This Claim qualifies as a Category 2 claim.

petitioner about a theory stated by his mother: "Didn't you tell your own mother that the child was hit by a car?" When petitioner could not remember, the prosecution asked him three or four more times. (15 RT at 3058.) The prosecution also asked petitioner if he had told his mother he went inside to get a towel before picking Consuelo up, and whether he told his mother that he called Estella. (*Id.* at 3062.) The prosecution asked petitioner whether he had obtained a towel before he picked Consuelo off the floor or after (*Id.* at 3061), and whether he picked the girl up and then called Estella himself. (*Id.* at 3062.)

b. The prosecution later asked: "Did you tell your mother the truth about what happened?" (15 RT at 3060.) Implying to the jury that either petitioner lied to the court or to his mother. Indeed, he even asks petitioner whom he lied to. (*Id.*) Thus, the prosecution implied the falsity of petitioner's statements to the court with unverified information produced without an opportunity for cross-examination.

c. All of these questions regarding irrelevant facts were asked without the presentation of the testimony of Maria, and without the prosecution even producing a statement given by her according to law enforcement records. This was even though a statement existed, and even though Maria was in the courtroom -- out in the hall -- assuming she was going to testify and waiting to do so. There was no reason for the prosecution to not call Maria other than to allow them to use false statements that they attributed to her.

d. The prosecution also manufactured false inconsistencies in petitioner's statements by asking petitioner questions regarding irrelevant facts.

(1) The prosecution emphasized at trial the fact that petitioner had stated during a police interview that he only lost sight of Consuelo for "one minute." Detective Valdez testified for the prosecution confirming that petitioner said the child had been out of his sight for one minute. (14 RT at 2751.) The prosecution then asked petitioner repeatedly about the fact that petitioner stated to the police that he had lost sight of Consuelo for "one minute" and then looked for her and found her outside on the ground. Rather than recognize that the statement "one minute" may have been a reference to a short period of time, the prosecutor emphasized any statement that did not agree with the literal meaning of "one minute." He asked petitioner several times whether he told the police he had only left Consuelo alone for one minute, or left her out of his sight for a minute. (15 RT at 3055; 3057; 3063.) When petitioner expressed some doubt about the amount of time Consuelo was out of his sight, the prosecution asked "Are you changing your story today?" He asked the same question again, "Did you leave her for one minute alone?" (15 RT at 3055.) When petitioner was unable to answer the prosecutor's questions with the specificity sought, the prosecutor asked: "Are you telling us that it was longer than a minute because you have heard the testimony of witnesses who say that these things could not have happened in one minute?" (15 RT at 3057.)

(2) The prosecutor further asked petitioner, "you stated earlier that you stated some lies to Detective Valdez. Did that have anything to do with the hamburgers?" (15 RT at 3069.) He pointed out "you told Detective Valdez that the hamburgers were purchased on Saturday not Sunday." (15 RT at 3069.) "You say the only thing different from your statement to the police until today's testimony is the one minute time difference and whether or not you had Burger King on that night." (15 RT at 3069.)

(3) When petitioner did not answer the prosecution's questions regarding these facts with the specificity he sought, the prosecutor asked petitioner: "Do you have select times when you tell the truth and when you do not tell the truth?" (15 RT at 3056.) Thus, the prosecution implied that petitioner was lying about what he said and did the day Consuelo was hurt simply because he stated he left Consuelo alone for longer than one minute, and because he did not remember on which day of the weekend he had visited Burger King. These minor irrelevant facts were unfairly used to imply that petitioner's statements at trial and during his interrogation regarding what he did the night of November 17, 1991 and what happened to Consuelo were false.

2. The State manufactured false testimony regarding the timing of the incident.

a. All percipient witnesses in their initial statements agreed that Cristina had asked to play for fifteen minutes on November 17, 1991. In an interview with law enforcement on November 18, 1991,

Cristina stated that, after her mother left for work, she asked petitioner if she could go to her friend's house for fifteen minutes. She said she was gone for no more than fifteen minutes when petitioner came to get her. Petitioner also stated in a law enforcement interview on November 18, 1991, that Cristina had asked to go see her friend for fifteen minutes, and he said yes. Maribel Aguilar, Cristina's friend, stated in a November 18, 1991 interview that Cristina went to her house at ten minutes to seven and left at 7:05 p.m. She said she kept checking her clock in her apartment so Cristina would not be late.

b. At the preliminary hearing in December 1991, after Cristina had been interviewed by the Delano Police, and told that she was lying about the incident, Cristina again stated that she played only for fifteen minutes, but this time said that it was *petitioner* who limited the time she could play. She also said that ten minutes after she left, petitioner came around the building and called for her. She said she knew the time because they had been watching the clock. (1 CT at 149.)

c. In a law enforcement interview with Ray Lopez on June 12, 1992, Cristina's statement began to change once more. This time she stated that when she asked petitioner if she could play, he said yes, but only for thirty minutes. Later in the interview she corrected this to fifteen minutes.

d. At trial, the prosecutor led Cristina to state that she asked petitioner if she could go out and play, but he limited the time she could go out. He told her she could only play for *thirty* minutes. (11 RT at 2182.)

e. Cristina's statements at trial, as presented by the prosecution, were false. While she early on stated that she had asked to play for a specific amount of time, her statement at trial, pursuant to a leading question from the prosecution, was that petitioner limited her playtime. Her statement that she had a fifteen-minute allotment was replaced at trial with a thirty-minute limit. These false statements were knowingly presented by the prosecution, who interviewed Cristina on several occasions, and who subjected her to coercive and suggestive questioning until she gave answers that agreed with the prosecution's theory of the case. (*See* Exh. 89 at 5553-55 [Declaration of James M. Wood] [explaining how the suggestive and coercive questioning of Cristina led her to give inaccurate and unreliable statements].) Her statements were then cited by the prosecution at closing argument as the most credible account of what happened that night. (18 RT at 3589-90). The prosecution clearly was attempting to falsely extend the time petitioner was alone with Consuelo.

f. A letter written by Terry McCauley, Cristina's counselor, stated that one month before trial Cristina was having trouble recalling "important aspects" of the events of November 17, 1991. (Exh. 9 at 3628-29.) This letter was withheld from the defense. It demonstrated that Cristina's memory regarding the events of that evening was unreliable. Yet, the prosecution argued at trial that where Cristina's statements conflicted with petitioner's, Cristina's were the more reliable choice, because "her statements have been consistent throughout" and because an "eleven year old.... has no reason to lie." (18 RT at 3589-90.)

g. As a result of these false statements, the jury believed petitioner had told Cristina to play for thirty minutes because he wanted to be alone with Consuelo in order to harm her, and because he believed he needed thirty minutes to do so. Thus, the prosecution manufactured, and the jury believed, this evidence of premeditation, where no such evidence existed, and where petitioner had not premeditated any harmful acts.

3. The State presented false testimony regarding Vicente's uncaring demeanor at DRMC and KMC.

a. The prosecutor presented the testimony of Dr. Jack Bloch, who stated that when he spoke to petitioner at KMC, petitioner was hunched forward looking toward the floor, exhibiting a lack of concern. (12 RT at 2465-66.) The prosecution presented the testimony of Anita Curran, that petitioner had acted "nonchalant" and exhibited lack of concern at DRMC. (14 RT at 2772-76.)

b. The prosecution knew these statements were false. The prosecution knew that Supervising DRMC Nurse Faye Van Worth described petitioner as "very supportive" and concerned about Estella. (Exhibit 4 at 1752 [Interview with Faye Van Worth].) In addition, numerous witnesses interviewed by the prosecution who knew petitioner, including family members of Consuelo's, told the police that petitioner cared a great deal about Consuelo, and was a caring and attentive person with children and others in general. (See, e.g., Exh. 4 at 2051 [Interview of Delia Salinas by Ray Lopez, May 14, 1992]; Exh. 4 at 2049-50 [Interview of Javier Alejandro by Ray Lopez, May 14, 1992]; Exh. 4 at 2198-99 [Interview of Estella Medina, November 26, 1991]; Exh. 4 at 1820-21

[Interview of Cristina Medina, November 18, 1991].) As a consequence, the prosecution knew that the testimony of the medical personnel it presented regarding petitioner's demeanor was unreliable and unfairly designed to indicate petitioner was uncaring. Unlike witnesses they interviewed who knew petitioner well, the witnesses presented regarding his demeanor had only briefly been exposed to him, did not speak Spanish, nor have any knowledge of Mexican culture. Moreover, the prosecution knew that a flat affect is typical of person experiencing trauma, especially one such as petitioner who suffers from post-traumatic stress disorder and a history of experiencing traumatic events, including the death of his young daughter.

c. The prosecution manufactured false contradictions in petitioner's testimony. Petitioner testified that he picked up Consuelo and took her to the sofa while he called Cristina. (15 RT at 3034.) The prosecution questioned him regarding whether he had instead put Consuelo on the bed. (*Id.*) Seconds later, the prosecution asked petitioner if he instead put her on the sofa. (*Id.* at 3037.) This line of questioning is irrelevant to the prosecution's inquiry, and was designed only to confuse petitioner and to create inconsistencies that could be exploited in an argument to the jury. These false contradictions included questions about the towel found in the bedroom and who made the telephone call to Estella.

d. The prosecution implied that petitioner spoke with more certainty than he had. The prosecution implied that petitioner stated he knew Consuelo ran into a door. Petitioner's conjecture made during an interview in which he was asked to offer an explanation for Consuelo's

injuries was therefore used to manufacture inconsistencies in his testimony when the prosecution implied that he had been sure about his statements.

e. The prosecution questioned petitioner in a way that implied he stated with certainty in his interview that Consuelo had been hit by a car. Petitioner stated instead that he thought Consuelo might have been hit by a car. Consistent with his testimony and his statements to law enforcement, petitioner told his friends that he thought Consuelo might have been run over by a car, though he did not know what had happened to her. (*See, e.g.*, Exh. 104 at 5870 [Declaration of Dionicio Campos Govea].) The prosecution overstated petitioner's certainty in order to confuse petitioner in an attempt to modify his testimony.

f. The prosecution implied that petitioner had showered and changed his underwear before he was arrested because they were soiled as a result of sodomizing Consuelo.

g. These false statements, not countered by the defense, gave the jury the impression that petitioner did not care about Consuelo when she was dying in the hospital. They presented a picture of petitioner as cold and distant, and capable of killing someone. They also led the jury to believe that petitioner had intentionally fabricated statements, or changed his testimony. These implications were false; petitioner did not fabricate statements or change his account of the events in any material respect. Any apparent minor inconsistencies were most likely due to his low cognitive functioning in combination with poor interpretation, which hampered his ability to understand the complex proceedings and permitted the prosecutor to manipulate petitioner's answers to make him sound evasive. (Exh. 126 at

6358 [Declaration of Antonio E. Puente, Ph.D].) The prosecution used these circumstances in conjunction with irrelevant questioning to improperly convey to the jury that petitioner was lying in court because he was guilty.

D. CLAIM 4: THE STATE PRESENTED FALSE AND MISLEADING TESTIMONY THAT PETITIONER CAUSED CONSUELO VERDUGO'S INJURIES THAT SHE SUSTAINED PRIOR TO NOVEMBER 17, 1991.[6]

The convictions and sentence of death were rendered in violation of petitioner's rights to a fair, reliable, rational, nonarbitrary and accurate determinations of guilt and penalty, to a fair trial free from false and misleading evidence, to an opportunity to confront and refute adverse evidence, to the disclosure of all material exculpatory evidence, and to the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law because the prosecution introduced, and trial counsel unreasonably and prejudicially failed to exclude or refute, testimony regarding the nature and cause of the victim's prior injuries and illnesses.

The prosecution presented false testimony and falsely argued at trial that petitioner caused prior injuries suffered by Consuelo Verdugo, including vaginal, head, abdominal, and arm injuries, and prior illness. The prosecution presented false testimony that petitioner had molested Consuelo in the past. The State falsely portrayed Consuelo as a healthy child who began to have health problems only after petitioner came into her life. In fact, the prosecution had knowledge that Consuelo was exposed to individuals who were violent and who had committed sex abuse crimes in the past, that petitioner was caring and gentle to Consuelo and had not had

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[6] This Claim qualifies as a Category 2 claim.

the opportunity or the propensity to commit violence that would cause the prior injuries, and that Consuelo had a myriad of health problems long before she met petitioner.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Although the prosecution was aware that Estella Medina's family and at least one male friend had a history of violence, drug abuse, and sex abuse crimes and had been exposed to Consuelo, the prosecution nonetheless falsely asserted and led the jury to believe that petitioner caused Consuelo's prior injuries.

a. A substantial portion of the prosecution's case against petitioner included testimony about injuries and illnesses that Consuelo sustained prior to November 17, 1991. These included vaginal, head, abdominal, and arm injuries.

b. During his questioning of Estella at trial, the prosecutor implied that Consuelo began to exhibit these injuries only after petitioner came to live with Estella and her daughters, thereby implying that petitioner caused Consuelo's past injuries and illnesses:

> Prosecutor: Mrs. Medina, isn't it true that you knew what was happening with this man but you weren't reporting it?
> Medina: No I didn't.
> Prosecutor: It wasn't until he came around that the child started having broken bones and bruises, isn't it?
> Medina: No.
> (13 RT at 2587-88.)

c. Throughout his case in chief and during closing argument, the prosecutor asserted through questions and argument that Estella's denials were false and, instead, that petitioner had caused these injuries.

d. The prosecution pointed out that Estella told slightly different stories about a time Consuelo obtained a head injury (14 RT at 2559; 2603; 2643), and elicited stories from other prosecution witnesses that implied Estella told different stories to different people, implying that Estella was covering up the real cause of the injury. (14 RT at 2730; 17 RT at 3347.) The prosecution also implied that Estella did not take Consuelo to the hospital when she hurt her head because she was protecting petitioner. (13 RT at 2582.)

e. The prosecutor implied, and argued, that petitioner had caused Consuelo's arm injury that she sustained on September 24, 1991, because Estella did not take Consuelo to the hospital until the day after Consuelo visited Delia, and petitioner had spent that night at Estella's. (11 RT at 2205; 13 RT at 2553-54.) He also presented evidence that Estella told conflicting stories about how Consuelo sustained this injury. (13 RT at 2553-55.)

f. The prosecutor elicited testimony from Diana Alejandro to show that Estella noticed a mood change in Consuelo before her death, implying that Consuelo was depressed because she was being molested. (13 RT at 2584.)

g. In fact, the prosecution possessed evidence demonstrating that several other individuals likely caused the injuries.

(1) The prosecution knew Consuelo was continually exposed to numerous individuals who were known drug users and/or known to be violent and likely injured Consuelo. These included: Javier Alejandro; Delia Salinas; Antonio Alejandro (Exh. 62 [Newspaper Article]); and Diana Alejandro.

(2) Javier Alejandro, Estella's brother, had a criminal record and was known to be violent. (Exh. 44 at 4748-49 [*People v. Javier Alejandro*, Kern County Superior Court Case No. 35099].) Javier was suspected of threatening members of the defense team at the time of trial. (Exh. 23 [Delano Police Department Report regarding Marisol Alcantar, dated March 26, 1993]; Exh. 105 at 5894-95 [Declaration of Marisol Calderon Alcantar].)

(3) The prosecution knew that one of Consuelo's main caretakers, her aunt Delia Salinas, was mentally unstable and likely a neglectful caretaker. The prosecution interviewed Delia Salinas on numerous occasions, during which she admitted that she suffered from "nervous breakdowns." (Exh. 4 at 2051-53 [District Attorney Case Report of Interview with Delia Salinas, dated May 21, 1992]; Exh. 4 at 2310 [District Attorney Case Report of Interview of Delia Salinas, dated July 24, 1992].) Her sister Estella says that Delia has suffered from major mental health problems her whole life. (Exh. 66 at 5356-57, 5361 [Declaration of Estella Alejandro Medina].) She has had repeated psychotic episodes for which she has been hospitalized several times. (*Id.*) In October of 1991 Delia

began to decompensate again. (*Id.*) She hallucinated and began irrationally stacking dishes and food on the kitchen counters. (*Id.* at 5363-64.) She became unresponsive. (*Id.* at 5364.) This psychotic episode lasted through Consuelo's death until about December of 1991. (*Id.*) The prosecution had in its possession copies of Delia's mental health records. (17 RT at 3334-52.) Delia also informed the district attorney investigator that she had been babysitting for Consuelo when Consuelo broke her arm. (Exh. 4 at 2051 [District Attorney Case Report of Interview with Delia Salinas, dated May 21, 1992].)

(4) Antonio Alejandro, Estella's brother, was one of Consuelo's babysitters. (Exh. 62 at 5211-12 ["Family Grieves in Child's Death," Bakersfield Californian, November 27, 1991]; Exh. 46 [*In re Marriage of Jennette Guzman and Antonio Perez Alejandro*, Kern County Superior Court, Case No. 525770].) The prosecution also knew that Antonio was violent. (Exh. 23 at 4127-45 [Delano Police Department Report].)

(5) Likewise, her aunt Diana Alejandro, who was also a frequent caretaker, was a known drug addict. (Exh. 4 at 2236 [Interview with Diana Alejandro, dated May 11, 1992]; Exh. 103 at 5838 [Declaration of Cristobal Aguilar Galindo].) She was also known around the community and by the prosecution to be violent. Diana told District Attorney investigator Ray Lopez that she did not want to talk to Estella about Consuelo because Diana knew she would end up becoming physically violent with Estella. (Exh. 4 at

2250, 2260 [Transcript of Interview with Diana Alejandro by Ray Lopez, May 12, 1992); Exh. 103 at 5838 [Declaration of Cristobal Aguilar Galindo].)

(6) The prosecution also knew that Consuelo had been exposed to known sex abusers, including Joe Avila (Exh. 4 at 2071-73 [Interview with Vicki Salinas by Ray Lopez]; Exh. 6 at 2943-51 [Rap sheet of Joe Avila]), and Sacaraias Alejandro (Exh. 38 [People v. Sacarias John Alejandro, West Kern County Municipal Court, Case No. 390803]; Exh. 39 [People v. Sacarias John Alejandro, Kern County Municipal Court, Case No. 54578]; Exh. 40 [People v. Sacarias John Alejandro, Kern County Superior Court, Case No. 41945A]; Exh. 41 [People v. Sacarias John Alejandro, Kern County Municipal Court, Case No. 56607]; Exh. 42 [People v. Sacarias John Alejandro, Kern County Superior Court, Case No. 47742A]; Exh. 43 [Debra Alejandro v. Sacarias John Alejandro, Kern County Superior Court, Case No. 547938].)

2. The prosecution presented false, misleading, and prejudicial medical testimony that Consuelo Verdugo had old rib injuries received three to four weeks prior to her death.

a. The State presented the testimony of Dr. Dibdin that Consuelo's ribs contained evidence of prior injury to the posterior, left eighth and ninth ribs. (11 RT at 2127.) He stated that these injuries occurred three to four weeks before her death. (11 RT at 2128.)

b. The prosecutor, relying on Dr. Dibdin's testimony falsely argued that petitioner caused these prior rib injuries. He stated in

opening argument that "[s]he didn't just have totally fractured rear ribs, she had old fractured ribs, several weeks old." (10 RT at 2027.) During closing argument, he argued the eighth and ninth posterior ribs on the left had old fractures that were three weeks old, (18 RT at 3588), "[w]e have old broken bones and old scarring of the pancreas.... Maybe that is what he did." (18 RT at 3652.)

(1) In fact, the prosecutor knew that Consuelo often fell and as a result was prone to injury. The prosecution knew that Consuelo had many other injuries that could have accounted for the healing fractures which were completely unrelated to petitioner. Petitioner was never present during any of these times that Consuelo had fallen and possibly caused injury to her ribs.

(a) Estella and her family told investigators of multiple incidents where Consuelo injured herself. Estella told the Delano Police and District Attorney Investigator Bresson that Consuelo was "always falling down, she's always getting into things. Even at my mom's house, you know, she's always bumping, she falls." (Exh. 4 at 2209 [Transcript of Interview with Estella Medina, July 9, 1992].) On one occasion, while trying to reach some knickknacks on a wall shelf, she climbed up to the top of the couch and fell off the back, hitting her head on the cement next to the sliding glass door. (Exh. 4 at 2200 [Delano Police Interview of Estella Medina, November 26, 1991.) Estella also

described multiple instances where Consuelo lost her balance and fell down, or ran around too quickly, bumping into things around the house. (*Id.* at 2189-91; 2208-10.) Another instance Estella described was when Consuelo climbed to the top of a chair and then fell backwards, off of it. (*Id.* at 2210.) Estella also testified that Consuelo had once fallen from a recliner and landed on her head on the ground outside the apartment. (13 RT at 2558-59.)

(b) Delia, Consuelo's aunt, told investigators that Consuelo was clumsy and fell down a lot. (Exh. 4 at 2051 [District Attorney Case Report, May 21, 1992].) Delia also testified that Consuelo climbed up on top of things, such as the table and the counter, "all the time" and that Consuelo often pulled the power cords connected to fans sitting up on tables or stands and pulled the fans down to the floor, which hit her head at least a couple of times on the way down. (17 RT at 3347, 3351.)

(c) Estella's and petitioner's friends, who were also caretakers of Consuelo witnessed Consuelo's penchant for injury. Maria Celia Campos vividly recalls Consuelo as an active child:

> Whenever I saw [Consuelo], I noticed that she was a handful. That little girl ran up and down and all over the place. She was always falling. Though she could walk, she fell all the time – she did not even need to

> have something to trip over. Her body was so flexible that she fell every other step – it was as if she had no strength in her legs. We had to keep right behind her when she went anywhere, or else she would fall or get into something. She loved to climb anything she could get onto. She climbed stairs, chairs, anything. One time, I remember I turned around and there was [Consuelo] on top of the refrigerator. We had no idea how she had managed to get herself up there. Another time, about two to three months before [Consuelo] died, she fell down the steps in front of my house. The steps were cement and rather high. There were two of them, and she just took a big tumble. Estella and I found her crying at the bottom of the steps. [Consuelo] was walking at the time. She walked out of the house alone and fell down the cement steps. (Exh. 98 at 5732 [Declaration of Maria Celia Campos].)

(d) Consuelo was known by all who were around her as a very active child who liked to climb things and pull things down from high places. (*See, e.g.*, Exh. 94 at 5684 [Declaration of Ana María Cordero Cárdenas de Dávalos]; Exh. 104 at 5865 [Declaration of Dionicio Campos Govea].)

(2) Moreover, the prosecutor knew Consuelo had been exposed to violent and unstable family members, who often babysat for her and were far more likely to have caused her injuries. As stated above, the prosecution also knew that Consuelo's aunt Delia, a frequent babysitter for Consuelo, had a history of mental health problems. (17 RT at 3334-52.)

3. The State presented false, misleading, and prejudicial testimony that Consuelo received past injuries to her abdomen sometime before her death.

a. The prosecution presented the testimony of Dr. Jack Bloch and Dr. Jess Diamond, who stated Consuelo had scarring and adhesions indicating prior injury to her pancreas. (12 RT at 2456-58 [Bloch]; 10 RT at 2047-48 [Diamond].) Bloch opined that the prior injury likely came from trauma, and occurred in the twenty-one months prior to her death. (12 RT at 2456-58.) Diamond testified that, during surgery, doctors had found adhesions, or scar tissue, on the right side of the large bowel. (10 RT at 2047.) According to Diamond, the adhesions were not normal, and were probably due to trauma, such as "being struck by external trauma." (10 RT at 2048.)

b. The prosecutor falsely argued that petitioner caused these injuries. The prosecution stated at trial that petitioner caused Consuelo's prior abdominal injuries. "Maybe he tried to get what he did the easy way. We have old broken bones and old scarring of the pancreas. We have old reports of incidents of head injury. Maybe that is what he did." (18 RT at 3652.)

c. The prosecutor knew these statements were false. Witnesses had reported to the prosecution that petitioner was not a violent man and had not harmed Consuelo in the past. (*See, e.g.,* Exh. 4 at 2051 [Interview of Delia Salinas by Ray Lopez, May 14, 1992]; Exh. 4 at 2049-50 [Interview of Javier Alejandro by Ray Lopez, May 14, 1992]; Exh. 4 at 2198-99 [Interview of Estella Medina, November 26, 1991]; Exh. 4 at

1820-21 [Interview of Cristina Medina, November 18, 1991] Exh. 125 at 6318 [Declaration of José Jesús Vásquez Dávalos].)

4. The prosecution presented false testimony and argument that petitioner caused Consuelo Verdugo's arm injury on September 24, 1991. The prosecution was aware that there was no evidence whatsoever to support its claim that petitioner saw Consuelo on that day. In addition, the prosecution knew of, but did not disclose, evidence in its possession that demonstrated that the injury was consistent with an accident, and that if the injury was the result of abuse, Delia Salinas was the likely abuser.

a. The prosecution attributed Consuelo's prior wrist injury to petitioner, and argued that Estella covered up the injury. "Hard to believe there's a mother out there who could act like this," argued the prosecutor. "He couldn't have found a better situation for his perversion. [Estella] did not protect Consuelo Verdugo. I mean, she can't even tell two doctors the same story about how she broke her arm. Maybe she did break it at the grandmother's, maybe she didn't." (18 RT at 3596.)

b. The prosecutor knowingly created this false impression that petitioner was responsible for the wrist injury when he possessed information proving that petitioner did not break Consuelo's wrist. Cristina, Delia, and Estella all told the prosecution that petitioner was not present, or even at the house, when Consuelo's wrist was broken. (*See, e.g.*, Exh. 4 at 2051 [Interview of Delia Salinas by Ray Lopez, May 14, 1992]; Exh. 4 at 2198-99 [Interview of Estella Medina, November 26, 1991]; Exh. 4 at 1820-21 [Interview of Cristina Medina, November 18, 1991].)

c. Indeed, the prosecutor withheld evidence that Consuelo's prior arm injury was consistent with the explanation given by Estella. A note in the prosecutor's file stated that on December 3, 1991, the prosecutor interviewed Dr. Chandrasekaran, the doctor who had treated Consuelo for her broken arm. These notes indicate that the doctor confirmed that Consuelo's wrist had been broken, and that there was no indication of child abuse, rather the injury was "consistent with [the] explanation" given, that Consuelo "fell." (Exh. 5 at 2568 [Handwritten notes].) This document was withheld from the defense. Had petitioner been provided this note, it would have been used to confirm that petitioner had not abused Consuelo or caused the injury and the prosecution's assertion to the contrary was false.

5. The prosecution presented false testimony that petitioner caused Consuelo Verdugo's prior head injury.

a. The prosecution questioned Estella and petitioner regarding a head injury Consuelo suffered at her apartment. Both Estella and petitioner consistently stated that Consuelo had hurt her head reaching for something on the wall in the living room, and that petitioner was not present when this occurred. (13 RT at 2555-57 [Estella]; 13 RT at 3046 [petitioner].) The prosecution implied, however, that petitioner was present when this injury occurred (15 RT at 3046), he caused the injury (18 RT at 3652), and Estella and petitioner lied about the cause of the injury to others (14 RT at 2730). The prosecutor further insinuated that Estella and petitioner then refused to take Consuelo to the doctor and instead put aloe vera on the injury to conceal petitioner's abuse. (13 RT at 2556-57.) In his

closing argument, the prosecution stated: "We have old reports of incidents of head injury. Maybe that is what he did." (18 RT at 3652.)

b. In fact, the prosecution knew that Consuelo was an over-active child who fell and hurt herself often. (*See, e.g.*, Exh. 66 at 5367-68 [Declaration of Estella Alejandro Medina]; Exh. 4 at 2050-51 [District Attorney Case Report, May 21, 1992]; Exh. 4 at 2422 [Transcript of Interview with Estella Medina, July 9, 1992]; *see also* discussion *supra* Claim 4(2)(b)(1)-(2).)

6. The prosecution presented false, misleading, and prejudicial testimony that petitioner had molested Consuelo on a prior occasion.

a. Early in 1992, Ray Lopez approached Estella's niece, Consuelo's and Cristina's cousin, Virginia (Vicki) Salinas. Lopez asked Vicki to participate in the investigation as an agent of the district attorney's office. (*See, e.g.*, 13 RT at 2569 [prosecutor refers to Vicki as an "investigator from my office"].)

b. Therefore, even though the prosecution knew Cristina did not believe petitioner ever harmed Consuelo in any way, that Consuelo had trouble sleeping and slept better with petitioner, whom she viewed as her father, Cristina's statements were presented at trial as evidence that petitioner molested Consuelo that night. (*See, e.g.*, 11 RT at 2189-90; 18 RT at 3591-92.) In addition, the prosecution presented false testimony that this was the only other night petitioner had stayed with Estella's daughters, implying that the only two times petitioner cared for them he molested Consuelo (11 RT at 2189-90), even though both Cristina and Estella told the police that petitioner stayed with the girls regularly without incident.

(Exh. 4 at 1814-48 [Interview with Cristina Medina]; Exh. 4 at 1849-1906 [Interview with Cristina Medina, June 12, 1992]; Exh. 4 at 2380-2514 [Interview with Estella Medina, July 9, 1992].)

7. The State presented false testimony implying petitioner molested Consuelo Verdugo causing her illness on or around Halloween.

a. The statements of Estella Medina that were given to the prosecution before trial indicated that Consuelo was ill at times in the months before her death. Estella told the prosecution that she thought Consuelo was sick, or was teething. (13 RT at 2584.) "I noticed that she was feeling kind of sad, she was feeling strange, she didn't want to eat too good, she wouldn't laugh, she wouldn't play, she would just lay in bed." (13 RT at 2584.)

b. At trial, the prosecutor falsely implied that petitioner caused Consuelo's illness by molesting her the month before her death (13 RT at 2584-86), that Estella refused to take Consuelo to the doctor because she sought to hide evidence of the molestation (13 RT at 2586), and that this was part of a pattern engaged in by petitioner and Estella. (18 RT at 3596.)

8. The prosecutor presented the false and coerced testimony of Estella Medina that she worried about her children when they were alone with petitioner.

a. To lend support to the prosecutor's false theory that petitioner was a threat to the children, law enforcement coerced Estella into testifying that she mistrusted petitioner with her children when in fact she placed the utmost trust in him. (See Claim 2, *supra.*) Estella's daughter

Cristina was removed from her home by the police officers and district attorney investigators who interviewed her about the case. This occurred after Estella told the officers she would not testify that petitioner had harmed her daughter. (Exh. 4 at 2215, 2225 [Transcript of Interview with Estella Medina, November 26, 1991].) They told her that she needed to believe that petitioner had raped and sodomized her daughter, and not let her love for petitioner "blind" her to this established fact. (*Id.* at 2214.)

b. After Cristina temporarily was returned to Estella, Ray Lopez again removed her from her mother's custody immediately after he interviewed Estella on July 9, 1992, because Estella still did not believe petitioner had hurt her daughter. (Exh. 4 at 2380-2514.)

c. Thus, Estella was told she had to prove she was a more protective mother in order to receive custody of Cristina once again. She believed that she needed to demonstrate to the police, the district attorney, and the Department of Human Services caseworkers that she had tried to protect her daughters from any abuse committed by petitioner, even though she did not believe he was in any way abusive to them. She therefore testified for the district attorney at trial that she had told petitioner, "If he ever touched my kids I would have him locked up." (13 RT at 2562.) She also testified that she told her daughters to close their doors whenever she was not home. (13 RT at 2562.) She made these statements in order to prove that she was sufficiently suspicious of petitioner, and sufficiently protective of her daughters in light of this suspicion, even though she did not believe that petitioner would cause harm to them in any way. (Exh. 66 at 5373, 5386-88 [Declaration of Estella Medina].) The prosecutor knew

these statements were false, and knew that Estella did not believe petitioner ever harmed her daughters. Despite this knowledge, he coerced and presented these false statements.

d. As a result of Estella's false and coerced statements, the jury believed Estella mistrusted petitioner with her daughters, and therefore believed she had reason to do so because he had harmed them or threatened to harm them in the past. Estella's false and coerced statements thus supported the prosecution's false theory that petitioner had caused Consuelo's prior injuries, and led the jury to believe that indeed he had caused them.

9. The prosecution presented false testimony that Consuelo was in good health prior to November 17, 1991, and failed to disclose information that indicated possible causes of her prior injuries other than abuse by petitioner.

a. The prosecution based its case on an intentionally false premise that contradicted and ignored the evidence it had obtained. An assumption central to the state's case was that: "On November 17, 1991, Consuelo Verdugo before 7:00 p.m. was a *healthy*, twenty-one-month-old little girl and within fifteen minutes she had been sodomized...raped... [and] beaten." (18 RT at 3597 [emphasis supplied]; *see also* 10 RT at 2024 [opening statement].) The prosecution elicited the testimony of Diana Alejandro that Consuelo was a "normal and healthy child" before this day. (14 RT at 2730.)

b. However, the prosecution had knowledge before trial that Consuelo had a host of health problems long before petitioner met her

or completely unrelated to petitioner, including anemia, broken bones, and problems walking. Her habit of climbing things, pulling appliances, such as fans, down from shelves by their power cords, and falling often combined to cause the symptoms mentioned by others. (Exh. 55 at 5042-45 [Transcript of Interview of Delia Alejandro by District Attorney Investigator Ray Lopez, May 14, 1992]; Exh. 66 at 5366 [Declaration of Estella Alejandro Medina]; Exh. 98 at 5732 [Declaration of Maria Celia Campos].)

(1) Estella and her family told investigators of multiple incidents where Consuelo injured herself. On one occasion, while trying to reach some knickknacks on a wall shelf, she climbed up to the top of the couch and fell off the back, hitting her head on the cement next to the sliding glass door. (Exh. 4 at 2200 [Delano Police Interview of Estella Medina, November 26, 1991.) Estella also described multiple instances where Consuelo lost her balance and fell down, or ran around too quickly, bumping into things around the house. (*Id.* at 2189-91; 2208-10.) Estella told the Delano Police and District Attorney Investigator Bresson that Consuelo was "always falling down, she's always getting into things. Even at my mom's house, you know, she's always bumping, she falls." (*Id.* at 2209.) Another instance Estella described was when Consuelo climbed to the top of a chair and then fell backwards, off of it. (*Id.* at 2210.) Estella also testified that Consuelo had once fallen from a recliner and landed on her head on the ground outside the apartment. (13 RT at 2558-59.) Estella also told District Attorney Investigator

Lopez that "ever since she was, you know, a baby she, she got diaper rash. She would always have diaper rash. I would always have Desitin, you know, to put on her or something. One time I had to take her to the doctor because she got a real bad rash." (Exh. 4 at 2422 [Transcript of Interview with Estella Medina, July 9, 1992].)

(2) Delia, Consuelo's aunt, told investigators that Consuelo was clumsy and fell down a lot. (Exh. 4 at 2051 [District Attorney Case Report, May 21, 1992].) Delia also testified that Consuelo climbed up on top of things, such as the table and the counter, "all the time" and that Consuelo often pulled the power cords connected to fans sitting up on tables or stands and pulled the fans down to the floor, which hit her head at least a couple of times on the way down. (17 RT at 3347, 3351.)

(3) Diana Alejandro, Estella Medina's other sister, also told Lopez on May 11, 1992, that Consuelo "was always rashed [i.e., she always had a rash] when she was living down ... on 1313 Albany." (Exh. 4 at 2254 [Transcript of Interview with Diana Alejandro, May 11, 1992].) Diana explained that Consuelo always had a rash because her diaper was not changed at night by members of the Alejandro family. (Exh. 4 at 2287 [Transcript of Interview with Diana Alejandro, May 11, 1992].)

c. Witnesses also told the prosecution that petitioner took very good care of Consuelo, was not violent, and did not hurt her or cause her health problems. (*See, e.g.*, Exh. 4 at 2051 [Interview with Delia Salinas]; Exh. 4 at 2049-50 [Interview with Javier Alejandro]; (Exh. 4 at

1814-48 [Interview with Cristina Medina]; Exh. 4 at 1849-1906 [Interview with Cristina Medina, June 12, 1992]; Exh. 4 at 2380-2514 [Interview with Estella Medina, July 9, 1992].)

d. The prosecution knew that Consuelo had exposure to men known to be violent who may have caused her prior injuries, such as Javier Alejandro, Antonio Alejandro, and others, and to sex abusers, such as Jose Avila and Sacarias Alejandro. (See, e.g., Exh. 4 at 2071-73 [Interview with Vicki Salinas by Ray Lopez]; Exh. 6 at 2943-51 [Joe Avila's rap sheet]), and Sacarias Alejandro (Exh. 38 [People v. Sacarias John Alejandro, West Kern County Municipal Court, Case No. 390803]; Exh. 39 [People v. Sacarias John Alejandro, Kern County Municipal Court, Case No. 54578]; Exh. 40 [People v. Sacarias John Alejandro, Kern County Superior Court, Case No. 41945A]; Exh. 41 [People v. Sacarias John Alejandro, Kern County Municipal Court, Case No. 56607]; Exh. 42 [People v. Sacarias John Alejandro, Kern County Superior Court, Case No. 47742A]; Exh. 43 [Debra Alejandro v. Sacarias John Alejandro, Kern County Superior Court, Case No. 547938].)

10. The prosecutor thus prejudiced petitioner's case by falsely linking him to prior injuries and illnesses suffered by Consuelo Verdugo when no evidence existed to show he had in any way harmed or threatened Consuelo in the past. As a result of the prosecution's cover-up and presentation of unconstitutionally false evidence, the jury believed that Consuelo was healthy and free from threats of violence before petitioner met her, and that her health problems and injuries arose only after she met him. From this false information the prosecution falsely proposed, and the

jury wrongly inferred, that petitioner must have caused Consuelo's prior injuries, and that the injuries Consuelo suffered on November 17, 1991 were the culmination of the continuous violence described by the prosecution. Had the prosecutor not knowingly introduced evidence that falsely linked petitioner to Consuelo's prior injuries, the jury would not have believed petitioner had the character to commit the crimes he was charged with, and the verdict would have been different.

E. CLAIM 5: THE STATE PRESENTED FALSE AND MISLEADING TESTIMONY THAT PETITIONER WAS A CHILD MOLESTER, WHEN IT HAD OVERWHELMING EVIDENCE IN ITS POSSESSION DISPROVING ITS OWN ALLEGATIONS WHICH IT FAILED TO DISCLOSE.[7]

Petitioner's conviction, confinement, and death sentence were illegally obtained in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law rights to due process; a fair trial; present a defense; confrontation; compulsory process; a reliable and accurate assessment of guilt and penalty based on accurate, not false testimony, evidence, and argument; a fair, non-arbitrary sentencing determination; and to be free of the imposition of cruel and unusual punishment were violated by the prosecutor's false assertions and inferences that petitioner was a child molester who had molested Consuelo and her sister Cristina in the past; and by the state's failure to disclose and the jury's failure to hear evidence that Consuelo's sister Cristina had not been sexually abused, that people who knew petitioner and had seen him care for Consuelo stated that he was not violent and was not a child molester, and that Consuelo had health problems that led her to hurt herself regularly.

Although the prosecution insinuated throughout the investigation and trial that petitioner previously committed acts of sexual misconduct, thereby tainting the witnesses' testimony and the jury's determination of guilt and penalty, the State knew that petitioner had not committed any such acts.

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[7] This Claim qualifies as a Category 2 claim.

When the prosecutor stated during closing argument that petitioner had been molesting Consuelo for the months preceding her death, as evidenced by Consuelo's prior injuries, and that Cristina was "lucky to get out alive" because petitioner had been molesting her too, the prosecutor knew these statements were not true. He knew that countless witnesses, including Consuelo's mother, Consuelo's sister, petitioner's brother, and friends of Consuelo's family had provided evidence that petitioner was not a child molester and had never molested or hurt Consuelo Verdugo, and that a sex abuse exam conducted in December 1991 proved that Cristina had not been molested, and that this evidence demonstrated to any reasonable person that the prosecutor's statements were false. The prosecutor also knew that members of Estella's family and at least one man, a convicted child molester, with whom Estella spent time, had exposure to Consuelo. He knew that Consuelo had health problems that caused or contributed to her prior injuries.

Despite having possession of this information and knowing it was favorable to the defense, the prosecutor failed to disclose it in discovery, knowing that if it was disclosed and presented at trial, a reasonable probability existed that the jury would have found petitioner not guilty of rape, sodomy, or lewd and lascivious conduct leading to Consuelo's death. Instead, he presented false testimony, and falsely asserted during his closing argument that petitioner was a child molester, that he had molested Consuelo and Cristina in the past, causing Consuelo's prior injuries, and that child molester, Joe Avila, only came into Estella's life after Consuelo died. The false testimony and false assertions adversely affected the jury's judgment.

In support of this claim, petitioner alleges the following facts, among

others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The defense called four witnesses during the guilt phase to testify regarding petitioner's character. On April 13, 1993, Antonio Duran Delatorre testified that "when he [petitioner] has spoke to me... he is honest, I can trust him 100 percent." (18 RT at 3275.) He also opined that petitioner is not a violent man. On the same day, Guadalupe Benavides testified that petitioner was honest and non-violent. She stated that when he was around her daughter Patricia, she never saw him behave improperly. (16 RT at 3281-84.) Additionally, Hector Figueroa testified that petitioner was honest and not violent, and had never behaved improperly around his two young boys. (16 RT at 3292-93.) On April 14, 1993, Armando Navarrette Benavides testified that, in his opinion, petitioner was truthful, honest, and not violent. (*Id.* at 3375.)

2. During his closing argument, the prosecutor disparaged this character evidence, remarking that petitioner's "character witnesses haven't seen him for five years, haven't seen him for eight years." (18 RT at 3566.) He argued that the credibility of these witnesses and their statements as to petitioner's character was undercut by the fact that the defense did not present any witnesses who had been close to petitioner in the past five years.

3. The prosecutor then argued that petitioner was a child molester who molested both Consuelo and Cristina before Consuelo's death, and that another child molester spent time with the girls only after Consuelo died and petitioner was arrested. He argued that "Cristina is

lucky to get out alive. Not only from this guy behind me, but the next guy in line that she [Estella] meets at the funeral. Joe Avila, another convicted child molester, that she knows is a child molester." (18 RT at 3592.) In response to an objection, the prosecution revised his statement to "another child molester." (*Id.* at 3592-93.) In rebuttal, the prosecutor again said that "[petitioner]'s a molester. Maybe he tried to get what he wanted the easy way." (18 RT at 3652.)

4. The prosecution argued that petitioner had a prior conviction when it knew this was untrue.

a. The prosecutor asked Estella if petitioner had come back to the United States early from Mexico in the beginning of 1991 because "he was in danger there." (13 RT at 2647-48.) Ms. Huffman's objection was overruled, and the witness affirmed that this was true. (13 RT at 2648.) He later stated to the defense, in the presence of Judge Stuart, that petitioner had done the "same thing" down in Mexico. (Exh. 65 at 5353 [Declaration of Jeffrey Harbin].) While the defense stated it would address this incident in which "something evidently bad" happened in Mexico, the defense never did so. (15 RT at 2901.)

b. The Delano Police officers suspected that petitioner had committed a crime down in Mexico, and contacted the Mexican Federales for information regarding petitioner. They were never able to corroborate statements that petitioner had committed prior crimes.

c. Indeed, the prosecution stipulated at trial that petitioner had no prior record of felony convictions in the United States or in Mexico. (19 RT at 3767.)

d. The prosecutor knowingly made false statements when he alleged petitioner had committed prior similar crimes. These statements affected the jury's determinations during both the guilt phase and penalty phase of trial. The statements made in front of the judge biased the decision-maker, Judge Stuart, against petitioner.

5. The prosecutor knew at the time he made these statements that they were false. Statements of several witnesses, including the critical witnesses in the case, obtained by and in the possession of the prosecution, all contradicted the prosecutor's assertions that petitioner was a child molester. Several witnesses told the prosecution that petitioner did not have the character of a molester, had never been known to harm children, was gentle and kind with children, and did not get angry or violent.

a. Consuelo's mother, Estella Medina, stated in every recorded interview with the police and the district attorney's office that she did not and could not believe that petitioner had in any way harmed her children. In her first interview she told the police, "I would never protect him. But I never, I swear to God, I never saw him do anything to my daughters like that. He loved her, he loved my baby." (Exh. 4 at 2215 [Interview with Estella Medina, November 18, 1991].) Eight months later, in an interview with a district attorney investigator, she told him "he never hit me, he never hit the girls. He ... treated the girls, you know, nice, like when I was, would be tired and he was home, he would feed the girls, he would make them something to eat.... He never mistreated them." (Exh. 4 at 2418 [Interview with Estella Medina, July 9, 1992].) She said she had

"no indication whatsoever" that would have indicated petitioner was molesting her daughter. (*Id.*)

b. Consuelo's sister, Cristina Medina, stated in an interview with the police that petitioner had never hurt either her or Consuelo, that she liked petitioner and was not afraid of him, that he never "touched [her] in some way that he shouldn't," never touched her in her "private parts," never tried to "touch her," and that he was nice to her and bought her a lot of things. (Exh. 4 at 1819-20; 1830-31 [Interview with Cristina Medina, November18, 1991].) In a later interview with the district attorney investigator she again said that the baby never got hurt when Vicente was taking care of her, that Consuelo never got hurt "with Vicente", that Vicente took good care of Consuelo, that Vicente took good care of Cristina, and that Vicente never "did anything" to molest Cristina, and never yelled at her. (Exh. 4 at 1868; 1872-73 [Interview with Cristina Medina, June 11, 1992].) She also said that Vicente never "did anything" to her, was always good to her, was always good to her sister, never hit her, was nice to her, bought her things, and never did anything that she did not like, or that she felt uncomfortable about or bad about, to either her or Consuelo. (Exh. 4 at 1816-88 [Interview with Cristina Medina, June 11, 1992].)

c. Delia Salinas, Consuelo's aunt and regular babysitter, told the district attorney investigator that she never suspected that Consuelo was abused, and that she never knew petitioner to be violent or abusive. (Exh. 55 at 5045 [Interview with Delia Alejandro, 5/14/92].)

d. Consuelo's uncle, Javier Alejandro, also told the district attorney's office that he never noticed anything unusual about Consuelo's or Cristina's health or suspected either of them was ever abused. (Exh. 4 at 2050 [Interview with Javier Alejandro, 5/14/92].

e. Terry Bryand, Consuelo's sister-in-law, with whom Cristina lived for the entire summer of 1991, also told Ray Lopez that she never saw "anything at all that might have led [her] to suspect that [Consuelo] was molested," and that in fact she was shocked when she found out. She also told Lopez that petitioner was a very quiet man, and asked Lopez whether he knew for sure that it was petitioner who committed the crime. (Exh. 56 at 5054, 5067 [Interview with Terry Bryand, 6/10/92].)

f. Ruben Verdugo, Consuelo's brother, told Lopez he never suspected petitioner was molesting his sister. (Exh. 59 at 5157 [Interview with Ruben Verdugo].)

g. Detective Al Valdez interviewed the farm laborers who worked with petitioner. (Exh. 69 at 5412 [Declaration of Al Valdez]; Exh. 103 at 5839 [Declaration of Cristobal Aguilar Galindo].)

h. Two officers, who introduced themselves as detectives, interviewed petitioner's brother, Manuel Benavides, days after petitioner was arrested. In response to the detective's questions, Manuel told the detectives that his brother was passive and did not use drugs. Manuel told the detectives that petitioner was very kind to Manuel's young daughters and had been alone with them. Further responding to the detective's questions, Manuel stated that he did not believe petitioner was guilty.

6. The prosecution possessed records that disproved the assertions made at trial that petitioner had molested Cristina.

a. On November 26, 1991, at the request of the Kern County District Attorney's office, Estella Medina brought Cristina Medina to the District Attorney's office to receive counseling from Velda Murillo. Cristina was to receive a sex abuse examination by Dr. Jess Diamond at Kern Medical Center, as arranged by the District Attorney's office, however Cristina declined to be examined on that date. (Exh. 4 at 2125 [Police Report dated 11/26/91].)

b. On December 10, 1992, after Cristina had been taken from her mother by the district attorney's office and placed in Jamison Child Center, Alice Thompson, a social worker from the Department of Human Services, brought Cristina to Kern Medical Center for a second exam, at the request of Detective Nacua of the Delano Police Department. Dr. Diamond examined Cristina and found no evidence of sexual molestation. (Exh. 14 at 3942-53 [Kern Medical Center records of Cristina Medina].)

c. Since law enforcement requested the exams, they were notified of the results. (Exh. 14 at 3942-53 [Kern Medical Records of Cristina Medina].)

7. The prosecution knew that Consuelo was generally prone to injure herself.

a. Delia Salinas, Consuelo's aunt and babysitter, told district attorney investigator Lopez that Consuelo was clumsy and fell down

a lot, and that she was an active child who bruised herself often. (Exh. 4 at 2051 [DA Case Report, Interview with Delia Salinas].)

b. Javier Alejandro, Consuelo's uncle, also told Lopez that Consuelo was a very active child. (Exh. 4 at 2050 [DA Case Report, Interview with Delia Salinas].)

8. The prosecution knew that Consuelo was exposed to violent persons and sex abusers whom, unlike petitioner, were far more likely to have caused any of her prior injuries.

a. Vicki Salinas told law enforcement that Estella was spending time with a man named Joe Avila, with whom she had written while he was in prison. (Exh. 4 at 2072-73 [DA Case Report of Interview with Vicki Salinas].) She also said Estella had been friends with Joe since he had been released from prison. (*Id.*) The District Attorney's office was in possession of Joe's rap sheet, and knew he had been imprisoned for child molestation. Joe's records, which were in the possession of the State, show he was released on November 20, 1990, one year before Consuelo sustained her injuries. (Exh. 6 at 2943-51 [Rap Sheet of Joe Avila].) The prosecution therefore knew that Estella and her daughters had been spending time with Avila for one year before Consuelo's death.

b. Despite the fact that the prosecution had in its possession evidence demonstrating Joe Avila, a sex offender, was regularly spending time with, and had access to, Consuelo Verdugo for one year prior to her death, the district attorney's office did not investigate Avila as a suspect, disclosed conflicting and incorrect information indicating that Avila was paroled either several days or one year *after* Consuelo was

injured, and falsely stated at trial that Estella only met Avila after Consuelo died, at Consuelo's funeral. (18 RT at 3592-93.)

c. Petitioner suffered prejudice as a result of the failure to disclose Avila's rap sheet or proper parole date. Because the prosecution improperly failed to disclose the material evidence in its possession indicating that Avila was paroled one year before Consuelo's death, the defense was prevented from presenting an alternative theory of the cause of Consuelo's injuries. Had the prosecution disclosed this evidence, the defense would have presented testimony that Avila could have caused the injuries, as well as used the evidence to impeach the statements of Diana Alejandro and Delia Salinas regarding Consuelo's prior injuries. Had the defense impeached the witnesses in this way, it is reasonably likely the result of the trial would have been different.

d. The prosecution knew Consuelo was continually exposed to numerous individuals who were known drug users and who were known to be violent and likely injured Consuelo.

(1) Antonio Alejandro, Estella's brother, was one of Consuelo's babysitters. (Exh. 62 at 5211-12 ["Family Grieves in Child's Death," Bakersfield Californian, November 27, 1991].) The prosecution also knew that Antonio was violent. (Exh. 23 at 4127-45 [Delano Police Department Report]; Exh. 46 [*In re Marriage of Jennette Guzman and Antonio Perez Alejandro*, Kern County Superior Court, Case No. 525770]; Exh. 59 at 5148 [Interview of Ruben Verdugo, July 13, 1992].)

(2) Nicasio Alejandro, Estella's brother, was a violent man who had tried to shoot his brother and discharged a firearm while in a fight at the Brandywine Apartments. Nicasio regularly spent time with Estella and her two daughters and also threatened to shoot his brother Javier while in the presence of Cristina Medina. (Exh. 4 at 2411 [Interview with Estella Alejandro by Ray Lopez, dated 7/9/92]; Exh. 45 [*People v. Nicasio Alejandro*, Kern County Municipal Court Case No. DM033819A].)

(3) Javier Alejandro, Estella's brother, had a criminal record and was known to be violent. (Exh. 44 at 4748-49 [*People v. Javier Alejandro*, Kern County Superior Court Case No. 35099].) Javier was suspected of threatening members of the defense team at the time of trial. (Exh. 23 [Delano Police Department Report regarding Marisol Alcantar, dated March 26, 1993]; Exh. 105 at 5894-95 [Declaration of Marisol Calderon Alcantar].)

(4) The prosecution knew that one of Consuelo's main caretakers, her aunt Delia Salinas, was mentally unstable and likely a neglectful caretaker. The prosecution interviewed Delia Salinas on numerous occasions, during which she admitted that she suffered from "nervous breakdowns." (Exh. 4 at 2051-53 [District Attorney Case Report of Interview with Delia Salinas, dated May 21, 1992]; Exh. 4 at 2310 [District Attorney Case Report of Interview of Delia Salinas, dated July 24, 1992].) Her sister Estella says that Delia has suffered from major mental health problems her whole life.

(Exh. 66 at 5356-57, 5361 [Declaration of Estella Alejandro Medina].) She has had repeated psychotic episodes for which she has been hospitalized several times. (*Id.*) In October of 1991 Delia began to decompensate again. (*Id.*) She hallucinated and began irrationally stacking dishes and food on the kitchen counters. (*Id.* at 5363-64.) She became unresponsive. (*Id.* at 5364.) This psychotic episode lasted through Consuelo's death until about December of 1991. (*Id.*) The prosecution had in its possession copies of Delia's mental health records. (17 RT at 3334-52.) Delia also informed the District Attorney investigator that she had been babysitting for Consuelo when Consuelo broke her arm. (Exh. 4 at 2051 [District Attorney Case Report of Interview with Delia Salinas, dated May 21, 1992].)

(5) Likewise, Consuelo's aunt Diana Alejandro, who was also a frequent caretaker, was a known drug addict. (Exh. 4 at 2236 [Interview with Diana Alejandro, dated May 11, 1992]; Exh. 103 at 5838 [Declaration of Cristobal Aguilar Galindo].) She was also known around the community and by the prosecution to be violent. Diana told District Attorney investigator Ray Lopez that she did not want to talk to Estella about Consuelo because Diana knew she would end up becoming physically violent with Estella. (Exh. 4 at 2250, 2260 [Transcript of Interview with Diana Alejandro by Ray Lopez May 12, 1992]; Exh. 103 at 5838 [Declaration of Cristobal Aguilar Galindo].)

(6) Darlene Salinas, Cristina's cousin, had a criminal record for theft and drug use, including the use of PCP which can cause the user to become violent. (Exh. 9 at 3766 [Juvenile Records, *In re Cristina Medina*].) The prosecution was aware of this information and also knew that Darlene spent a great deal of time with Consuelo.

9. Thus, the prosecutor had in its possession evidence demonstrating that petitioner was not a child molester, was trusted by many to care for their children, was adored by children who knew him, including Consuelo and Cristina, had not molested Consuelo in the past, and had never molested Cristina. The prosecutor also knew that Consuelo was clumsy, fell a lot, had been in several accidents including a couple causing her to hit her head and a break her wrist, and that she fell and bruised a lot. Finally, the prosecutor knew that Estella had regular contact with a convicted child molester. The prosecution also knew that Estella's family members, Consuelo's uncles and aunts who babysat her, were violent, used drugs, and that one was a child molester.

a. Despite this knowledge, the prosecutor falsely accused petitioner of being a child molester who had molested both of Estella's girls, violating petitioner's right to a trial free of false and inaccurate evidence. Moreover, by presenting false testimony, the prosecution deprived petitioner of a fair trial, violating his Fourteenth Amendment right to due process. These arguments affected the outcome of the trial. Had the prosecution refrained from making these false statements, the jury would not have believed petitioner possessed the character of someone who would

rape and sodomize Consuelo and cause her injuries, and would not have convicted him of the special circumstances of rape, sodomy, or lewd and lascivious acts with a child.

b. The State withheld from the defense the statements of petitioner's brother Manuel Benavides that petitioner was not a child molester, was a gentle man, was very caring of small children, and was non-violent, even when drunk. These exculpatory statements were in the possession of the prosecution before trial. As a result of their nondisclosure, defense counsel did not present as character evidence the compelling statements of his brother who had regular contact with petitioner while he was around Consuelo Verdugo, and who firmly believed he could not have harmed her, or any other child. Further, counsel did not present the testimony of petitioner's brother, who had known petitioner all his life, and who had several daughters who had grown up around petitioner without incident. The prosecution failed to disclose this information in its possession knowing that had it disclosed these statements, defense counsel would have presented the testimony of this witness, and a reasonable probability existed that his statement would have affected the outcome of the trial. Moreover, the failure to disclose this information made petitioner's trial fundamentally unfair in violation of his right to due process, to a fair and non-arbitrary sentencing determination, and to be free from cruel and unusual punishment.

10. The prosecution further failed to disclose and withheld from the defense any documentation of the second sex abuse exam of Cristina Medina, conducted on December 10, 1991, by Dr. Jess Diamond at Kern

Medical Center, at the request of Delano Police Department Detective Jeff Nacua. Dr. Diamond's report of this exam was exculpatory in that it confirmed that Consuelo's sister Cristina showed absolutely no physical signs of sex abuse or molestation and that Cristina denied ever having experienced sex abuse or molestation. By withholding this exculpatory report, requested and received by the prosecution, the district attorney prevented the defense from knowing that the exam had been conducted, and that it had conclusively established that Cristina had not been molested. The prosecution also prevented the defense from presenting proof that Cristina had not been molested by petitioner in response to the prosecution's false statements that petitioner had molested Consuelo and Cristina. Defendant was thus deprived of his right to a fundamentally fair trial based on accurate information. Had this report been disclosed and introduced at trial, conclusively demonstrating that Cristina had never been molested, there is a reasonable probability that the outcome of the trial would have been different.

11. In combination with other constitutional errors and omissions concerning improper character evidence that was presented or argued by the prosecution, the prosecution's failure to disclose this evidence was prejudicial. This evidence would have raised a reasonable doubt as to whether petitioner killed Consuelo Verdugo. Alone and in combination with all of the other information not presented to the jury, this evidence would have produced a different result at trial.

F. CLAIM 6: THE STATE PRESENTED IRRELEVANT EVIDENCE CONCERNING ESTELLA MEDINA IN AN ATTEMPT TO GENERATE JUROR OUTRAGE AT PETITIONER.[8]

Petitioner's conviction and sentence of death were rendered in violation of his rights to a fundamentally fair and reliable determination of guilt and penalty, to a trial free of materially false and misleading evidence, the right to confront and cross-examine witnesses, and to the disclosure of all materially favorable evidence including impeachment evidence, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law, when the State improperly asked the jury to punish petitioner for Estella Medina's child neglect.

The prosecution introduced irrelevant evidence and testimony regarding Estella's alleged neglect of her children to urge the jury to believe that this neglect made it possible for petitioner to molest her daughters, and thereby asked the jury to illogically infer a motive and explanation for why petitioner molested Consuelo.

In support of this claim, petitioner alleges the following facts, in addition to those to be presented after full investigation, discovery, and access to this Court's subpoena power and an evidentiary hearing:

1. Estella Medina continued to support, visit, and believe in petitioner's innocence after his incarceration and discontinued contact with petitioner only after she was ordered to by law enforcement and Child

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[8] This Claim qualifies as a Category 2 claim.

Protective Services. The prosecution used this fact against petitioner to imply that since Estella was the only person who believed in petitioner's innocence, she was blinded by love. In fact, the prosecution had coerced the statements of Cristina after she told the prosecution that she also doubted petitioner had committed the crimes. The prosecution urged the jury to infer that Estella's bad acts colored petitioner's character because they provided a motive—in that they provided an opportunity—for him to molest her children. However, Estella's neglect provided only an opportunity, it said nothing about petitioner's character and whether he was a child molester. Because the prosecution had no bad character evidence to present regarding petitioner, it presented Estella's bad character evidence instead, and asked the jury to link them.

a. For example, the prosecution implied that Estella's loyalty to petitioner was detrimental to the welfare of her children, when there was ample evidence contradicting this claim. (13 RT at 2551-52; 2560-61; 2565; 2586-87.)

> **Prosecutor:** Now you have been out to the jail to visit him, haven't you?
> **Estella:** Yes, I did.
> **Prosecutor:** On four occasions?
> **Estella:** Uh-huh.
> **Prosecutor:** Did you ever ask him then about what happened to your child?
> **Estella:** He would tell me the same thing.
> **Prosecutor**: But you went back and saw him again anyway?
> **Estella**: Uh-huh.
> (13 RT at 2551-52.)

2. The state used Estella Medina's alleged relationship with Joe Avila to suggest she would knowingly and voluntarily expose her children to a child molester. Therefore, the prosecution argued, petitioner must also be a child molester. (*See, e.g.*, 13 RT at 2567-68; 2579-81.)

> **Prosecutor:** Mrs. Medina, would you voluntarily expose your child to a known child molester?
> **Estella:** No.
> **Prosecutor:** What about Joe Avila? Is he a...Do you know **Joe Avila**? Yes or no.
> **Estella:** Yes.
> **Prosecutor:** You know, do you not, that he is a registered sex offender for children?
> **Estella:** Yes.
>
> (13 RT at 2567-68.)
> **Prosecutor:** Wasn't he there on other occasions with you, whether at that house or at another location, when Cristina was there? Yes or no.
> **Estella:** Yes.
> (13 RT at 2580.)

3. The prosecution implied that Estella Medina's justification for lack of medical insurance was an attempt to conceal prior injuries and illnesses, allegedly perpetrated by the petitioner, by not seeking proper medical attention. (13 RT at 2555-59; 2582; 2645; 14 RT at 2731-33.)

> **Prosecutor:** Do you remember her having any head injuries at all?
> **Estella:** Yes, she did.
> **Prosecutor:** On how many occasions?
> **Estella:** About once or twice.
> **Prosecutor:** And one in particular was pretty swollen, wasn't it?
> **Estella:** Yes, it was.
> **Prosecutor:** Did you take her to the doctor?
> **Estella:** No, I didn't.
> **Prosecutor:** Why didn't you take her to the doctor?

Estella: Because I didn't have insurance for her and I didn't have money to pay for a doctor.

(13 RT at 2555.)

4. The prosecution indicated Estella Medina's inconsistent accounts of Consuelo's arm injury and head injury were attempts to conceal petitioner as the perpetrator of those injuries despite the absence of any demonstrated nexus to petitioner. (13 RT at 2553-55; 2558-59; 2582; 2643-45.)

Prosecutor: Did you see what happened to her to cause the injury to her arm?
Estella: No, I didn't.
Prosecutor: All right. Now you indicated that the day before your child went to the hospital for her arm, the day before you found her with a swollen arm she was at someone else's house. Is that correct?
Estella: Yes, she was.
Prosecutor: Did you tell that to the doctor at the time you went to have her treated?
Estella: Yes, I did.
Prosecutor: Did you ever tell anyone that she fell off of a swing? And that calls for yes or no.
Estella: No.
Prosecutor: Did you ever tell anyone that she fell off the bed?
Estella: Yes. She was always falling off the bed.
Prosecutor: About -- let me back up and ask you a specific question. Did you tell anyone that she fell off the bed and that's how she broke her arm?
Estella: No.
Prosecutor: And you are sure about that?
Estella: Yes, I am sure.
Prosecutor: Did you ever tell anyone that she fell off the sofa and that's how she broke her arm?
Estella: No.
Prosecutor: Did you ever tell anyone at a doctor's office you didn't know what happened at all –

Estella: No, because I --
Prosecutor: -- to her arm?
Estella: I told the doctor what had happened to her arm.
(13 RT at 2554-55.)

5. The prosecution alleged that Estella's apparent lack of concern regarding Consuelo's prior illnesses of feeling sad, not laughing, not playing, not eating well, laying in bed and her being sick Halloween night, indicated petitioner was molesting her while Estella looked the other way. (13 RT at 2584-86.)

Prosecutor: I asked you previously about whether or not the child ever exhibited any problems that you saw. And I want to ask you something, Mrs. Medina. Did you ever tell an investigator from my office, Ray Lopez, on July 4th, 1992, the following: I noticed that she was feeling kind of sad, she was feeling strange, she was feeling sad, she didn't want to eat too good, she wouldn't laugh, she wouldn't play, she would just lay in bed. Did you ever tell him that?
Estella: I recall telling him that she was sad and sometimes that she wouldn't eat. But to lay in bed -- well, yeah, she would lay in bed but -- I mean, I figure it was because she had a headache or she had -- like she was barely getting her teeth, maybe I thought that was because of that.
Prosecutor: Let me ask the question again. Did you say that to the investigator?
Estella: Yes.
Prosecutor: Is that true?
Estella: Well, yes.
Prosecutor: Was that about a month before she was killed?
Estella: A month before –
THE COURT: Okay. So you weren't talking about the day before she died, or two days before she died, or when she was six weeks old, but you were, in fact,

describing to the investigator how the child appeared to you about a month before she died?
Estella: Yes.
THE COURT: Okay.
Prosecutor: Did you ever take her to a doctor when you noted those things?
Estella: One time I took her for a checkup, I took her to Dr. Seminario, and he told me she was fine.
Prosecutor: You took the child to Dr. Seminario on October 10, 1991, when she was still wearing her cast for a WIC checkup. Is that correct?
Estella: Yes.
Prosecutor: All right. That's to get food stamps, isn't it?
Estella: No, not food stamps.
Prosecutor: What's it for?
Estella: For the WIC.
Prosecutor: What's that?
Estella: It's the program where they give you -- they provide you food for the child.
Prosecutor: Okay.
Estella: Like milk, cereal, eggs.
Prosecutor: Let me ask the question again. When you saw the child was feeling sad and laid around in bed for a week, didn't eat too good, did you take her to the doctor for that reason?
Estella: No, because -- I mean, like I said, I thought it was because of her teeth. Because every time her teeth would come out, I mean, they get sick, they throw up, they have fever, and I didn't take her for that. But I would give her -- you know, like she would have a cold, I would give her Tylenol. I would give her cough medicine if she would have a cough.
Prosecutor: And if she had a bruise on her head, you gave her aloe vera?
Estella: Yeah.
(13 RT at 2584-86.)

6. Estella Medina's priorities regarding money, paying rent, making car payments, paying clothing bills, and paying food bills, but not

paying for Consuelo to see a medical doctor, were used by the prosecution to demonstrate Estella's neglectful nature, caring more about material possessions that her child's health and welfare. (13 RT at 2582; 2593.)

> **Prosecutor:** Mrs. Medina, you indicated that you took Consuelo in for the broken arm. At that time did you have insurance?
> **Estella:** No.
> **Prosecutor:** Okay. You indicated you didn't take her in for the head injury, that you put aloe vera on because you didn't have insurance. Is that correct?
> **Estella:** Right.
> **Prosecutor:** Now you have a GMC Jimmy at the time that you're making payments on. Is that correct?
> **Estella:** Yes.
> **Prosecutor:** And you had rent?
> **Estella:** Yes.
> **Prosecutor:** And food?
> **Estella:** Yes.
> **Prosecutor:** And clothing bills?
> **Estella:** Yes.
> **Prosecutor:** And that's what you indicated to our investigator, isn't it?
> **Estella:** Yes.
> **Prosecutor:** You didn't have the money to take Consuelo to the doctor. Is that correct?
> **Estella:** Right.
> (13 RT at 2582.)

7. The prosecution sought to establish Estella Medina as a neglectful mother, choosing old folk remedies, such as aloe vera for bruises and swelling, and seeking treatment from doctors in Mexico, instead of using conventional western medicine and local medical doctors. (13 RT at 2556-59; 14 RT at 2731-33.)

> **Prosecutor:** Mrs. Medina, what did you do for the child's head injury that was swollen?

Estella: We would get some herbs, some aloe vera, herbs. While he was the one who put it on her. So aloe vera, herbs, on her head and the swelling went down and the bruise, you know.
Prosecutor: Now you have had training with respect to head injuries, haven't you?
Estella: Yes.
Prosecutor: And a head injury like that could be very serious, could it not?
Estella: Yes.
Prosecutor: But despite that you took her to someone to rub aloe vera on her head instead of getting medical treatment. Is that correct?
Estella: Yes, it is.
(13 RT at 2556-57.)

8. The prosecution sought to establish that Estella Medina's lack of timely disclosure regarding the alleged locked door incident with Consuelo indicated her lack of concern for the well-being of her children and established her willingness to protect petitioner. (13 RT at 2561-62.)

Prosecutor: Did Christina ever tell you about an incident that occurred before the attack on Consuelo on November 17, 1991?
Estella: No.
Prosecutor: Didn't she tell you on May 22nd of 1992, on your way home from Magic Mountain Park, excuse me, Magic Mountain that she remembered a time that Vicente had come in the room and taken Consuelo out and kept her in his room behind a locked door for the night?
Estella: Yes. But that was -- okay, that was in May of '92. Where was the injury? Why did she wait about six months to tell me?'
Prosecutor: And that's what you thought was important was why did Christina wait so long to tell you. Is that right?
Estella: Why?
Prosecutor: Is that right?

Estella: Yes.

(13 RT at 2561-62.)

9. The prosecution sought to establish Estella's negligent caretaking of her daughters through the use of hearsay testimony of Delia Salinas[9] and Diana Alejandro, who testified to Estella's inconsistent statements regarding Consuelo's head injury, arm injury and illnesses. (14 RT at 2730-33; 2736-37.)

Prosecutor: Was there ever a time that you noted that Consuelo had a cast on her arm?
Diana: Yes, I did.
Prosecutor: And did you ask Estella Medina how she received that injury?
Diana: She said by playing around in my mom's back yard.
Prosecutor: Did you ever notice that she had a head injury?
Diana: Yes, I did. She had a bump in her forehead.
Prosecutor: And where was it located in her forehead?
Diana: I don't remember. But I remember it was right around here in her forehead.
Prosecutor: Meaning upper right-hand part?
Diana: Yes.
Prosecutor: Near the hairline?
Diana: Yes, sir.
Prosecutor: And did you ask Estella Medina how she received that?
Diana: Yes. She said she bumped her head on the coffee table trying to walk.
(14 RT at 2730.)

Prosecutor: Did you ever see her when she had a bump on her head before--
Dahlia: Yes.
Prosecutor: Yeah? Did you ask Estella what happened to her head?

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[9] Delia Salinas' name is misspelled in the Reporter's transcript as "Dahlia".

Dahlia: Yeah, she, couple of times she dropped the fan out of the dresser.
Prosecutor: Oh, okay. Is that what Estella told you?
Dahlia: Yes. Well, she'd done it at my house too. She would drop the fan, or get whatever on the table and just pull it out of the table.
Prosecutor: She would pull on things, huh?
Dahlia: Um-hum.

(17 RT at 3347)

10. The prosecution argued that Estella provided petitioner with the opportunity to injure her children, and turned a blind eye to Consuelo's injuries and illnesses. (18 RT at 3595.)

> But just like some other things, we apply our common sense, if we take a look at this in terms of how it applies in life and how it applies in the evidence in this case, the fulcrum for this molester and killer was Estella Medina. She is the point around which this case turns; she provided the opportunity for him. And that's why Estella Medina was presented here. Her guilt, innocence, culpability, responsibility, and negligence was not an issue in the case except as it relates to the defendant.(18 RT at 3595-96.)
>
> If the evidence of the prior injuries before and the lack of reporting don't convince us, certainly her actions after this child is killed has got to convince us, she would have never turned him in. Never.(18 RT at 3597.)

11. It is through this irrelevant evidence and testimony that the prosecution urged the jury to believe that Estella's continuous neglect and lack of concern for her children's welfare made it possible for petitioner to molest her daughters.

G. CLAIM 7: THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE THAT WAS RELEVANT TO THE IMPEACHMENT OF PROSECUTION WITNESSES AND THAT INDICATED THE PROSECUTION HAD MANUFACTURED FALSE TESTIMONY.[10]

Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law rights to due process, a fair trial, the effective assistance of counsel, present a defense, confrontation, compulsory process, a reliable and accurate guilt and penalty assessment based on accurate rather than false testimony and evidence, a fair, reliable, non-arbitrary sentencing determination, and to be free of the imposition of cruel and unusual punishment were violated by the prosecutor's failure to disclose material exculpatory evidence.

The prosecution withheld from the defense voluminous materials, containing overwhelming amounts of exculpatory evidence, especially evidence of state misconduct. Documents withheld included evidence that contradicted or undermined the autopsy report findings presented by the prosecution and evidence that the prosecution manufactured medical evidence. The prosecution also withheld documents and information demonstrating that petitioner was not guilty and that Consuelo Verdugo's prior and current injuries were most likely attributable to individuals other than petitioner, and/or to causes other than rape and sodomy. The prosecution withheld analyses of forensic evidence yielding information that supported petitioner's statements at trial.

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[10] This Claim qualifies as a Category 2 claim.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The prosecution withheld a case report dated September 4, 1992, in which the prosecutor harassed UCLA witnesses and pressured them to give statements regarding the case. On September 4, 1992, district attorney Robert Carbone went to UCLA with investigator Ray Lopez and attempted to interview Rick Harrison, Joylene Martinez, and Debra Ridling. When they stated they did not want to talk with him, District Attorney Carbone became very hostile, raised his voice at the witnesses, and was verbally abusive towards them. (Exh. 78 at 5457-58 [Declaration of Rick Harrison, M.D.]; Exh. 4 at 2954-56 [DA Case Report dated September 8, 1992].) The report indicates that District Attorney Carbone and Investigator Lopez immediately requested to speak with the hospital administrator, and subsequently spoke to the patient relations liaison and then legal counsel. (Exh. 4 at 2955-56 [DA Case Report dated September 8, 1992].) Due to his coercive tactics, legal counsel suggested to Harrison and Ridling that they talk to District Attorney Carbone, and the patient relations liaison for the hospital called Ridling into her office and required her to assist District Attorney Carbone. (*Id.* at 2956.) Harrison felt threatened enough to call hospital security or District Attorney Carbone's supervisor in Kern County. (Exh. 78 at 5457-58 [Declaration of Rick Harrison, M.D.]; Exh. 4 at 2954-56 [DA Case Report dated September 8, 1992].)

2. Had this report been disclosed to the defense, the defense would have impeached not only Dr. Harrison, but also other UCLA

witnesses and other medical and non-medical witnesses by questioning them regarding the tactics used by the prosecution to interview them and obtain their testimony. In conjunction with the misconduct engaged in by the prosecution with respect to obtaining Cristina Medina's testimony and Estella Medina's testimony, this incident demonstrated the lengths to which the prosecution would go to obtain information it deemed inculpatory. Had this document been disclosed and usable by the defense to expose prosecutorial misconduct, there is a reasonable probability the outcome of the trial would have been different.

3. The prosecution failed to disclose a police report in which officers manufactured evidence of rib injuries. On November 18, 1991, at Kern Medical Center, Dr. Chabra examined x-rays of Consuelo Verdugo's rib fractures, and noted no evidence of fractures. Subsequently, on December 4, 1991, police detectives Jeff Nacua and Al Valdez, reviewed the x-rays and "discovered ... additional broken ribs on Consuelo's left side." (Exh. 5 at 2607 [Police Report].) The detectives "brought [these additional injuries] to Dr. Chabra's attention," who explained that, according to the report, "the breaks were not seen due to possibly being overlooked." (*Id.*) This document reflects a clear attempt by the prosecution to manufacture evidence. Had this report been disclosed before trial, the defense would have used it to challenge the evidence of Consuelo's rib and abdominal injuries presented by the prosecution, and to impeach the manner in which the prosecution developed and obtained the medical evidence presented at trial. Had this document been disclosed there

is a reasonable probability that the outcome of the trial would have been different.

4. The state failed to disclose the report of Dr. Jess Diamond's December 10, 1991 sex abuse exam of Cristina Medina that disproved the state's own false statements made at trial that petitioner had sexually abused Cristina. On November 26, 1991, Cristina met with District Attorney's Investigator Bresson and Detective Nacua at Kern Medical Center so that she could receive a sex abuse exam from Dr. Jess Diamond. (Exh. 4 at 2125 [District Attorney Case Report, September 8, 1992].) On that date she did not want to be examined. (Exh. 14 at 3942 [Examination Report of Jess Diamond, November 26, 1991].) The State arranged for a second examination to occur on December 10, 1991. (Exh. 14 at 3947 [Examination Report of Jess Diamond, December 10, 1991].) The results of the second examination demonstrated that there was no evidence Cristina had been sexually abused. In addition, Cristina stated that "no person ever touched her 'chi-chi' (breast), bottom (buttocks) or private (genital area)." (Exh. 14 at 3947-50 [Examination Report of Jess Diamond, December 10, 1991].) Having not disclosed this report, the prosecutor implied that petitioner had molested Cristina as well, arguing that Cristina is "lucky to get out alive" from "this guy behind me," referring to petitioner. (18 RT at 3592.) He also stated that "[petitioner]'s a molester. Maybe he tried to get what he wanted the easy way." (18 RT at 3652.)

5. Had the prosecution disclosed this obviously exculpatory report, the defense would have offered it as evidence to counter the prosecution's statements that petitioner was "a molester" and would have

objected to the prosecution's knowing presentation of improper arguments at trial. Had the report been disclosed, there is a reasonable probability that the outcome of the trial would have been different.

6. The prosecution failed to disclose to the defense a police report that demonstrated defense counsel's secretary was being threatened by Consuelo Verdugo's family, the results of any investigation concerning these threats, or evidence that Consuelo's uncle Javier Alejandro, a prosecution witness, may have been involved in those threats. (12 RT at 2478-83.) During trial, defense attorney Huffman stated several times on the record that she and her staff were being threatened because they represented petitioner. On March 19, 1993, she stated that her secretary, Marisol Alcantar, was being followed regularly as she traveled to and from work, and that the night before, when she had pulled off the road to a call box, the drivers had slowed down and showed her a shotgun. (2 RT at 385.) Ms. Huffman indicated that Alcantar had attempted to report the incidents to the Sheriff's Department, and had been told it was "none of [their] business." (*Id.*) She also said Alcantar had attempted to file a report with Highway Patrol, but that she was told she needed to call the Sheriff. (*Id.*) Judge Stuart simply suggested that Huffman not allow her secretary to travel alone. (2 RT at 386.) The prosecution said nothing in response.

a. On March 26, 1993, Huffman stated on the record that "[t]oday someone broke into [her] office and tied up [her] secretary and beat her up. ... We believe it's the same people that have been following her and making the threats." (7 RT at 1574-75.)

b. The Delano Police Department investigated Alcantar's allegations on March 26, 1993. (Exh. 23 at 4127-45) [Delano Police Department Report].) The police report indicates that Alcantar knew the individuals who were following and threatening her, and that they were Consuelo Verdugo's uncles, Javier and Antonio. (*Id.*) Although the document is ostensibly redacted, the names are still readable. Alcantar was shown a photo spread, and selected one of the Alejandros as a suspect. (*Id.*) She said she was seventy percent sure of her choice. (*Id.*) Alcantar also expressed frustration that the police did not seem to believe her statements. (*Id.*)

c. Before Javier Alejandro testified for the prosecution, on April 6, 1993, the prosecution moved to exclude any reference to his crime as irrelevant. (12 RT at 2476.) As a result, no mention of these incidents was made in front of the jury for any reason.

7. The prosecution failed to disclose to the defense the fact that Estella Medina was sued for child support by the office of the district attorney for welfare benefits given to Darlene Salinas and Vicki Salinas while the case was pending, in exchange for their assistance with the case.

a. The prosecution presented the testimony of Darlene Salinas and Virginia (Vicki) Salinas at the penalty phase of trial. Darlene implicitly supported the imposition of the death penalty when she testified that Consuelo's family wanted "justice" to be done, and stated that "nothing like this should happen to children again." (19 RT at 3743-44.) Vicki testified that she took care of Cristina after her sister's death, and described the impact of Consuelo's death on Cristina. (19 RT at 3745-47.)

b. District Attorney investigators Ray Lopez and Greg Bresson arranged for Cristina to be removed from Estella's custody, which led to her eventual placement in the custody of Darlene and Reynaldo Salinas and later Vicky Salinas. These relatives received financial assistance in the form of welfare assistance for taking custody of Cristina. These benefits provided an incentive for them to cooperate with the prosecution. The District Attorney's office filed lawsuits against Estella Medina to obtain welfare benefits for both Darlene and Vicki. (Exh. 13 at 3931-41 [*County of Kern v. Estella Medina* (regarding request for public assistance by Virginia Salinas)]; Exh. 12 at 3910-30 [*County of Kern v. Estella Medina* (regarding request for public assistance by Darlene Salinas)].)

c. The prosecution was aware that both Darlene and Reynaldo Salinas had criminal records indicating a history of drug abuse. (Exh. 9 at 3766-67 [Juvenile Records].) The prosecution overlooked their drug problems and other criminal convictions that indicated they were not safe placements for Cristina, in exchange for their cooperation and assistance with the investigation and their testimony at trial.

d. Vicki Salinas' agency relationship with law enforcement is discussed in the analysis of Claim 2, *supra.* That discussion is hereby incorporated by reference as if set forth fully herein.

8. The State turned over false discovery and presented false evidence that convicted child molester Joe Avila had not been exposed to Consuelo Verdugo because he was incarcerated on the date of the offense,

and withheld evidence of Avila's proper parole date and evidence that Consuelo was exposed to him in the year preceding her death.

a. The prosecution presented testimony that Estella had seen Avila at Consuelo's funeral, for Christmas 1991, New Year's 1991, and on July 4, 1992, and had exposed her daughter Cristina to Avila on these dates, but did not mention any contact with Avila before Consuelo's death. (13 RT at 2577-80, 2592.) He argued at closing that Estella met Joe Avila at Consuelo's funeral, implying that Consuelo had not been exposed to Avila while she was alive. (19 RT at 3592-93; 3597.) Moreover, he stated in front of Judge Stuart that evidence regarding Joe Avila was relevant to show how Estella allowed petitioner to have access to Consuelo. He then argued in closing that Estella saw petitioner and Avila on all the same days. (18 RT at 3597.)

b. However, Vicki Salinas had informed law enforcement that Estella was spending time with a man named Joe Avila regularly before Consuelo's death, and that she had written to him while he was in prison. (Exh. 4 at 2072-73 [DA Case Report of Interview with Vicki Salinas].) She also said Estella had been friends with Avila since he had been released from prison. (Exh. 4 at 2072-73 [DA Case Report of Interview with Vicki Salinas].) The District Attorney's office was in possession of Avila's rap sheet, and knew he had been imprisoned for child molestation. Avila's records, which were in the possession of the State, show he was released on November 20, 1990, one year before Consuelo sustained her injuries. (Exh. 6 at 2943-2951 [Rap Sheet of Joe Avila]; Exh. 9 at 3661-3684 [Juvenile

Records].) The prosecution therefore knew that Estella and her daughters had been spending time with Avila for one year before Consuelo's death.

c. Despite the fact that the prosecution had in its possession evidence demonstrating Joe Avila, a sex offender, was exposed to Consuelo Verdugo for one year prior to her death, the district attorney's office did not investigate Avila as a suspect, disclosed conflicting and incorrect information indicating that Avila was paroled either several days or one year *after* Consuelo was injured, and falsely stated at trial that Estella only met Avila after Consuelo died, at Consuelo's funeral. (18 RT at 3592-3593.)

d. Petitioner suffered prejudice as a result of the failure to disclose Avila's rap sheet or proper parole date. Because the prosecution improperly failed to disclose the material evidence in its possession indicating that Avila was paroled one year before Consuelo's death, the defense was prevented from presenting an alternative theory of the cause of Consuelo's injuries. Instead, the prosecution was allowed to use Estella's relationship with Avila to suggest petitioner's guilt, by asking the jury to infer that Estella's relationship with Avila mirrored her relationship with petitioner, but chronologically occurred later. Had the prosecution disclosed this evidence, the defense would have presented testimony that Avila could have caused the injuries, as well as used the evidence to impeach the statements of Diana Alejandro and Delia Salinas regarding Consuelo's prior injuries, and to counter the prosecutor's arguments that Estella's relationship with Avila was evidence that she allowed petitioner access to her daughters to molest them. Had the defense been able to

introduce this evidence and impeach the witnesses in this way, it is reasonably likely the result of the trial would have been different.

9. The State failed to turn over evidence from the crime lab that was consistent with petitioner's statements that he found Consuelo outside.

a. Jeanne Spencer, a Kern County Criminalist, testified that when she analyzed tissue containing vomit that she found at Estella's apartment she did not find any dirt or gravel consistent with it having been cleaned up from outside. Rather, she said she found nylon tri-level carpet fibers in the vomit indicating contact with some carpet-like fiber. (11 RT at 2291.) The prosecution argued during closing argument that this evidence contradicted petitioner's statement that he had found Consuelo laying outside the front door. (18 RT at 3650.) In fact, Spencer's reports, which went undisclosed at trial, indicated that she found "small dirt particles" in a napkin in the kitchen wastebasket that was consistent with a tape lift from outside. (Exh. 7 at 3426-27 [Handwritten Notes].) She found dirt and debris in the napkins in the bathroom wastebasket. (Exh. 7 at 3412 [Lab Notes].) Her reports also showed that Consuelo's sweatshirt contained plant fibers (Exh. 7 at 3506) and that blood on Consuelo's shoe sole may have picked up dirt and gravel. (Exh. 7 at 3942.) All of this evidence was consistent with petitioner's version of events, that he had found Consuelo outside the front door. None of this evidence was disclosed to the defense at trial.

b. The defense was unable to counter the prosecution's challenge to petitioner's statements at trial that he had found Consuelo outside. Petitioner's credibility was significantly undermined by the

forensic evidence produced at trial that there was no evidence Consuelo had been outside. Had the prosecution disclosed these reports, the defense would have been able to support petitioner's statements, bolstering his credibility and making his statements believable to the jury. Therefore, had this evidence been disclosed, there is a reasonable probability that the jury would have believed petitioner's version of events, and that the outcome of petitioner's trial would have differed.

10. The State failed to turn over two CT brain scans of Consuelo Verdugo's head injuries conducted at UCLA.

a. Medical records indicate that four CT scans were conducted of Consuelo Verdugo: one on November 21, 1991 (Exh. 3 at 1059 [UCLA Report]; one on November 22, 1991 (Exh. 3 at 462 [UCLA Report]; one on November 23, 1991 (Exh. 3 at 480 [UCLA Report]; and one on November 25, 1991 (Exh. 3 at 1215 [UCLA Report]. Only one was disclosed to the defense. (14 RT at 2832.) Dr. Baumer testified that he could not see brain infarcts in the CT scans. (*Id.*) Had the missing CT scans been disclosed, Baumer would have seen and assessed the brain infarcts. Hence, he could have been able to opine that the infarcts were due to Consuelo's medical condition on November 21, 1991, and to refute the false and inaccurate testimony presented by the prosecution that Consuelo had been suffocated and shaken.

11. The State failed to disclose that several of its witnesses who were regularly exposed to Consuelo were violent, had drug and other criminal convictions, or were mentally ill, thereby preventing the defense

from impeaching the witnesses and presenting evidence regarding alternative causes of Consuelo's prior and current injuries.

a. Delia Salinas, Darlene Salinas, Virginia (Vicki) Salinas, Diana Alejandro, and Javier Alejandro all testified for the prosecution. All were close family members of Consuelo's. Delia, Diana, and Javier all babysat or had contact with Consuelo regularly. Darlene and Virginia both had children Cristina's age that spent time with Cristina. (19 RT at 3743-44; Exh. 4 at 2047 [Police Report].)

b. The prosecution implied to the jury at trial that Delia suffered a mental breakdown because of Consuelo's death. (19 RT at 3740-42.) The prosecution interviewed Delia Salinas numerous times, however, during which she admitted that she suffered from "nervous breakdowns" and explained that this was the reason that her siblings did not tell her about the suspected cause of Consuelo's injuries. (Exh. 4 at 2051-53 [District Attorney Case Report of Interview with Delia Salinas, dated May 21, 1992]; Exh. 4 at 2310 [District Attorney Case Report of Interview of Delia Salinas, dated July 24, 1992].) The prosecution had in its possession copies of Delia's mental health records which likely would have shown that Delia has suffered from mental health problems throughout her life, that she has had repeated psychotic episodes which resulted in hospitalization, and that she suffered such an episode in October of 1991, which lasted through December of 1991, and that made her psychotic and unresponsive. (17 RT at 3334-52; Exh. 66 at 5363-64 [Declaration of Estella Alejandro Medina].) This information, which was likely contained in the hospital records in the prosecution's possession, could have been used to impeach Diana's

statement attributing Delia's nervous breakdown to her niece's death. Further, the information could have been used to show that Delia was an inadequate caretaker for Consuelo and her inattention to Consuelo likely accounted for her prior injuries. Had this information been presented to the jury, it is reasonably likely that the results of the proceeding would have been different.

c. The prosecution knew that Darlene had prior drug convictions for PCP, a serious drug that can make the user violent, and that she had a prior conviction for theft. (Exh. 9 at 3766 [Juvenile Records].) The prosecution withheld this information from the defense. The defense was therefore prevented from presenting evidence to show Darlene could have caused Consuelo's prior and current (November 17, 1991) injuries, and to show that despite a violent past, the prosecution orchestrated awarding custody of Cristina to Darlene, in order to coerce Estella's testimony at trial. The defense was further prevented from arguing that Darlene had an incentive to cooperate with the prosecution and testify against petitioner in order to avoid her own prosecution for drug offenses, and in order to obtain financial assistance in the form of welfare benefits that were awarded to her for the months she had custody of Cristina.

d. Diana Alejandro had a history of drug abuse and violence and was known in the community as one who liked to fight and used drugs, including marijuana and pills. (Exh. 103 at 5838 [Declaration of Cristobal Aguilar Galindo].) Had the prosecution disclosed this evidence, the defense could have used it to show that Diana was an inadequate caretaker for Consuelo and her violent nature combined with her

drug abuse likely accounted for Consuelo's prior injuries. The defense would also have been able to use this information to impeach Diana during her trial testimony. Had this information been presented to the jury, it is reasonably likely that the results of the proceeding would have been different.

e. As stated above, the prosecution knew that Javier Alejandro had threatened Defense Attorney Huffman's secretary, Marisol Alcantar. (Exh. 23 at 4127-45 [Delano Police Department Report].) The prosecutor moved to prohibit the defense from impeaching the witness with this information when he testified. (12 RT at 2476.) This prohibited the defense from impeaching the witness and presenting information that he was an alternative suspect with respect to both Consuelo's prior injuries and illnesses, and the injuries she sustained on November 17, 1991. The defense was also prevented from exposing the fact that Javier had an interest in assisting with the prosecution of petitioner to avoid his own prosecution.

f. Vicki Salinas told law enforcement that Estella was spending time with a man named Joe Avila, whom she had written to while he was in prison. (Exh. 4 at 2072-73 [DA Case Report of Interview with Vicki Salinas].) She also said Estella had been friends with Avila since he had been released from prison. (*Id.*) The District Attorney's office was in possession of Avila's rap sheet, and knew he had been imprisoned for child molestation. Avila's records, which were in the possession of the State, show he was released on November 20, 1990, one year before Consuelo sustained her injuries. (Exh. 6 at 2943-51 [Rap Sheet of Joe Avila].) The

prosecution therefore knew that Estella and her daughters had been spending time with Avila for one year before Consuelo's death.

g. Had this evidence been disclosed to the defense, the defense would have had ample evidence to provide alternative theories of Consuelo's injuries and death, evidence that was woefully and noticeably lacking at trial. In addition, with evidence of Avila's proper release date, the defense would have countered the prosecution's claim that Estella's relationship with Avila somehow demonstrated that she had a predilection for child molesters and that petitioner was therefore a child molester.

h. Alone, and cumulatively, the withholding of this information prejudiced petitioner's defense. Had this information been disclosed, there is a reasonable probability the outcome of petitioner's trial would have been different.

12. The state withheld evidence that Consuelo Verdugo was of ill health long before she met petitioner; and that petitioner was a gentle, caring man who was not violent, whom Consuelo viewed as her father, and who was not believed to have caused Consuelo's injuries, even by Consuelo's family.

a. The prosecution withheld the statements of Manuel Benavides, Cristobal Aguilar Galindo, Jose Jesus Vasquez Davalos, and other farmworkers interviewed by the police.

(1) Detectives interviewed petitioner's brother, Manuel Benavides, at the hotel where petitioner and his fellow farmworkers stayed. (Exh. 103 at 5839 [Declaration of Cristobal Aguilar Galindo].) Manuel Benavides told the officers that his

brother was passive, and did not use drugs. Manuel explained that petitioner was very kind to Manuel's young daughters and had been alone with them before. In response to the officer's questions, Manuel told them he did not believe petitioner was guilty.

(2) Cristobal Aguilar told the prosecution that he knew petitioner and worked with him. Cristobal also told the prosecution that he and petitioner grew up in the same town and that they come to the United States each year to pick grapes. (Exh. 103 at 5838 [Declaration of Cristobal Aguilar Galindo].)

(3) Jose Jesus Vasquez Davalos was also questioned by the prosecution. He gave his full name and was asked what hours he had seen petitioner on the day Consuelo was hurt and whether petitioner had had a beer. Jose told the prosecution that petitioner had had a beer to digest his food. Jose told the prosecution that he had known petitioner since Jose was twelve years old and that he knew petitioner's family well. The prosecution also inquired into petitioner's comings and goings to and from Mexico and the United States. Jose told the prosecution that petitioner got along with everyone in their town. (Exh. 125 at 6318 [Declaration of Jose Jesus Vasquez Davalos].)

(4) Detectives spoke to all or most of the farmworkers shortly after the incident. Detectives went to the hotel where petitioner and his co-workers were staying and interviewed them, one by one, in a room at the hotel, asking each farmworker questions about petitioner's background. (Exh. 125 at 6318

[Declaration of Jose Jesus Vasquez Davalos]; Exh. 103 at 5839 [Declaration of Cristobal Aguilar Galindo]); (Exh. 69 at 5412 [Declaration of Al Valdez].)

b. All of petitioner's co-workers had seen petitioner's healthy and loving interactions with Consuelo on the many days that Estella brought her to the hotel.

c. The State's withholding of these material and exculpatory statements was prejudicial to petitioner's case. The evidence was material because it demonstrates petitioner's exposure to young children and petitioner's reputation in his hometown as peaceful and kind.

13. The State withheld evidence of interviews of medical personnel, including Anne Tait, Richard Harrison, and defense expert Warren Lovell because they produced exculpatory information.

a. The State failed to disclose an interview of Dr. Anne Tait of DRMC by Gregg Bresson on December 11, 1991. (1 CT at 162-64.) Bresson stated in his testimony that he had interviewed Tait, a doctor at DRMC who observed no tearing, bleeding, swelling, or discharge consistent with sexual abuse when she treated Consuelo Verdugo on November 17, 1991. While he referred to his report of this interview during trial, this report was not disclosed to the defense. The defense was therefore prevented from impeaching Tait with her statements that she had not seen evidence of sex abuse when she treated Consuelo. (Exh. 76 at 5441-43 [Declaration of Dr. Anne E. Tait, M.D.].) Had Tait's exculpatory statements been disclosed, the defense would have powerfully countered the prosecution's cause of death evidence with affirmative statements that there

was no evidence of rape or sodomy within the first several hours after Consuelo was injured, and would have demonstrated that the prosecution was presenting false testimony that Consuelo had been sexually abused.

b. The State failed to disclose evidence that Gregg Bresson had spoken to Rick Harrison, a doctor who treated Consuelo at UCLA, on December 10, 1991. (1 CT at 203-04, 208-09.) Bresson stated in his testimony that he was referring to a report of this interview, but the report was not disclosed to the defense. The defense was therefore prevented from using the report to counter the prosecution's cause of death evidence with Harrison's statements that he believed the cause of Consuelo's injuries and death was blunt force trauma to the abdomen, and not sodomy and rape. Had the report been disclosed, the defense would have impeached Harrison with his statements that undermined the prosecution's cause of death.

c. The district attorney, Robert Carbone, contacted defense expert Warren Lovell on April 8, 1993, and did not report the substance of this contact. Carbone implied to the jury that Lovell had been fired from his position as Chief Medical Examiner in Ventura County. (14 RT at 2888.) Lovell had told Carbone prior to this, however, that he had not been fired from his job. Had the prosecution disclosed the contents of this phone conversation, the defense would have objected to this statement as an example of misconduct. With the evidence from this phone call presented in support, rather than having its objection overruled, as occurred at trial, the defense objection would have been sustained as improper, and the jury's impression of Dr. Lovell would not have been tainted. Thus, had

the conversation been disclosed, in conjunction with all other documents evidencing state misconduct, the outcome of the trial would have been different.

14. The State withheld evidence of prior interviews with petitioner's mother. On April 13, 1993, during trial, Al Valdez approached petitioner's mother and asked to interview her. He said to her "Maria, it's a while I've been here, right?" (Exh. 4 at 2133 [Interview with Maria Figueroa]) implying that he had visited her before, a while ago. Valdez states that this interview reconfirms a prior interview in which an audiotape malfunctioned. (*Id.*) Valdez states that he is reading from a declaration signed by Maria during that prior interview. (*Id.*) In this interview, Valdez discusses petitioner's description of what happened to the little girl, and the specific description of events petitioner gave his mother regarding these events. No prior contact between Maria and Valdez was reported to the defense, and no declaration was disclosed.

15. The prosecution failed to report prior conversations with Estella Medina, Cristina Medina, Diana Alejandro, and other members of Consuelo's family.

a. On November 26, 1991, investigator Gregg Bresson and prosecutor Carbone were at UCLA Medical Center, where they talked with Estella Medina and her son Ruben Verdugo about Consuelo, petitioner, and petitioner's case. This contact went unreported. (*See* Exh. 4 at 2211 [Interview with Estella Medina, November 26, 1991].) Estella was questioned regarding allegations that Cristina had blood in her underwear and petitioner's decision to return to the United States from Mexico early

that year. (*Id.* at 2211, 2228.) Exculpatory evidence discussed during this conversation, such as petitioner's real reason for returning early to the United States, was not reported. Had the prosecution disclosed this evidence, the defense would have been able to prevent the State's misconduct at trial when the State falsely implied that petitioner had returned early from Mexico because he was wanted by authorities there. Had the information been disclosed and the defense made use of it in this manner, there is a reasonable probability the outcome of the trial would have differed.

b. On July 21, 1992, Vicki Salinas talked with Ray Lopez about a prior interview of Cristina Medina conducted by Al Valdez in which Valdez discussed the concept of rape with Cristina. (See Exh. 4 at 1664-76 [Transcript of Interview with Vicki Salinas].) Before and after that date, Ray Lopez visited Cristina regularly at the house of her cousin and aunt, in attempts to prepare her interview and trial testimony. Investigator Gregg Bresson also met with Cristina on December 20, 1991 to obtain forensic evidence. (Exh. 7 at 3508 [Control Blood Sample].) No evidence of these interviews was disclosed before trial. Had evidence of these interviews been disclosed, the defense would have been able to adequately challenge the prosecution's improper removal of Cristina from her home that was orchestrated in order to coerce and manufacture her testimony for trial, as well as coerce her mother's statements. Had this evidence been disclosed, the outcome of the trial would have differed.

16. The prosecution withheld voluminous documents at trial, including evidence supporting petitioner's statements at trial regarding the

facts of the incident, documents illustrating the false medical testimony manufactured and introduced by the prosecution, and information provided by friends and family of petitioner that was exculpatory. The disclosure of this information, alone and in combination, would have changed the trial outcome.

H. CLAIM 8: THE STATE PREJUDICIALLY FAILED TO DISCLOSE BENEFITS OFFERED TO WITNESSES IN EXCHANGE FOR THEIR ASSISTANCE WITH THE CASE.[11]

Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law rights to due process, a fair trial, the effective assistance of counsel, present a defense, confrontation, compulsory process, reliable and accurate guilt and penalty assessments based on accurate rather than false testimony and evidence, a fair, reliable, non-arbitrary sentencing determination, and to be free of the imposition of a cruel and unusual punishment were violated by the prosecutor's failure to disclose material benefits to witnesses.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The prosecution presented the testimony of Darlene Salinas and Virginia (Vicki) Salinas at the penalty phase of trial. Darlene helped the prosecution make its case for the imposition of death when she testified that Consuelo's family wanted "justice" to be done, and stated that "nothing like this should happen to children again." (19 RT at 3743-44.) Vicki testified that she took care of Cristina after her sister's death, and described the impact of Consuelo's death on Cristina. (19 RT at 3745-47.)

2. District Attorney investigators Ray Lopez and Greg Bresson arranged for Cristina to be removed from Estella's custody, which led to her

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[11] This Claim qualifies as a Category 2 claim.

eventual placement in the custody of Darlene and Reynaldo Salinas and later Vicki Salinas. These relatives received financial rewards in the form of welfare assistance for taking custody of Cristina. These benefits provided an incentive for them to cooperate with the prosecution. The District Attorney's office filed lawsuits against Estella Medina to obtain welfare benefits for both Vicki and Darlene. (Exh. 12 at 3910-30 [*County of Kern v. Estella Medina*, Kern County Superior Court, Case No. 700491 (regarding request for public assistance by Darlene Salinas]; Exh. 13 at 3931-3941 [*County of Kern v. Estella Medina* (regarding request for public assistance by Virginia Salinas].))].) This enabled Vicki to receive welfare benefits in the form of cash payments.

3. The prosecution was aware that both Darlene and Reynaldo Salinas had criminal records indicating a history of drug abuse. (Exh. 9 at 3766 [Juvenile Records].) The prosecution overlooked their drug problems and other criminal convictions that indicated they were not safe placements for Cristina, in exchange for their cooperation and assistance with their investigation and their testimony at trial. This also bestowed a benefit onto Darlene and Reynaldo Salinas by assisting them in overcoming obstacles to receiving welfare benefits, such as a criminal and drug history, that they otherwise would not have been able to overcome.

4. In addition to Vicki Salinas' questioning of Cristina on behalf of Investigator Lopez, Vicki also questioned Estella on Lopez' behalf. On July 6, 1992, Lopez requested that Vicki telephone Estella and ask her about her relationship with Joe Avila, and whether she knew that Joe was a registered sex offender. Vicki agreed and did so. (Exh. 4 at 2091-96 [Kern

County District Attorney Bureau of Investigation Supplemental Report dated July 7, 1992].) The information she obtained, that Estella was spending time with Joe Avila, was used at trial by the prosecution to cross-examine Estella. (13 RT at 2569-73.) The prosecutor also referred to Vicki as an "investigator from [the D.A.'s office]" at trial when he mentioned Estella's discussion with Vicki regarding her relationship with Joe Avila. (13 RT at 2569.) As Lopez had used Vicki to obtain information from Cristina, he used Vicki to obtain evidence from Estella because he could not obtain it himself. He made a request that Vicki obtain specific evidence in a specific way – by allowing her phone conversation with Estella to be recorded – and Vicki obtained this evidence for Lopez' and the prosecution's use at trial, not for her own use. (Exh. 4 at 2091-96 [Kern County District Attorney Bureau of Investigation Supplemental Report dated July 7, 1992].)

5. The prosecutor referred to Vicki as his "investigator" at trial. (13 RT at 2569 [referring to telephone call between his "investigator" and Estella Medina that was actually made by Vicki Salinas at the behest of investigator Ray Lopez].)

6. Finally, Vicki used the fact that she had been awarded temporary custody of Cristina to provide testimony for the prosecution at the penalty phase. (19 RT at 3745-47.)

7. These witnesses therefore received benefits in exchange for their acting as agents for law enforcement and providing testimony at trial. The prosecution had both imputed knowledge, by virtue of the fact that members of the investigation team had knowledge of these arrangements,

and actual knowledge, as evidenced by the District Attorney's office's involvement in filing the child support cases against Estella, of the existence of this information. As the District Attorney's office itself filed the welfare suits against Estella, the evidence was certainly within its possession and shows the District Attorney's direct involvement in assisting its witnesses in receiving these monetary benefits in exchange for their testimony at trial. This evidence was material and very favorable to the defense as it demonstrated the methods employed by the prosecution in developing evidence for trial, provided evidence that Cristina's and Estella's testimony was coerced, and would have led competent defense counsel to investigate the cooperation and testimony of the Salinas/Alejandro family providing compelling impeachment material challenging the credibility and bias of the prosecution's witnesses. The disclosure of this evidence prior to trial would have allowed the defense to use the information obtained to counter false and misleading trial testimony, as well as to investigate further the favorable evidence discovered by them. As a result, there is a reasonable probability that petitioner would not have been convicted or sentenced to death absent this due process violation.

I. CLAIM 9: THE STATE'S RELIANCE ON PETITIONER'S ILLEGALLY OBTAINED AND INVOLUNTARY STATEMENTS AND ITS PREJUDICIAL MISCONDUCT IN INTERROGATING PETITIONER VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.[12]

Petitioner's conviction, sentence, and confinement were rendered in violation of petitioner's rights against self-incrimination and his rights to due process, present a defense, a fair trial, compulsory process, confrontation, counsel and the effective assistance thereof, equal protection, present all available relevant mitigating evidence, and reliable guilt, death eligibility, and penalty verdicts based on accurate information, rather than false testimony or misinformation as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the state constitution analogues, by virtue of the state's reliance on petitioner's unreliable and involuntary statements and the fruits of those statements that were obtained as the result of violations of *Miranda v. Arizona* and its progeny and the separate constitutional rules governing police interrogations. Petitioner's statements were further rendered involuntary by the failure of the state's representatives ever to inform him of his consular rights or to inform him of his *Miranda* rights in a timely manner. Moreover, petitioner's waiver of his constitutional rights, when those rights were provided to him, is invalid. The trial court erroneously permitted the prosecution to use the unreliable unconstitutionally obtained statements against petitioner to suggest that inconsistencies were indicative of his guilt and this error had a substantial and injurious effect and influence on the

[12] This Claim qualifies as a Category 2 claim.

jury's determination of the verdicts at the guilt and penalty phases of petitioner's trial.

In support of this claim petitioner alleges the following facts, in addition to those to be presented after full investigation, discovery, additional time, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in the claims pertaining to the state's misconduct; trial counsel's ineffective representation; petitioner's mental retardation, mental illness and neurological dysfunction; and petitioner's rights under the Vienna Convention (*see* Claims 1-8, 10-13, 26), are incorporated into this claim as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. Prior to questioning petitioner, although petitioner was objectively and subjectively a suspect and effectively in custody at the time, the investigating police officers failed to give him *Miranda* warnings when interrogating him about Consuelo's injuries. This interrogation, conducted by two police officers, occurred in a room at the hospital after the officers separated petitioner and Consuelo's mother.

a. According to contemporaneous police reports, by the time the investigating (and interrogating) officers questioned petitioner, they had been told by other law enforcement that medical personnel suspected Consuelo's injuries were the product of child abuse and violent force, not the accident described by Estella Medina.

(1) According to contemporaneous police reports, by the time the investigating (and interrogation) officers questioned

petitioner, they had been told that Consuelo Verdugo had a lacerated bowel and severely damaged pancreas.

(2) The reports also show that they were further told that Consuelo's anal sphincter was lose and that during the pancreas operation an old scar was located near the fresh injury. The old scar meant that Consuelo's pancreas had been previously ruptured, but healed itself.

(3) The officer's contemporaneous reports also show that by the time they questioned petitioner for the first time, they had interviewed Estella Medina, who told them that she was with petitioner, Consuelo, and Consuelo's sister Cristina during the day until she went to work; that Consuelo was healthy all day; and that she left Consuelo in petitioner's care and went to work until her daughter Cristina phoned her because of Consuelo's injuries.

b. Despite all of the foregoing, and the officers' belief that petitioner was a suspect and their decision to focus their investigation on petitioner, no one informed petitioner of his rights to remain silent, to stop the questioning once it began, or to the assistance of a lawyer at any time, free of charge

3. Petitioner was interviewed a second time that same day – November 18, 1991 – and provided with a written copy of the *Miranda* warnings. This interview occurred at the Delano Police Department. The warnings were defective.

a. According to the transcript of the taped interview, the investigating officers had petitioner read the *Miranda* rights to himself and

offered no explanation of them. "Mr. Benavides's pre-adolescent intellectual functioning is below the receptive language and reading level necessary to understand the concepts in the *Miranda* waiver." (Exh. 126 at 6357 [Declaration of Antonio Puente, Ph.D.].) In order to comprehend these warnings one must have reading abilities equivalent to that of a substantially older child. The prosecutor's notes prepared during his investigation of the case demonstrate his own disbelief ("*Δ was told to read his own rights?") over this practice.

b. Petitioner's mental retardation, deficient intellectual functioning and neurocognitive deficits rendered him unable to understand these advisements. His significant brain damage limited his capacity to understand and voluntarily waive his rights to counsel and to remain silent. The English transcription of the warnings in Spanish, as read aloud by petitioner, contains words and concepts that were beyond his intellectual and cognitive capacity. (Exh. 126 at 6357-59 [Declaration of Antonio Puente, Ph.D.).)

c. The state's translation of the *Miranda* warnings was incorrect, confusing and inaccurate and the interrogating officers failed to ensure that petitioner, a monolingual Spanish-speaker, unfamiliar with the American criminal justice system and culture, understood his rights. The grammatical mistakes in the waiver are particularly confusing for petitioner, whose intellectual functioning is equivalent to that of a seven and half year old. (Exh. 126 at 6357-59 at [Declaration of Antonio Puente, Ph.D.].) Even the prosecutor, prior to trial, questioned the validity of the police

department's Spanish version of the warnings: ("Is DPD Spanish Miranda valid? (I don't think so!!)").

d. The lack of explanation by the investigating officers and the lack of clarity in the warnings themselves rendered them and the ensuing purported "waiver" of all of his constitutional rights invalid, not only because of petitioner's neurocognitive and intellectual deficits, and the warning's inherent deficiency, but also because of significant, relevant cultural differences between petitioner's culture and the American criminal justice system. These include, among others, the differing connotations of the word "rights," the lack of any analogous privilege to the right to remain silent, and the lack of any analogous privilege to the right to a free lawyer.

e. Petitioner's ensuing participation in his interrogation, and the assent that the state would use as a valid waiver was neither intelligent nor voluntary. Consequently, petitioner's statements and the fruits thereof, used to demonstrate falsely a consciousness of guilt, were unconstitutionally obtained and unconstitutionally used at trial.

4. The State failed to advise petitioner of his right to consular assistance, which would have permitted him to obtain proper translation and understand his right to counsel. At no time before, during, or after petitioner's arrest did any state official inform him of his right to seek the assistance of Mexican consular officers, as required by Article 36(1)(b) of the Vienna Convention on Consular Relations ("VCCR"). The state also failed to notify directly Mexican consular officers that petitioner, a Mexican citizen, had been arrested, as required by Articles I and VI of the Bilateral Consular Convention. The state never provided the Mexican government

through its consular officers with a meaningful opportunity to provide consular assistance to petitioner, as required by both the VCCR and the Bilateral Consular Convention.

5. Petitioner's statements to the investigating officers were involuntary because:

a. Petitioner was not effectively or properly advised of his constitutional rights to remain silent, to control absolutely whether or not he was interviewed, to the assistance of a lawyer for free whenever he wanted one, or his rights as a Mexican national.

b. Petitioner's demeanor, indicative of fear, anxiety, and submission to authority bespeaks coercion, not voluntariness. Given his cultural differences, language barrier, and neurocognitive deficits, petitioner would have needed extensive explanations of the reason for law enforcement's interview, as well as repeated and simplified explanations of the questions asked, and repeated admonishments to refrain from speculating or answering questions to which he did not truly have the answer. (Exh. 126 at 6357 [Declaration of Antonio Puente, Ph.D.].)

c. Petitioner lacks the ability to interpret or evaluate the context of an interrogative interview and his mental and intellectual deficits rendered him particularly susceptible to suggestion in questioning, given his desire to please those in authority. [Exh. 126 at 6358 [Declaration of Antonio Puente, Ph.D.].)

d. Petitioner had no prior record, no prior arrests or detentions, and no prior similar contacts with law enforcement.

6. The facts which rendered petitioner's statements involuntary and coerced, and which rendered his purported waivers invalid that are set forth above, combined with the exceptionally poor quality of the Spanish translation supplied by interrogating officer Valdez, rendered petitioner's statements unreliable. A competent Spanish language speaker and interpreter, listening to the audiotape of petitioner's interrogation, has described Officer Valdez's Spanish as "limited and broken" and catalogued numerous errors which resulted in miscommunication and changed the meaning of phrases, questions, and responses. There are also significant contextual errors and statements by petitioner's interrogator that are made completely unintelligible by poor grammar, poor verb conjugation, or gross mispronunciations. Petitioner's responses to Valdez's questions, which are replete with such errors, as exacerbated by petitioner's intellectual deficits, rendered his answers to questions of dubious validity or meaning. Moreover, petitioner's neuropsychological deficits, particularly those that rendered him unable to remember and recite facts or to provide a narrative description of a prior event, were likely to cause him to confabulate in order to mask his lack of information or memory.

7. The use of petitioner's statements had a substantial and injurious effect on the jury's determination of guilt and penalty, thereby rendering the trial court's refusal to suppress these statements prejudicial constitutional error.

J. CLAIM 10: THE STATE UNFAIRLY TARGETED PETITIONER AS THE SOLE SUSPECT AND IGNORED EVIDENCE THAT IMPLICATED OTHER SUSPECTS.[13]

Petitioner's conviction and sentence of death were rendered in violation of his rights to a fundamentally fair and reliable determination of guilt and penalty, to a trial free of materially false and misleading evidence, the right to confront and cross-examine witnesses, to a trial by a fair and impartial jury, to a conviction beyond a reasonable doubt, to effective assistance of counsel, and to the disclosure of all materially favorable evidence including impeachment evidence, and to authorities refraining from destroying potentially exculpatory evidence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law, because law enforcement officials immediately targeted petitioner as the source of Consuelo's injuries, to the exclusion of investigating persons much more likely to have caused her past and current injuries, and conducted no investigation into any of these known and substantially more plausible prospects.

The prosecution knew that Consuelo's family members, whom she saw almost daily, were violent, used drugs regularly, experienced psychotic episodes, and had criminal records. Moreover, the prosecution specifically had in its possession evidence that two individuals to whom Consuelo was exposed were convicted child molesters. Despite this knowledge and evidence, the prosecution unfairly focused on petitioner as the sole suspect

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[13] This Claim qualifies as a Category 2 claim.

in the case, failed to conduct even a cursory investigation of any other suspect, and suppressed any evidence tending to show that someone other than petitioner could have caused Consuelo's injuries, fundamentally depriving him of his right to a fair trial.

In support of this claim, petitioner alleges the following facts, in addition to those to be presented after full investigation, discovery, and access to this Court's subpoena power and an evidentiary hearing:

1. Even as Consuelo Verdugo was being attended by medical personnel, law enforcement focused the entire investigation on obtaining information concerning petitioner. (Exh. 69 at 5410 [Declaration of Al Valdez].) The day after Consuelo Verdugo died, the police stated in their report that petitioner must have sodomized Consuelo, causing her injuries. (Exh. 4 at 1913 [Police Report dated 11/19/91].)

a. Police arrested petitioner the day after Consuelo was injured. (Exh. 69 at 5412 [Declaration of Al Valdez].)

b. Law enforcement noted that petitioner had no prior arrests or convictions, but did not believe that was significant. (Exh. 69 at 5412 [Declaration of Al Valdez].)

2. **Joe Avila.** Vicki Salinas told law enforcement that Estella Medina was spending time with a man named Joe Avila, to whom she had written while he was in prison. (Exh. 4 at 2072-73 [DA Case Report of Interview with Vicki Salinas, July 1, 1992].) She also said Estella had been friends with Joe since he had been released from prison. (Exh. 4 at 2072-73 [DA Case Report of Interview with Vicki Salinas, July 1, 1992].) The District Attorney's office was in possession of Joe's rap sheet, and knew he had been imprisoned for child molestation. Joe's records, which were in the

possession of the State, show he was released on November 20, 1990, one year before Consuelo sustained her injuries. (Exh. 6 at 2946 [Rap Sheet of Joe Avila].) The prosecution therefore knew that Estella and her daughters had been spending time with Avila for one year before Consuelo's death.

a. The prosecutor presented testimony that Estella had seen Avila at Consuelo's funeral, for Christmas 1991, New Year's 1991, and on July 4, 1992, and had exposed her daughter Cristina to Avila on these dates, but did not mention any contact with Avila before Consuelo's death. (13 RT at 2577-80; 2592.) He argued during his closing argument at the guilt phase that Estella met Joe Avila at Consuelo's funeral, implying that Consuelo had not been exposed to Avila. (18 RT at 3592-93; 3597.) Moreover, he stated before Judge Stuart that evidence regarding Joe Avila was relevant to show how Estella allowed petitioner to have access to Consuelo. He then argued in closing that Estella saw petitioner and Avila on the same days. (18 RT at 3597.)

b. Despite the fact that the prosecution had in its possession evidence demonstrating Joe Avila, a sex offender, was regularly spending time with, and had access to, Consuelo Verdugo for one year prior to her death, the district attorney's office did not investigate Avila as a suspect and instead disclosed conflicting and false information that Avila was paroled either several days or one year *after* Consuelo was injured, and falsely stated at trial that Estella only met Avila after Consuelo died, at Consuelo's funeral. (18 RT at 3592-93.)

c. Petitioner suffered prejudice as a result of the failure to disclose Avila's rap sheet or proper parole date. Because the prosecution

improperly failed to disclose the material evidence in its possession indicating that Avila was paroled one year before Consuelo's death, the defense was prevented from presenting an alternative theory of the cause of Consuelo's injuries. Had the prosecution disclosed this evidence, the defense would have presented testimony that Avila could have caused the injuries, would have used the evidence to impeach the statements of Diana Alejandro and Delia Salinas regarding Consuelo's prior injuries. Had the defense impeached the witnesses in this way, it is reasonably likely the result of the trial would have been different.

d. The district attorney's office knew that Avila had been released from prison one year before Consuelo's death, yet at trial the prosecutor represented that Estella met Joe Avila at Consuelo's funeral. (RT 3592-93.) The prosecutor therefore failed to turn over and intentionally withheld information from the defense that Joe Avila had access to and spent time with Estella's daughters beginning in November of 1990, and presented false testimony and argument to the jury at trial. (Exh. 6 at 2946 [Rap Sheet of Joe Avila]).

3. **Javier.** The prosecution was aware that Javier had a criminal record and that he was violent. (Exh. 44 at 4748-49 [*People v. Javier Alejandro*]). However, the prosecution never investigated Javier as a suspect in the case.

a. In fact, Javier was suspected of threatening the defense at the time of trial. The prosecution improperly moved to exclude the use of these threats as impeachment evidence, and this motion was granted. (12 RT at 2476.) The defense was therefore prevented from using proper

impeachment evidence at trial to challenge the credibility of a witness who was violent, and who had threatened the defense lawyers in the case.

4. **Delia**. The prosecution interviewed Delia Salinas on numerous times, during which she admitted that she suffered from "nervous breakdowns." (Exh. 4 at 2051-53 [DA Case Report of Interview with Delia Salinas, dated May 21, 1992]; Exh. 4 at 2310 [DA Case Report of Interview of Delia Salinas, dated July 24, 1992].) The prosecution had in its possession copies of Delia's mental health records. (17 RT at 3334-52.) Delia also stated to the district attorney investigator that she had been babysitting for Consuelo when Consuelo broke her arm. (Exh. 4 at 2051 [DA Case Report of Interview with Delia Salinas, dated May 21, 1992].) Despite Delia's unstable mental health, and Consuelo's regular exposure to her, the prosecution never investigated Delia as a possible cause of Consuelo's prior injuries, or the injuries she sustained on November 17, 1991. Instead the prosecution focused solely on petitioner and falsely implied that he was responsible for Consuelo's broken arm and other past injuries.

a. The prosecution withheld Delia's mental health records from the defense. Had the prosecution disclosed these records to the defense at trial, the defense would have been able to impeach Delia's testimony regarding her recollections of Consuelo's prior injuries, and would have had an evidentiary basis from which to argue that Delia was a possible cause of those injuries. Had the defense been able to use the withheld evidence in this manner, the outcome of the trial would have been different.

b. The defense would also have been able to use these records to impeach Diana Alejandro's statements that Delia suffered a nervous breakdown because of Consuelo's death. As her sister explains, "Delia has had mental health problems her whole life." (Exh. 66 at 5363 [Declaration of Estella Alejandro Medina].) She has had repeated psychotic episodes for which she has been hospitalized several times. (*Id.*) In October of 1991 Delia began to decompensate again. (*Id.*) She hallucinated and began irrationally stacking dishes and food on the kitchen counters. (*Id.* at 5364-64.) She became unresponsive. (*Id.* at 5364.) This psychotic episode lasted through Consuelo's death until about December of 1991. (*Id.*) This or similar information, which the prosecution possessed, but did not disclose, could have been used to impeach Diana's statement attributing Delia's nervous breakdown to her niece's death. (19 RT at 3741-42.) Further, the information could have been used to show that Delia was an inadequate caretaker for Consuelo and her inattention to Consuelo likely accounted for her prior injuries. Had this information been presented to the jury, it is reasonably likely that the result of the proceedings would have been different.

5. **Diana**. The prosecution interviewed Diana numerous times during its investigation of Consuelo's injuries and death. Diana told the prosecution that she was one of Consuelo's babysitters. (Exh. 4 at 2236 [Interview with Diana Alejandro, dated 5/11/92].) Had the State conducted a proper investigation it would have discovered that Diana had a history of drug use and instability. (Exh. 103 at 5838 [Declaration of Cristobal Aguilar Galindo].) Given that Diana was a frequent babysitter for

Consuelo, the State should have investigated whether she was as or more likely to be responsible for Consuelo's prior injuries than petitioner, who had no such past history.

6. **Darlene**. Darlene Salinas, Cristina's cousin, had a criminal record for theft and drug use, including the use of PCP which can cause the user to become violent. (Exh. 9 at 3766 [Juvenile Records, *In re Cristina Medina*].) The prosecution was aware of this information, and aware that Darlene spent a great deal of time with Consuelo. However, the prosecution did not investigate Darlene as a suspect; instead, the prosecution prompted DHS/CPS to award temporary custody of Cristina to Darlene after removing Cristina from her mother's custody. (Exh. 9 at 3731 [Juvenile Records, *In re Cristina Medina*]; Exh. 68 at 5408 [Declaration of Raymond Lopez].) The prosecution offered Darlene custody of Cristina, despite her drug use and criminal convictions, in exchange for her testimony against petitioner.

7. **Sacarias**. The prosecution possessed information showing that Sacarias Alejandro, Estella's brother, had been charged with sex abuse offenses shortly before Consuelo was injured in 1991. (Exh. 42 at 4728 [*People v. Sacarias Alejandro*].) The prosecution did not investigate Sacarias as a possible cause of Consuelo's injuries.

8. **Nicasio**. The prosecution possessed information that Nicasio Alejandro, Estella's brother, was a violent man who had tried to shoot his brother, and that Estella and her two daughters spent time with him regularly. (Exh. 4 at 2411 [Interview with Estella Alejandro by Ray Lopez,

dated 7/9/92].) The prosecution did not investigate Nicasio as a possible suspect in the case.

9. **Antonio**. The prosecution knew that Antonio Alejandro, Estella's brother, was one of Consuelo's babysitters. (Exh. 62 at 5211-12 ["Family Grieves in Child's Death," *Bakersfield Californian*, November 27, 1991].) The prosecution also knew that Antonio was violent. (Exh. 23 at 4127-45 [Delano Police Department Report]; Exh. 59 at 5148 [Interview with Ruben Verdugo, July 13, 1992]; Exh. 46 [*In re Marriage of Jennette Guzman and Antonio Perez Alejandro*, Kern County Superior Court, Case No. 525770].) Despite this knowledge, the prosecution did not investigate Antonio as a possible suspect who caused Consuelo's injuries.

10. **Attempted kidnap of Cristina**. Cristina told law enforcement that shortly before her sister's death, on October 6, 1991, she was followed by two men who attempted to abduct her near her home. (Exh. 4 at 1838 [Interview of Cristina Medina, dated 11/18/91]; Exh. 5 at 2544 [Delano Police Call].) The State did not investigate these suspects to determine whether they caused Consuelo's injuries. When Cristina mentioned this in her first interview with law enforcement, they simply asked, "nobody bothered you since then?" (Exh. 4 at 1838 [Interview of Cristina Medina, dated 11/18/91].)

11. The prosecution rendered petitioner's trial fundamentally unfair in violation of petitioner's right to due process when it failed to investigate numerous leads and alternative suspects, withheld or falsely reported, or failed to disclose in a timely manner, information relevant to those leads, thereby disabling the defense from conducting an adequate

investigation, and focused its investigation entirely on petitioner. The State knew that information about mentally unstable, violent individuals and child sex abusers in Consuelo's life was highly relevant, and it suppressed this evidence, preventing the defense from presenting alternative suspects and alternative theories to explain Consuelo's death.

K. CLAIM 11: THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT DURING TRIAL.[14]

The convictions and sentence of death were rendered in violation of petitioner's rights to fair, reliable, and rational determinations of guilt and penalty an individualized determination of penalty based on the jury's consideration and weighing only of materially accurate, nonprejudicial, relevant record evidence presented during the trial and as to which petitioner had notice and a fair opportunity to test and refute, to have the jury give full effect to all evidence in mitigation of penalty, to the privilege against self-incrimination, to confrontation and compulsory process, to a jury trial by a fair and impartial jury, to conviction beyond a reasonable doubt, to due process and to the effective assistance of counsel as guaranteed by the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law because the prosecution engaged in a pervasive, purposeful, intentionally improper, and consistent pattern of misconduct that was designed to and did in fact prejudicially deprive petitioner of the foregoing constitutional rights.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts set forth in Claims 1, 2, 3, 4, 5, 6, 7 and 8, *supra*, are hereby incorporated by reference as if fully set forth herein, to avoid unnecessary duplication.

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[14] This Claim qualifies as a Category 2 claim.

2. The prosecution erroneously and prejudicially misstated the law by equating the burden of proving guilt beyond a reasonable doubt with the burden of producing truthful testimony and evidence.

a. The prosecution began voir dire by introducing the concept of proof beyond a reasonable doubt to an alternate juror who ultimately deliberated petitioner's guilt and penalty, as follows, "I like to sum up beyond a reasonable doubt as one word, the truth. We're here to search for the truth." (4 RT at 850.)

b. The prosecution repeatedly and intentionally continued to define the reasonable doubt burden as the journey, or search, for the truth. (5 RT at 971; 7 RT at 1463; 9 RT at 1883.)

c. The prosecution intentionally reaffirmed this gross misstatement of law, concluding the guilt phase argument by stating, "I will ask you [during rebuttal] as I ask you now, in accordance with evidence presented, taking a cold reasonable hard look at this evidence to return a true verdict based on truth and fact and that is that the defendant is guilty. . . ." (18 RT at 3598.)

d. The prosecution's repeated remarks were intended to and did undermine the presumption of innocence, negate an essential element of the state's burden of proof, and deny petitioner due process, rendering the entire trial fundamentally unfair and the guilt and penalty determinations unreliable.

3. The prosecution regularly, intentionally and improperly referred to facts not in evidence.

a. The prosecution repeatedly, improperly and falsely imputed a romantic relationship between Estella and Joe Avila after the events culminating in petitioner's prosecution so as to bolster the characterization of Estella as an untrustworthy, uncaring and woefully neglectful parent who serially and willfully entered into relationships with known child molesters and undermine her credibility. (13 RT at 2570, 2573.)

b. During cross-examination of defendant, the prosecution insinuated that Estella told hospital workers that the victim had previously hurt her head from following Cristina, not from falling off the couch/chair. (15 RT at 3046.) No evidence was introduced as to what Estella told hospital workers and there is no statement by anyone in the police reports or interviews supporting this insinuation. This question was crafted to undermine petitioner's and Estella's credibility by suggesting that both attempted to cover up the source of the injuries the victim suffered prior to and during the time of the crime.

c. The prosecution elicited testimony from Estella that petitioner told her he had returned from Mexico because "he was in danger there and wanted to come back early." (13 RT at 2647-8). Defense counsel objected and the court overruled the objection. The improper inference that the jury necessarily and prejudicially drew was that the defendant had committed a crime in Mexico and was escaping the authorities. Coupled with the prosecution's repeated suggestions that petitioner had a history of committing child molestation crimes, this statement exhorted the jury to convict petitioner based on facts not in evidence and on an erroneous

perception that petitioner would commit another child molestation crime if acquitted.

d. During guilt phase closing arguments, the prosecution inflammatorily and intentionally falsely implied that petitioner previously had molested children.

(1) In characterizing Estella Medina as a neglectful mother, the prosecution argued, "Christina is lucky to get out alive. Not only from this guy behind me, but the next guy in line that she meets at the funeral. Joe Avila, another convicted child molester, that she knows is a child molester." (18 RT at 3593.)

(2) Despite objection by trial counsel and a curative instruction by the court, the prosecutor improperly and prejudicially falsely continued to imply that petitioner had previously been convicted of child molestation and/or that the victim's mother knew petitioner was a child molester, in stating, "I should have said another child molester, one that [the victim's mother] knows to be a convicted registered sex offender for children." (18 RT at 3593.)

(3) The prosecution reinforced the inference that evidence not presented during trial established petitioner's prior convictions when, during penalty phase closing arguments, he stated, "[a]nd [trial counsel] may say to you taking this man's life won't bring [the victim] back. So what? Life is precious. We don't take burglars and release them because they have already committed burglary." (19 RT at 3785.)

(4) These remarks were designed to and did in fact invite the jury to conclude that petitioner committed the sexual acts at issue – the core dispute as to the guilt phase and upon which petitioner's capital liability hinged -- simply because evidence not presented demonstrated that he had done it before and but for this misconduct, the jury would not have convicted petitioner and sentenced him to death.

e. The prosecution also improperly denigrated petitioner by making rude and obscene gestures toward him in full view of the jury. (Exh. 107 at 5902-03 [Declaration of Al Hernandez].) Eventually petitioner stopped making eye contact with the prosecutor to avoid seeing his menacing gestures. (Id.) The prosecutor's comments and actions went beyond the evidence admitted at trial and amounted to the presentation of false and inflammatory testimony and inference. Evidence not presented at trial demonstrated that petitioner's demeanor in fact was the result of his mental illness, of being ill-informed of the proceedings due to the poor interpretation provided at trial, and low level of cognitive functioning. (See Claims 12, 13, and 20.)

f. Individually and cumulatively the prosecutor's false and prejudicial references to facts not in evidence were intended to and were of such a nature that they in fact did undermine petitioner's right to a fair trial and a reliable guilt and penalty phase determination.

4. The prosecution prejudicially misstated facts by falsely and erroneously characterizing the testimony of medical witnesses and overstating the medical evidence.

a. During the guilt phase closing argument, the prosecutor erroneously implied that additional inculpatory evidence not presented further established petitioner's guilt and capital liability including, but not limited to, the connection between the amount of force necessary to break ribs and child abuse. (18 RT at 3594-95.)

b. This case hinged upon medical opinions, observations, and conclusions and the credibility of such determinations. The prosecution's erroneous comments had the desired effect of bolstering the state's theory and fatally undermining petitioner's case. Singly and cumulatively, they rendered the guilt and penalty phases fundamentally unfair and the determinations unreliable.

5. The prosecution improperly and prejudicially denigrated defense experts at trial.

a. On cross-examination, the prosecutor asked Dr. Baumer, "[I]sn't it true that you would not come testify on the case unless you were allowed to consult with Dr. Lovell and he got paid too? Isn't that true, yes or no?" (14 RT at 2887.) The prosecution withdrew the question before the court could rule on the objection.

b. During guilt phase closing arguments, the prosecutor further impugned Dr. Baumer by suggesting that he misused Dr. Shaw's report and used one line to change his testimony five minutes before he took the stand for $2,000.00. (18 RT at 3571.)

c. Combined, these remarks painted Dr. Baumer as a charlatan, given to molding testimony based on the needs of defense counsel and the amount of money he is being paid. As a result, the jury

improperly was invited to disregard his testimony and ignore his conclusions and opinions, both crucial components of petitioner's defense case. But for these remarks, the jury would not have found petitioner guilty or sentenced him to death.

6. The prosecution improperly and prejudicially equated defense counsel's failure to take specific actions with petitioner's guilt.

a. The prosecutor repeatedly and intentionally commented on petitioner's failure to examine evidence collected and analyzed by Dr. Dibdin.

(1) In conducting his direct exam of Dr. Dibdin as to the physical evidence collected from the victim and examined, the prosecution asked Dr. Dibdin if the retained microscopic samples, and whole cross-section of the anus and vagina, bladder, brain, and ribs were available to petitioner's trial counsel for viewing and whether trial counsel did in fact view the items. Dr. Dibdin responded "no." (11 RT at 2141.) Petitioner objected to this question and the court sustained the objection.

(2) The prosecution returned to this topic, concluding the direct examination of Dr. Dibdin by asking, "just to be sure, you still maintain all the samples you took in your lab today. Is that correct?" (11 RT at 2144.)

(3) During guilt phase arguments, the prosecution further commented on petitioner's failure to examine evidence, stating, "Dr. Dibdin is put on the stand by me and we go over the microscopic analysis in some part, but not in detail. Of course their

expert didn't pick up the microscopic slides and evidence until after [Dr. Dibdin] testified." (18 RT at 3569.)

(4) Finally, in penalty phase closing argument, the prosecution again affirmed that the victim's body parts are "still there at the coroner's office as we have heard." (19 RT at 3784.)

(5) By repeatedly and explicitly eliciting testimony that petitioner failed to examine and test readily available evidence, the prosecution improperly implied that the evidence established petitioner's guilt and correspondingly that the failure to take advantage of an opportunity to view and test the evidence was tantamount to an admission of guilt. These untested conclusions and inferences prejudiced petitioner, rendering the guilt and penalty phases fundamentally unfair and unreliable.

b. During guilt phase closing arguments, the prosecution improperly and prejudicially argued that trial counsel did not ask prosecution witnesses about petitioner's statements that the victim may have suffered the injuries in a motor vehicle accident because those statements were inherently unreliable and, if put to the test by the government, would be revealed as false and fabricated evidence. (18 RT at 3569.) The remarks had the desired effect of undermining petitioner's credibility and suggesting that the defense was a sham.

c. The prosecution during guilt phase arguments, further suggested petitioner's omissions were synonymous with guilt when chastising trial counsel for neglecting to ask defense witnesses to bring their

reports or records documenting their observations of the victim in and around the time of the crime. (18 RT at 3568.)

d. Singly and cumulatively, the prosecution's improper remarks were intended to and did result in the jury finding defendant guilty and sentencing him to death based on petitioner's failure to act thus depriving petitioner of a fair trial and a reliable guilt and penalty phase trial

7. The prosecution improperly and prejudicially invited the jury to infer guilt based on petitioner's in court demeanor by arguing, during guilt phase closing arguments, "Did he look you guys [the jury] in the eyes when he said he didn't do it? Could he look us in the eyes and say he didn't do it? No. They called him nervous. They called him nonchalant. . . . I want to use another word, he is guilty. He looks guilty. He is guilty." (18 RT at 3594.) As alleged above, the prosecutor's menacing gestures towards petitioner made him avert his eyes, (Exh. 107 at 5902-03 [Declaration of Al Hernandez]), and allowed the prosecutor to argue that petitioner's demeanor was evidence of guilt. The prosecutor's remarks were offered as untested evidence of petitioner's guilt, thereby undermining the presumption of innocence and denying petitioner a fair trial and reliable jury determination as to guilt.

8. The prosecution falsely instructed the jury to ignore good character evidence, because it had "nothing to do with what he did at the scene." Various types of good character evidence were presented, including that he is honest and nonviolent.

9. The prosecution erroneously and prejudicially argued that the jury should show petitioner the same mercy and sympathy he showed the

victim, utilizing petitioner's denial of guilt as a reason to sentence him to death.

a. The prosecutor concluded his penalty phase argument by stating: "I ask you one final thing, that is to give the defendant the mercy that he gave to Consuelo Verdugo. When he asked for your mercy here today through Mr. Harbin, you remember him on the stand denying anything happened. Mr. Harbin says that he could be rehabilitated, I ask you to remember how he denied every single thing for hours on there. I ask you to show him the same mercy that he showed Consuelo Verdugo and to do justice here today, that is to sentence him to death." (19 RT at 3780.)

b. In improperly appealing to the passions and prejudices of the jury, the prosecutor invited the jury to convict petitioner based on emotions and fear and ignore the reasoned individualized consideration of mitigating evidence as dictated by the fourteenth and eighth amendments, thereby resulting in an unreliable, arbitrary, capricious and fundamentally unfair penalty determination.

10. The individual and cumulative effect of the prosecutor's misconduct as set forth in the foregoing paragraphs could not have been cured by objection and admonition of the trial court. The instances of misconduct were of a nature and were timed by the prosecutor to highlight the substance of his comments and to be exacerbated by timely objection and further discussion in the presence of the jury. The individual and cumulative effect of the misconduct alleged herein and in the earlier claims demonstrating the coerced, false nature of the prosecution's case and the prosecutor's repeated failure to disclose material favorable evidence,

prejudiced petitioner and had a substantial and injurious influence or effect on the jury's determination at the guilt and penalty phases of petitioner's trial, and deprived the proceedings of fundamental fairness.

11. To the extent that this Court concludes that trial counsel and/or appellate counsel failed to object to the various acts of misconduct and/or raise this challenge on appeal, despite the non-record facts presented in support of this claim, petitioner has been prejudicially deprived of effective assistance of counsel.

L. CLAIM 12: PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF THE RIGHT TO COMPETENT INTERPRETER SERVICES DURING HIS CAPITAL TRIAL.[15]

Petitioner's conviction, death sentence, and confinement were unlawfully obtained in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights and their California Constitutional counterparts, not to be tried while incompetent; to comprehend the nature and content of all capital proceedings against him; to assist counsel in his defense; to be present; to present a defense; to confront and cross-examine the witnesses against him; to the effective assistance of counsel; to a fair and impartial jury; to a reliable, fair, non-arbitrary and non-capricious determination of guilt, death eligibility, and penalty verdicts based on accurate information, rather than false testimony or misinformation; to due process of law; to defense representation and a court-appointed interpreter free of conflicts of interest; to the enforcement of mandatory state laws; and in violation of his state and federal constitutional rights to a qualified interpreter and to equal protection under the laws; because at the time of the capital proceedings against him, petitioner was a monolingual Spanish-speaker; the trial proceedings were conducted in English; the interpreters appointed for petitioner were untrained, uncertified and unqualified, and failed to competently and adequately interpret the proceedings to petitioner and interpret witnesses' testimony to the court. Despite the trial court's and defense counsel's awareness of these facts, the court and counsel failed to inquire into the need to employ readily available remedies to enable petitioner to comprehend and participate in the proceedings. As a result of

[15] This Claim qualifies as a Category 2 claim.

the inadequate interpretation, unrectified by the court and defense counsel, petitioner gleaned only a haphazard understanding of the proceedings that resulted in his death sentence and was unable to assist counsel in his defense. Moreover, the jury received materially false, inaccurate and incomplete accounts of the testimony of the Spanish-speaking witnesses, including petitioner.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in the claims pertaining to the state's misconduct; trial counsel's ineffective representation; petitioner's mental retardation, mental illness and neurological dysfunction; and petitioner's illegally obtained and involuntary statements, (see Claims 9, 13, 20), are incorporated into this claim as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. At the time of the capital proceedings against him, petitioner was (and is to this day) a monolingual Spanish speaker.

3. The California Constitution guaranteed petitioner the right to a qualified interpreter throughout the proceedings. (*See* Cal. Const. Art. I., Sec. 14.)

4. The interpreters appointed by the court to interpret for witnesses and employed by defense counsel to communicate with petitioner and witnesses, Al Hernandez and Victor Almaraz, were unqualified, uncertified, and failed competently and adequately to interpret the proceedings for petitioner.

a. Al Hernandez interpreted in court for petitioner including interpreting the witnesses' testimony to petitioner, interpreting counsel's questions to petitioner during his testimony and petitioner's testimony to the court, and interpreting for petitioner and counsel when they communicated in court. (Exh. 107 at 5901-02 [Declaration of Al Hernandez].) Hernandez also once interpreted for some Spanish-speaking friends and family of petitioner at defense counsel's office. (*Id.* at 5902.) In addition, Hernandez reviewed the transcript and translation of petitioner's interrogation prepared by law enforcement prior to it being given to the jury to follow while the tape of the interrogation was played in court. (1 RT at 97-98.)

b. Victor Almaraz interpreted the testimony of all Spanish-speaking defense witnesses, except petitioner, both during the guilt and penalty phases. During the guilt phase he interpreted for all the defense character witnesses – Guadalupe Benavides, Hector Figueroa, Armando Benavides (16 RT at 3278, 3290; 2 CT at 515) – and during the penalty phase for all the defense witnesses – Dionicio Campos and Delfino Trigo. (18 RT at 3751, 3759; 3 CT at 787.) Almaraz interpreted for petitioner during a hearing on a motion to continue on February 28, 1992. (RT of proceedings conducted on February 28, 1992 at 3.) Almaraz was also the main contact between defense counsel Harbin and the friends and relatives of petitioner. (Exh. 108 at 5906 [Declaration of Victor G. Almaraz].)

c. Though neither Hernandez nor Almaraz were certified to interpret, (Exh. 107 at 5901-02 [Declaration of Al Hernandez]; Exh. 108 at 5909 [Declaration of Victor G. Almaraz]), the trial court failed to make

the statutorily required determination that good cause warranted their appointment. The court and counsel also prejudicially failed to ensure that Hernandez's and Almaraz's abilities to speak Spanish and interpret for witnesses and petitioner met the state constitutional right to a competent interpreter and federal right to due process.

d. Had the court made such an inquiry and had counsel moved to ensure that the testimony of defense witnesses and petitioner was competently, reliably, and accurately interpreted, they would have learned that both Hernandez and Almaraz are incompetent interpreters and translators.

e. Hernandez was an incompetent interpreter and translator.

(1) He has failed the state certification examination for interpreters "three or four times." (Exh. 107 at 5901 [Declaration of Al Hernandez].) Hernandez fundamentally misunderstood his function as an interpreter. (Exh. 87 at 5536 [Supplemental Declaration of Haydee Claus, M.A.].) Hernandez did not interpret the meaning of petitioner's words, but rather gave a literal interpretation, which at times distorted the meaning of petitioner's words. (*Id.*) The state certification examination that Hernandez failed repeatedly precisely tests an interpreter's ability to interpret words in context, rather than literally. (*Id.*)

(2) Hernandez had no training or competence to translate the extensive and complicated medical terminology used at trial. His cursory preparation, which entailed watching Spanish-

language television and buying books, (Exh. 107 at 5901 [Declaration of Al Hernandez]), coupled with his inherent incompetence rendered him unable accurately to interpret in court.

(3) Hernandez also failed to interpret all parts of the proceedings for petitioner. Petitioner complained to his niece, Norma Patricia Yañez Benavides, when she visited him in jail, that his interpreter did not interpret everything that was happening in court. (Exh. 111 at 5962 [Declaration of Norma Patricia Yañez Benavides].)

f. Almaraz is an incompetent interpreter and translator. He was not a state certified interpreter. (Exh. 108 at 5909 [Declaration of Victor G. Almaraz].) Prior to and during petitioner's trial, Almaraz was known for being an incompetent, unreliable, and inaccurate interpreter whose misinterpretations have created substantial confusion in court.

(1) Defense counsel's secretary Marisol Alcantar, a fluent Spanish and English speaker, has witnessed his inability to translate correctly:

> [Almaraz's] Spanish is sometimes unintelligible – he uses slang and combines English and Spanish words. I have heard Victor interpret in court on previous occasions, and he has often used the wrong word to translate between English and Spanish and vice versa. I saw him once translate the word "vésicula," which means gallbladder, as a "woman's private area." This created a lot of confusion in court. As a fluent English and Spanish speaker, I would not use him in a courtroom.

(Exh. 105 at 5893 [Declaration of Marisol Alcantar Calderon].)

(2) Hernandez has also witnessed Almaraz's incompetence:

> I knew Victor from a number of previous cases where we had both interpreted. I consider Victor to be an incompetent translator. He was not well-educated or trained and, although he could handle some simple matters, he could not handle anything complex. He does not speak Spanish well. Judges allow him to translate on cases because they take pity on him. I witnessed many times when he misinterpreted a word by a witness which led to a lot of confusion in the courtroom. In one case where we worked together he did not know how to interpret "taller," which, in the context the witness used it, meant car repair shop. I saw him mumble a nonsensical word to cover up for the fact that he did not know the word. I had to tell him how to translate the word.
>
> I also was with Victor in another case, which took place before Vicente's trial, where the attorneys, Victor, and I were called into the judge's chambers to clarify some confusion that had been created as a result of his mistranslation. Initially I was interpreting for the defendant, while Victor was doing so for the witnesses. The prosecutor had asked a young man, who was a Spanish-speaking witness, when he had used the bathroom. Victor used "servicio" for "bathroom," which confused the witness who thought he was asking whether he had served in the armed services. The witness said he had not been in the "servicio." We then went in chambers where it became clear that Victor had failed to adequately convey the question to the witness, which had led to the confusion.
>
> (Exh. 107 at 5904 [Declaration of Al Hernandez].)

(3) Spanish-speaking friends and family of petitioner who spoke to Almaraz had difficulty understanding him because his Spanish was so poor. Jose Isabel Figueroa, a distant cousin of petitioner, describes his difficulties communicating with Almaraz as follows:

> Victor spoke Spanish, but not very well. It seemed like Spanish was not his first language and he had a *Tejano* accent and way of speaking: He used words in English, and other times he mixed words so they were strange combinations of Spanish and English. I found it hard to understand him. His vocabulary was limited and his pronunciation was poor.

(Exh. 102 at 5795 [Declaration of Jose Isabel Figueroa].)

(4) Petitioner's brother, Evaristo Benavides, also struggled to understand Almaraz because of his very poor Spanish speaking skills. Evaristo explains: "Each time [Almaraz] called, I struggled to understand him, as his Spanish was very bad. I could tell he was not a native speaker and could not pronounce words well." (Exh. 119 at 6173 [Declaration of Evaristo Benavides].)

g. Accurate interpretation also requires that the interpreter transmit the meaning of the witnesses' words in context rather than offering a literal interpretation that may distort the meaning. (Exh. 87 at 5536 [Declaration of Haydee Claus].) The failure of the court or counsel to provide and ensure accurate interpretation violated petitioner's state and federal constitutional rights.

5. Hernandez's interpretation of petitioner's testimony and the questions posed to him by the attorneys during his testimony was prejudicially incompetent, inaccurate, incomplete, and confusing.

a. Instead of properly interpreting the meaning of petitioner's testimony, Hernandez provided nonsensical, word-for-word interpretations. (*See, e.g.*, 15 RT at 2997 ("Estella went for me at the apartment from my work");15 RT at 3015 ("I turned on the fan so it could – the air could hit the child").)

b. Petitioner had difficulty understanding the questions put to him during his testimony, and conveyed this fact to the court, defense counsel and the prosecutor. (*See, e.g.*, 15 RT at 2974, 3031, 3050, 3065.) Petitioner's inability to understand the questions is also evidenced by his sometimes incongruous and wholly unresponsive answers to questions. (*See, e.g.*, 15 RT at 3008 ("Q. And what time do you normally leave when you go to work? A. Well, like that day – well, like another day Estella was going to take me."); *see also e.g.*, 15 RT at 3010, 3011, 3018, 3023, 3024, 3027, 3030-32, 3034, 3040, 3050, 3055, 3077.)An example of an incorrect interpretation – which was later capitalized on by the prosecutor – was Hernandez's interpretation of petitioner's testimony, "Me sentia mal," as "I was feeling bad." (Exh. 107 at 5902 [Declaration of Al Hernandez]; 15 RT at 3010, 3028, 3029.)

c. The phrase "Me sentia mal" actually has a broad range of meanings in Spanish. The most common meaning is, "I was feeling sick," but depending on context it can also mean "I was feeling sad/worried /distraught/sorry/upset." Trained interpreters are taught to ascertain

contextual clues that provide the intended meaning. In this case, there are obvious clues as to the intended meaning, since petitioner stated three times while using the phrase that he had not slept or eaten for some time. The correct interpretation in those instances, therefore, was "I was feeling sick." (Exh. 63 at 5223 [Declaration of Haydee Claus].) Hernandez's literal translation of petitioner's words without regard to context is a common mistake of untrained and uncertified interpreters. (Exh. 87 at 5536-37 [Supplemental Declaration of Haydee Claus, M.A.].)

d. Petitioner's limited cognitive capacities only exacerbated the prejudice to petitioner resulting from the poor interpretation. Petitioner's inability to understand the words used in the proceedings is evident from his asking Hernandez the meaning of simple words: "I recall he asked me what the words 'octavo' and 'sodomizar' meant. I explained 'octavo,' which means eighth. I also explained 'sodomizar,' which is the word I used to translate sodomy. When I did so, he said that he had not done that to the girl." (Exh. 107 at 5902 [Declaration of Al Hernandez].) The inadequate interpretation of petitioner's capital proceedings precluded petitioner from comprehending the testimony adduced at his trial, or communicating with counsel regarding such testimony, and thus deprived petitioner of his Sixth Amendment rights to confrontation and cross-examination of the witnesses against him, and to the effective assistance of counsel. This violation of petitioner's constitutional rights was per se prejudicial, and had a substantial and injurious effect or influence on the jury's determination of the verdict at the guilt and penalty phases of petitioner's trial.

e. The inadequate interpretation also in effect absented petitioner from the proceedings, in violation of his right to be present in the proceedings against him, as guaranteed by the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. This violation of petitioner's constitutional rights was per se prejudicial, and had a substantial and injurious effect or influence on the jury's determination of the verdict at the guilt and penalty phases of petitioner's trial.

6. Hernandez's poor translation skills also materially prejudiced petitioner's representation when he incorrectly stated that the transcription and translation performed by law enforcement of petitioner's interrogation was accurate. (1 RT at 97-98.) As explained more fully in Claim 13, the translation of the interrogation was riddled with inaccurate and misleading statements that fundamentally and prejudicially changed and misrepresented petitioner's words to the jury. The interpretation of the testimony of Spanish-speaking witnesses and the attorney's and court's questions to these witnesses by Almaraz was equally inadequate.

a. Nearly every witness for whom Alamarz interpreted stated that they did not understand a question or expressed confusion regarding the questions Almaraz interpreted. (*See, e.g.*, 16 RT at 3280, 3292-93, 3295, 3298; 17 RT at 3376; 19 RT 3752, 3754, 3756, 3760, 3763.) This is noteworthy especially because all of the witnesses gave very limited testimony, and yet what little Almaraz interpreted was confusing. Given this uncommon level of confusion expressed by all the witnesses and

Almaraz's track record of poor interpretation, it is highly likely that his poor interpretation skills account for the confusion.

b. It is evident from the transcript that Almaraz offered a literal interpretation of the witnesses' words, thus distorting them or making them sound incoherent. For example, in interpreting Dionicio Campos' testimony during the penalty phase, Almaraz used the word "ranch" to interpret the word "rancho" in Spanish. (19 RT at 3753.) "Rancho" does not mean "ranch" in English. As used by Campos and people from Mexico, "rancho" refers to a group of a few humble houses and families who live in a rural area among the fields. (Exh. 104 at 5858 [Declaration of Dionicio Campos].) By using the word "ranch" Almaraz gave the distorted impression that petitioner had grown up in a far more affluent place than where he did.

c. Almaraz's inability accurately to interpret questions, tendency to translate literal words rather than meaning, limited vocabulary in Spanish, and practice of mixing Spanish and English likely contributed to the witnesses' confusion and rendered his interpretation of their testimony inaccurate. As a result, petitioner was denied the fundamental right to present witnesses in his defense and to have the jury decide his case using an accurate understanding of the witnesses' statements.

7. The trial court's failure to appoint a certified, qualified and competent interpreter, despite the court's knowledge that the interpreters appointed by the court were not certified, not qualified, and not competent, violated petitioner's state constitutional right to a qualified interpreter, and his Fourteenth Amendment rights to equal protection and due process of

law. This violation of petitioner's constitutional rights was per se prejudicial, and had a substantial and injurious effect or influence on the jury's determination of the verdict at the guilt and penalty phases of petitioner's trial.

8. The inadequate interpretation of petitioner's trial precluded petitioner from having a rational and factual understanding of the capital proceedings against him, from being present, and from assisting counsel in his defense. As set forth in Claim 13, petitioner's difficulty in comprehending the proceedings due to their inadequate interpretation was exacerbated by petitioner's mental disabilities. As a result, petitioner was unable to participate at his trial in violation of his Fourteenth Amendment right to due process of law.

9. The trial court was aware that the interpreters were unqualified and that their interpretation was inadequate, but nevertheless unreasonably failed to inquire into the need for or to employ readily available remedies to provide the jury with truthful, accurate and complete interpretations of the testimony of the Spanish-speaking witnesses, including petitioner. The trial court's errors resulted in the introduction of false, inaccurate, and incomplete testimony to the jury in violation of petitioner's Fourteenth Amendment right to due process; Sixth Amendment rights to present a defense, to confront and cross-examine witnesses against him and to the effective assistance of counsel; and Eighth Amendment right to a reliable, fair, non-arbitrary and non-capricious determination of guilt, death eligibility, and penalty based on accurate information, rather than false testimony or misinformation. This violation of petitioner's

constitutional rights was per se prejudicial, and had a substantial and injurious effect or influence on the jury's determination of the verdict at the guilt and penalty phases of petitioner's trial.

10. Petitioner's trial counsel was aware that the interpreters were unqualified, and that their interpretation was inadequate, but nevertheless unreasonably failed to object to the court's failure to employ readily available remedies to enable petitioner to comprehend and participate in the proceedings; to provide petitioner with a certified, qualified, and competent interpreter; or to provide the jury with truthful, accurate and complete interpretations of the testimony of the Spanish-speaking witnesses, including petitioner.

a. Trial counsel had no valid strategic reason for failing to object to the inadequate interpretation of the capital proceedings against petitioner, and this failure was unreasonable under the circumstances. Competent counsel would have ensured that adequate interpretation was provided during petitioner's capital trial.

b. But for trial counsel's failure to ensure that adequate interpretation was provided during petitioner's capital trial, there is a reasonable probability that the jury would not have convicted petitioner nor sentenced him to death.

11. Each of these violations of petitioner's constitutional rights considered independently or cumulatively were per se prejudicial, and had a substantial and injurious effect or influence on the jury's determination of the verdict at the guilt and penalty phases of petitioner's trial. Petitioner did

not at any time implicitly or explicitly waive the constitutional rights set forth above.

M. CLAIM 13: PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR AND RELIABLE DETERMINATION OF GUILT AND PENALTY BY TRIAL COUNSEL'S PREJUDICIALLY DEFICIENT PERFORMANCE.[16]

The convictions and sentence of death were rendered in violation of petitioner's rights to a fair and impartial jury, to a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, to the effective assistance of counsel, to present a defense, to a trial free of materially false and misleading evidence, and to due process of law as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law because petitioner's trial counsel rendered constitutionally deficient representation at all critical stages of the criminal proceedings.

Trial counsel unreasonably failed to conduct a timely or adequate investigation of the potential guilt and penalty phase issues, did not develop or present a coherent trial strategy, and were unable to make informed and rational decisions regarding potentially meritorious defenses and tactics. Petitioner's counsel's errors and omissions were such that a reasonably competent attorney acting as a diligent and conscientious advocate would not have performed in such a fashion. Reasonably competent counsel handling a capital case at the time of petitioner's trial knew that a thorough investigation of the prosecution's theories of guilt, independent analyses of

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[16] This Claim qualifies as a Category 2 claim, except for subsection 20, which is a new claim and therefore is a Category 3 claim.

the physical evidence supporting those theories, including, but not limited to, the reliability of anticipated medical testimony and the chain of custody of forensic evidence and potential defenses, was essential to the development and presentation of a defense at trial. Reasonably competent counsel knew that adequate investigation of the victim's prior injuries and illnesses sought to be introduced by the prosecution was essential to successfully moving to exclude the evidence and developing a sound defense strategy. Reasonably competent counsel also recognized that a thorough investigation of a defendant's background and family history, including, but not limited to, the defendant's medical, mental health, academic, social and cultural history, was essential to the adequate preparation of both the guilt and penalty phases.

Counsel's failures to investigate adequately and present defenses and protect petitioner's statutory and constitutional rights prejudiced the defense. But for counsel's unprofessional errors, the result of the proceeding would have been different.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Trial counsel unreasonably and prejudicially failed to investigate causes for Consuelo's injuries, including but not limited to the failure to independently analyze the available physical evidence and medical records, interview logical witnesses and consult with independent experts.

a. Reasonably competent counsel would have considered and investigated the following possible defenses: (1) that the criminal

agency was caused by alternative suspects; (2) that the evidence to support the special circumstances and felonies were caused by means other than criminal agency; and, (3) the cause of death offered by the pathologist was anatomically impossible.

b. Trial counsel unreasonably focused on a car accident as a theory for the injuries even though she could not account for the vaginal and anal trauma by that theory. (Exh. 64 at 5338 [Declaration of Donnalee H. Huffman]; Exh. 106 at 5898 [Declaration of Jon Purcell].) Having fixated on this as an explanation for some of Consuleo's injuries, trial counsel unreasonably failed to develop evidence in support of that theory or any explanation for the other injuries. As a result, at pretrial proceedings on March 16, 1993, Ms. Huffman informed the court that she did not have any witnesses to support the notion that the injuries were caused by an auto accident. (1 RT at 134.)

c. Trial counsel failed to conduct an adequate investigation of guilt. Huffman initially hired Richard Villalovos who performed only the limited task of photographing the crime scene and speaking to neighbors. (Exh. 70 [Declaration of Richard Villalovos].) Subsequently, Huffman hired Jon Purcell, who did not speak Spanish and whose primary work was to coordinate witnesses, serve subpoenas, and deliver materials to experts. (Exh. 106 at 5897 [Declaration of Jon Purcell].)

d. Trial counsel knew or reasonably should have known that she was required to vigorously rebut the evidence of sexual abuse. (Exh. 64 at 5337 [Declaration of Donnalee H. Huffman].) By 1993, the

year of the trial, Kern County had become notorious for its over-zealous prosecution of alleged molestation rings. Reasonably competent counsel would have investigated and presented testimony concerning the bias of the prosecution's witnesses and the likelihood of prosecutorial over-reaching and misconduct. Hospital records from UCLA in trial counsel's possession indicated a level of bias. A communication from UCLA medical personnel to the prosecution stated: "get this guy for all of us." (Exh. 3 at 412 [Letter from Diane L. Huddleston].) Counsel unreasonably failed to investigate and present evidence that this bias permeated the views of medical personnel, or otherwise to investigate the reliability of the medical evidence proffered by the prosecution.

e. Counsel unreasonably failed to review the medical records and thoroughly investigate the medical evidence regarding Consuelo's injuries.

(1) As a result of counsel's unfamiliarity with the medical evidence, her questioning of the medical personnel was frequently incoherent. (*See, e.g.*, 12 RT at 2411, 2471.) Trial counsel's lack of preparation and unfamiliarity with the medical records significantly prejudiced petitioner. Examples of counsel's inept questioning include but are not limited to her cross-examination of Dr. Harrison where she unreasonably sought to introduce testimony that he had noted superficial lacerations of the victim's anus in his notes, (12 RT at 2391.), even though he repeatedly denied having noted lacerations. (12 RT at 2394-95.) No possible reasonable defense trial strategy informed counsel's

repeated, mistaken, efforts to force Dr. Harrison to adopt such damaging and false evidence.

(2) Defense counsel's cross-examination of Dr. Harrison (12 RT at 2357-97), like that of most of the doctors, evidenced counsel's lack of any coherent theory to explain the medical condition of Consuelo during her hospitalization and she was completely unprepared to put on a defense. For forty pages of transcript, she requested that Dr. Harrison comment on his medical reports without purpose or direction to her questioning. Not having interviewed any of the medical experts who testified prior to trial, she used the trial as an opportunity for discovery. Counsel's strategy of discovering the facts at trial was unreasonable and fell far below a reasonable standard of competence. In fact, her cross-examination of Dr. Harrison was so ineffective and aimless, that she failed to establish any points favorable to the defense at all. Her cross-examination was so ineffective, that the prosecutor did not even redirect at the end of her cross. (12 RT at 2397.)

2. Trial counsel unreasonably failed to investigate and present readily available medical evidence contradicting the State's purported evidence in support of Count Two (rape) (PC § 261); Count Three (lewd act upon a child) (PC § 288(a)); and Count Four (sodomy with a child) (PC § 286(c)); and the special circumstance allegations that the murder was committed during the commission of rape, (PC § 190.2(a)(17)(C)); during commission of sodomy, (PC § 190.2(a)(17)(D)); and during the commission of a lewd act upon a child (PC § 190.2(a)(17)(E)). The readily available

evidence included, but was not limited to, the testimony of qualified medical personnel who could and would have testified that immediately after the alleged offense the decedent showed absolutely no medical or physical indications of having been sexually assaulted.

a. Reasonably competent counsel would have recognized the need to investigate the presence or absence of injuries or trauma to the child's genitalia and anus in preparation for potential defense at trial. Trial counsel knew or reasonably should have known that the prosecution's case relied upon the assertion that the child sustained injuries to her genitalia and anus. The prosecutor's evidence which was reasonably known to counsel included Dr. Diamond's, preliminary hearing testimony describing his observations of lacerations to the genitalia and anus, ([1 CT at 183-85]) and the conclusion of the State's pathologist, Dr. Dibdin that the internal abdominal injuries were attributable to blunt force trauma of the anus. (Exh. 8 at 3555, 3560 [Autopsy Protocol].)

b. Despite the obvious importance of such an investigation, trial counsel failed to undertake any investigation to determine whether the prosecution's assertions regarding the genital and anal injuries were materially accurate or legally relevant. In particular, trial counsel failed to locate, interview, or present the testimony of persons who had relevant information about the condition of Consuelo's genitalia and anus when she was first admitted to the hospital at Delano Regional Medical Center ("DRMC").

c. Although trial counsel knew or should have known that all DRMC personnel who saw Consuelo in the first two hours after the

alleged attack possessed the medical training and expertise to examine for and recognize physical indications of sexual abuse, and had affirmatively and emphatically stated to law enforcement that they had not detected any injury to the genitalia or anus during repeated medical procedures, including attempts to catheterize the child and take her rectal temperature, counsel did not interview any of these participant witnesses or present their testimony at trial.

(1) Linda Roberts, R.N., was the attending nurse at DRMC when Consuelo was admitted at 7:50 p.m., shortly after the alleged attack. Nurse Roberts repeatedly attempted to catheterize Consuelo and took her rectal temperature. (Exh. 1 at 5 [DRMC Records].) Counsel knew or should have known that Nurse Roberts told District Attorney investigator Ray Lopez the following:

> I did not see anything unusual about it [her vaginal and anal area] and that's why we were real surprised when we heard that...I didn't see any tearing, I didn't see any bruising, I didn't see any bleeding, I didn't see anything out of normal. We always look for that, you know, we're trained to look for that...and I'm sure that if something would have been, you know, really wrong there it would've just caught my eye immediately, but uh, I did not see that...It was nothing fresh, there was...nothing, no. No. Absolutely not. There was no bruising of any sort, I didn't see any bruising. (Exh. 4 at 1683-84 [Law Enforcement Records].)

(2) Though counsel possessed the above quoted transcript of the District Attorney investigator's interview with Roberts, counsel prejudicially and unexplainably failed to interview Roberts or present her testimony or statements at trial. Had trial

counsel contacted Roberts and presented her testimony she would have confirmed that there was absolutely no signs of injury to Consuelo's genitalia or anus when she was admitted at DRMC. (Exh. 74 at 5432-33 [Declaration of Linda Roberts, R.N.].)

(3) Counsel knew or should have known that Faye Van Worth, R.N., the supervising nurse taking care of Consuelo also saw no signs whatsoever of injury to her genitalia or anus. Nurse Van Worth told District Attorney Investigator Lopez the following:

> When we were catheterizing her, I saw no evidence in the vaginal area, okay? I found nothing that made me suspicious of sexual trauma. ....
>
> I did not turn her over and look [at the anus], but you know, in a child that small, there was nothing obvious or gross...or I would have seen it when I tried to put the catheter in... because you have the legs apart. And you know in a child that small, the urethra [?] is right there by the vaginal area and I...saw nothing that made me suspicious at that time, of sexual assault. (Exh. 4_at 1745-46 [Law Enforcement Records].)

In response to Lopez's question regarding what might have happened to the child's diaper Van Worth responded:

> Usually ... if it was a disposable diaper it probably was tossed in the garbage....But, if there was anything suspicious on it, they would've noticed it...If it was grossly bloody. There was no blood around the rectum, there was nothing when I tried to catheterize her that would make me suspect sexual assault. (Exh. 4 at 1748-49 [Law Enforcement Records].)

In response to further questions regarding possible injuries to the genitalia or anus Van Worth responded emphatically:

> [T]here was no swelling, there was no vaginal discharge, there was no blood. I didn't notice anything gross in the vaginal-rectal area when I was trying to get the Foley in that would make me suspicious. (Exh. 4 at 1759-60 [Law Enforcement Records].)
>
> [T]he rectal-vaginal tear I saw no indication of that. (Exh. 4 at 1764 [Law Enforcement Records].)
>
> [T]here was no blood on the sheet. (Exh. 4 at 1768 [Law Enforcement Records].)

(4) Had counsel contacted and interviewed Nurse Van Worth she would have stated and testified the following:

> We did not see scratches, tears, or bruises on her genitalia or anus while we worked on Estella's daughter. There was no swelling, and no discharge or blood that would have indicated she had been harmed. Had there been vaginal or anal trauma, I am certain we would have seen it. Moreover, multiple rectal temperatures were taken of this patient and the doctor or nurse who took the temperature saw no signs of trauma or abuse in that area. Taking a rectal temperature is an invasive procedure. If a patient shows signs of anal trauma then a temperature would be taken by other means.

(5) Emergency Room Technician Donald Jordan was also involved in the initial admittance of Consuelo to DRMC and may have helped take her clothes off. Jordan told Detective Lopez that though he was looking for blood, he did not recall observing any. (Exh. 4 at 1778 [Law Enforcement Records].) Defense counsel unreasonably failed to interview and present Jordan's testimony at trial.

(6) The only DRMC nurses who were called to testify, Francis Zapiain and Anita Caraan, were called by the prosecutor who carefully limited the scope of their direct examination to avoid disclosing the fact the witnesses did not observe any bruising, tearing, blood or swelling of the child's genitalia and anus. (14 RT at 2777-89; 2770-76.)

(a) Defense counsel's cross-examination of Nurse Zapiain was ineffectual principally in that she failed to ask whether Zapiain had seen any indication of injury to the anus and genitalia. (14 RT at 2787-2788.) In an interview with District Attorney investigator Lopez, Zapiain indicated that she had not seen any blood, secretions, or anything unusual in Consuelo's genitalia. (Exh. 4 at 1792 [Law Enforcement Records].) Had defense counsel contacted and interviewed Zapiain, counsel could have elicited her testimony regarding the lack of any signs of injury. Nurse Zapiain would have testified the following:

> ...Linda Roberts and I were both looking at the child's genital area while we tried to catheterize her, and I saw no redness, no swelling, no scarring, no blood or other discharge, no irritation, nothing. We observed nothing that looked abnormal, and especially nothing that looked like an indication of sexual abuse. The nurses also took her rectal temperature and saw nothing unusual about her anus or rectum. (Exh. 73 at 5425-26 [Declaration of Francis Zapiain].)

(b) Nurse Anita Caraan's brief testimony focused on Mr. Benavides's demeanor. Defense counsel unreasonably failed to elicit her observations regarding the lack of injuries to the genitalia and anus. (14 RT at 2770-76.) Nurse Caraan had told District Attorney investigator Lopez that she did not see any blood in the child's underwear, nor did she have any reason to suspect abuse prior to transferring her to Kern Medical Center ("KMC"). (Exh. 4 at 1803-13 [Law Enforcement Records].) Had defense counsel contacted Caraan prior to trial and asked her at trial about her observations regarding the lack of injuries, Caraan would have testified consistent with all DRMC personnel that there were no injuries to the genitalia or anus. (Exh. 72 at 5419-22 [Declaration of Anita Caraan].)

(7) Defense counsel unreasonably failed to ask the only witness from DRMC called to testify for the defense, Dr. Ann Tait, about the lack of injury to the genitalia and anus. Dr. Tait was the emergency room doctor on duty at DRMC when Consuelo was admitted. Dr. Tait's emergency room records do not mention any injury or anything unusual in Consuelo's genitalia or anus. (Exh. 1 at 3-4 [Emergency Treatment Record, Dr. Tait, November 17, 1991].) Dr. Tait's testimony regarding the genitalia and anus was limited to stating that she did not do a vaginal or rectal exam and that

she did not remember whether or not there was blood on the gurney when Consuelo was transferred to KMC. (17 RT at 3311-33.)

(8) Defense counsel did not contact Dr. Tait prior to testifying and consequently was completely unprepared to present her testimony. (Exh. 65 at 5345-55 [Declaration of Jeffrey Harbin].) Following her typical modus operandi, defense counsel used the trial as an opportunity to discover what her witnesses might say. Had counsel contacted Dr. Tait prior to trial she would have explained that she did not observe any injury to the genitalia and anus during her entire stay at DRMC. Dr. Tait would have dispelled the prosecutor's suggestion that she did not have the training to recognize signs of sexual abuse or that the absence of such observations in her notes was due to the emergency nature of the situation. (Exh. 76 at 5442 [Declaration of Ann Tait, M.D.])

(9) Had defense counsel contacted and interviewed the DRMC personnel and presented their testimony they could have countered the prosecutor's and the Court's false and misleading suggestions that the reason no injury was seen at DRMC was because of poor training or lack of opportunity to properly visualize the genitalia and anus, or to document their observations. (14 RT at 2879 [prosecutor]; 14 RT at 2881 [Court].) All the medical personnel attending Consuelo at DRMC have been trained to identify sexual and physical abuse and are mandated by law to report any suspicions of abuse. (Exh. 75 at 5436, 5438 [Declaration of Faye Van Worth]; Exh. 74 at 5432-33 [Declaration of Linda Roberts,

R.N.]; Exh. 72 at 5420-21 [Declaration of Anita Caraan]; Exh. 73 at 5425 [Declaration of Francis Zapiaian].)

(a) If defense counsel had asked her to testify Supervising Nurse Van Worth would have stated unequivocally that she and her staff had the training to identify, document, and report any signs of abuse. (Exh. 75 at 5438 [Declaration of Faye Van Worth]; [Listing Training].) Nurse Van Worth would have testified the following:

> No one on my staff saw any trauma to the little girl's genitalia that night. There were numerous times that the staff would have seen signs of abuse if it existed – when the baby's diaper was removed, during countless attempts to catheterize her, as well as when her rectal temperature was taken. With each of these procedures, the nurse or doctor must visualize, and look at, the urethral and/or rectal areas. In addition, when removing her diaper, if the doctor or nurse saw any blood, discharge, or anything suspicious, the medical staff person is obligated to save and bag the diaper for testing or review by the police. As there was nothing suspicious on the diaper, the nurse did not save it. (Exh. 75 at 5536-37 [Declaration of Faye Van Worth].)

(b) If she had been asked to testify Nurse Linda Roberts would have explained that she has extensive training in recognizing signs of physical and sexual abuse and could not have missed any tearing, swelling, bleeding, or bruising during the two hours she attended to Consuelo. Linda Roberts would have testified as follows:

> In 1991, when I attended to Consuelo, I had the skill, training, and opportunity to notice if there had been any trauma to the genitalia and anus. At that time, I had not only completed my required sexual abuse training as part of my RN licensing and training, but I had also undergone Sexual Assault Response Training (SART), and had completed my Trauma Nursing Core Curriculum (TNCC), as well as received my pediatric advanced cardiac life support certification. The sexual abuse training I received specifically trained me to detect signs of sexual abuse. (Exh. 74 at 5432-33 [Declaration of Linda Roberts, R.N.].)

(10) Defense counsel's unreasonable failure to present the critical testimony of the first medical personnel to examine Consuelo after her injury, was prejudicial. No reasonable jury would find that a child could be sodomized and raped by an adult male at 7:00 p.m. and show no signs of any injury to her genitalia or anus an hour later.

d. Counsel knew or should have known that there was no accurate reliable medical evidence of vaginal penetration. Counsel's unreasonable failure to cross-examine prosecution experts and present expert testimony regarding the lack of injury to the vaginal wall unduly prejudiced the defense by failing to counter the rape charge and special circumstance. Counsel knew or should have known that the tear to the anterior wall of the vagina noted in the autopsy report by Dr. Dibdin had not been corroborated by any other examining physician. Counsel knew or should have known that the irreconcilable contradictions in the descriptions of the purported injuries to the vaginal wall by the pathologist Dr. Dibdin and the sex abuse specialist Dr. Diamond seriously undermined their

credibility. Counsel's unreasonable failure to cross-examine Dr. Dibdin and Dr. Diamond regarding the inconsistencies in their testimony prejudiced the defense.

(1) In a diagram of the genitalia in the autopsy report, pathologist Dr. Dibdin notes: "LAC'D POSTERIOR FOURCHETTE ½ " NO VAGINAL PENETRATION?" (Exh. 8 at 3545 [Autopsy Report Diagram].) Defense counsel unreasonably failed to ask Dr. Dibdin the significance of his notation asking whether there was vaginal penetration. Defense counsel unreasonably failed to elicit testimony from Dr. Dibdin or qualified defense experts who could have explained that the ½ inch laceration of the posterior fourchette is an external injury to the vagina that does not support a finding of vaginal penetration. (Exh. 83 at 5510-11 [Declaration of William Kennedy, M.D.].) The posterior fourchette is the lower portion of the external female labia where the labia minora meet. An injury to the external vaginal genitalia does not indicate vaginal penetration. (Exh. 83 at 5510 [Declaration of William Kennedy, M.D.])

(2) Dr. Dibdin's testimony about the injury to the vagina was inconsistent with the observations of the vaginal injuries he recorded in the autopsy report. The observations in the autopsy indicate there was no vaginal penetration, whereas Dr. Dibdin's testimony misleadingly indicates that there was injury to the internal vaginal cavity. At trial Dr. Dibdin misleadingly testified: "There was a tear in the vagina, the opening of the vagina in the back wall.

And it measured half an inch in length, so it was quite a large laceration." (11 RT at 2123.) The prosecutor then asked him whether the "tear in the vaginal wall" could have been caused by catheterization. Dr. Dibdin responded that it was unlikely. (11 RT at 2123.) Dr. Dibdin's reference to a tear "in the vagina" and the prosecutor's restatement of the testimony as a "tear in the vaginal wall" misled the jury to believing that there was internal tearing of the vagina.

(3) In the text of the autopsy report Dr. Dibdin noted: "There is a half inch laceration of the posterior wall of the vaginal opening." (Exh. 8 at 3557 [Autopsy Protocol].) The only indication of this half-inch laceration in the diagram attached to the autopsy report is that noted as a half-inch laceration of the posterior fourchette, i.e. the outer labia or the vaginal opening. As noted above, Dr. Dibdin's notation in the autopsy report "NO VAGINAL PENETRATION?" next to the indication of the posterior fourchette injury documented the expert's awareness that such an injury does not indicate vaginal penetration.

(4) The prejudice from counsel's unreasonable failure to cross-examine Dr. Dibdin with his autopsy findings is pervasive. Dr. Dibdin's testimony that "[s]ome object was inserted into this child's vagina," (11 RT at 2143) was not supported by the findings in the autopsy. Likewise, Dr. Diamond, who relied on Dr. Dibdin's findings of internal vaginal tears, testified that the tear could have been caused only by something being placed inside of the

vagina. (10 RT at 2061.) Counsel's unreasonable failure to impeach Dr. Dibdin with his findings regarding the lack of vaginal penetration effectively conceded the rape and special circumstance charges.

(5) Defense counsel's unreasonable failure to present evidence that there were no injuries to the internal vaginal wall also had the prejudicial effect of conceding the prosecution's explanation for the difficulties in catheterizing the child. Dr. Dibdin testified that the laceration in the vaginal wall explained the difficulties catheterizing Consuelo. (11 RT at 2123.) Dr. Diamond, the prosecution's sex abuse specialist, relied on Dr. Dibdin's findings of a laceration of the internal vaginal wall to account for his difficulties catheterizing Consuelo. (10 RT at 2059-60.)

(a) Prejudicially relying on Dr. Dibdin's false injury descriptions, Dr. Diamond explicitly misled the jury to believing there was an injury in the internal vaginal wall. He testified:

> The wall of the vagina internal to that hymen that I described this morning – and if you look at the display there [referring to genital diagram displayed for the jury, People's Exhibit 1], it's labeled vagina, that's inside, inside the hymen, it has an anterior wall and a posterior wall. The opening was in the anterior wall. The posterior wall goes down toward the rectum. Anterior wall goes upwards towards the head, let's say. There was a tear in the anterior wall. [sic]. (10 RT at 2060.)

(b) Further, Dr. Diamond attributed catheterization difficulties to the internal tear in the vaginal wall. He explained that the tear to the internal vaginal wall "meant that the catheter, as I went for the urinary meatus, went into that vaginal opening and through the anterior wall [sic] of the vagina into the peritoneal cavity." (10 RT at 2060-61.) Since there was no tear to the internal vaginal wall, Dr. Diamond's explanation for where the catheter went was materially false and misleading. (Exh. 83 at 5506 [Declaration of William Kennedy, M.D.].) Defense counsel's unreasonable failure to cross-examine Dr. Dibdin with his autopsy report, which only documented external tears to the vagina, was prejudicial.

(6) The Court admitted Dr. Diamond's reliance on Dr. Dibdin's hearsay findings conditioned on Dr. Dibdin subsequently confirming the findings in his testimony. Further, the Court stated that if Dr. Dibdin's testimony did not confirm the findings, then Dr. Diamond's testimony would be stricken. (10 RT at 2060.) Defense counsel prejudicially failed to object to Dr. Diamond relying on findings not in the autopsy report. Dr. Diamond's testimony was false in two respects: (1) the autopsy report did not list tears to the interior vaginal wall; and, (2) the tear to the vaginal opening noted in the autopsy report was of the posterior, rather than anterior vaginal wall. Defense counsel

unreasonably failed to move to strike Dr. Diamond's testimony as falsely misstating the autopsy findings.

(7) Defense counsel's unreasonable failure to investigate the causes of the difficulty catheterizing Consuelo prejudiced the defense by conceding the prosecution's explanation that Mr. Benavides raping the child accounted for the catheterization difficulties. Counsel knew or should have known that the medical personnel who actually attempted the catherization, including but not limited to, Faye Van Worth, the Supervising Nurse at DRMC, attributed the difficulties catheterizing Consuelo to "an anomaly of the urethra." (Exh. 4 at 1745-46 [Law Enforcement Records].) Counsel unreasonably failed to contact Nurse Van Worth, investigate the possible causes of a urethral malformation, conduct the appropriate research and contact the appropriate experts.

(a) Counsel's unreasonable failure to investigate Consuelo's health history prejudiced counsel by preventing them from explaining Consuelo's injuries, including her prior illnesses and injuries.

(b) Through consultation with appropriate experts counsel would have learned that children born with urethral malformations are very difficult to catheterize. Counsel unreasonably failed to contact an appropriate expert who could have explained that the urethral anomaly seen by Nurse Van Worth at DRMC

could account for the difficulties catheterizing her rather than an injury from rape as argued by the prosecution. (Exh. 83 at 5512 [Declaration of William Kennedy, M.D.].)

(c) Counsel unreasonably failed to interview and call medical personnel at DRMC who also could and would have explained that at the time of Consuelo's examination, the facility lacked catheters suitable for pediatric uses. (Exh. 72 at 5420 [Declaration of Anita Caraan Wafford, LVN].)

(d) Counsel's failure to explain the cause of the difficulties for catheterizing Consuelo by her congenital urethral malformation and the unavailability of appropriate catheters seriously prejudiced the defense by leaving unrefuted the prosecution's explanation that rape caused the catheterization difficulties. But for counsel's deficient performance a reasonable jury would not have found Mr. Benavides guilty of the rape felony and special circumstance of count I. Prejudice from this error alone so infected the rest of the trial that no reasonable jury would have found Mr. Benavides guilty of murder or deserving of the death penalty had the rape charge been disproved.

(8) Defense counsel unreasonably and prejudicially conceded that there was a tear to the interior vaginal wall when

arguing in closing that Dr. Diamond caused the tear in attempting to catheterize Consuelo.

(a) Counsel argued that in order for the catheter to go through the tear in the anterior wall of the vagina into the peritoneal opening, as Dr. Diamond had testified, the catheter had to go through the urethral wall, and the anterior and posterior wall of the vagina to get into the peritoneum. (18 RT at 3620.) Hence, defense counsel argued, Dr. Diamond must have torn the vaginal wall when he tried to catheterize Consuelo. (18 RT at 3621.)

(b) Defense counsel failed to present any medical experts to support her theory that Dr. Diamond caused the internal tears by catheterizing her. In fact, as pointed out by the prosecutor on rebuttal, defense experts testified that they did not believe internal vaginal tears would be caused by catheterization. (18 RT at 3596.) Defense counsel's unreasonable uninformed and ineffective attempts to argue a medical position not supported by any expert testimony and prejudicially conceding the existence of an internal vaginal tear which did not exist, was extremely prejudicial to the defense.

(c) Instead of conceding that there was a tear to the vaginal wall, counsel could and should have

shown that no medical record showed any evidence of internal tearing to the vagina. Further, as demonstrated above, counsel should have shown that the autopsy report provided no medical basis for concluding there was an internal vaginal tear and in fact medically indicated ruling out vaginal penetration.

e. Defense counsel unreasonably failed to present evidence explaining the injuries to the outer vaginal labia, which first appeared at KMC.

(1) Counsel knew or should have known that medical personnel at DRMC repeatedly and unsuccessfully attempted to catheterize Consuelo with a Foley catheter during her first two hours in the hospital. DRMC personnel had ample opportunity to carefully observe and examine all the genitalia as they repeatedly and unsuccessfully attempted to insert a catheter into Consuelo's urethra. Counsel knew that no one at DRMC or in the ambulance ride to KMC observed any bleeding, swelling, tearing or any injury or trauma whatsoever to the child's genitalia or anus. (Exh. 4 at 1759-60, 1764 [Law Enforcement Records].)

(2) Counsel knew or should have known that repeated and unsuccessful catheterization attempts at DRMC provided the most likely medical explanation for the injury to the genitalia first observed at KMC, four hours after the alleged rape. (Exh. 83 at 5502 [Declaration of William Kennedy, M.D.].)

(3) Counsel unreasonably failed to present expert testimony showing that the Foley catheter used to catheterize Consuelo at DRMC was too large for the genitalia of a 21-month old. (Exh. 83 at 5500-01 [Declaration of William Kennedy, M.D.].) Foley catheters available at DRMC at the time were too large for pediatric use. (Exh. 72 at 5419-20 [Declaration of Anita Caraan Wafford, LVN].)

f. Trial counsel unreasonably failed to investigate and present evidence to counter the prosecution's allegations that the anal trauma seen by hospital personnel was caused by anal penetration with a penis.

(1) Trial counsel unreasonably failed to investigate and present evidence that the anal tears reported by Dr. Dibdin at autopsy were not present upon admission to DRMC and were not present in the tissue slides or gross pelvic tissue preserved at the Coroner's office.

(a) Dr. Dibdin testified that the anal "tears had gone through the muscles of the anus and that's why the anus was dilated to this large diameter." (11 RT at 2119.) Dr. Dibdin testified that penile penetration caused the injuries to the anus. (11 RT at 2143.)

(b) Counsel unreasonably failed to cross-examine Dr. Dibdin and present evidence showing that tears "through to the muscle" observed by Dr. Dibdin

could not have been present when Consuelo was admitted to DRMC because no medical personnel observed any trauma to her anus or genitalia at DRMC. (Exh. 83 at 5497 [Declaration of William Kennedy, M.D.]; Exh. 74 at 5431 [Declaration of Linda Roberts, R.N.]; Exh. 75 at 5437 [Declaration of Faye Van Worth, R.N.]; Exh. 76 at 5441 [Declaration of Ann Tait, M.D.]; Exh. 72 at 5421 [Declaration of Anita Caraan, LVN].) Consequently, counsel failed to counter the prosecution's theory that the anal tears observed at autopsy were evidence of petitioner sodomizing Consuelo on November 17, 1991.

(c) Counsel ineffectively presented evidence that the tears to the anus reported by Dr. Dibdin were not present in the preserved tissue. Counsel failed to prepare Dr. Lovell with the minimal medical records necessary and relevant to his assessment or provide him with sufficient time to review the materials and medical records. (Exh. 80 at 5475-84 [Declaration of F. Warren Lovell, M.D.].) Consequently, Dr. Lovell's testimony was unreasonably and prejudicially unclear and lacked any credibility. (16 RT at 3114-16.)

(2) Trial counsel unreasonably failed to present evidence explaining that the anal tears first seen 13 hours after Consuelo's admission to the hospital were attributable to manual

manipulation for examination and her deteriorating medical condition.

(a) Anal tears were not seen by emergency room personnel at DRMC or KMC. (Exh. 1 at 2-5 [DRMC Records]; Exh. 2 at 50 [KMC Emergency Room record, Dr. Alonso, November 17, 1991].) The anal tears were first seen by Dr. Diamond at KMC on November 18, 1991, at 9:00 a.m., 13 hours after she was first admitted to DRMC. By the time Dr. Diamond examined Consuelo she had undergone a four-hour surgery; she was oozing blood from all orifices and was in DIC, a serious hemorrhagic syndrome where the blood fails to clot causing bleeding and tissue necrosis; and, she had undergone numerous intrusive hospital procedures that required manual manipulation of the anus. (Exh. 2 at 154 [KMC –Surgical Intensive Care, Daily Care and Assessment Record].) The confluence of all these conditions is the most likely explanation for the tears seen by Dr. Diamond, which were not seen by any other medical personnel prior to his examination. (Exh. 83 at 5503-07 [Declaration of William Kennedy, M.D.].)

(b) Dr. Diamond testified that the tears to the anus were inconsistent with a large bowel movement

because their location at 9 o'clock precludes such an explanation. Dr. Diamond testified that bowel movements only produce tears at 12 o'clock and 6 o'clock. Trial counsel unreasonably failed to present evidence to show that Dr. Diamond's theory has no basis in any of the literature and is a wholly inappropriate basis to conclude that Consuelo was anally penetrated with a penis. (Exh. 83 at 5497 [Declaration of William Kennedy].)

(3) Trial counsel unreasonably failed to show that the anal laxity observed by medical personnel was due to the administration of paralytic agents prior to their examinations. (Exh. 83 at 5506 [Declaration of William Kennedy]; Exh. 79 at 5470 [Declaration of Anthony Shaw, M.D.]; Exh. 80 at 5479 [Declaration of F. Warren Lovell].) Likewise, trial counsel unreasonably failed to counter evidence presented by the prosecution that perianal swelling was also evidence of sodomy.

(a) Dr. Alonso, a second year resident at KMC, testified that Consuelo had no anal tone when he placed his finger in her anus. Counsel failed to present evidence that eight minutes after Consuelo arrived at KMC she was given Pavulon, a paralytic agent, which causes anal laxity. (Exh. 2 at 59 [KMC Emergency Care Record, November 18, 1991, R.N. B. Lackie].)

(b) Dr. Bloch, a surgeon at KMC, who was not given a full set of records to review prior to his testimony, testified that he could think of no other injury other than sex abuse that could account for a loose tone. (12 RT at 2474.) Dr. Bloch was not aware that Consuelo had only developed a lax tone directly after she was given paralytic agents. Counsel unreasonably failed to review an adequate set of medical records with Dr. Bloch prior to trial and cross-examine him with the information regarding the paralytic agent. Had Dr. Bloch been fully informed he would have testified that: "Because she did not present to DRMC with a lax anal tone and only developed laxity after she was given a paralytic agent, a reasonable explanation for the loose anal tone is the administration of the paralytic agent." (Exh. 77 at 5450-51 [Declaration of Jack Bloch, M.D.].)

(c) Dr. Diamond testified that there was "absolutely no tone" to Consuelo when he evaluated her. (10 RT at 2050.) He testified that a "traumatic incident" or tear of the sphincter accounted for the loss of tone. (10 RT at 2053-54.) Trial counsel unreasonably failed to cross-examine Dr. Diamond with evidence in the medical records that immediately prior to Dr. Diamond's examination on November 18,

1991, Consuelo had been given the paralytic agent Norcuron, which accounts for her loose tone and led to a precipitous drop in her consciousness level. (Exh. 2 at 154 [KMC –Surgical Intensive Care, Daily Care and Assessment Record]; Exh. 2 at 145 [KMC – Fluid Balance Sheet].)

(d) Dr. Dibdin testified that at autopsy the diameter of the anus had expanded to one inch, which was not normal for a child Consuelo's age. (11 RT at 2119.) Counsel unreasonably failed to present evidence that dilation of the anus is a normal post-mortem condition. (Exh. 79 at 5470-71 [Declaration of Anthony Shaw, M.D.].)

(e) Instead of offering evidence explaining the conditions of the anus was attributable to hospital procedures, counsel ineffectively attempted to show that a brain concussion accounted for Consuelo's anal laxity. (12 RT at 2471.) Counsel had no evidence to support her proffered explanation. There was no evidence of a serious head injury that would cause injury to the brain. (Exh. 84 at 5523 [Declaration of Aaron Gleckman].) Counsel's futile attempts to offer an explanation for the laxity related to a head injury left the prosecution's theory of sodomy accounting for the laxity unrebutted.

(f) Trial counsel unreasonably failed to present evidence that the perianal swelling first noted at KMC by the emergency room physician Dr. Alonso "likely resulted from these invasive procedures and her deteriorating medical condition over the course of her care." (Exh. 83 at 5497 [Declaration of William Kennedy].) Instead of presenting this evidence to explain the swelling, counsel futilely attempted to show that antibiotics accounted for the swelling. (10 RT at 2080.)

(4) Trial counsel unreasonably failed to consult an expert familiar with pediatric care and urological conditions who could have explained the likely causes of the trauma. Had she consulted with such an expert she would have been able to show that: "The anal injuries most likely resulted from manipulation of the anus as part of examination of the rectum, instrumentation associated with temperature taking and administration of medications. The overall appearance of redness and swelling of the genital and anal area likely resulted from these invasive procedures and her deteriorating medical condition over the course of her care." (Exh. 83 at 5497 [Declaration of William F. Kennedy].)

g. Reasonably competent counsel would have consulted with and presented the testimony of various medical experts to disprove the State's assertions that petitioner committed any of the acts alleged in Counts Two, Three, and Four, and the Special Circumstances.

(1) Although trial counsel recognized the need to employ medical experts concerning the alleged injuries to Counselo's genitalia and anus, they unreasonably failed to properly select, inform, guide, and solicit appropriate experts' opinions in a timely manner.

(2) After reviewing the medical records, defense expert Dr. Baumer asked counsel to hire Dr. Lovell in order to verify the slides of the genital injuries. Dr. Baumer taped his recommendations on March 12, 1993. At that time, he indicated to defense counsel that an expert was necessary to examine the slides and suggested that she hire Dr. Lovell to review the slides in order to verify the accuracy of the injuries noted in the autopsy protocol. On April 8, 1993, when Dr. Baumer testified he did not have the benefit of Dr. Lovell's review of the slides. Dr. Lovell did not review the slides until April 12, 1993. (16 RT at 3095.)

(3) Despite Dr. Baumer's instruction, trial counsel failed to obtain and use the services and opinions of a competent expert in time to prepare a defense at trial. As a consequence, Dr. Baumer prejudicially testified that "the proper conclusion would be a foreign object penetrated the anal area," such as a finger, broom or Coca Cola bottle. (14 RT at 2895.) Dr. Baumer relied on Dr. Dibdin's findings regarding anal tearing to reach these conclusions because he did not benefit from Dr. Lovell's finding that the medical evidence did not confirm the tear seen by Dr. Dibdin. (16 RT at 3114; Exh. 80 at 5478-83 [Declaration of F. Warren Lovell, M.D.].)

(4) In addition, Dr. Baumer was not given a minimally adequate set of records prior to testifying. On the day he testified, he stated that he had just received a record showing that Dr. Shaw had performed an anoscopy indicating that Consuelo had no injury to the anus and lower rectum. He testified that when he "walked into this courtroom" his opinion was that the child was sodomized, but after seeing Shaw's report it "concerns" him. (14 RT at 2849-50.)

(5) Dr. Baumer was not given all the relevant medical records with sufficient time to accurately determine the cause of the trauma later seen to Consuelo's genitalia and anus. Counsel's failure to prepare and adequately inform her experts of the medical condition of the child also led Dr. Baumer to admit on cross-examination that he did not think catheterization accounted for the "hole" in the posterior vaginal wall. (14 RT at 2870-71.) If Dr. Baumer had known that there was no "hole" in the vaginal wall, he would have been able to explain that the superficial injuries to the genitalia were consistent with catheterization. Had he been given an adequate set of medical records prior to trial, rather than the day of his testimony, he would have testified that the child's injuries were inconsistent with rape or sodomy.

(6) Dr. Lovell's testimony failed to alleviate the severe prejudice from Dr. Baumer's false and misleading assertions that the child was anally and vaginally penetrated. Dr. Lovell testified without the benefit of an adequate set of medical records or

the time to fully evaluate the tissue that was supposed to confirm the tears seen in the autopsy report. Dr. Lovell only looked at the tissue slides the day before he testified after the prosecutor repeatedly alerted the jury that no one from the defense had ever viewed the victim's tissue preserved at the Coroner's office.

(7) Dr. Lovell's lack of preparation for the trial prejudiced the defense and obliterated his credibility. Dr. Lovell was not given the pictures of the genitalia prior to trial. (Exh. 80 at 5478-79 [Declaration of F. Warren Lovell].) Hence, when he testified he hopelessly confused the vagina, anus and urethral meatus. In describing Defendant's Exhibit C he testified: "there are two orifices, the one that I've got on the bottom here, it, I, uh, I really can't say for certain, what looks right to me one way looks wrong when I turn it over ..." (16 RT at 3117.) Dr. Lovell's unfamiliarity with the photographs and evidence unnecessarily and prejudicially discredited his testimony. The prejudice of this lack of preparation was so severe that the Court stated that he did not "give much weight if indeed any" to the testimony of Dr. Lovell. (19 RT at 3858.)

(8) Counsel unreasonably failed to present readily available, clear, concrete, credible evidence that the tissue slides of Consuelo's perineum, contained no evidence of tears or scarring, either new or old. (Exh. 82 at 5489-94 [Declaration of Dale S. Huff, M.D.].)

3. Trial counsel unreasonably failed to investigate, develop, and present evidence that the cause of death offered by the Medical Examiner was anatomically impossible. Counsel knew or should have known that the cause of death offered by the Medical Examiner was inconsistent with the evidence in the medical records showing that there was no injury to Consuelo's rectum or lower abdominal organs. (Exh. 64 at 5339 [Declaration of Donnalee H. Huffman].)

a. KMC surgeon Dr. Bloch, who first operated on Consuelo, clearly states in his surgical report that when he opened her abdomen her "stomach, liver, distal small bowel, cecum and distal colon were intact." (Exh. 2 at 128 [Operative Report, Dr. Bloch, November 17, 1991].) Likewise, Dr. Shaw, a surgeon at UCLA who operated on November 20 and 23, 1991, stated that Consuelo had no injury to her colon. (Exh. 3 at 961-62 [UCLA Medical Records].)

b. Counsel unreasonably failed to interview the medical personnel who testified prior to trial and provide them with an adequate set of medical records. Had counsel provided them with the relevant medical records all the medical personnel who attended to Consuelo during her eight days of hospitalization would have testified that Dr. Dibdin's cause of death is anatomically impossible. (Exh. 79 at 5466-72 [Declaration of Anthony Shaw, MD]; Exh. 78 at 5456-57 [Declaration of Rick Harrison, MD]; Exh. 77 at 5451-52 [Declaration of Jack Bloch, MD].)

c. The only doctors who did testify that they disagreed with Dr. Dibdin's cause of death, Dr. Lovell (16 RT at 3126) and Dr. Bloch (12 RT at 2460), were not asked and did not otherwise provide any basis for

their belief. Counsel unreasonably failed to elicit testimony that would have explained that anal penetration causing injury to the upper abdominal organs would necessarily have to injure lower abdominal organs that were not injured. If presented with such a compelling explanation, any reasonable juror would have rejected the prosecutor's medically impossible theory regarding the cause of death.

d. The prejudice of trial counsel's failing was compounded by the prosecutor's false and misleading argument that the pathologist would be in the best position to determine the cause of death. (11 RT at 2356). The prosecution's medically unsound argument unfairly misled the jury to credit Dr. Dibdin's theory. But for counsel's errors the testimony of the examining doctors and the result of the trial would have been dramatically different. (Exh. 79 at 5366-72 [Declaration of Anthony Shaw, MD]; Exh. 78 at 5456-57 [Declaration of Rick Harrison, MD]; Exh. 80 at 5480-84 [Declaration of F. Warren Lovell, MD].)

e. If counsel had not failed to cross-examine Dr. Dibdin with the evidence in the medical records showing that the cause of death was anatomically impossible, the jury would not have returned verdicts of guilt or death.

4. RIB AND ABDOMINAL INJURIES - Rib and abdominal injury – Trial counsel unreasonably failed to show that compression by squeezing was not the only theory accounting for all the injuries as Dr. Dibdin testified.

5. Trial counsel unreasonably failed to investigate and present evidence to counter the prosecution's theory of premeditated first-degree murder premised on the theory that petitioner suffocated Consuelo.

a. The prosecution argued that petitioner suffocated Consuelo in order to cover up for molesting her and prevent the neighbors from hearing her scream while he sodomized her. (18 RT at 3587.) The prosecution presented the testimony of Dr. Bentson to show that the brain infarcts suffered by Consuelo in the hospital were the result of suffocation. (12 RT at 2406.) In closing, the prosecutor falsely argued that the infarcts were conclusive proof that the child had been suffocated because there was no evidence her heart stopped or she had seizure activity, which would otherwise account for the brain infarcts. (18 RT at 3586.)

b. Trial counsel unreasonably failed to counter the prosecution's theory with overwhelming evidence available to disprove that the brain infarcts indicated she had been suffocated. Said evidence included, but was not limited to, the following:

(1) Brain infarcts are not caused by suffocation. A victim of asphyxiation will show no injuries to the brain at autopsy. (Exh. 81 at 5485-87 [Declaration of Vincent Di Maio, M.D].)

(2) If the child had been suffocated she would have been dead in three minutes and could not have survived without immediate resuscitation. (Exh. 81 at 5485-87 [Declaration of Vincent Di Maio, M.D].) Between 7:00 p.m. on November 17, 1991, the time that the prosecution contends the suffocation occurred and 7:50 p.m., when she was admitted to DRMC, no resuscitation

was administered. When she was admitted to DRMC she was still conscious and alert. (Exh. 1 at 3 [Emergency Treatment Record, Dr. Tait].) Counsel unreasonably failed to investigate and present this readily available and incontrovertible evidence to refute Dr. Bentson's testimony and the prosecution's argument regarding premeditation.

c. Trial counsel unreasonably failed to present contrary compelling evidence explaining the non-criminal causes of Consuelo's brain infarcts. Consuelo most likely suffered the brain infarcts from the precipitous drop in oxygen supply when she went into cardiac and respiratory arrest at DRMC or otherwise from the prolonged state of very low blood pressure during her hospitalization.

(1) The brain infarcts were first documented on November 21, 1991, on computerized tomography (CT) head scans at UCLA Medical Center. (Exh. 3 at 1059 [UCLA Radiological Services Diagnostic Report].) At this point, she had been hospitalized for four days and had been in a critical state of consistent disseminated intravascular coagulopathy (DIC) and low blood pressure, which together most likely accounted for her brain infarcts. (Exh. 80 at 5483 [Declaration of F. Warren Lovell, M.D.]; Exh. 84 at 5522 [Declaration of Aaron Gleckman, M.D.].)

(2) Trial counsel unreasonably failed to cross-examine Dr. Bentson with information that could have readily explained her brain infarcts. Dr. Bentson testified that he had not reviewed the child's medical records before opining that suffocation

accounted for the brain infarcts. He further testified that a cut off of oxygen to the brain could account for the infarcts. (12 RT at 2414.)

(3) Counsel's unreasonable lack of familiarity with the medical records prejudicially prevented her from presenting reliable and credible evidence to show that Consuelo had suffered a cardiac arrest on November 17, 1991, while she was at DRMC, which was the most likely medical explanation for her brain infarcts. Counsel failed to ask any of the DRMC personnel who testified about their records indicating that she coded while in their care. Had she called Linda Roberts, R.N., the attending nurse at DRMC, she would have testified that Consuelo's heart rate dropped precipitously an hour and a half after she was admitted to the hospital, at 9:20 p.m., leading to a cardiac and respiratory emergency, which lasted thirteen minutes. (Exh. 74 at 5429-30 [Declaration of Linda Roberts, R.N.].) This information was critical to explaining her brain infarcts and should have been used by counsel to cross-examine Dr. Bentson and refute the theory of premeditation. Counsel also unreasonably failed to provide defense experts, Dr. Lovell and Dr. Baumer, with this information.

(4) Instead of presenting the reliable and well-documented evidence of the cardiac emergency at DRMC, counsel ineffectively attempted to show Consuelo had suffered a seizure while in transport from DRMC to KMC at approximately 10:00 p.m. on November 17, 1991. Counsel called Ruben Garza, a paramedic with the Delano Ambulance Service, to attempt to show Consuelo

had undergone CPR in the ambulance. Counsel did not prepare him to testify or review the ambulance records prior to his testimony. As a consequence, Garza testified that he only vaguely remembered transporting Consuelo on that night. He testified she did not suffer a seizure during transport and he did not perform cardiopulmonary resuscitation (CPR). (16 RT at 3263) Timely review of the ambulance transport records reasonably would have informed counsel that they do not show Consuelo had a seizure or required CPR. (Exh. 2 at 120 [Emergency Medical Services Report].)

d. Trial counsel's unreasonable failure to present such evidence and rebut the prosecution's theory was prejudicial because the prosecutor was able to argue in rebuttal that Consuelo must have been suffocated because there was no evidence of loss of oxygen to the brain. (18 RT at 3658.)

6. Trial counsel unreasonably failed to investigate and present evidence refuting the prosecution's theory that Consuelo's brain injuries were the result of her having been shaken by petitioner.

a. Counsel unreasonably failed to present any evidence to counter Dr. Dibdin's testimony that the subdural hemorrhage suffered by the child "suggested" and was "very often indicative" of shaken baby syndrome. (11 RT at 2135-36.)

b. Typical brain injuries from shaken baby syndrome include subdural hemorrhages, retinal hemorrhages, and cerebral edema.

(1) The very small 5 milliliter subdural hemorrhage seen at autopsy and dated by the pathologist could not have resulted

from shaking occurring on November 17, 1991, by the petitioner. By the pathologist's own estimate the subdural hemorrhage is 3 to 6 days old, i.e. occurring at the earliest November 19, 1991. (Exh. 8 at 3560 [Autopsy Protocol].) The evidence in the brain slides shows that the subdural is about 2 days old. Even if Dr. Dibdin's aging of the subdural is correct, the subdural could have occurred only while Consuelo was in the hospital. It could not have resulted from shaking by petitioner.

(2) Consuelo also did not have extensive bilateral retinal hemorrhages, which are typical of shaken baby syndrome. The first sign that Consuelo had any retinal hemorrhage was on November 21, 1991, when Dr. Miller, an ophthalmologist at UCLA, examined her and found a small intraretinal pin-point hemorrhage to her right eye. This small retinal hemorrhaging is most likely the result of DIC and persistent low blood pressure and is wholly inconsistent with shaken baby syndrome. (Exh. 84 at 5520 [Declaration of Aaron Gleckman, M.D.].)

(3) The only indication of cerebral edema was non-specific, and also was most likely due to DIC. (Exh. 84 at 5521 [Declaration of Aaron Gleckman, M.D.].)

c. Counsel unreasonably failed to present expert testimony to refute Dr. Dibdin's testimony. Counsel did not ask any of the testifying doctors whether they agreed that Consuelo had been shaken. Had counsel asked the doctors and reasonably informed them of the relevant medical information, they would have testified that the injuries to the brain

are inconsistent with shaking. (Exh. 78 at 5458 [Declaration of Rick Harrison, M.D.]; Exh. 80 at 5483 [Declaration of F. Warren Lovell].)

7. Trial counsel unreasonably failed to move to exclude the evidence of prior injuries to the victim as being irrelevant and prejudicial to the petitioner. Counsel also failed to move to exclude unreliable testimony by Cristina Medina implying that one night petitioner took Consuelo into his room for a nefarious purpose. To the extent the evidence of prior injuries and the Cristina incident was admissible, counsel failed to develop, investigate, and present evidence that refuted the prior injuries and/or explain them as unrelated to petitioner.

a. At least as early as October of 1992, six months prior to trial, counsel were aware from the allegations in the search warrant that the prosecution would seek to prove petitioner's guilt of the charged crimes by implying that he was responsible for Consuelo's past injuries and illness. From discovery turned over by the prosecution defense counsel knew or should have known that petitioner was not present when Consuelo broke her wrist, when she became ill during Halloween, and when she fell off a recliner. (Exh. 4 at 2495-96 [Interview of Estella Medina 7-9-92]; Exh. 53 at 5014-26 [Interview of Vicki Salinas]; Exh. 55 at 5042-52 [Interview of Delia Alejandro].) Counsel knew or reasonably should have known that Consuelo's prior injuries and illness were irrelevant to the November 17, 1991, charges and were unduly prejudicial.

b. Counsel's uninformed and ineffectual efforts to exclude the unreliable, irrelevant and unduly prejudicial evidence demonstrates that counsel had no tactical reason to permit it to be

introduced. A week prior to trial, March 10, 1993, counsel filed a "Motion in Limine to Exclude Evidence of any Uncharged Acts and Evidentiary Hearing." The motion referred specifically to only two incidents, though it generally alluded to a request for exclusion of all evidence of uncharged acts and all character evidence. The motion referred to: (1) testimony from Cristina Medina alleging that one night petitioner had taken Consuelo into his room when she was crying and locked the door; and, (2) an illness suffered by Consuelo around Halloween. (2 CT at 409-31.) At the hearing on the motion, counsel also limited her arguments to these two issues. Defense counsel had no tactical basis, reasonable or otherwise, for failing to object and failing to move to exclude all testimony, including not only opinion but also percipient witness testimony, on the basis of irrelevance and undue prejudice.

c. Lacking any reasonable trial strategy, counsel stated she had "no problem" with the prosecution introducing testimony and evidence regarding the uncharged crimes even though they had no relevance to petitioner's guilt of the charged accounts. (1 RT at 67-68.) Counsel had no reasonable basis for failing to argue at the hearing for the motion that the evidence of prior uncharged crimes was unconnected to petitioner, irrelevant to the charged crimes, and inadmissible as it was not probative of petitioner's identity, motive, common plan or intent in the charged crimes, and was unduly prejudicial. The prosecution's sole basis for introducing evidence of Consuelo's prior injuries and illness was to create a spurious, irrelevant, and inflammatory chain of inferences by which Consuelo's injuries implied Estella Medina was a bad mother, which

implied Estella let her daughters be molested, which in turn implied petitioner's guilt of the November 17, 1991, charged offenses.

d. In ruling on the defense's motion in limine the court failed to fulfill its independent duty to find by a preponderance of the evidence that the petitioner committed the uncharged offenses and that the evidence was more probative than prejudicial. The Court ruled that the prosecution could elicit testimony from Diana Alejandro regarding Consuelo's Halloween illness and from Cristina Medina regarding Mr. Benavides taking Consuelo to his bedroom when she was crying, excluding only their opinion about the accounts. (1 RT at 68.) The Court invited the prosecution to "tie it together" or "draw inferences" from the evidence. (1 RT at 62.)

e. Defense counsel's unreasonable failure to object to the evidence of uncharged crimes substantially prejudiced petitioner by allowing the prosecutor to imply petitioner's guilt of the charged crimes by wholly unsupported inferences that petitioner had a predisposition to abuse Consuelo. Furthermore, the prosecutor invited the jury to infer that petitioner was guilty of the charged November 17, 1991, offenses because Estella Medina provided him with the opportunity to abuse Consuelo in the past. The prosecutor argued that Estella Medina's alleged inconsistencies in her accounts of Consuelo's past injuries and illness, her favoring herbal remedies over a physician's medical attention for Consuelo's head injury, and her alleged failure to report the injuries were evidence of petitioner's guilt of the charged offenses. (18 RT at 3595-97.)

f. Counsel's error was compounded by her objection to limiting instructions regarding the prior injuries.

(1) Defense counsel unreasonably objected to the prosecutor's request for jury instructions limiting the jury's use of the evidence of uncharged crimes against petitioner to prove motive, intent, common plan or opportunity, and requiring the jury to find the uncharged crimes were committed by petitioner by a preponderance of the evidence. (17 RT at 3413.) Defense counsel had no tactical basis, reasonable or otherwise, for opposing the limiting jury instructions.

(2) Knowing that he had introduced the lay and medical evidence of Consuelo's old injuries to imply petitioner had abused Consuelo in the past, the prosecutor requested that the jury be given CALJIC 2.50 [Evidence of Other Crimes]; CALJIC 2.50.1 [Evidence of Other Crimes by the Defendant Proved by a Preponderance of the Evidence]; and CALJIC 2.50.2 [Definition of Preponderance of the Evidence]. (17 RT at 3413.) The prosecutor explained that he had proposed such instructions for the jury's consideration of the prior evidence of abuse, broken ribs, and prior vaginal and anal tears, as well as the head injury. (17 RT at 3412-13.)

(3) Defense counsel opposed the limiting jury instructions based on the following unreasonable position: "MRS. HUFFMAN: Well, I'm objecting to [the jury instructions] being here, your Honor, there's no evidence that shows that there are any

prior crimes. There may be some inferences that could be used to argue with regard to circumstances, but there certainly is no evidence of prior crimes regarding my client." (17 RT at 3412-13.) Upholding counsel's objection, the Court did not give the required limiting instructions.

(4) As a result of defense counsel's unreasonable failure to move to exclude the evidence of uncharged crimes and her unreasonable decision to oppose limiting jury instructions the jury was able to use such evidence for any purpose and without making a finding that petitioner committed such crimes by a preponderance of the evidence.

(5) Without limiting instructions, the jury was able to make the impermissible inference that because none of the testifying witnesses had actually seen Consuelo break her wrist, and because Estella Medina may have given differing accounts of how Consuelo broke her wrist, petitioner must be guilty of the charged offenses of sexual and physical abuse alleged to have occurred November 17, 1991.

g. Trial counsel unreasonably failed to impeach Cristina with the fact that she did not mention the locked door incident until June 1992, and only after being subjected to intense coercive and suggestive questioning. (Exh. 89 at 5551-54 [Declaration of James M. Wood, Ph.D.].) Further, counsel failed to obtain and present an expert opinion evaluating the reliability of Cristina's account. Had counsel done so, they and the jurors would have learned that "Cristina's description at trial of this event

as one that made her 'uncomfortable' is an unreliable statement, and any insinuation at trial that Cristina was afraid of Mr. Benavides hurting her sister during this event was improperly drawn." (*Id.* at 5553.) Trial counsel also unreasonably failed to object to the prosecutor's leading questions of Cristina Medina on direct regarding this incident. (11 RT at 2189-90.) Through leading questioning the prosecutor elicited unreliable and inaccurate testimony from a child who had been manipulated by law enforcement to manufacture false evidence.

h. Petitioner was also prejudiced by the admission of Dr. Dibdin's testimony regarding old injuries to the ribs, and an area broadly defined as the "anus, vagina, and urinary bladder." (11 RT at 2128.) Dr. Bloch also testified to the old adhesion to the pancreas, which he stated was indicative of trauma. (12 RT at 2457.) Counsel unreasonably failed to move to exclude this evidence as there was absolutely no evidence of a nexus to petitioner.

i. To the extent the prior injuries were admissible trial counsel failed to investigate, develop and present evidence to show that petitioner was not responsible for the injuries.

(1) Counsel could have presented evidence to show that the old rib injuries were likely caused during one of the many times that Consuelo fell, rather than by petitioner, who had no history of abusing Consuelo or any other child. Consuelo was known for being clumsy and falling a lot. (*See e.g.*, Exh. 98 at 5732 [Declaration of María Celia Campos]; Exh. 94 at 5681 [Declaration of Ana María Cordero Cárdenas de Dávalos]; Exh. 104 at 5865

[Declaration of Dionicio Campos Govea].) Her aunt Delia testified that she fell a lot and was very active even after she broke her arm. (17 RT at 3340.) About two or three months before Consuelo died she "took a big tumble" down some cement steps outside of Maria Celia Campos's house. (Exh. 98 at 5733 [Declaration of María Celia Campos].) This fall could account for the old rib fractures which Dr. Lovell, a bone pathologist, dated as at least two months old. (16 RT at 3138.) Consuelo's fall in Delia's backyard in September of 1991, which caused her to break her arm, could also account for her old rib injuries. Petitioner unreasonably failed to present evidence to show that the old rib injuries were likely caused in one of these many falls that were unrelated to petitioner.

(2) Further, counsel failed to present a plethora of good character evidence indicating that petitioner, arrested at the age of 42, had never engaged in any act of physical or sexual misconduct with children and instead had a long history of being caring and loving. (Exh. 111 at 5948 [Declaration of Norma Patricia Yáñez Benavides]; Exh. 112 at 5994-95 [Declaration of Irma Leticia Yáñez Benavides]; Exh. 95 at 5696-97 [Declaration of Nélida Benavides Flores]; Exh. 96 at 5705-06, 5708 [Declaration of Juana Flores Rivera].)

j. To the extent prior incidents were admissible trial counsel unreasonably failed to investigate, develop and present evidence to show that petitioner was not responsible for the injuries.

8. Counsel unreasonably failed to investigate and present evidence supporting petitioner's account that he found Consuelo outside on the night she was injured. Through the testimony of Jeanne Spencer, a Kern County Criminalist, the prosecution sought to prove that evidence collected from the crime scene and victim showed she was found inside the apartment. (11 RT at 2291.) Had counsel requested all available discovery from the crime lab she would have discovered that there were numerous pieces of evidence supporting petitioner's account that he found Consuelo outside, including:

a. Crime lab documents show Consuelo's sweatshirt had hair, plant material, and fibers. (Exh. 7 at 356 [Criminalist's Records].) Counsel unreasonably failed to present evidence that the plant material on the sweatshirt was consistent with the tape lift of outside the doorway (#15) taken by the Ms. Spencer when she inspected and processed the crime scene. (Exh. 7 at 3426 [Criminalist's Records].)

b. Crime lab documents show there was apparent blood on Consuelo's shoe sole. Criminalist Spencer did not type the blood because the stain was too small. (Exh. 7 at 3492 [Criminalist's Records].) Photos of the shoe sole are consistent with the blood on the shoe sole having picked up some dirt and gravel, indicating that Consuelo then stepped on blood outside.

c. Criminalist Spencer found eight items in the bathroom wastebasket. Seven are tissues and one is a napkin. The napkin, item 11G, has dirt like debris and blood. (Exh. 7 at 3412 [Criminalist's Records].)

d. Criminalist Spencer found two paper towels and one napkin in the kitchen wastebasket. On the napkin she found an odor of vomit, no clumpy vomit, dried plant material, red fibers, and "small dirt particles." On one of the paper towels she found vomit, carpet fibers and "small orange paint chip." (Exh. 7 at 3426-27 [Criminalist's Records].) The plant material and dirt particles are consistent with the outside tape lift. The paint chip is also consistent with the child having been found outside. Counsel unreasonably failed to cross-examine Spencer with this information when she testified that there was no evidence of outside debris on the kitchen paper towels. (11 RT at 2291.)

e. Criminalist Spencer received several paraffin blocks from the UCLA pathology lab, one of which came from the victim's nasal pharynx. When she melted it down she found "plant material, plant cells and fibrous material (plant cellulose)." (Exh. 7 at 3468 [Criminalist's Records].) On cross-examination, she stated that she could not identify what type of plant material it was. (11 RT at 2324.) Counsel unreasonably failed to argue that the plant material, along with the other evidence supported petitioner's account that she was found outside.

9. Trial counsel unreasonably failed to obtain an accurate transcript and translation of petitioner's November 18, 1991, interview with law enforcement and a certified translation of the interview. The uncertified, seriously flawed transcription and translation of the interview was given to the jury to read while the prosecution played the tape of the interview. (People's Exhibit 2.) Petitioner was seriously prejudiced by the inaccuracies in the transcription and translation of the interview in that it

failed to accurately reflect his responses to questions regarding the night of the incident.

a. Al Hernandez, an uncertified translator who has failed the certification examination three to four times, verified in court that the transcription and translation done by law enforcement was accurate. (1 RT at 97-98; *see also* Exh. 107 at 5901 [Declaration of Al Hernandez].)

b. There were crucial mistakes in the translation that unduly prejudiced petitioner. (Exh. 63 at 5214-23 [Declaration of Haydee Claus, M.A.].) The transcript is replete with Spanish language errors, translation errors, and transcription errors that seriously undermine the accuracy of the document and fails to portray an accurate picture of the interrogation. The transcript corrects the numerous mistakes made by Detective Valdez in Spanish when questioning petitioner and therefore fails to show how his broken Spanish confused petitioner and made him unable to fully understand the questions. Said errors include, but are not limited to Valdez's use of the word "rapada," literally "shaved clean," to mean "raped." This and other misuses of the Spanish language were misleadingly altered and deleted from the transcription given to the jury and thereby failed accurately to show that petitioner was confused by Valdez's poor Spanish language skills. (Exh. 63 at 5214, 5219-20 [Declaration of Haydee Claus].)

c. Materially false and misleading errors in the translation of the interview included, but were not limited to, petitioner's statement that he found Consuelo "tirada afuera," which means "lying outside." The translation given to the jury incorrectly states that petitioner said he found

her on the "floor." (Exh. 63 at 5220, 5242 [Declaration of Haydee Claus, M.A.].) A crucial issue at trial was whether petitioner had found Consuelo outside. The prosecution argued that petitioner's inconsistent statements made him incredible. (18 RT at 3565.) The mistranslation of petitioner's statement inaccurately portrayed petitioner as giving inconsistent statements.

d. The mistranslation and inaccurate transcription of the interview failed to show how Detective Valdez's poor Spanish affected Mr. Benavides's ability to understand his questions and considerably distorted the interrogation. The jury was evaluating Mr. Benavides' credibility based on his answers to the questions. The inaccurate translation and transcription of the transcript affected the juries' ability properly to evaluate Mr. Benavides's credibility based on the statements. In sum, "[t]he numerous and significant errors [in the transcript] may have severely impaired what Mr. Benavides understood in Spanish during this interview and provide an deceptive picture to English readers of the document." (Exh. 63 at 5223 [Declaration of Haydee Claus, M.A.].)

e. Counsel unreasonably failed to verify that the transcription and translation of the November 18, 1991 interview given to the jury was accurate and fully depicted the nature of the interrogation. Counsel requested that Al Hernandez, an uncertified interpreter with an extensive law enforcement background, verify the transcription and translation provided by DA investigator Valdez.

f. Counsel's limited cross-examination of Valdez did not remedy the prejudice. She asked him only whether petitioner would have

some difficulty understanding terms he used. Valdez stated that he thought there was no confusion because he received an answer back. (14 RT at 2759.) Counsel unreasonably failed to present evidence to show that the interpretation was deeply flawed and seriously confused petitioner because of the many inaccuracies and Anglicisms used to communicate with him. (Exh. 63 at 5214 [Declaration of Haydee Claus].)

10. Trial counsel unreasonably failed to provide petitioner or to ensure petitioner was otherwise provided with a continuous, competent, certified interpreter to interpret trial proceedings and assist him in communicating with his attorney. Counsel's failure had pervasive effects and effectively violated petitioner's Fifth Amendment right to be present at his trial and confront witnesses.

a. Mr. Hernandez's errors in interpretation made petitioner appear to be speaking grammatically incorrect Spanish (see, e.g., 15 RT at 2997 ["Estella went for me at the apartment from my work"; 15 RT at 3015 [turned on fan "so air could hit the child"]; 15 RT at 3047; 15 RT at 3054), and speaking in non sequiturs (15 RT at 3008, 3010, 3011, 3018, 3023, 3024, 3030-32, 3034, 3035, 3036, 3040; 3049; 3055.) At one point, petitioner even stated that he was having trouble understanding the prosecutor's questions. (15 RT at 3050.) This series of mistranslations had a serious prejudicial effect by inaccurately portraying petitioner to the jury as evasive, thus seriously affecting his credibility with the jury.

b. Among the most prejudicial errors in interpretation was Mr. Hernandez's inaccurate translation of the Spanish phrase: "Me sentia mal," to "I felt bad." The correct translation for this phrase is "I was

feeling sick." (Exh. 63 at 5223 [Declaration of Haydee Claus, M.A.].) Mr. Hernandez repeatedly mistranslated this phrase giving the impression that petitioner meant to say he had a bad character. (See, e.g., 15 RT at 3010 ["I was feeling real bad"]; 15 RT at 3028-29 ["I do feel bad" and "I was feeling bad."]; [Exh. 107 at 5902 [Declaration of Al Hernandez].) The prosecutor then cross-examined petitioner about whether he lied when he "felt bad." This was devastating for petitioner's credibility and allowed the prosecutor to argue in closing that petitioner testimony was so unbelievable that it alone is sufficient to convict him. (18 RT at 3565.)

c. Poor interpretation also affected petitioner's ability to understand the Court's questions about the right to remain silent. The Court asked petitioner a series of long yes or no questions regarding whether he understood his right to which he answered "Yes." At the end, when petitioner was asked whether he has any questions he stated "I do not understand." (15 RT at 2972-74.) Poor interpretation coupled with petitioner's severe deficit in cognitive skills prevented him from properly understanding his right not to testify. [Exh. 126 at 6358 [Declaration of Antonio Puente, Ph.D.].) The poor interpretation alone effectively prevented him from fully participating in his defense.

11. Trial counsel unreasonably failed to provide accurate interpretation for monolingual Spanish speaking defense witnesses. In order to avoid unnecessary duplication the petitioner incorporates by reference the facts in Claim 12 as if fully pled herein.

a. Victor Almaraz, a non-certified interpreter with a history of poor interpretation in court translated for most of the defense

witnesses. Almaraz had a history of mixing Spanish and English during his interpretation, and confusing witnesses with his poor interpretation. (Exh. 105 at 5893 [Declaration of Marisol Calderon Alcantar]; Exh. 107 at 5904 [Declaration of Al Hernandez].).

b. Almaraz's poor Spanish was confusing and hard to understand for the witnesses whom he spoke to. (*See, e.g.,* (Exh. 102 at 5795 [Declaration of Jose Isabel Figueroa]; Exh. 119 at 6173 [Declaration of Evaristo Benavides].)

c. Almaraz's poor interpretation skills prejudiced petitioner by ineffectively presenting the testimony offered by the defense in support of his good character and in mitigation. The testimony of all Spanish-speaking defense witnesses including Javier Armando Navarrette Benavides, Dionicio Campos, Delfino Trigo, Guadalupe Benavides, and Hector Figueroa was thoroughly affected by the poor translation of Mr. Almaraz. (16 RT at 3280-83, 3292-93, 3295-96, 3298; 17 RT at 3376-78; 19 RT at 3752, 3754-56, 57664).

d. Almaraz's poor interpretation prevented these witnesses from being heard fully and accurately in court. The poor interpretation only exacerbated the prejudice from counsels' severely deficient presentation of good character and mitigation evidence.

12. Trial counsel unreasonably failed to ensure the accuracy of petitioner's testimony by preparing him to testify and reviewing his testimony.

a. Trial counsel's only preparation was to tell petitioner to "practice his English." (Exh. 64 at 5342 [Declaration of Donnalee H.

Huffman].) Counsel failed to prepare petitioner to be cross-examined with his previous statements. (Exh. 107 at 5905 [Declaration of Al Hernandez].) Counsel admits that, the cross-examination of petitioner did not go well. (Exh. 64 at 5342 [Declaration of Donnalee H. Huffman].)

b. As a result of petitioner's lack of preparation, in addition to serious interpretation problems, his testimony came out stunted and defensive. (15 RT at 2983-2990). The prosecutor seized upon purported inconsistencies, which were minor in any event, such as whether Consuelo had been gone for literally "a minute," (15 RT at 3057); when he had gone to Burger King (15 RT at 3003); and, whether he told Cristina to turn on the fan (15 RT at 3043). Petitioner was cross-examined with statements he allegedly told other people, such as his mother, about the incident. (15 RT at 3058.) Counsel unreasonably failed to prepare petitioner to review his statements to other witnesses regarding the incident. Consequently, petitioner appeared defensive, apprehensive, and incredible in his testimony. This unfair and misleading picture of petitioner's credibility allowed the prosecutor to argue in closing that petitioner was completely unbelievable. (18 RT at 3565-66.)

c. It is also clear from petitioner's question to the court regarding his right to remain silent – i.e. "I don't understand" – that counsel had not reviewed this with petitioner and failed to fully explain his rights under the Fifth Amendment. (11 RT at 2974-75.)

13. Trial counsel unreasonably failed to investigate, develop and present at the guilt phase of the trial good character evidence and evidence

of the absence of sexual deviance pursuant to *People v. Stoll* [(1989) 49 Cal. 3d 1136.]

a. Trial counsel unreasonably failed to interview prior to trial and prepare the good character witnesses he called for the defense at the guilt phase of the trial. Trial counsel knew or should have known that there were numerous other lay witnesses who had known petitioner well for extended periods of time and knew him to be a non-violent individual, with a reputation for honesty.

(1) Counsel Jeff Harbin was in charge of presenting character witnesses at the guilt phase of the trial. Counsel Harbin failed to investigate and present evidence regarding petitioner's life-long history of being good to children and a kind, gentle, caring individual. Evidence of petitioner's behavior with children and lack of sexual deviance was admissible good character evidence under *People v. Stoll*. Counsel unreasonably failed to present the numerous witnesses who could and would have given extensive details about their experiences with petitioner and his good character. Instead, counsel, or his interpreter Almaraz, randomly selected witnesses from the hallway to testify on petitioner's behalf without having investigated whether they had relevant evidence to present. (Exh. 86 at 5533 [Declaration of Hector Figueroa Ramirez]; Exh. 101 at 5774-75 [Declaration of Guadalupe Pelayo Benavides]; Exh. 102 at 5791-98 [Declaration of Jose Isabel Figueroa].) The witnesses that testified seem to have been selected solely on whether or not they

lived in the United States. (Exh. 100 at 5762 [Declaration of Antonio Duran Delatorre].)

(2) Counsel's lack of preparation and investigation into petitioner's life history led him to randomly call the least helpful witnesses to testify on petitioner's behalf and fail to elicit useful testimony from those witnesses he did call. Counsel's failures included, but were not limited to the following:

(a) Guadalupe Pelayo Benavides was called to testify on petitioner's behalf. (16 RT at 3279-84.) She was a second cousin of petitioner and had last seen him eight years prior to testifying. Counsel unreasonably failed to contact and interview Ms. Pelayo prior to testifying. (Exh. 101 at 5775 [Declaration of Guadalupe Pelayo Benavides].) Ms. Pelayo testified that her daughter, Patricia, who was sitting in the hallway, knew petitioner much better and had been around him when she was a young child. Patricia's testimony would have been valuable *Stoll* character evidence to show petitioner lacked the deviant nature characteristic of someone who sodomizes a baby. Counsel unreasonably failed to interview Patricia or present her testimony. Counsel's random selection of Ms. Pelayo, instead, prejudiced petitioner by allowing the prosecution to argue that Ms.

Pelayo's testimony lacked relevance because she had not seen him recently. (18 RT at 3567.)

(b) Counsel Harbin called Antonio Delatorre Duran to testify. (16 RT at 3271-77.) Harbin's failure to speak to or adequately familiarize himself with the substance of Mr. Delatorre's possible testimony was reflected in counsel's mistaken representation to the Court that Mr. Delatorre would not need an interpreter while Mr. Delatorre actually informed the bailiff that he did require an interpreter. (16 RT at 3270.) Without any understanding about the process and feeling pressured by the court to testify in English, Mr. Delatorre agreed to testify in English, which limited his ability to express himself fluently and accurately. (Exh. 100 at 5761-63 [Declaration of Antonio Duran Delatorre].) Further, counsel's failure to speak to Mr. Delatorre prior to his testimony left counsel ignorant of the fact that the last time the witness saw petitioner was five years prior to trial. Just as with Ms. Pelayo, the prosecution discounted Mr. Delatorre's testimony because he was not recently acquainted with petitioner. (18 RT at 3567.)

(c) Counsel also called Hector Figueroa to testify as a character witness. (16 RT at 3291-98.) Mr. Figueroa's testimony was prejudicially distorted by

having to testify via the inaccurate interpretation of Victor Almaraz. Counsel's unreasonable failure to contact Mr. Figueroa prior to testifying prevented him from learning whether he had useful information about petitioner's character. Mr. Figueroa's testimony regarding petitioner's exposure to Consuelo was excluded because he had only seen them together two or three times. (16 RT at 3293-94.)

(d) Finally, counsel called Javier Armando Navarette Benavides to testify as the last character witness. His testimony was extremely brief and perfunctory. He was asked only if he considered petitioner to be honest, truthful, and non-violent, all of which he answered affirmatively. (17 RT 3374-76.)

(e) Counsel unreasonably failed to present numerous other witnesses who had extensive exposure to petitioner and Consuelo and could have given credible and reliable evidence regarding petitioner's exposure to her. (See e.g. Exh. 94 at 5695 [Declaration of Ana María Cordero Cárdenas de Dávalos]; Exh. 98 [Declaration of María Celia Campos]; Exh. 104 at 5865, 5867, 5871 [Declaration of Dionicio Campos Figueroa]; Exh. 102 at 5792-93, 5798, 5801 [Declaration of José Isabel Figueroa]; Exh. 103 at 5838-39, 5841 [Declaration of Cristóbal Aguilar

Galindo]; Exh. 125 at 6316 [Declaration of José Jesús Vásquez Dávalos].) Many of these witnesses were in the hallway waiting to be called to testify or could have been easily contacted in Delano to arrange for their testimony. Counsel's unreasonable failure to present this evidence had very serious prejudicial effect. Evidence of petitioner's caring and loving nature towards Consuelo could have, alone, swayed the jury to find him not guilty.

(3) Counsel's meager presentation of only four witnesses, many of whom had not seen petitioner for many years, was completely ineffective and fell far below the standard of care for a capital trial. Counsel readily admits that no strategic purpose underlay his choice of witnesses. (Exh. 65 at 5352 [Declaration of Jeffrey Harbin].) Victor Almaraz, the interpreter who was the main defense team member to have contact with petitioner's friends and family, was not an investigator and failed to conduct an adequate investigation which would have uncovered numerous friends and family members that could have given compelling good character evidence about petitioner. (Exh. 108 at 5906 [Declaration of Victor G. Almaraz].) Trial counsel's unreasonable failure to prepare and interview the good character witnesses led to his choosing the weakest witnesses and failing to present witnesses who had far greater personal knowledge and could have given more credible and detailed information regarding petitioner's good character.

b. Trial counsel knew or should have known that numerous lay witnesses who had known petitioner well for extended periods of time knew him to be very caring and gentle with children, in particular the victim, Consuelo Verdugo, and her sister, Cristina Medina. Trial counsel unreasonably failed to investigate, develop, and present the testimony of numerous lay witnesses who had had ample exposure to petitioner as children and who had left their children in petitioner's care.

(1) Counsel unreasonably failed to present testimony from petitioner's daughter who had grown up with petitioner and could and would have testified to his caring, gentle nature. (Exh. 95 at 5698 [Declaration of Nélida Benavides Flores].)

(2) Counsel unreasonably failed to present evidence from petitioner's nieces, to whom petitioner was a second father. Petitioner niece, Norma Patricia Cardenas, in particular had been very eager to testify and even traveled from Mexico, at her own expense, explicitly to help in petitioner's trial. Counsel unreasonably failed to call her to testify. (Exh. 111 at 5960 [Declaration of Norma Patricia Yañez Benavides]; Exh. 112 at 5993 [Declaration of Irma Leticia Yáñez Benavides].)

(3) Counsel unreasonably failed to present evidence from petitioner's numerous friends who had entrusted their children to petitioner's care and knew him to be kind and caring with children. (*See, e.g.,* Exh. 96 at 5707 [Declaration of Juana Flores Rivera]; Exh. 121 at 6233-34 [Declaration of Enedina Benavides Figueroa]; Exh. 99 at 5746-58 [Declaration of Ingacio Padilla

Rivera]; Exh. 102 at 5793-95 [Declaration of Jose Isabel Figueroa]; Exh. 122 at 6273-74 [Declaration of Guadalupe Padilla Benavides].)

c. Trial counsel knew or should have known that under *People v. Stoll* expert and lay testimony was admissible to show that petitioner lacked the psychological profile and extreme sexual deviance typical of people who molest children, especially a victim as young as a 21 month old baby. Counsel unreasonably failed to retain a mental health expert to evaluate petitioner and determine whether his mental health profile had indicia of such deviance. Had counsel retained proper mental health experts and had them conduct a clinical examination, counsel would have been able to present evidence that petitioner's lacks the type of deviance to be a child molester. (Exh. 127 at 6415-23 [Declaration of Francisco C. Gomez, Ph.D].)

14. Trial counsel unreasonably and prejudicially failed to present expert testimony at the guilt phase to explain petitioner's mental state during the incident, while he was at the hospital, and during questioning by police. Reasonably competent counsel would have presented such testimony to demonstrate that petitioner's behavior upon finding Consuelo on the ground his affect and demeanor, and his inability to respond appropriately to law enforcement questioning were all consistent with his cognitive, psychological, and psychiatric impairments. Reasonably competent trial counsel also would have presented such testimony in support of a motion to suppress petitioner's statements to law enforcement as being unreliable, coerced and made without a knowing and intelligent waiver of his constitutional rights. Reasonably competent trial counsel also

would have developed and presented expert testimony in the penalty phase as compelling mitigation. Trial counsel had no informed strategic reason not to investigate, develop, and present such evidence.

a. Trial counsel was aware, or reasonably should have been aware, of petitioner's severe and longstanding neuropsychiatric disorders. A reasonable and competent investigation of petitioner's background would have revealed a history of malnutrition, neurotoxin exposure, being given alcohol as a child, and a lifetime of physical abuse, psychological terror and countless other traumas contributing to petitioner's compromised mental functioning and dissociation during stressful events. A reasonable and competent investigation of petitioner's background and history would have revealed that petitioner suffers from longstanding severe neurological and psychiatric disorders. Petitioner's family history consists of multigenerational patterns of mental illness, cognitive dysfunction, chemical dependency, and related domestic chaos.

b. Trial counsel knew or reasonably should have known that petitioner exhibited signs and symptoms of depression. Petitioner's friends who visited him in custody all observed the severity of his depression. (*See, e.g.*, Exh. 102 at 5790 [Jose Isabel Figueroa]; Exh. 103 at 5837 [Declaration of Cristobal Aguilar Galindo]; Exh. 111 at 5953 [Declaration of Norma Patricia Yáñez Benavides]; Exh. 121 at 6231-32 [Declaration of Enedina Benavides Figueroa]; Exh. 110 at 5921 [Declaration of Juana Benavides González].)

c. Trial counsel knew or should have known that petitioner's cognitive functioning is significantly impaired. His inability to

understand simple concepts has been apparent since he was a boy in middle school when petitioner's mental limitations became abundantly clear to his teachers and his peers. In his adulthood, petitioner made every effort to surround himself with others who took care of him and dictated all major decisions and responsibilities in his life, and made no efforts to advance out of a job that demanded brutal physical labor while paying less than most other work. (*See, e.g.*, Exh. 114 at 6028-29 [Declaration of Benito Preciado Benavides]; Exh. 123 [Declaration of Elvira Benavides Preciado]; Exh. 116 [Declaration of María Dolores Castañeda de Palafox]; Exh. 125 at 6315-16 [Declaration of José Jesús Vásquez Dávalos]; Exh. 103 at 5832-34, 5837-38 [Declaration of Cristobal Aguilar Galindo]; Exh. 96 at 5707 [Declaration of Juana Flores Rivera]; Exh. 94 at 5679-80 [Declaration of Ana María Cordero Cárdenas de Davalos]; Exh. 99 at 5749 [Declaration of Ignacio Padilla Rivera]; Exh. 102 at 5789-91 [Declaration of Jose Isabel Figueroa]; Exh. 104 at 5864-65 [Declaration of Dionicio Campos Govea].)

d. During the one or two occasions that trial counsel Huffman visited petitioner with her secretary present for interpretation, and in his persistent calls to her office, petitioner's acute mental distress was made obvious by his constant crying and pleas for help. (Exh. 105 at 5891 [Declaration of Marisol Calderon Alcantar].) Petitioner lost weight while in jail and his depression was immediately apparent to all who had contact with him. (Exh. 86 at 5531-32 [Declaration of Hector Figueroa Ramirez]; Exh. 102 at 5794-95 [Declaration of Jose Isabel Figueroa]; Exh. 98 at 5735 [Declaration of María Celia Campos]; Exh. 97 at 5716 [Declaration of María Elena Acevedo Benavides].) Despite petitioner's obvious

deteriorating mental state, trial counsel failed to undertake any investigation of petitioner's mental functioning or impairments. Trial counsel collected no material on petitioner's life or social history, did not consult any mental health professionals, and did not conduct any interviews of petitioner's family and friends concerning his mental functioning.

e. Reasonably competent counsel would have conducted such an investigation, retained the services of appropriate mental health experts, including a psychiatrist or psychologist, and a neuropsychologist to examine, test, and render opinion on petitioner's mental functioning, and present the findings to the jury at the guilt and penalty phases of the trial.

f. Trial counsel's failure to present a mental health expert at the guilt and penalty phases was prejudicial. Had such evidence been presented, the jury would have received a coherent, compelling, and expert description of petitioner's mental functioning and impairments and the effects that those impairments had on his behavior at the time of the incident, while in the hospital, and during interrogation. (See, e.g., Exh. 127 [Declaration of Francisco C. Gómez, Jr., Ph.D.]; Exh. 126 [Declaration of Antonio E. Puente, Ph.D.].) Petitioner's impairments include depression, posttraumatic stress disorder (PTSD), severe cognitive deficits, including mental retardation and severe deficits in reasoning skills, and alcohol dependency. (See, e.g., Exh. 126 [Declaration of Francisco C. Gomez, Jr., Ph.D.].) In addition, the experts would have provided a wealth of compelling mitigation at the penalty trial.

g. If such testimony had been presented at petitioner's trial, the jury would have not convicted petitioner or sentenced him to death.

15. Counsel unreasonably failed to present evidence that petitioner did not present a future danger to society if he were given the penalty of life without possibility of parole (LWOP). Petitioner has always been a model prisoner with no disciplinary offenses. Counsel's unreasonable failure to present this evidence had a prejudicial effect. Had counsel properly presented this evidence jurors deliberating whether to sentence him to LWOP would have taken this information into consideration and spared him the death penalty. That jurors were deliberating regarding sentencing petitioner to LWOP is evident from the note they sent out asking whether LWOP means LWOP. There was no possible strategic reason to preclude presenting this information of positive prison adjustment.

16. Trial counsel was ineffective for unreasonably and prejudicially failing to investigate, develop and present compelling mitigation evidence at the penalty phase of the trial. Trial counsel unreasonably, incompetently, and prejudicially failed to locate, interview and present the testimony of relevant and readily available family and friends who could have provided compelling mitigation regarding petitioner's background, social and cultural history, and mental illness.

a. Trial counsel Donnalee Huffman abdicated all responsibility for the penalty phase of the trial to counsel Jeffrey Harbin. (Exh. 64 at 5343 [Declaration of Donnalee H. Huffman].) Counsel Harbin

failed to prepare or conduct any investigation into the mitigation because he was inexperienced and Ms. Huffman failed to supervise or direct his work. (Exh. 65 at 5345-46 [Declaration of Jeffrey Harbin].)

(1) Prior to trial, counsel was provided with a list of 77 witnesses who knew petitioner and could have testified on his behalf at penalty. Counsel unreasonably failed to contact these witnesses or investigate petitioner's social history and mental health. Counsel Harbin has been disbarred due to a pattern of failing to follow-up on litigation he commences for his clients.

(2) Counsel Harbin's and Huffman's mutual failure to discharge their responsibility for conducting any investigation into mitigation completely denied petitioner the right to competent counsel and led to a deplorable paucity of mitigation evidence.

(3) The entire penalty phase, including opening and closing arguments, presentation of witnesses, jury deliberation, and verdict, lasted one day. The defense called to testify only two witnesses who only briefly referred to petitioner being a hard worker.

(4) The deplorable nature of counsel's performance at the penalty phase prompted the Court to intervene and sua sponte exact a stipulation from the prosecution that petitioner did not have a prior felony record. The express motive for the Court's intervention was its concern for the "integrity of proceeding." (19 RT at 3765.)

(5) Counsel lacked any strategic reason for failing to call the numerous witnesses available and willing to present mitigation evidence.

(a) Counsel Harbin attempted to conceal his professionally deficient performance by offering false, misleading, and self-serving excuses. For example, Harbin claimed he did not call petitioner's mother because she was having a nervous breakdown, an excuse belied by many witnesses who saw Ms. Benavides at the time and described her as having been capable, ready, and eager to testify on her son's behalf. (See, e.g., Exh. 104 at 5869-70 [Declaration of Dionicio Campos Govea]); (Exh. 98 at 5734-35 [Declaration of María Celia Campos]); (Exh. 102 at 5800 [Declaration of José Isabel Figueroa]); (Exh. 101 at 5774 [Declaration of María Guadalupe Pelayo Benavides]); (Exh. 103 at 5840 [Declaration of Cristobal Aguilar Galindo]); (Exh. 119 at 6176 [Declaration of Evaristo Benavides Figueroa]); (Exh. 118 at 6146 [Declaration of Julia Govea Figueroa]); (Exh. at 125 at 6319 [Declaration of José Jesús Vásquez Dávalos].)

(b) Harbin now admits that he did not speak to witnesses because he did not speak Spanish. (Exh. 65 at 5352 [Declaration of Jeffrey Harbin].)

(c) The task of contacting witnesses was left to Victor Almaraz who was not a trained investigator and who was thoroughly unprepared to interview

witnesses for potential mitigation in a capital case. (Exh. 108 at 5908 [Declaration of Victor G. Almaraz].) Almaraz not only had no training as an investigator, but also had a long history of criminal behavior including multiple arrests for possession of cocaine and heroin, assault with a deadly weapon and spousal abuse, embezzlement, and shoplifting. (*See* Exh. 24-32 [Criminal cases related to Victor Gonzalez Alamaraz].) Almaraz was very unprofessional in what little investigation he did. He flirted with female witnesses and failed to conduct any substantive interviews of the witnesses. (*See, e.g.,* Exh. 111 at 5960-61 (Declaration of Norma Patricia Yanez Benavides); Exh. 97 at 5716-17 (Declaration of Maria Elena Acevedo Benavides).) His meetings with friends and family of petitioner were cursory and limited to obtaining contact information. He did not write any reports of these contacts. (Exh. 108 at 5906 [Declaration of Victor G. Almaraz].)

b. A minimally competent investigation would have revealed compelling facts in mitigation, as documented by the dozens of declarations of family members, friends, teachers, and co-workers, and as summarized by Dr. Francisco C. Gomez., (Exh. 127 at 6364-66 [Declaration of Francisco C. Gomez, Jr., Ph.D].) To avoid unnecessary repetition of these compelling facts, the declarations filed in support of the

Corrected Amended Petition are incorporated as if set forth in full. The persuasive mitigating facts that were readily available to defense counsel include, but are not limited to the following:

(1) Petitioner was born into a family whose history included mental illness, alcoholism, extreme poverty, malnutrition, and horrific physical and psychological abuse. His parents, Alberto Benavides and Maria Figueroa, have a multigenerational history of impoverishment, mental impairments, alcoholism, and violence that compromised petitioner's own mental functioning from birth through childhood and adulthood. (*See, e.g.*, Exh. 127 at 6366-68 [Declaration of Francisco C. Gomez, Jr., Ph.D.].) Petitioner's genetic legacy is one of generations of poor peasants, initially enslaved to work the haciendas of wealthy landowners and condemned to poverty as *campesinos*, a system of sharecropping under which few families were able to thrive. Attempts by the *campesinos* to organize and better their conditions were met with violence and death. As a result, petitioner's parents, like their ancestors, began and ended their lives in extreme hardship. (Exh. 127 at 6364-66 [Declaration of Francisco C. Gomez, Jr., Ph.D.].)

(2) Petitioner's father, Alberto Benavides Rodriguez, began exhibiting signs of mental instability from an early age which escalated in severity throughout his life. Early on in his life, he developed a penchant for alcohol abuse, an aggressive personality, and the habit of terrorizing those around him. (Exh. 127

at 6371-75 [Declaration of Francisco C. Gomez, Jr., Ph.D.]; Exh. 90 at 5561-62 [Declaration of Elena Benavides Rodriguez].)

(3) Petitioner grew up in an extremely poor farming settlement, where there was no running water, no electricity, and insufficient food. Food and water were often not available to him as a baby and throughout his youth. Petitioner and his family suffered through periods where they had to live off of hard tortillas and water and went to bed hungry, including a period of particularly severe drought when petitioner was a toddler. Petitioner's father isolated the family from the outside world and deprived them of food. Alberto's terrorization of the family in this manner exacerbated the poverty petitioner suffered to levels far more severe than was common in the already poor area in which Mr. Benavides lived. (See, e.g., Exh. 121 at 6220 [Declaration of Enedina Benavides Figueroa]; Exh. 119 at 6163-64 [Declaration of Evaristo Benavides Figueroa]; Exh. 114 at 6033-34 [Declaration of Benito Preciado Benavides]; Exh. 115 at 6056-66, 6059-60 [Declaration of Emilia Gonzalez Sanchez]; Exh. 110 at 5917-18 [Declaration of Juana Benavides González]; Exh. 124 at 6289 [Declaration of Ignacia González Campos]; Exh. 92 at 5635 [Declaration of Elena Preciado].)

(4) Along with his siblings, petitioner was forced to work long hours on the family farm beginning as soon as he learned to walk. Petitioner was rarely given any breaks or enough time to finish a meal and was often forced to work through his hunger. (See,

e.g., Exh. 110 at 5920-21 [Declaration of Juana Benavides González]; Exh. 114 at 6027-28 [Declaration of Benito Preciado Benavides]; Exh. 119 at 6167 [Declaration of Evaristo Benavides Figueroa]; Exh. 121 at 6222 [Declaration of Enedina Benavides Figueroa]; Exh. 86 at 5528 [Hector Figueroa Ramirez].)

(5) As a young boy, petitioner was forced to apply toxic chemicals to the crops on the family farm. Petitioner took on this job because the chemicals affected his older brother more than he could handle. Petitioner applied the pesticides with his bare hands and often consumed food afterwards without washing his hands. (See, e.g., Exh. 120 at 6207-08 [Declaration of Aurelio Baltazar Campos]; Exh. 119 at 6168 [Declaration of Evaristo Benavides Figueroa]; Exh. 102 at 5781 [Declaration of José Isabel Figueroa]; Exh. 103 at 5835-36 [Cristobal Aguilar Galindo]; Exh. 125 at 6312 [Declaration of José Jesús Vasquez Dávalos]; Exh. 100 at 5759 [Declaration of Antonio Durán Delatorre].)

(6) Petitioner suffered severe physical and emotional abuse at the hands of his father from the time of his birth through adulthood which caused him acute mental and physical distress. All of petitioner's childhood and adult life were permeated by Alberto's alcoholism, rigid control over those around him, and sadistic abuse had a profound effect on petitioner, from his childhood into his adult life. His father physically and psychologically abused his entire family but focused the abuse on petitioner and petitioner's mother. Petitioner's father's severe

alcoholism exacerbated the violence. The effects caused petitioner to live in a constant state of terror from the time he was a young boy. (*See, e.g.*, Exh. 85 at 5526-27 [Declaration of Alberto Benavides]; Exh. 91 at 5592 [Declaration of Josefina Benavides Rodriguez]; Exh. 110 at 5920-23 [Declaration of Juana Benavides Gonzalez]; Exh. 113 at 6014 [Declaration of Rosa Ramos]; Exh. 114 at 6030 [Declaration of Benito Preciado Benavides]; Exh. 115 at 6061 [Declaration of Emilia Gonzalez Ruiz]; Exh. 120 at 6204, 6205-06 [Declaration of Aurelio Baltazar Campos]; Exh. 121 at 6221-22, 6225 [Declaration of Enedina Benavides Figueroa]; Exh. 124 at 6288-89 [Declaration of Ignacia Gonzalez Campos]; Exh. 111 at 5950-53 [Declaration of Norma Patricia Yanez Benavides]; Exh. 117 at 6115-16 [Declaration of Rosa Campos Espinoza].)

(7) Petitioner's father's violence included abuse during petitioner's mother's pregnancies resulting in the death of at least one child in utero, and attempts to kill petitioner's mother. When petitioner was a toddler, petitioner witnessed his father attempt to hang petitioner's mother with a noose while she was six months pregnant. (Exh. 124 at 6288 [Declaration of Ignacia Gonzalez Campos].)

(8) Petitioner often tried to protect his mother from abuse, to leading to further beatings by his father. Petitioner put himself at his father's mercy to spare his mother from being beaten with a horsewhip. Even as little boy, petitioner's desire to protect his mother often led him to stand between his father and his mother and

tell his father to hit him instead. (See, e.g., Exh. 121 at 6226 [Declaration of Enedina Benavides Figueroa]; Exh. 124 at 6288-89 [Declaration of Ignacia Gonzalez Campos]; Exh. 110 at 5920-21 [Declaration of Juana Benavides González].)

(9) Throughout his life petitioner has sustained numerous serious head trauma. As a toddler, petitioner was knocked over by an animal, hitting his head on a rock. (Exh. 127 at 6383 [Declaration of Francisco C. Gómez, Jr., Ph.D].) Petitioner was frequently thrown from wild horses and bulls as a young boy and suffered a significant head injury in a serious automobile accident in the 1970s. (See, e.g., Exh. 122 [Declaration of Guadalupe Padilla Benavides]; Exh. 97 at 5715 [Declaration of Maria Elena Acevedo Benavides].)

(10) Petitioner was fed milk with high concentrations of alcohol from the time he was a baby. This combined with petitioner's genetic predisposition for alcoholism caused petitioner to suffer from a lifelong affliction of alcoholism. Petitioner's intake of alcohol, by all accounts, either allowed petitioner to forget the pain in his life, or, more often, caused him to become solemn, quiet, sleepy, and sad, but did not manifest itself in violence or aggression under the influence of alcohol. (Exh. 127 at 6417-18 [Declaration of Francisco C. Gómez, Jr., Ph.D].)

(11) His genetic predisposition to alcoholism and depression coupled with the violence, poverty, and emotional abuse that petitioner dealt with throughout his life, resulted in him

suffering significant depression and PTSD from early childhood on through his adulthood. (See, e.g., Exh. 102 at 5790 [José Isabel Figueroa]; Exh. 103 at 5837 [Declaration of Cristóbal Aguilar Galindo]; Exh. 111 at 5933 [Declaration of Norma Patricia Yáñez Benavides]; Exh. 121 at 6231-32 [Declaration of Enedina Benavides Figueroa]; Exh. 110 at 5921 [Declaration of Juana Benavides González].)

(12) Petitioner has also demonstrated significant cognitive deficits throughout his life from the time he was a young boy, when his mental limitations became abundantly clear to his teachers and his peers, into his adulthood, where he made every effort to surround himself with others who cared for him and handled the larger decisions and responsibilities in his life. (See, e.g., Exh. 114 at 6028-29 [Declaration of Benito Preciado Benavides]; Exh. 123 [Declaration of Elvira Benavides Preciado]; Exh. 116 [Declaration of María Dolores Castañeda de Palafox].)

(13) Despite his father's attacks, petitioner was quiet and extremely hardworking as a child, a young man, and as an adult. He maintained an unwavering respect for his father regardless of the abuse Alberto inflicted on Petitioner and his family. (See, e.g., Exh. 99 at 5746-47 Declaration of Ignacio Padilla Rivera]; Exh. 86 at 5530-31 [Declaration of Hector Figueroa Ramirez]; Exh. 96 at 5706-08 [Declaration of Juana Flores Rivera]; Exh. 104 at 5863 [Declaration of Dionicio Campos]; Exh. 111 at 5953 [Declaration of Norma Patricia Yáñez Benavides]; Exh. 112 at 5996 [Declaration of

Irma Leticia Yáñez Benavides]; Exh. 93 at 5659-60 [Declaration of Jesús Dávalos Preciado]; Exh. 102 at 5787 [Declaration of José Isabel Figueroa]; Exh. 114 at 6027, 6029-30, 6033 [Declaration of Benito Preciado Benavides]; Exh. 121 at 6224-25, 6229-30 [Declaration of Enedina Benavides Figueroa]; Exh. 113 at 6016 [Declaration of Rosa Ramos].)

(14) Petitioner has a long history of being a caring and loving father figure to his children, his girlfriend's children, and children in his extended family. Petitioner took on the role of father for his nieces after his brother-in-law passed away and left petitioner's sister with two daughters under the age of three. Petitioner lived with and cared for his nieces throughout their childhood and both nieces view petitioner as a father. (*See, e.g.*, Exh. 123 at 6279 [Declaration of Elvira Benavides Preciado]; Exh. 121 [Declaration of Enedina Benavides Figueroa]; Exh. 111 [Declaration of Norma Patricia Yáñez Benavides]; Exh. 112 [Declaration of Irma Leticia Yáñez Benavides]; Exh. 99 at 5745-46 [Declaration of Ignacio Padilla Rivera]; Exh. 96 [Declaration of Juana Flores Rivera].)

(15) Petitioner twice suffered the tragic loss of a newborn child due to bronchopneumonia and complications related to premature birth, both of which profoundly and traumatically affected petitioner. (*See, e.g.*, Exh. 96 [Declaration of Juana Flores Rivera].) The injury of Consuelo, the child he loved as his own, caused petitioner to relive the trauma anew. Remaining by Estella's

side at the hospital trying to understand what happened, petitioner, nonetheless, struggled to remain calm, be tough, and not show his emotions, as he had been taught his entire life. (Exh. 127 at 6407-08, 6413 [Declaration of Francisco C. Gómez, Jr., Ph.D].)

c. Trial counsel's unreasonable and constitutionally deficient failure to develop and present this and other compelling mitigation contained in the exhibits prejudiced petitioner. The evidence could have explained many of petitioner's actions on the night of the incident and also could have been used to prove a lingering doubt theory. The failure to provide this evidence left the jury with no basis upon which to spare petitioner's life. If this evidence had been presented, the jury would have decided to spare petitioner's life.

17. Trial counsel unreasonably failed to preserve petitioner's rights under the Vienna Convention to the assistance of the Mexican Consulate.

a. Petitioner wrote to the Mexican Consulate in Fresno seeking their assistance in October of 1992. Petitioner requested that the consulate contact his lawyer, Ms. Huffman, to arrange for them to assist with the preparation of the case. Between October of 1992 and December of 1992 the consulate repeatedly attempted to contact petitioner's attorneys to no avail. The consulate left messages that were never returned. Finally, in December of 1992 the consulate wrote a letter to Ms. Huffman regarding the case and offering their assistance.

b. Counsel unreasonably failed to respond to the Consulate's contacts until the trial had ended. In May of 1993, after the

guilt and penalty phase had concluded, counsel Harbin contacted the consulate to request a letter on behalf of petitioner to submit to the court. The consulate promptly complied and submitted a letter citing the Vienna Convention and requesting mercy for the petitioner. (3 CT at 833.) The Court rejected the letter, along with the other letters submitted at sentencing.

c. Counsel's unreasonable delay in contacting the consulate and seeking their assistance directly prejudiced petitioner's ability to obtain the assistance of the consulate. The consulate would have been invaluable in attempting to help him understand those rights. The arrest of petitioner without notification of his consulate rights violated international law and, in this instance, merited suppression of his statements to the police thereafter. Petitioner stated that he did not understand the waiver of his rights, and did not understand his rights because he has never been "involved in these problems" and is unfamiliar with the American legal system. (15 RT at 3052.) Petitioner's severe cognitive impairments and mental health disorder, combined with an unfamiliarity with the legal system made his waiver of the right to counsel involuntary and subject to suppression. Had counsel responded to the consulate they could have argued that in petitioner's case international law required suppression of his statements to the police. In addition, had the consulate been contacted earlier they could and would have assisted with the preparation of petitioner's defense and the vindication of his fair trail right including, but not limited to, assistance with translation and contacting social history witnesses, family and friends to present at petitioner's trial. But for

counsel's unreasonable failure to enlist and/or accept the readily available assistance of the Mexican Consulate, petitioner would not have been convicted or sentenced to death.

18. Trial counsel unreasonably failed to object to irrelevant, unreliable, and prejudicial evidence, including:

a. *Estella's work records* Counsel unreasonably failed to object to irrelevant and unreliable evidence that Estella was obligated by training to report any suspicion of child abuse. The prosecution introduced records and testimony to this effect. Estella's obligation to report abuse is irrelevant because it does not make any fact more likely than not relating to petitioner's guilt.

b. *Estella's demeanor* - Counsel unreasonably failed to object to prosecution questioning witnesses about Estella Medina's demeanor in the hospital. (12 RT at 2463-62 [Asking Dr. Bloch about Ms. Medina's "flat affect and bizarre lack of concern."].) Estella Medina's affect in the hospital is irrelevant to petitioner's guilt of the charged offenses and was admitted to imply that Estella Medina's lack of concern over her daughter's condition was indicative of why she would allow petitioner to abuse her child. This long string of assumptions is completely speculative and based on a series of unreliable inference regarding inadmissible character propensity evidence.

c. *Petitioner's demeanor at the hospital* Trial counsel unreasonably failed to object to unreliable, irrelevant, and prejudicial testimony by Dr. Bloch about petitioner's flat affect and "bizarre lack of concern." (12 RT at 2464.) Dr. Bloch initially was not able to identify

petitioner in court. When asked if he recognizes the man who was in the hospital on the night of the incident, he states "I can only assume that the gentleman sitting here is the same individual." Counsel unreasonably failed to object at that point to any further evidence regarding petitioner based on his inability to recognize petitioner. Moreover, Dr. Bloch testimony was based on his notes, rather than his memory, and therefore was hearsay admitted for the truth of the matter asserted. Finally, Dr. Bloch's testimony was unreliable and prejudicial in that it tended to imply petitioner's guilt based on his flat affect, which was an appropriate response of shock to the illness of a child, especially for someone who had previously endured the tragic loss of a daughter. (Exh. 96 at 5705 [Declaration of Juana Flores Rivera].)

d. *Joe Avila.* Trial counsel unreasonably failed to object to evidence that Estella Medina was dating a convicted sex offender after petitioner was arrested. This information was irrelevant to petitioner's guilt of the charges and prejudicial inferential character propensity evidence. The court admitted it for the limited purpose of showing that Estella was the type of person that would allow her children to be exposed to child molesters and allowed the jury to infer that her propensity was indicative of petitioner's guilt of the offenses. This chain of inferences is unreliable, prejudicial, and inadmissible as propensity character evidence.

e. *Autopsy photos* –Counsel unreasonably failed to renew her objection to the prejudicial and inflammatory photographs from autopsy and hospitalization of Consuelo. (15 RT at 2971.)

f. *Illegal search of Brandywine apartment* – Trial counsel unreasonably failed to object to the initial searches of apartment – two searches were without Estella's permission.

g. *Prosecution badgering petitioner-* Trial counsel unreasonably failed to object to the prosecution badgering petitioner on cross-examination. (15 RT at 3031-32, 3035, 3038.)

h. *Facts not in evidence* – Counsel repeatedly and unreasonably failed to object to the prosecution's questions assuming facts not in evidence, (15 RT at 3034; 3048; 3054; 3057-58; 3061; 3079); and to asking questions beyond the scope of cross examination. (16 RT at 3240; 3296.)

i. *Victim Impact evidence* – Counsel unreasonably failed to timely object to the lack of notice regarding victim impact evidence.

j. Hearsay evidence -

(1) Counsel unreasonably failed to object a number of times that experts testified to inadmissible and unreliable hearsay evidence. For example, Dr. Diamond testified that the adhesions to the pancreas found by Dr. Bloch at KMC were indicative of trauma. (10 RT at 2047) Dr. Diamond was not qualified to opine on the nature of the old pancreatic injury and his reference to the old adhesions was inadmissible prejudicial, hearsay.

(2) Counsel unreasonably and repeatedly failed to object to unreliable hearsay evidence from lay witnesses. For example, Cristina Medina testified that no one had seen Consuelo hurt herself when she broke her arm. (11 RT at 2209-10.) Cristina's

testimony to what other may or may have not seen is inadmissible hearsay. Cristina's unreliable testimony permitted the prosecutor to falsely argue that since no one had seen Consuelo break her arm petitioner could be responsible for it.

k. *Leading questioning on direct examination.* Counsel unreasonably failed to object to extensive leading questioning of prosecution witnesses on direct examination. (See, e.g., 10 RT at 2049, 2071, 2130, 11 RT at 2133-34, 2137-38, 2186-87, 2211-12, 2226, 2266, 12 RT at 2356, 2422, 2435-36, 2460).

l. *Prejudice* - Trial counsel compounded the error of failing to object to inadmissible evidence by unreasonably withdrawing their request for a jury instruction explaining each item that was admitted for a limited purpose. Trial counsel Harbin had requested Forecite jury instruction 2.09a, which would itemize evidence received for a limited purpose. The court stated that it was inclined to accept the jury instruction but noted that counsel has not itemized the evidence. Harbin indicated he had fallen behind on his reporter's transcript reading but stated he could provide the list at a later date or withdraw the request. The Court responded by refusing the instruction. (17 RT at 3497.) Petitioner was prejudiced by counsel's failure to request the jury instruction with an itemized list of evidence.

19. Trial counsel unreasonably failed to select a fair and impartial jury. Counsel claimed on the record that she forewent the use of four remaining peremptory challenges in voir dire because she thought she had the best available jury pool. The jury questionnaires of the sitting jurors

reveal that the jury was bias in favor of the prosecution and some were emotionally predisposed to convict petitioner because of their own traumatic experiences with child abuse.

a. Counsel unreasonably failed to move to strike jurors for cause or use a peremptory strike for many of the jurors who were ADP (automatically in favor of the death penalty) and bias against petitioner. (See, e.g., questionnaire of Juror Peggy Rivard; RT 635-642; Questionnaire of Juror Gordon Jones; RT 8980-898.)

b. Trial counsel's unreasonable lack of strategy was apparent even with jurors who were not ultimately selected for the panel. Counsel failed to move to strike for cause or use a peremptory challenge to strike (1) prospective jurors who would automatically vote for the death penalty for child molesters, (RT 757-763); (2) prospective jurors who would automatically vote for the death penalty if they found the petitioner guilty of murder (RT 536-546); (3) prospective jurors who believed the death penalty is imposed too seldom (RT 749-756); (4) Trial counsel unreasonable attempts to rehabilitate ADP jurors rather than move to strike them.

20. Counsel unreasonably failed to ask for a curative instruction based on the outrageous conduct of one of Estella's sister's on the stand where she stood up and started yelling at the friends of petitioner who were in the audience. (Exh. 102 at 5798 [Declaration of Jose Isabel Figueroa].) Counsel should have requested a curative instruction from the judge to prevent the jury from being unduly inflamed by the witness' conduct.

21. Counsel unreasonably failed to object to all instances of false evidence and prosecutorial misconduct, herein listed as Petition Claims 1-6, 9-11, 16. Counsel also unreasonably failed to request missing reports by the Sheriff Department, District Attorney Office, Coroner facility, and crime lab which disabled them from requesting additional exculpatory discovery including, inter alia, missing reports, audiotapes and forensic evidence. Petitioner incorporates by reference Claims 7 and 8.

N. CLAIM 14: PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFLICT-FREE REPRESENTATION.[17]

The judgment of conviction and sentence of death were rendered in violation of petitioner's rights to the effective assistance of counsel, conflict-free representation, a fair trial, present a defense, confrontation and compulsory process, an impartial jury and a reliable determination of guilt and an individualized, rational and noncapricious determination of penalty as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law, by virtue of trial counsel's conflicting interests that adversely affected their representation of petitioner.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in the claims pertaining to the trial counsel's ineffective representation and the inadequate interpreters (see Claims 12 and 13), are incorporated into this claim as if fully set forth herein to avoid unnecessary duplication of relevant facts.

2. Trial counsel Jeffrey Harbin's State Bar problems and financial difficulties created an actual conflict of interest that adversely affected his performance in petitioner's case. During his representation of petitioner, Harbin experienced severe financial hardships, including the

[17] This Claim qualifies as a Category 2 claim.

economic decline of non-legal business. As a result, Harbin accepted additional legal work to generate income, but was incapable of rendering the promised legal services. As a result, the financial and legal burdens proved overwhelming and he was unable to devote sufficient time to petitioner's case.

> (1) In the years preceding his appointment on behalf of petitioner, Harbin had been retained to perform legal services, but failed to do so. As a result, a state bar complaint was filed against him, which resulted in a private reproval in September 1992, as he was preparing for petitioner's trial. The bar difficulties continued with additional complaints lodged against him. Eventually, this Court ordered Harbin suspended from the practice of law for two years in 1994. In 2002, Harbin was disbarred by order of this Court.
>
> (2) In part, Harbin's professional difficulties stemmed from his financial problems. In 1992, he became a part-owner of a bar and grille, devoting substantial amount of his time to that venture. As his non-law business venture began to fail, his need for income increased and he accept legal work that he could not perform.
>
> (3) Harbin's problems also stemmed from his habits of gambling, drinking, and using drugs, which eventually got him into debt. (Exh. 108 at 5906 [Declaration of Victor Almaraz].)

(4) In a Settlement letter to one creditor, written on March 27, 1993 – in the middle of petitioner's trial – Harbin wrote that he would retire from the practice of law as of September 1993.

(5) In October 1993, Harbin filed for Chapter 7 bankruptcy and estimated that his debt exceeded $500,000, exclusive of taxes owed to the State of California and the United States Treasury. (See Exh. 18 [Bankruptcy Records].)

(6) As a result of his financial and state bar difficulties, Harbin over-extended himself with legal and non-legal work, developed physical manifestations of the tremendous stress he experienced, and was forced to devote increasing amounts of his time and effort to address his personal problems. Harbin's preoccupation with his professional and personal matters adversely affected his ability to devote sufficient time to petitioner's case.

3. Trial counsel Donnalee Huffman's own financial difficulties and personal problems created an actual conflict of interest that adversely affected her performance in petitioner's case.

a. Throughout her representation of petitioner, Huffman was distracted by her husband's deteriorating medical condition, caused in large measure by his alcoholism. In addition, the Huffmans faced increasing financial difficulties themselves, as their debts mounted. Liens and lawsuits for nonpayment were instituted. Their financial situation deteriorated to the point that they no longer paid their secretaries or office support staff. (See, e.g., Exh. 20 [*Calderon v. Huffman*, suit for wages]; Exh. 21 [*Alcantar v. Huffman*, suit for wages].) Eventually, the Huffmans

resorted to bankruptcy. (Exh. 19 [Bankruptcy Proceedings].) Even the experts in petitioner's case resorted to litigation in an attempt to be paid for their time. (Exh. 22 [*Lovell and Baumer v. Huffman*].)

b. Like Harbin, Huffman increasingly sought and obtained court appointments and retained cases in an effort to generate income. (Exh. 105 at 5890 [Declaration of Marisol Alcantar].) As a result, Huffman became grossly over-extended and was unable to devote sufficient time to petitioner's case. Huffman's only concession to her representation of petitioner was to forgo accepting new appointments a month before he went on trial for his life. (Exh. 64 at 5337-38 [Declaration of Donnalee Huffman].) By then it was too late. Her case load was unbearable from the weight of cases previously accepted.

c. Huffman's personal and financial burdens adversely affected her representation of petitioner. Harbin recalls the effects of the problems:

> When the trial began, however, I realized that Ms. Huffman had not conducted even a minimal investigation of the guilt phase issues, and I believed that we were woefully unprepared. Ms Huffman's failure to prepare for trial in part resulted from her preoccupation with traumatic events in her life, including her husband's illness and with other family and financial problems, and in part from the fact that it was her style to "wing it." (Exh. 65 at 5347 [Declaration of Jeffrey Harbin].)

4. Trial counsel had an actual conflict of interest that adversely affected counsel's performance when trial counsel Donnalee Huffman and her secretary were threatened with death by Consuelo's uncles and others.

(See, e.g., Exh. 105 at 5894-95 [Declaration of Marisol Calderon Alcantar].)

a. Because of her representation of petitioner, Huffman faced ridicule and threats to her safety. (See Exh. 64 at 5337 [Declaration of Donnalee H. Huffman]; Exh. 105 at 5894 [Declaration of Marisol Calderon Alcantar].) During trial, defense attorney Huffman stated several times on the record that she and her staff were being threatened because they represented petitioner.

b. On March 19, 1993, Huffman stated that her secretary, Marisol Alcantar, was being followed regularly as she traveled to and from work, and that the night before, when she had pulled off the road to a call box, the drivers had slowed down and showed her a shotgun. (2 RT at 385.)

c. On March 25, 1993, Ms. Huffman received a note in court that there was an emergency at her office and that she was requested to call the Delano Police Department. (7 RT at 1535.) When she responded to the call, she learned that intruders had forced their way into her office, threatened, assaulted, and tied up her secretary, and ransacked certain files.

d. The Delano Police Department investigated Alcantar's allegations on March 26, 1993. (Exh. 23 at 4127-45 [Police Report].) The police report indicates that Alcantar knew the individuals who were following and threatening her, and that they were Consuelo Verdugo's uncles, Javier and Antonio Alejandro. (*Id.*) She was shown a photo spread, and selected one of the Alejandros as a suspect. (*Id.*) She said she was seventy percent sure of her choice. (*Id.*) Alcantar also expressed frustration

that the police did not seem to believe her statements. (*Id.*; Exh. 105 at 5894-95 [Declaration of Marisol Calderon Alcantar].)

e. As a result of the threats to her life and her employees, Huffman was wary of investigating the Alejandros, even though such an investigation was warranted to explain Consuelo's prior injuries and the circumstances surrounding Cristina's testimony concerning the closed-door incident. As such, Ms. Huffman had an actual conflict that adversely affected her representation of petitioner.

O. CLAIM 15: SEVERAL INSTANCES OF UNCONSTITUTIONAL AND PREJUDICIAL JUROR MISCONDUCT OCCURRED DURING TRIAL.[18]

Petitioner's conviction, death sentence, and confinement were unlawfully obtained in violation of petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, and a fair, accurate and reliable guilt and penalty determination based solely on record evidence and reason, not passion or prejudice by several instances of juror misconduct in the course of the proceedings below.

There are well-established guidelines for juror conduct during trial – guidelines contained in the jury instructions at every trial. Jurors may not prematurely discuss or decide a case prior to deliberations. It is also misconduct for a juror to consider material extraneous to the record or to discuss the case with third parties. It is misconduct for jurors to inject their own untested expert knowledge into the deliberations. Most importantly, jurors may not disregard the law or the court's instructions regarding the law. In particular, when instructed on the meaning of legal terms and concepts, jurors must accept the definitions and explanations as offered to them by the court and must apply the law as set forth in the court's instructions.

In support of this claim, petitioner alleges the following facts, among

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[18] This Claim qualifies as a Category 3 claim.

others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts contained in the allegations set forth in Claims 13, 19, and 26 are incorporated by this reference as if fully set forth herein.

2. Throughout the trial, the court repeatedly instructed the jury on their obligations and duties not to discuss the case with anyone apart from the other jurors during deliberations, to base their decisions only upon the evidence presented in the case, to avoid seeking guidance from friends, counselors and spiritual leaders and not to prejudge the case or determine the penalty before hearing all of the evidence to be presented. Despite these clear and emphatic admonitions, several jurors committed prejudicial and improper misconduct in violation of the court's instructions.

a. Juror Kucharski improperly and prejudicially interjected her personal feelings by telling other jurors that Dr. Bloch was a liar. As Dr. Bloch was the only expert who disagreed with Dr. Dibdin's analysis, Juror Kucharski's statements prejudicially swayed the other jurors to give more credence to Dr. Dibdin's conclusions than merited but for Juror Kucharski's disparaging, yet authorative remarks. Dr. Dibdin's testimony was a lynch pin of the prosecution's case and without Juror Kucharaski's gross misconduct, the jury would not have found petitioner guilty.

b. Juror Karroll Wolfe committed prejudicial misconduct by routinely making contact with witness Lori Garland while the trial was ongoing and failing to report this contact to the court.

(1) Witness Lori Garland was called by the defense during the guilt phase of Mr. Benavides's trial. Prior to being called to the stand, the prosecutor notified the court that witness Garland had been talking to juror Wolfe in the hallway. (16 RT at 3204.)

(2) The court held a hearing out of the presence of the jury. (16 RT at 3205-3235.) Witness Garland told the court that she and juror Wolfe knew each other and had worked together as waitresses approximately five years earlier. (16 RT at 3206.) Witness Garland knew that Ms. Wolfe was a sitting juror in Mr. Benavides's trial. (*Ibid.*) Witness Garland admitted to the court that she had been present in the courtroom for the past two days and that she and juror Wolfe had conversed in the hallway outside the courtroom the day before and the day of the hearing. (16 RT at 3205-3207, 3210-3211.) The day of the hearing, she and juror Wolfe had spoken for half an hour in the hallway outside the courtroom in the presence of another male juror. (16 RT at 3206.) Witness Garland told juror Wolfe that she had been subpoenaed in the case. (16 RT at 3210.) Prosecutor Carbone understood the import of the misconduct, stating to the court, "I'm just upset about the fact that we have a witness here who has clearly talked to a juror in front of other jurors on a day before we are expecting to end evidence in a death penalty case, and we are not even notified of any potential problem." (16 RT at 3215.) The court felt inclined to throw juror Wolfe off the jury because she had disregarded his clear instruction not to talk to anyone associated with the case:

> I will tell you quite frankly, my inclination is to throw her off. I don't almost care what she says. . . . I have been probably preaching too much, so much so that nobody pays any attention. But I specifically told this group that you don't talk to anybody. And if you run into anybody in the hallway, the first thing you do is ask them are you a witness or a potential witness. And this lady Garland had to have known she was a potential witness and here they are talking together. (16 RT at 3216.)

(3) Juror Wolfe was then questioned by the court. (16 RT at 3225-29.) She admitted that she knew witness Garland and had worked with her as a waitress approximately five years earlier. (16 RT at 3225.) She denied having spoken to witness Garland the prior day, claiming that she did not recognize witness Garland at that point. (16 RT at 3226.) She admitted speaking to witness Garland on the day of the hearing for the duration of the break, but denied having spoken about the case. (16 RT at 3226-28.) She explained that they were in the presence of another male juror for the duration of the conversation. (*Ibid.*) Neither she nor the other male juror reported this conversation to the court. Nevertheless, the court decided to leave juror Wolfe on Mr. Benavides's jury. (*Id.* at 3230.)

(4) Juror Wolfe's rendition of facts contradicted witness Garland's memory of the events. Witness Garland told the court that she had spoken to juror Wolfe the day before the hearing as well as the day of the hearing. The court never resolved this discrepancy and never learned the exact nature of the conversation between juror Wolfe and witness Garland.

(5) Juror Wolfe committed prejudicial misconduct by repeatedly making contact with witness Garland during the trial. She and the male juror accompanying her committed further misconduct by failing to report this contact to the court. Their failure to do so raises the specter of other types of unreported misconduct and failure to follow the court's instructions.

c. Juror Karroll Wolfe also committed prejudicial misconduct by disregarding the court's instructions regarding the law. When the judge in this case instructed on the meaning of life without the possibility of parole. Juror Wolfe refused to accept the definition and explanation as given to her and the other jurors by the court. Juror Wolfe did not apply the law as set forth in the court's instructions because she continued to reject the court's instructions as to the meaning of life without the possibility of parole, and insisted that petitioner would be before a parole board within a few years and that he would be released and would re-offend. (Exh. 109 at 5912 [Declaration of Karroll Mulholland].) Exacerbating the prejudice from this misconduct, Juror Wolfe communicated her erroneous views to the rest of the jurors.

P. CLAIM 16: THE COURT'S PRO-PROSECUTION BIAS INFECTED THE TRIAL AND SWAYED THE JURORS TO DISCREDIT THE DEFENSE AND MATERIALLY PREJUDICED THE OUTCOME OF THE TRIAL.[19]

Petitioner's conviction, death sentence, and confinement were unlawfully obtained in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution and state law rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, and a fair, accurate and reliable guilt and penalty determination based solely on record evidence and reason, not passion or prejudice by the trial court's prejudicial misconduct during the proceedings.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. There are numerous instances where the court took over questioning of the witnesses effectively prejudicing the defense. The court revealed its pro-prosecution bias in the questioning of witnesses and materially advanced the prosecution's case. By asking these pro-prosecution questions the court gave its imprimatur to the prosecution's case and actively demeaned the defense witnesses.

a. While the prosecution was cross-examining Dr. Baumer the Court at times took over the questioning and misstated what Dr.

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[19] This Claim qualifies as a Category 1 claim.

Baumer had said. In one instance the court said Dr. Baumer had acknowledged that poor training could account for the DRMC personnel finding a clean diaper upon the child's admission to the hospital. (14 RT at 2880.) In fact, Dr. Baumer had not agreed to that proposition when cross-examined earlier by the prosecution. (*Id.* at 2879.)

b. A few minutes later the court once again took over the questioning of Dr. Baumer and mischaracterized the witness' testimony as indicating "in essence that this particular individual [defense expert Dr. Lovell] is more reliable than one hundred percent of the texts out there." (*Id.* at 2888.) Surprised by the mischaracterization, Dr. Baumer responded: "I don't think I said it like that, did I, your Honor?" The court responded: "Sir, you have been using lots of words and I'm going to say this with a smile, but I'm distilling it on down because that's what I am doing." Attempting to explain Dr. Baumer stated: "I'm sorry. I'm not sure that's –"

The Court then interjected:

> Your'—all witnesses do that. It's just a little late in the day and I'm a little irritated because I thought I left word, not with you personally, but I wanted you here at 1:30 because my jurors have other things to do with their lives besides sit here.
>
> I've got a 4:30 commitment, I've got a 5:30 commitment and a seven o'clock commitment, one of which I can and will break again, but doctor, I wanted you here at 1:30 and you weren't. We haven't got time to go into an explanation about why, but since you asked a question, usually I don't say too much, but late enough in the day, I'm going to tell you that's what I have heard you saying and –

BAUMER: Oh.

THE COURT: I don't know what's going on with that doctor.

BAUMER: All –

THE COURT: Do you know what's been going on?

BAUMER: With who?

THE COURT: Dr. Lovell.

BAUMER: Huh-uh. No, I really don't, honest to goodness, but I will tell you –

THE COURT: Sir, when you don't know something, that's time for you to be quiet.

BAUMER: He asked me.

THE COURT: You answered the question.

BAUMER: No, but I was told to be here from 2:30 to three.

THE COURT: Okay.

BAUMER: I'm sorry.

THE COURT: Very good. Go ahead.

(*Id.* at 2889.)

c. The Court's chastising of the defense expert in front of the jury and his comments that "my jurors have other things to do with their lives besides sit here" prejudiced petitioner by indicating that the defense was wasting the juror's time by going to trial.

d. The Court cemented this impression when he warned the defense attorney that "there's a difference between redirect and rehash." (RT 2893.) The Court's indication for the record that he is stating this

"with a smile," (RT 2893) simply belies the irritation in his tone which he felt a need to counter. The Court often used this technique to attempt to neutralize his notorious bad temper. (Exh 64 at 5342 [Declaration of Donnalee H. Huffman].) The Court's irritation was clear when he told the jurors that it "did tell her [defense counsel] to have this one here at 1:30..." (14 RT at 2896.)

e. In another poignant example of the Court asked the following rhetorical question of Dr. Tait, the only defense witness from DRMC: "Given a choice between providing treatment to a patient on the one hand, and preserving potential evidence of child abuse on the other hand, which choice do you make?" Dr. Tait responded: "The patient." (17 RT at 3333.) The Court's question was completely unnecessary, inappropriate, and set up a false dichotomy. The Court's question was designed to undermine the defense theory that the DRMC personnel's failure to preserve the diaper was because they did not see any evidence of physical or sexual abuse, rather than because they were in a rush or poorly trained. The Court's biased questioning alone and coupled with the defense counsel's unreasonable failure to object to the Court's bias significantly prejudiced the defense. As both the defense and prosecution had rested when the Court asked its question, the defense was unable to elicit testimony from Dr. Tait that would have explained that had there been evidence of abuse in the diaper, such as blood, the staff would have preserved it. Moreover, Dr. Tait could have explained that the emergency circumstances of the child's treatment did not and would not preclude them from seeing blood in her diaper or otherwise noticing the severe injuries to

the genitalia and anus alleged to have been inflicted by the defendant. (Exh. 76 at 5442 [Declaration of Anne Tait, M.D.].)

f. The Court's demeaning of defense witnesses was exacerbated by defense counsel's ineffective assistance in failing to object to the prosecutor's misconduct in badgering witnesses. In one instance the testifying defense expert said he could be wrong. The prosecutor stated: "I know you are wrong." (14 RT at 2884.) Defense counsel unreasonably failed to object to the prosecutor's misconduct.

2. The court's voir dire of prospective jurors also revealed his bias and infected the jury. The Court referred to people in favor of the death penalty as his "friends." By contrast, the Court referred to anti-death penalty people as follows: "I know some people who are, for whatever reason, against the death penalty." (3 RT at 593-94.)

Q. CLAIM 17: THE STATE PRESENTED IMPROPER VICTIM IMPACT EVIDENCE.[20]

The convictions and sentence of death were rendered in violation of petitioner's rights to a fair, reliable, and rational determination of guilt and individualized determination of penalty based on the jury's consideration and weighing only of materially accurate, nonprejudicial, relevant evidence presented during the trial and as to which petitioner had notice and a fair opportunity to test and refute, to have the jury give full effect to all evidence in mitigation of penalty, to the privilege against self-incrimination, and to the effective assistance of counsel as guaranteed by the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the prosecutor introduced, the court allowed, and trial counsel failed to object to the admission of improper and false victim impact evidence and argument that was designed to and did in fact prejudicially deprive petitioner of the foregoing constitutional rights.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. In California capital cases, victim impact evidence is considered part of the immediate circumstances of the crime, and therefore permitted under California Penal Code section 190.3. (*People v. Edwards* (1991) 54 Cal.3d 787, 835-36.) Such evidence is limited, however, to only that evidence that logically shows the harm of the defendant. (*Id.*) Evidence of circumstances of which defendant could not reasonably have

[20] This Claim qualifies as a Category 2 claim.

been aware at the time of the capital offense is not admissible. (*See People v. Fierro* (1991) 1 Cal.4th 173, 264 [conc. and dis. opn. Kennard, J.].)

2. Both California law and the United States Constitution prohibit the introduction of unduly prejudicial evidence or victim impact evidence for which the defendant could not reasonably have been aware. In addition, the Eighth Amendment prohibits the introduction of any victim impact evidence except that which is strictly confined to the circumstances permitted by *Payne v. Tennessee* (1991) 501 U.S. 808. Pursuant to *Payne*, the only permissible victim impact evidence in a capital trial is evidence of the relative of the victim who witnesses the direct or immediate aftermath of the crime.

3. The prosecutor introduced irrelevant, highly inflammatory victim impact evidence that was designed to and did prejudicially deprive petitioner of the right to a fair trial, the right to confront and cross-examine witnesses and the right to reliable guilt and sentencing determinations.

a. The prosecution argued that the same mercy should be given petitioner that was given to Consuelo. The prosecution requested during its closing argument for the penalty phase that the jury "show him the same mercy that he showed Consuelo Verdugo and to do justice here today, that is to sentence him to death." (19 RT at 3785.) This argument negated any attempt by the jurors to properly follow instructions and consider any evidence that would warrant mercy, because it equated mercy with death. It therefore left the jurors with no choice but to impose a death verdict. In addition, the prosecution's invocation of "justice" implies that petitioner would not be punished if he were sentenced to life in prison.

These statements were highly improper, were likely to lessen the jury's responsibility at sentencing, and interfered with the jury's ability to consider all mitigating evidence in favor of mercy.

b. Without notice to the defense, the prosecution presented the penalty phase testimony of Darlene Salinas, which consisted of a statement Darlene had written regarding the impact of Consuelo's death. This statement was improper.

(1) The statement appealed to God, quoting Matthew 19, Verse 14, "Suffer little children to come unto me, and do not forbid them, for such is the kingdom of heaven," and expressing a wish to God that justice be done, and that "nothing like this ever happens again." These statements invoked religion and religious condemnation, improperly implying to the jury that it was their moral duty to impose death. Mention of justice was obviously equated with death.

(2) Defense counsel was given no notice that victim-impact evidence concerning God, reciting the Bible, equating justice with death and arguing that death was the moral punishment, was to be introduced. Defense counsel also received no notice that the victim-impact testimony would discuss future events rather than the immediate effect of Consuelo's death. Defense counsel was therefore prevented from asserting a timely objection to the improper evidence, and was forced to make a hollow objection after the testimony had already been read and considered by the jury. (19 RT at 3747.)

c. The prosecution also presented the testimony of Virginia (Vicki) Salinas during the penalty phase. Vicki described how Consuelo's sister, Cristina Medina, felt about her sister's death. (19 RT at 3746.) Her testimony contained conjecture regarding how Cristina felt even though Cristina was available to testify and had testified herself in the guilt phase. Thus, Vicki's testimony contained improper hearsay statements.

d. The prosecution falsely implied that Delia Salinas had a nervous breakdown solely because of Consuelo's death. Diana Alejandro testified at the penalty phase that the crimes against Consuelo affected her family such that her oldest sister, Delia Salinas "just had a nervous breakdown." (19 RT at 3742.) The prosecution knew, however, that Delia Salinas had severe mental illness characterized by regular psychotic symptoms. (17 RT at 3334-3352.) The State thus presented inflammatory evidence that did not logically result from petitioner's alleged actions, since it referred to a condition that predated Consuelo's injuries and death. The State knew that Delia's mental health problems existed independent of any action taken by petitioner, and committed misconduct by falsely attributing it to petitioner.

4. The court erroneously admitted this egregious evidence and failed to properly instruct the jury as to the constitutionally permissible ways in which victim impact evidence could be considered. The court's inaction allowed the interjection of impermissible guilt and sentencing factors in petitioner's penalty phase trial. The prejudice to petitioner from this testimony only escalated as a result of the court's failure to limit the scope of this testimony and to provide necessary limiting instructions. As a

result, petitioner's trial was fundamentally unfair and the sentence unreliable.

5. Trial counsel failed to challenge the admission of this evidence and to object during its presentation. Trial counsel also failed to request a constitutionally appropriate limiting instruction. Trial counsel thus prejudicially failed to protect petitioner's constitutional rights to a fair and reliable sentencing. His actions were neither strategic nor reasonable and fell well below the standards established for reasonably competent counsel. (*See also* Claim 13.)

R. CLAIM 18: THE TRIAL COURT UNCONSTITUTIONALLY AND PREJUDICIALLY ORDERED PETITIONER TO BE SHACKLED THROUGHOUT THE TRIAL.[21]

Petitioner's conviction, death sentence and confinement were unlawfully obtained in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial, the presumption of innocence, equal protection, the right to be present and the opportunity to be heard, the effective assistance of counsel, to be mentally present during trial and a fair, reliable and accurate determination of guilty and penalty by the trial court's decision, made in petitioner's absence and without manifest need or factual support, to shackle petitioner.

In support of this claim, petitioner alleges the following facts, in addition to those to be presented after full investigation, discovery, and access to this Court's subpoena power and an evidentiary hearing.

1. The trial court violated petitioner's right to be brought before the court with the appearance of dignity and self- respect of a free and innocent man.

2. At no time during the prosecution of petitioner did petitioner engage in contumacious or defiant conduct. He was at all times respectful of the dignity of the court and never presented a threat to the security of the judge, the jurors, courtroom personnel, or spectators.

3. The trial court never provided notice to petitioner that it was considering shackling him for the trial, a hearing was never conducted and petitioner was never afforded a fair opportunity to contest the undisclosed

[21] This Claim qualifies as a Category 2 claim.

basis relied on by the court to shackle petitioner. The trial court made each decision, from the first to the last, concerning the need for physical restraints without obtaining evidence to justify the need for shackles, or requiring a factual showing to support the use of shackles, or considering the use of less prejudicial milder alternatives. The court did not establish a compelling need or a manifest necessity for shackling or assess the harm to petitioner from the shackling. Nor did the trial court afford petitioner a fair opportunity to challenge the rumors.

4. Throughout the prosecution, petitioner was shackled in the courtroom in view of the jury to petitioner's prejudice.

a. Petitioner first appeared in shackles in Municipal Court. The shackles were readily observable to spectators and a picture of petitioner wearing shackles appeared in the November 28, 1991 edition of a local newspaper. (See, e.g., 2 CT at 381-382.)

b. Petitioner then also appeared shackled in Superior Court. His relative Hector Figueroa states: "When I was in the courtroom I remember seeing Vicente had handcuffs on his hands. I was sad to see Vicente chained like that." (Exh. 86 at 5534 [Declaration of Hector Figueroa Ramirez].) His distant cousin also believes he recalls seeing petitioner in handcuffs. (Exh. 102 at 5797 [Declaration of Jose Isabel Figueroa].)

c. The fact that Hector Figueroa saw the shackles while he was testifying in court on April 13, 1993, (16 RT 3291), compels the conclusion that the jury also saw the shackles.

5. The shackles presented a false and prejudicial appearance that petitioner needed to be separated from the community at large and created an inherent danger that the jury formed the impression that petitioner was dangerous or untrustworthy.

6. The shackles were painful, upsetting, and distracting to petitioner and added a prejudicial burden to petitioner's ability to communicate to the court or to counsel.

a. Petitioner was a non-English speaking foreign national and the use of the shackles rendered him functionally unable to exercise his rights to a fair trial and to the assistance of counsel during courtroom proceedings.

b. The shackles exacerbated petitioner's other limitations in his ability to participate in the proceedings, including his impaired neuropsychological and intellectual functioning. (Exh. 126 [Declaration of Antonio Puente, Ph.D.].)

7. The trial court's unconstitutional shackling of petitioner had a substantial and injurious effect on the jury's guilt and penalty phase verdicts and was prejudicial to petitioner. Petitioner was charged with a crime that was the subject of intense prejudicial pre-trial publicity but the evidence was not overwhelming. The shackling in petitioner's case was in fact prejudicial for all of the reasons the law deems shackling undesirable -- it suggested to petitioner's jury that he was dangerous and guilty, it impaired his mental faculties, it was visible to the jury, and it was painful to him.

S. CLAIM 19: PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL COURT'S FAILURE PROPERLY TO INSTRUCT THE JURY OR RECTIFY JUROR CONFUSION REGARDING THE SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE.[22]

Petitioner's conviction, death sentence, and confinement were unlawfully obtained in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments rights to due process, to be free of arbitrary and capricious sentencing, to effective assistance of counsel, to an individualized sentencing proceeding, to full consideration of mitigating evidence, to be free of cruel and unusual punishment, to a fair and impartial jury, and to a penalty verdict by the jury free from constitutionally impermissible extraneous, inaccurate, irrelevant, unreliable, and prejudicial information that petitioner did not have the opportunity to deny or explain, because the trial court failed, and trial counsel failed to object to the trial court's failure, to properly instruct the jury or rectify juror confusion regarding the meaning of a sentence of life without the possibility of parole.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. During the penalty phase of petitioner's capital trial, the prosecutor argued that petitioner lacked remorse and could not be rehabilitated, thus implying that he would continue to be dangerous in the future. (19 RT at 3785.)

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[22] This Claim qualifies as a Category 2 claim.

2. During the penalty phase, the trial court instructed the jury that "[a] sentence of life without the possibility of parole means that Mr. Benavides will remain in state prison for the rest of his life and will not be paroled at any time. A sentence of death means that Mr. Benavides will be executed in state prison." (19 RT at 3776; 3 CT at 767.)

3. The jurors were confused by this instruction, and expressed doubt that petitioner, if sentenced to life without possibility of parole, would actually never be paroled.

a. Petitioner's jury began its deliberations regarding his penalty on April 22, 1993 at 11:35 a.m. Shortly thereafter, the jury requested and was given a copy of the penalty phase instructions. The jurors adjourned from their deliberations from 12:00 to 1:30 p.m. (3 CT at 783, 788.)

b. At 2:35 p.m., the court and counsel convened to discuss a note sent to the court by the jurors. (3 CT at 788.) The handwritten note stated as follows:

4-22-93

> Life without possibility of parole – how permanent is it? Can this be overturned in the future by legal changes? (Other than appeal) Is there a chance for him to walk out of prison EVER!! Explanation? 4/22/93

Harry Noschese

(3 CT at 782.)

4. The trial court failed properly to address and rectify the jurors' expressed confusion regarding the sentence of life without

possibility of parole, instead merely repeating to the jury the instruction that had confused them in the first place.

a. The trial court showed the jurors' note to counsel, and stated:

> Counsel, I am tempted to bring [the jurors] back in and read to them again the instruction that they have in there already that reads, quote, a sentence of life without possibility of parole, that means that Mr. Benavides will remain in state prison for the rest of his life and will not be paroled at any time, period. A sentence of death means that Mr. Benavides will be executed in state prison, period, end quotes.
>
> I'm open to any other suggestions, however. (19 RT at 3826.) All counsel agreed with the court's suggested approach. (19 RT at 3827.)

b. At 2:37 p.m., the trial court called the jury in and instructed them as follows:

> Ladies and gentlemen of the jury, I apologize for the delay between the time you sent your note out and the time I brought you back in here to answer it.
>
> It's been so long since we went through jury selection that I'm not sure I covered this with you or not, but on the off chance I did not, let me do so now. And if I have already done it, I apologize for the repetition.
>
> Before I can respond to any note, I am required to get counsel together to go on the record to share with them my intended response to get their input, to think about any input they might have and then to make it a decision.
>
> We have read and considered your note and we all agree that the appropriate response is found in the instruction that has already been given to you. And

> that one reads, quote, a *chance* of life without the possibility of parole means that Mr. Benavides will remain in state prison for the rest of his life and will not be paroled at any time, period. A sentence of death means that Mr. Benavides will be executed in state prison, period, end quotes.
>
> That instruction answers your question.
>
> I ask you, please, to return to the jury room to continue with your deliberations.

(19 RT at 3827-28 [emphasis added]; 3 CT at 789.)

5. After the trial court reinstructed the jury, the jurors continued to be confused by the instruction, and continued to doubt that petitioner, if sentenced to life without possibility of parole, would actually never be paroled.

a. Juror Karroll Mulholland understood life without possibility of parole to mean that petitioner would go before a parole board in a few years and have a chance of being let out. (Exh. 109 at 5912 [Declaration of Karroll Mulholland].) After the judge re-read the instruction in response to the jury note, Mulholland told the other jurors that petitioner would be released from prison and would re-offend if they gave him LWOP. She convinced her fellow jurors to sentence petitioner to death based on this rationale. (*Id.*)

b. The court's improper reference to a "chance" – rather than "sentence" – of life without the possibility of parole (19 RT at 3827) suggested to the jurors that an LWOP sentence only resulted in a *chance* that petitioner would serve the rest of his life in prison.

c. Empirical studies support the conclusion that petitioner's jurors were confused and skeptical about the meaning of the sentence of life without the possibility of parole. "Where LWOP is the alternative [to the death penalty], jurors either do not know about it, or do not believe it really means the defendant will, in fact, never be released on parole." (Eisenberg et al. *The Deadly Paradox of Capital Jurors* (2001) 74 So.Cal. L.Rev. 371, 373; see also *id.* at 396-97; Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing* (1999) 77 Tex. L.Rev. 605, 697 ["fewer than one in five California jurors actually believe [that capital defendants sentenced to LWOP] will usually spend the rest of their lives in prison"]; *id.* at 699 ["[t]he unmistakable theme in these California death cases is that the jurors simply did not believe that a defendant sentenced to LWOP was sure to stay in prison"]; Dieter, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty* (Apr. 1993) Death Penalty Info. Ctr. 8 [reporting results of a March 1993 poll of 1,000 registered voters nationwide in which "[w]hen asked how long someone with a sentence of life without parole would serve, only 11% believed that such a person would never be released".])

d. Studies further show that if the jury asks the court a question, a directly responsive answer is more likely to resolve the confusion than giving the jurors the same instructions they failed to understand in the first place. (See Garvey et al. *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases* (2000) 85 Cornell L. Rev. 627, 638-39.)

6. Petitioner was prejudiced by the trial court's failure properly to address and rectify the jurors' expressed confusion regarding the sentence of life without possibility of parole.

a. After the trial court reinstructed the jury, at 4:10 p.m., on April 22, 1993, the jurors requested trial exhibit 87 – a photo of the victim alive. (3 CT at 784, 789.) At 4:40 p.m. – just over two hours after the court reinstructed them on the penalty of life without the possibility of parole, and the same day the deliberations began – the jurors announced that they had reached a verdict. The jurors' penalty phase verdict was death. (3 CT at 789.)

b. The jurors' confusion regarding the sentence of life without possibility of parole, and the court's failure to rectify this confusion, created a false choice for the jurors between sentencing petitioner to death and sentencing him to a limited period of incarceration.

c. Empirical studies show that "jurors who underestimate the alternative [sentence to a death sentence] are more likely to vote for death, whether the alternative does or does not permit parole." (Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing* (1999) 77 Tex. L.Rev. 605, 671.) Studies further show that how long a juror thinks an individual sentenced to life imprisonment will *actually* serve is directly relevant to whether the juror votes for death. (See id. at 652-64; Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 7-8; Luginbuhl & Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, (1995) 70 Ind. L.J. 1161, 1178-79 ["the belief that a

defendant who was not sentenced to death would spend relatively little time in prison and then be released back into society appears to be a strong motivation for a juror's vote for death"]).

d. Studies further show that the less capital jurors understand penalty phase instructions, the more likely they are to impose the death penalty. (See Garvey et al. *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases* (2000) 85 Cornell L.Rev. 627, 640-42; Diamond & Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions* (1996) 79 Judicature 224, 231; Weiner et al. *Comprehensibility of Approved Jury Instructions in Capital Murder Cases* (1995) 80 J. of Applied Psychology 455, 464.)

e. The trial court's failure properly to address and rectify the jurors' expressed confusion regarding the sentence of life without possibility of parole had a substantial and injurious effect or influence on the jury's determination of the verdict at the penalty phase of petitioner's trial.

7. Petitioner's trial counsel unreasonably failed to object to the trial court's failure properly to address and rectify the jurors' expressed confusion regarding the sentence of life without possibility of parole. (19 RT at 3826-27.)

a. Trial counsel had no valid strategic reason for failing to object to the trial court's mishandling of the jurors' confusion regarding the sentence of life without the possibility of parole, and this failure to object was unreasonable under the circumstances. Competent counsel

would have objected to the trial court's inadequate response to the jurors' questions.

b. But for trial counsel's failure to object to the trial court's improper response to the jurors' expressed confusion regarding the sentence of life without possibility of parole, there is a reasonable probability that the jury would not have sentenced petitioner to death.

8. To the extent that this Court concludes that trial counsel and/or appellate counsel failed to object to the trial court's failure to properly instruct the jury and/or raise this challenge on appeal, despite the non-record facts presented in support of this claim, petitioner has been prejudicially deprived of effective assistance of counsel.

T. CLAIM 20: PETITIONER IS INELIGIBLE FOR A DEATH SENTENCE AND HIS CONVICTION CANNOT STAND BECAUSE OF HIS MENTAL RETARDATION.[23]

Petitioner's sentence of death is unlawful and was unconstitutionally obtained in violation of his rights to trial by jury, due process, equal protection, effective assistance of counsel, a fair and reliable determination of guilt, death eligibility and penalty, to be free of cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law because he is mentally retarded. Petitioner's mentally retarded functioning made him ineligible for the punishment of death.

In addition, petitioner's functioning, which places him in the mentally retarded range of mental capacity, rendered him unable to cooperate and assist counsel or to understand the proceedings with the constitutionally requisite mental capacity throughout the trial, thereby rendering his conviction void.

Moreover, petitioner's functioning tainted his ability to perceive, recall and relate relevant and critical information and events accurately; rendered his interactions with authority figures open to question; detrimentally affected his demeanor, testimony, and statements to law enforcement officials; and created the unwarranted false impression of guilt or lack of remorse from the time of his arrest through sentencing.

Either alone, or in combination with other neurocognitive deficits and mental vulnerabilities, petitioner's significantly sub-average intellectual

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[23] This Claim qualifies as a Category 2 claim.

functioning and profound limitations in adaptive behavior render his conviction void and his sentence constitutionally invalid.

In support of this claim petitioner alleges the following facts, in addition to those to be presented after full investigation, additional time, funding, discovery and access to this Court's subpoena power and an evidentiary hearing:

1. Petitioner's familial, prenatal, perinatal, childhood, and adolescent history is replete with possible etiologies of his sub-average intellectual, neurocognitive, and adaptive functioning. Those facts set forth in Claim 13, detailing possible etiologies for his mental impairments, including in utero, early and frequent exposure to and involuntary ingestion of neurotoxins and alcohol, repeated head trauma from infancy through late adolescence, in utero physical trauma, and prenatal and childhood malnutrition, and as set forth in Exh. 126 at 6355 [Declaration of Antonio E. Puente, Ph.D.]; Exh. 124 at 6288, 6290 [Declaration of Ignacia González Campos]; Exh. 119 at 6166-69 [Declaration of Evaristo Benavides Figueroa]; Exh. 118 at 6145 [Declaration of Julia Govea]; Exh. 123 at 6279 [Declaration of Elvira Benavides Preciado]; Exh. 122 at 6261-65 [Declaration of Guadalupe Padilla Benavides]; Exh. 91 at 5590 [Declaration of Josefina Benavides Rodriguez]; Exh. 121 at 6236-37 [Declaration of Enedina Benavides Figueroa], are incorporated by this reference as if fully set forth herein.

2. Petitioner's mentally retarded functioning, either alone or in combination with co-existing neurocognitive deficits and mental illness, rendered his testimony and statements inaccurate and unreliable; accounted for his inability to perceive and respond appropriately upon discovering the

injured victim; rendered invalid any waivers of constitutional rights; and inaccurately and falsely presented a portrait of a guilty and uncaring individual. (See Exh. 126 at 6356-59 [Declaration of Antonio Puente, Ph.D.].)

3. The composite picture emerging from the assessment of petitioner's intellectual and cognitive functioning places him in the mentally retarded range of functioning; the results of his achievement, cognitive and intelligence testing are substantially sub-average. (Exh. 126 at 6348-54 [Declaration of Antonio Puente, Ph.D.].)

a. Petitioner's cognitive functioning, as measured by the Woodcock-Muñoz Battery, is equivalent to that of a child who is 7 years and 5 months old. Petitioner's score placed him in the third percentile of functioning; in other words, petitioner scored lower than ninety-seven percent of the population and possesses cognitive abilities of a child who is not yet seven-and-a-half years old. (Exh. 126 at 6350 [Declaration of Antonio Puente, Ph.D.].)

b. Petitioner suffers from global deficits in memory including immediate recall, delayed recall, and recall with or without interfering or prompting information. (Exh. 126 at 6346 [Declaration of Antonio Puente, Ph.D.].) His capacity to store and later retrieve information ranged from that of a child between four and seven years old. (Exh. 126 at 6347 [Declaration of Antonio Puente, Ph.D.].)

c. At all relevant times, petitioner had, and currently has, severe deficiencies in abstract reasoning, organization, concept-forming, solving problems and integrating information imparted to him. He has

substantial difficulty using feedback to modulate or alter his behavior, integrating and handling more than one stimulus, and shifting a course of ongoing activity. His performance on tests measuring these faculties revealed he functions at the level of a child under the age of seven. (Exh. 126 at 6343 [Declaration of Antonio Puente, Ph.D.].)

d. Petitioner's intellectual functioning as measured by the CTONI, which is heavily weighted in reasoning tests and is specifically designed to be unbiased with regard to race, gender, ethnicity or language, placed him in the bottom one percent of the population, with an IQ of 48. Similarly, his scores on the Benton Visual Test, a test of non-verbal intelligence, yielded an estimated IQ between 60 to 69. (Exh. 126 at 6349 [Declaration of Antonio Puente, Ph.D.].)

e. The Broad Cognitive Ability Measure Extended Scale of the Bateria Woodcock Muñoz yielded a "standard score," which is equivalent to an I.Q. score of 72, placing him in the third percentile of the population. (*Id.* at 6350) Petitioner's intellectual functioning as measured by the Wechsler Adult Intelligence Scale–Spanish Version (WAIS), the Escala de Inteligencia de Wechsler para Adultos–III (WAIS-III) (Mexican Version), General Ability Measure for Adults (GAMA), Beta 3, and Peabody Picture Vocabulary Test produced similar results. Petitioner's I.Q. scores on these tests ranged from 80 to 83. His level of cognitive and academic functioning as measured by the Peabody was equivalent to that of a child aged 13 to 14 years old. (Exh. 126 at 6349-50 [Declaration of Antonio Puente, Ph.D.].)

(1) Adjusted for the widely accepted and recognized "Flynn effect," petitioner's I.Q. scores would be lower than, but statistically similar, to that obtained on the Woodcock-Muñoz.

(2) The guidelines for clinicians assessing mental retardation issued by the American Association of Intellectual and Developmental Disabilities (AAIDD) direct clinicians to "take into consideration the Flynn Effect as well as the standard error of measurement when estimating an individual's true IQ score." (AAIDD, *User's Guide: Mental Retardation - Definition, Classification and Systems Support* (10th ed. 2007) 20-21.) The Flynn Effect is based on studies showing that IQ scores have been increasing from one generation to the next in all fourteen nations for which data existed at the time of the studies. On average, the full scale IQ increases approximately 0.33 points every year since a test was normed. Consequently, I.Q. tests must be recalibrated and restandardized to retain their accuracy. (*Id.* at 20.) Based on this known inflation of IQ scores, petitioner's scores on the above tests fall within the mental retardation range.

f. "Considering Mr. Benavides's scores as a whole and taking into account different intellectual functioning skills measured by these different tests, Mr. Benavides's scores fall within the range of mental retardation and indicate significant impairment in intellectual functioning." (Exh. 126 at 6349 [Declaration of Antonio Puente, Ph.D.].)

4. Petitioner's substantially subaverage intellectual and cognitive functioning exist and existed concurrently with clinically significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. (Exh. 126 at 6350-51 [Declaration of Antonio Puente, Ph.D.].)

a. Petitioner's deficits in social skills manifest themselves primarily in his inability to avoid victimization. As a small child he was hit by his siblings and other children and he took no steps to defend himself. (Exh. 115 at 6061-62 [Declaration of Emilia González Ruiz].) Though his father beat petitioner from a very young age, petitioner continued working for him and subjecting himself to abuse even as an adult. (*See, e.g.*, Exh. 111 at 5960-61 [Declaration of Norma Patricia Yáñez Benavides].) His mother and most of his other siblings eventually left their father to avoid this abuse, while petitioner remained loyally by his side. (Exh. 119 at 6165 [Declaration of Evaristo Benavides].)

b. Petitioner's deficits in conceptual skills are demonstrated by his deficits in functional academics, including language, reading and writing skills. Petitioner failed most of his classes in seventh and eighth grade. (Exh. 52 [Education Records].) As his *secundaria*, or middle school, teacher explains: "When he entered *secundaria*, he began to have problems understanding new concepts. Even as one of the oldest students in his class, he was unable to understand the new information and concepts." (Exh. 116 at 6097 [Declaration of María Dolores Castañeda de Palafox].) His *secundaria* classmate recalls that petitioner had difficulty reading correctly and understanding what he read: "When he did happen to

read, he read through the sentences like a train without making any stops for punctuation. He did not seem to understand what he was reading. He just seemed to be reading it mechanically without putting the proper emphasis on the words." (Exh. 123 at 6277 [Declaration of Elvira Benavides Preciado].) Petitioner also made many mistakes when he wrote and failed to use the proper punctuation marks. (*Id.*) Petitioner eventually left school in the ninth grade. His classmate Benito Preciado explains: "Vicente and I, however, did not finish school. Neither did his brother Manuel. We were as dumb as donkeys. Vicente and I did not like school because we did not do well in our studies. We preferred to be outside in the fields where we could do our work well." (Exh. 114 at 6028-29 [Declaration of Benito Preciado Benavides].) It is noteworthy that though petitioner was a sixteen and seventeen year old during his attendance in the secundaria, which made him one of the oldest students in the class, he was still unable to keep up with his fellow classmates.

c. Petitioner's current functional academic skills do not show much improvement from the time he was in the *secundaria*. His writing, oral language, and Spanish language abilities are equivalent to those of a child between 10 and 13 years old. (Exh. 126 at 6352 [Declaration of Antonio Puente, Ph.D.].) His reading and writing scores as reflected on the Woodcock-Muñoz battery are equivalent to those of a 17 year old adolescent boy. (*Id.*) It is probable that this level of performance represents an improvement due to the structured prison environment in which he has lived over the last fifteen years.

d. Petitioner is illiterate in English. The fact that he has not learned English after living in an English-speaking environment for over twenty years is a significant indicator of his conceptual skill deficits. (Exh. 126 at 6353 [Declaration of Antonio Puente, Ph.D.].)

e. Petitioner also has significant deficits in practical skills related to independent living. Throughout his life petitioner has surrounded himself with a network of friend and family caretakers who have helped him function despite his cognitive deficits. His girlfriend in the 1980s, Juana Flores, remembers that his mother took care of most of his needs while she took care of household tasks. (Exh. 96 at 5707 [Declaration of Juana Flores Rivera]; Exh. 99 at 5746 [Declaration of Ignacio Padilla Rivera].) Similarly, when he worked in the United States he had all his needs taken care of by his work crew leaders. His crew leaders Delfino Trigo, Cristobal Aguilar, and Leon Aguilar made all the logistical arrangements for petitioner to travel to and from the United States. When he crossed the border illegally, his crew leaders took care of contacting and paying the guide to insure petitioner's passage to the United States. (Exh. 103 at 5832-33 [Declaration of Cristobal Aguilar Galindo].) His crew leader also helped him arrange his papers to legalize his immigration status. (Exh. 94 at 5694-95 [Declaration of Ana Maria Cordero Cárdenas de Dávalos].) The crew leaders also provided him with work, lodging, and food, and they also managed his money. (Exh. 125 at 6315 [Declaration of Jóse Jesús Vásquez Dávalos].)

f. Though most other crew members progressed to higher paying, less arduous, and more cognitively challenging jobs, such as

construction, petitioner remained working as a farmworker. (Exh. 103 at 5837-38 [Declaration of Cristobal Aguilar Galindo]; Exh. 102 at 5791 [Declaration of Jose Isabel Figueroa]; Exh. 86 at 5530 [Declaration of Hector Figueroa Ramirez]; Exh. 93 at 5659-60 [Declaration of Jesus Davalos Preciado]; Exh. 100 at 5758 [Declaration of Antonio Delatorre].)

g. One of the reasons petitioner was not able to work in construction was because he did not know how to drive. (Exh. 99 at 5749 [Declaration of Ignacio Padilla Rivera].) He was afraid of driving and never learned how to do so. (Exh. 103 at 5833 [Declaration of Cristobal Aguilar Galindo]; Exh. 102 at 5789-90 [Declaration of Jose Isabel Figueroa].) Other crew members drove him to and from the field, and his girlfriend Estella Medina drove him to and from her apartment. (Exh. 103 at 5834 [Declaration of Cristobal Aguilar Galindo]; Exh. 99 at 5749 [Declaration of Ignacio Padilla Rivera]; 15 RT at 2997.) When he contributed funds with his friends to buy a car, he was the only owner who did not drive the car. (Exh. 102 at 5789-90 [Declaration of Jose Isabel Figueroa].)

h. Petitioner's inability to call Estella on the day Consuelo was injured without the assistance of a nine year-old also shows his deficits in mastering basic practical skills and social skills related to taking responsibility.

i. As is evident from his life history, petitioner's deficits in social, functional, and practical skill and impairments in intellectual functioning are longstanding and manifested themselves prior to the age of 18. (Exh. 126 at 6349 [Declaration of Antonio Puente, Ph.D.].)

5. Petitioner's severe intellectual, cognitive, and adaptive behavioral deficits exist and existed concurrently with diffuse brain damage. This brain damage, which is mild to moderate, had a significant effect on his ability to function. (Exh. 126 at 6341-42 [Declaration of Antonio Puente, Ph.D.].)

a. Petitioner's impairment index of 1.0 on the Halstead Reitan Neuropsychological Battery indicated that he tested in the impaired range on all tests used to derive the impairment index. Petitioner's Neuropsychological Deficit Scale score of 47 placed him in the range of individuals with moderate brain impairment. (Exh. 126 at 6341-42 [Declaration of Antonio Puente, Ph.D.].)

b. Petitioner's lifelong significant organic brain dysfunction provides the context in which his intellectual, cognitive, and adaptive behavioral deficits must be evaluated, as it exacerbated his already compromised intellectual functioning and placed his behavior and thought processes clearly within the mentally retarded range of functioning.

6. Petitioner has mental retardation and is therefore ineligible for the death penalty. His disability – limitations that represent a substantial disadvantage when attempting to function in society – not only render him ineligible for the death penalty, but rendered him mentally incompetent to stand trial, to waive significant constitutional rights, and to testify, and rendered his behavior and statements at the time of the crime and his courtroom demeanor unreliable and inaccurate in a myriad of ways detrimental to him.

7. Standing alone or combined with his cluster of major mental impairments – including posttraumatic stress disorder, a major depressive disorder and alcohol dependence – petitioner's mental disability renders and rendered him ineligible for the death penalty for all of the reasons forming the predicate for *Atkins v. Virginia* (2002) 536 U.S. 304.

U. CLAIM 21: PETITIONER'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE IT WAS SELECTED AND IMPOSED IN A DISCRIMINATORY, ARBITRARY, AND CAPRICIOUS FASHION AND WAS BASED ON IMPERMISSIBLE RACE AND GENDER CONSIDERATIONS.[24]

Petitioner's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and in violation of Petitioner's rights guaranteed by Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law because the prosecution used race, gender, and other unconstitutional considerations in its charging decision to seek the death penalty. Petitioner's federal constitutional rights to a fair trial, to be free of arbitrary and capricious sentencing, to an individualized sentencing proceeding, to be free of cruel and unusual punishment, and to equal protection of the laws were violated.

The equal protection guarantee of the federal Constitution prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis. This principle has greater importance when the possible sentence is death. The Supreme Court consistently has recognized that the qualitative difference of death from all other punishments requires a greater degree of scrutiny of the capital sentencing determination. Accordingly, the Constitution demands a high degree of rationality in imposing the death penalty. A capital sentencing system that permits race, gender, or other

[24] This Claim qualifies as a Category 2 claim.

impermissible criteria to influence charging decisions or one that permits arbitrary and capricious charging decisions violates the Constitution.

Similarly, the Constitution is violated when the death sentencing scheme results in arbitrary and capricious charging and sentencing patterns. A death sentence is unconstitutionally imposed when the circumstances under which it has been imposed create an unacceptable risk that the death penalty may have been meted out arbitrarily or capriciously or through whim or mistake.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Under California law, the Kern County District Attorney is responsible for identifying the murder cases in Kern County in which the state will seek the death penalty.

2. During the period 1977-1993, the Kern County District Attorney's Office used race as a criterion in its charging decisions regarding the identification of cases in which to seek a penalty of death, including the decision to charge petitioner.

a. The Kern County District Attorney's Office sought the death penalty in this case against petitioner, who is Hispanic, while not seeking the death penalty in other cases in which the defendant was non-Hispanic but which had similar or more egregious facts than petitioner's case. (Exh. 106 at 5897 [Declaration of Jon B. Purcell].)

b. Petitioner's race was a factor that was used to his detriment by the Kern County District Attorney's Office in its charging decision to seek the death penalty against him.

c. The ultimate decision-maker in the Kern County District Attorney's Office was white, as were many, if not all, of the intermediate decision-makers in petitioner's case.

d. In addition to racial discrimination in petitioner's case, there is a pattern of racial discrimination in the charging decisions of the Kern County District Attorney's Office for the years 1977-1995.

e. This pattern of racial discrimination in the charging decisions of the Kern County District Attorney's Office is consistent with empirical studies indicating the widespread presence of racial bias in charging decisions generally. Such studies show that the death penalty is imposed and executed upon non-whites with a frequency that is disproportionate to their representation among the number of persons arrested for, charged with, or convicted of death-eligible crimes. (See, e.g., "Developments in the Law, Race and Criminal Process," 101 *Harv. L. Rev.* 1472, 1525-26 (1988).)

3. During the period 1977-1993, the Kern County District Attorney's Office used gender as a criterion in its charging decisions regarding the identification of cases in which to seek a penalty of death, including the decision to charge petitioner.

a. Petitioner's gender was a factor that was used to his detriment by the Kern County District Attorney's Office in its charging decision to seek the death penalty against him.

b. The ultimate decisionmaker in the Kern County District Attorney's Office was male as were many, if not all, of the intermediate decisionmakers in petitioner's case.

c. In addition to gender discrimination in petitioner's case, there is a pattern of gender discrimination in the charging decisions of the Kern County District Attorney's Office for the years 1977-1993.

d. This pattern of gender discrimination in the charging decisions of the Kern District Attorney's Office is consistent with empirical studies indicating the widespread presence of constitutionally impermissible gender bias in charging decisions generally.

e. The death sentence is imposed and executed upon men with a frequency that is disproportionate to their representation among the general population, the number of persons arrested for, charged with or convicted of death eligible crimes.

4. During the period 1977-1993, the Kern County District Attorney's Office used economic status as a criterion in its charging decisions regarding the identification of cases in which to seek a penalty of death, including the decision to charge petitioner.

a. Petitioner's economic status was a factor that was used to his detriment by the Kern County District Attorney's Office in its charging decision to seek the death penalty against him.

b. In addition to economic discrimination in petitioner's case, there is a pattern of economic discrimination in the charging decisions of the Kern County District Attorney's Office for the years 1977-1993.

c. This pattern of economic discrimination in the charging decisions of the Kern District Attorney's Office is consistent with empirical studies indicating the widespread presence of constitutionally impermissible economic status bias in charging decisions generally. In

petitioner's case, the Kern County District Attorney's utilization of petitioner's indigence as a factor in charging decisions constitutes prosecutorial misconduct and violated petitioner's fundamental due process rights. Kern County is not alone in the prejudice against indigent minority men, as California's death row is overwhelmingly comprised of indigent men.

d. Statistically, the death penalty in the State of California as a whole is disproportionally applied to impoverished defendants who are represented by counsel appointed at public expense. The death sentence is imposed and executed upon poor people with a frequency that is disproportionate to their representation among the general population, the number of persons arrested for, charged with or convicted of death eligible crimes. The application of the death penalty against individuals based on their poverty level is simply another unjustifiable standard and arbitrary classification that is prohibited by the United States Constitution and the Constitution of the State of California. A prosecutor's utilization of the poverty level of an individual as a factor in deciding whether to charge capitally is also prosecutorial misconduct.

5. During the period from 1977-1993, the Kern County District Attorney's Office applied no consistent permissible criteria in its charging decisions with respect to those cases in which it sought a penalty of death, including the decision to charge petitioner.

a. During this period, the Kern County District Attorney's Office used impermissible criteria, namely race, gender and economic status

of the defendant, in its charging decisions regarding the cases in which it would seek a penalty of death.

b. In petitioner's case, the Kern County District Attorney's Office decided to seek the death penalty. This charging decision was made on the basis of impermissible factors – race, gender and economic status -- and was not based upon any constitutionally permissible factors that were consistently applied across all death penalty-eligible murder cases.

c. The Kern County District Attorney's Office sought the death penalty in this case against petitioner, while not seeking the death penalty in other cases with similar or more egregious facts than those presented by petitioner's case.

d. The pattern of the charging decisions for death-eligible homicides indicates that the Kern County District Attorney's Office has no consistent, constitutionally permissible criteria on which to base its death penalty decisions.

6. The application of race, gender, and economic status as criteria for imposing the death penalty against petitioner was constitutionally impermissible. Similarly, arbitrary and capricious charging decisions violate the Constitution. Accordingly, petitioner's sentence of death must be set aside.

7. Trial counsel was ineffective in failing to present appropriate challenges to the charging decision. Petitioner's trial counsel failed to raise available challenges to the constitutionality of the charging decision in this case. Counsel failed to raise a challenge to the California statutory scheme

in general and failed to raise the issue that capital charging decisions and sentences in California, and in Kern County in particular, are disproportionately determined by the race and gender of the victim, the race and gender of the accused, and the class of the accused. Trial counsel's unreasonable and prejudicial failure to raise such challenges deprived petitioner of his Sixth Amendment rights. A reasonably competent attorney during the time of petitioner's trial would have raised such a challenge.

8. The violations of petitioner's guaranteed constitutional rights in this regard were per se prejudicial and relief is warranted without any showing that the error was harmless. This error so infected the integrity of the proceeding against Petitioner that the error cannot be deemed harmless and the State will be unable to meet its burden in showing this error harmless. In any event, this violation of petitioner's rights had a substantial and injurious effect or influence on the verdict, rendered the penalty judgment fundamentally unfair and resulted in a miscarriage of law. Habeas relief is therefore warranted.

V. CLAIM 22: THE STATE'S DEATH PENALTY STATUTE FAILS TO NARROW THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY AND RESULTS IN IMPOSITION OF DEATH IN A CAPRICIOUS AND ARBITRARY MANNER.[25]

Petitioner's conviction, judgment of death, and confinement are unlawful and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments, and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law, because the California death penalty statute fails to narrow the class of offenders eligible for the death penalty and permits the imposition of death in an arbitrary and capricious manner. In particular, petitioner's conviction of capital murder violated the Eighth and Fourteenth Amendments' requirements that the provisions of a state's death penalty statute must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder, and thereby resulted in the imposition of a freakish, wanton, arbitrary and capricious judgment of death. The failure to narrow the class of persons eligible for capital punishment deprived petitioner of his due process and equal protection rights under the Fourteenth Amendment; permitted arbitrary selection for prosecution without consistent guidelines to ensure reliability; and violated the Eighth Amendment prohibition against cruel and unusual punishment.

In support of this claim, petitioner alleges the following facts, in addition to those to be presented after full investigation, discovery, and access to this Court's subpoena power and an evidentiary hearing:

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[25] This Claim qualifies as a Category 1 claim.

1. Petitioner was convicted of first-degree murder and sentenced to death under California Penal Code sections 187(a), 190.2(a)(17)(C), 190.2(a)(17)(D) and 190.2(a)(17)(E). The special circumstances rendering petitioner eligible for imposition of a sentence of death were three felony-murder special circumstances, as alleged and found true under Penal Code sections 190.2(a)(17)(C), 190.2(a)(17)(D) and 190.2(a)(17)(E).

2. Under the Eighth and Fourteenth Amendments, a death penalty statute must, by rational and objective criteria, genuinely narrow the group of murderers who may be subject to the death penalty.

3. California's death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have actually expanded the statute's reach.

4. As written and applied, the California death penalty statute potentially sweeps the great majority of murders into its grasp, and permits any conceivable circumstance of a crime – even diametrically opposite ones (e.g., the fact that a decedent was young as well as the fact that a decedent was old, the fact that a decedent was killed at home as well as the fact that a decedent was killed outside the home) – to be used to justify the imposition of the death penalty.

5. Interpretations of California's death penalty statute by this Court and the United States Supreme Court have placed the burden of narrowing the class of murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute.

6. The California death penalty statute contained twenty-nine different crimes punishable by death at the time of petitioner's crime and,

according to the voter's pamphlet, was specifically enacted for the purpose of making every murderer eligible for the death penalty.

7. Empirical evidence shows that this goal has largely been achieved. A survey of published and unpublished decisions, from 1988 through 1992, on appeals from first degree murder convictions establishes that more than 84 percent of first degree murder cases are factually special circumstance cases under the statute in place in 1997, thus rendering such murderers death-eligible. (Schatz & Rivkind, "The California Death Penalty Scheme: Requiem for Furman," 72 *N.Y.U.L. Rev.* 1283, 1332-35 (1997).) California's death penalty scheme defines death-eligibility so broadly that it creates a greater risk of arbitrary death sentences than the pre-*Furman* death penalty schemes. California's statutorily defined death-eligible class is so large and imposition of the death penalty on members of the class so infrequent as to violate *Furman* and its progeny.

8. Penal Code section 190.2's failure to genuinely narrow the class of death eligible murderers is neither corrected nor ameliorated by Penal Code section 190.3, the statute that sets forth the circumstances in aggravation and mitigation which the jury is to consider in determining whether to impose a sentence of death upon a defendant convicted of special circumstance murder. In practice and as a result of interpretation by this Court, the factors in Penal Code section 190.3 have been used in ways so arbitrary and contradictory as to violate due process of law. Furthermore, this Court's interpretations of the section 190.3 factors have created a process biased in favor of death that does not genuinely narrow the pool of murderers to those most deserving of death.

9. California's statutory scheme is particularly death biased in felony-murder cases, such as petitioner's case, because the California felony-murder rule itself is exceedingly broad, all first degree felony-murder cases are special circumstance cases, and after rendering a first degree murder conviction and special circumstance finding based on felony-murder, the penalty jury is instructed to weigh the same felony-murder "crime circumstances" and the same felony-murder special circumstance(s) as factors in aggravation. (See Cal. Penal Code § 190.3(a).)

10. Safeguards employed by most other states to ensure a fair jury verdict are not a part of California law, and the review of death judgments by this Court yields an affirmance rate higher than any other court in the country, much higher than the affirmance rate in states such as Florida, Georgia, or Texas.

11. Individual prosecutors in California are afforded complete unguided discretion to determine whether to charge special circumstances and to seek penalties of death, thereby creating a substantial risk of county-by-county arbitrariness. (See *People v. Adcox* (1988) 47 Cal.3d 207, 275-76 [Broussard, J. concurring].)

12. The present death penalty law in California is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

13. The number and breath of the special circumstances, i.e., the death-eligibility finding under California's death penalty statute, has steadily increased since 1977.

a. In 1977, the California Legislature enacted a new death penalty law. Under the law, one of twelve special circumstances had to be proved beyond a reasonable doubt to make a murderer death-eligible. (Stats. 1977, ch. 316, at 1255-66.) Under the statute, death eligibility was to be the exception rather than the rule. As stated by this Court, first degree murder was "'punishable by life imprisonment for extraordinary cases in which special circumstances are present.'" (*People v. Green* (1980) 27 Cal.3d 1, 48 [quoting *Owen v. Superior Court* (1979) 88 Cal.App.3d 757, 760].) In addition, according to this Court, the special circumstances were intended to define death eligibility in California and thus perform the narrowing function required by *Furman v. Georgia* (1974) 408 U.S. 238. (*Green, supra*, 27 Cal.3d at 61.)

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

> And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would. (1978 Voter's

Pamphlet, p. 34.)

c. The Briggs Initiative sought to achieve this result by expanding the scope of Penal Code section 190.2 in a number of respects.

(1) The Briggs Initiative more than doubled the number of special circumstances, adding five more "victim" circumstances, Penal Code section 190.2(a)(8) (federal law enforcement officer), (9) (fireman), (11) (prosecutor), (12) (judge), (13) (elected or appointed official); four more felony-murder circumstances, Penal Code section 190.2(a)(17)(iv) (sodomy), (vi) (oral copulation), (viii) (arson), (ix) (train wrecking); two more "means" circumstances, Penal Code section 190.2(a)(15) (lying in wait), (19) (poison); two more "motive" circumstances, Penal Code section 190.2(a)(5) (to avoid arrest or escape), (16) ("hate" motive); and one new catchall circumstance: that the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity," Penal Code section 190.2(a)(14).

(2) The Briggs Initiative substantially broadened the definitions of prior special circumstances, most significantly by eliminating the across-the-board homicide mens rea requirement of the 1977 law. Under the Briggs Initiative, the majority of the special circumstances, including the felony-murder circumstances, for the actual killer, have no homicide mens rea requirement. (See Cal. Penal Code § 190.2(a)(17); see also *People v. Anderson* (1987) 43 Cal.3d 1104 (1987).)

(3) The Briggs Initiative expanded death-eligibility for accomplices by eliminating the "personal presence" and "physical aid" requirements generally applicable under the 1977 law.

d. Since the adoption of the Briggs initiative in 1978, the Legislature and the California Supreme Court have continued to expand the scope of both first-degree murder and the special circumstances.

(1) In 1982, the Legislature added a new "means" theory of first-degree murder to Penal Code Section 189: knowing use of armor-piercing bullets. (1982 Cal. Stat. 950, § 1 [codified as amended at Cal. Penal Code § 189].). In 1990, Proposition 115 added five first-degree felony murders to Penal Code section 189 (felony-murder kidnapping, train wrecking, sodomy, oral copulation and rape by instrument). In 1993, the Legislature added felony-murder carjacking and murder perpetrated by means of discharging a firearm from a motor vehicle to section 189. (See Stats. 1993, c. 611, § 4, 4.5, 6.) In 2000, the Legislature added torture-felony murder to the list of felony murders in Penal Code section 189. (See Stats. 1999, c. 694, §1.) The Legislature again expanded the scope of first-degree murder in 2002 by adding murder perpetrated by means of a weapon of mass destruction to Section 189. (See Stats.2002, c. 606 (A.B.1838), § 1, eff. Sept. 17, 2002.)

(2) In 1981, the Legislature, as part of a general rejection of the diminished capacity defense, eliminated two mental state defenses previously available in first-degree murder cases. (1981 Cal. Stat 404, §§ 2, 7 [codified as amended at Cal. Penal Code

§§ 22, 189].) This Court had previously held that proof of intoxication (and, inferentially, any mental defect) could negate malice, even in the case of a premeditated killing, *People v. Conley*, (1966) 64 Cal.2d 310, but the defense was eliminated by amendments to the definition of "malice." (Cal. Penal Code § 188; see also *People v. Saille* (1991) 54 Cal.3d 1103 [explaining that changes in § 188 repudiated *Conley*].) Similarly, this Court had earlier held that, even in the case of a planned killing, a defendant could negate "premeditation and deliberation" by raising a doubt as to whether the defendant had the capacity to "maturely and meaningfully reflect upon . . . his contemplated act." (*People v. Wolff* (1964) 61 Cal.2d 795.) That defense was eliminated by amendments to the definition of "willful, deliberate, and premeditated killing." (Cal. Penal Code § 189; see also *People v. Stress* (1988) 205 Cal.App.3d 1259.)

(3) The list of special circumstances underwent similar statutory expansions. In 1990, Proposition 115 added two more felony-murders to the special circumstances list: mayhem and rape by instrument. It also expanded the witness killing special circumstance to apply to witnesses in juvenile proceedings. It expanded the liability of felony-murder accomplices, eliminating the intent to kill requirement and requiring only that the accomplice meet the constitutional threshold required by the Eighth Amendment and controlling Supreme Court decisions. In 1996, Propositions 195 and 196 were enacted, adding felony-murder car jacking, murder of a

juror, and murder by discharging a firearm from a motor vehicle to the list of special circumstances and expanding the kidnap felony-murder special circumstance to include carjack kidnaps. (See Stats. 1995, c. 477, § 1 [Prop. 195, approved March 26, 1996]; Stats. 1995, c. 478, § 2 [Prop. 196, approved March 26, 1996].) In 2000, the lying in wait, kidnap felony-murder and arson felony-murder special circumstances were expanded. (See Stats. 1998, c. 629, § 2, Proposition 18, approved March 7, 2000.) Also in 2000, the gang killing special circumstance was added by Proposition 21. (See Proposition 21, approved March 7, 2000.)

e. Despite the far broader sweep of the special circumstances under the Briggs Initiative, the special circumstances are still allegedly expected to perform the same constitutionally required "narrowing" function as the "aggravating circumstances" or "aggravating factors" that some of the other states use in their capital sentencing statutes. (*People v. Bacigalupo* (1993) 6 Cal.4th 457.)

14. The death-eligible class created by the California death penalty scheme is too broad to comply with *Furman.*

a. As a result of the number of special circumstances, the legislative definition of first degree murder, and judicial rulings on the scope of first degree murders, the special circumstances and common felonies statutes, a substantial majority of murders in California have been first degree murder and, in virtually all of them, at least one special circumstance could be proved.

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

c. At the time of petitioner's crime and conviction, Penal Code section 190.2 contained 29 special circumstances, or 29 different crimes punishable by death.

d. The real breadth of the special circumstance categories is not in the number of categories alone or in the number that produce death sentences, but in two factors that, in combination, make California's scheme exceptional.

(1) First, California, along with only seven other states (Florida, Georgia, Maryland, Mississippi, Montana, Nevada, and North Carolina), makes felony-murder simpliciter a narrowing circumstance. (See *People v. Anderson* (1987) 43 Cal.3d 1104.) Although the felony-murder language of Penal Code section 189 is not identical to the special circumstance language in application, there is no difference. (See *People v. Hayes* (1990) 52 Cal.3d 577.)

(2) Second, California, along with only three other states (Colorado, Indiana and Montana), makes "lying-in-wait" a "narrowing" circumstance. (Cal. Penal Code § 190.2(a)(15).) As interpreted by this Court, this circumstance encompasses a substantial portion of premeditated murders. Only California and Montana have death penalty schemes with both felony-murder

simpliciter and lying-in-wait death-eligibility circumstances and, unlike California's numerous and broad felony-murder special circumstances, Montana's felony-murder narrowing circumstances encompass only two felonies: aggravated kidnapping and sexual assault on a minor. (See Mont. Code Ann. § 46-18-303(7), (9) (1995).)

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

f. There also was complete overlap between the felony murders listed in section 189 and the special circumstances listed in Penal Code section 190.2(a)(17). As of the date of the crime, all of the felonies listed in section 189 (arson, rape, robbery, burglary, mayhem, kidnapping, train wrecking, sodomy, oral copulation, lewd act on a child, and rape by instrument) also were special circumstances. (See Cal. Penal Code § 190.2(a)(17).)

g. The only intentional first-degree murders not expressly qualifying for the death penalty were those where the first-degree murder was established by proof of premeditation and deliberation. Some of these murders would have been capital murders because the defendant committed another murder, Cal. Penal Code section 190.2 (a)(2), (a)(3), the defendant acted with a particular motive, Cal. Penal Code § 190.2 (a)(1), (a)(5),

(a)(16), or the defendant killed a particular victim, Cal. Penal Code § 190.2, (a)(7) - (a)(13)).

h. Virtually all the remaining premeditated murders also would have been capital murders because, by definition, most premeditated murders are committed while the defendant was lying in wait. (Cal. Penal Code § 190.2 (a)(15); see *People v. Morales* (1989) 48 Cal.3d 527, 557, 575; see also *People v. Ceja* (1993) 4 Cal.4th 1134, 1147 [Kennard, J., concurring].).

i. The situation is similar with regard to unintentional first-degree murders. Unintentional murders are first-degree murders by virtue of the felony-murder rule. (Cal. Penal Code § 189.) An unintentional killing during one of the listed felonies makes the actual killer death eligible.

j. At the time of petitioner's crime and in the years following, the broad reach of the felony-murder rule has resulted from three factors.

(1) The felony-murder rule applies to the most common felonies resulting in death, particularly robbery and burglary, crimes which themselves are defined very broadly by statute and court decision.

(2) The felony-murder rule applies to killings occurring even after completion of the felony, if the killing occurs during an escape, i.e., before the defendant reaches a place of "temporary safety," or as a "natural and probable consequence" of

the felony. (See *People v. Cooper* (1991) 53 Cal.3d 1158; *People v. Birden* (1986) 179 Cal.App.3d 1020.)

(3) The felony-murder rule is not limited in its application by normal rules of causation and applies to altogether accidental and unforeseeable deaths. (See, e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 447.).

k. The breadth of Penal Code section 190.2 is more than just theoretical. Empirical evidence confirms what is evident from the face of the statute in effect in 1997: a survey of 596 published and unpublished decisions on appeals from first and second degree murder convictions in California, from 1988 through 1992, as well as 78 unappealed murder conviction cases filed during the same period in three counties, Alameda, Kern, and San Francisco, demonstrates that Penal Code section 190.2 fails to perform the narrowing function required under the Eighth and Fourteenth Amendments. ("California Death Penalty Scheme: Requiem for Furman," *supra*, at 1327-35.)

l. According to this survey, this Court reversed a capital case, in whole or in part, only once because of insufficient evidence to support the finding of special circumstances. (See *People v. Morris* (1988) 46 Cal.3d 1.)

m. The results of this study of published appeals from first degree murder convictions make clear the following points:

(1) First, the overwhelming majority (92 percent) of non-death judgment first-degree cases are also factually special circumstance cases.

(2) Second, the felony-murder special circumstances play the predominant role in defining death-eligibility in the California scheme. One or more of the felony-murder special circumstances was proved in almost three-quarters (74 percent) of the death judgment cases and in 60 percent of the other actual or potential special circumstance cases. ("California Death Penalty Scheme: Requiem for Furman," *supra*, at 1328-30.)

n. The results of this study of unpublished appeals from first-degree murder convictions generally confirm the data for the published cases. Again, the overwhelming majority (85 percent) of first-degree murder cases are factually special circumstance cases, with the majority of the special circumstance cases being felony-murder cases. The distribution of special circumstances closely tracks the distribution in the published non-death judgment first-degree murder cases.

o. The published case sample indicates that 92 percent of non-death judgment first-degree murder cases are factually special circumstance cases, while the unpublished case sample puts the number at 85 percent. When the percentages for the three categories of first degree murder cases (death judgment cases, published non-death judgment cases, and unpublished cases) are combined according to their respective proportions of total first degree murder cases, the result is that approximately 87 percent of first degree murder cases are factually special circumstance cases. Thus, approximately seven out of eight first-degree murder cases are factually special circumstances cases, the majority of first-degree murders are felony murders, and felony murders are virtually all

special circumstance murders. Accordingly, California's felony-murder special circumstance, which was one of the vehicles used to make petitioner death-eligible, alone defeat any possibility of genuine narrowing.

p. The class of first degree murderers is narrowed to a death-eligible class not only by the special circumstances of section 190.2, but also by Penal Code section 190.5, which forbids application of the death penalty to anyone under the age of eighteen at the time of the commission of the crime. When juvenile first-degree murderers are excluded from the calculation, the result is that more than 84 percent of first degree murderers are statutorily death eligible under Penal Code section 190.2.

q. Professor Shatz's study demonstrates that Penal Code section 190.2 fails to narrow genuinely the group of murderers who may be subject to the death penalty and does not address the risk of arbitrariness prohibited by the Eighth and Fourteenth amendments. According to this study, only 9.6 percent of those statutorily death-eligible under California's death penalty scheme are actually sentenced to death. If 84 percent of first degree murderers are statutorily death-eligible, and only 9.6 percent are sentenced to death, California has a death sentence ratio of 11.4 percent. This ratio is significantly below the assumed percentage of death judgments at the time of *Furman* (15-20 percent), a percentage impliedly found by the majority of the United States Supreme Court to create enough risk of arbitrariness to violate the Eighth Amendment.

15. Because almost all first-degree murders in California fall within the special circumstances enumerated in Penal Code section 190.2, the death penalty statute fails to genuinely narrow the class of death eligible

murderers in violation of the Eighth and Fourteenth Amendments. As a consequence, the death-eligible class is so large that fewer than one out of eight statutorily death-eligible convicted first degree murderers is actually sentenced to death. Under California's death penalty scheme, there is no meaningful basis to distinguish the cases in which the death penalty is imposed. California's scheme defines death-eligibility so broadly that it creates a greater risk of arbitrary death sentences than the pre-*Furman* death penalty schemes.

16. Penal Code section 190.2's failure to narrow the death-eligible class is neither corrected nor ameliorated by controls at other points in the process. Penal Code section 190.2's failure to narrow is not ameliorated by Penal Code section 190.3's aggravating and mitigating circumstances.

a. Penal Code section 190.2's failure to narrow genuinely the class of death eligible murderers is neither corrected nor ameliorated by Penal Code section 190.3, the statute which sets forth the circumstances in aggravation and mitigation which the jury is to consider in determining whether to impose a sentence of death upon a defendant convicted of special circumstance murder. The purpose of this statute, according to its language and interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. In actual practice, it has been used in ways so arbitrary and contradictory as to violate due process of law.

b. Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having found

that the broad term "circumstances of the crime" meets constitutional scrutiny, this Court has never applied any limiting construction to this factor. Instead, the California Supreme Court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor because the defendant had a "hatred of religion," or because three weeks after the crime defendant sought to conceal evidence, or threatened witnesses after his arrest, or disposed of the decedent's body in a manner that precluded its recovery.

c. Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

> (1) Because the defendant struck many blows and inflicted multiple wounds, or because the defendant killed with a single execution-style wound.
>
> (2) Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification) or because the defendant killed the victim without any motive at all.
>
> (3) Because the defendant killed the victim in cold blood or because the defendant killed the victim during a savage frenzy.

(4) Because the defendant engaged in a cover-up to conceal his crime, or because the defendant did not engage in a cover-up and so must have been proud of it.

(5) Because the defendant made the victim endure the terror of anticipating a violent death or because the defendant killed instantly without any warning.

(6) Because the victim had children, or because the victim had not yet had a chance to have children.

(7) Because the victim struggled prior to death, or because the victim did not struggle.

(8) Because the defendant had a prior relationship with the victim, or because the victim was a complete stranger to the defendant.

d. Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of factors inevitably present in every homicide:

(1) The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.

(2) The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an

aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire.

(3) The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.

(4) The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day.

(5) The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.

e. The foregoing examples of how the factor (a) aggravating circumstance is applied in practice make clear that every prosecutor relies upon it as an aggravating factor in every case without limitation.

f. Juries consider, and prosecutors have been permitted to turn entirely opposite facts, or facts that are inevitable variations of every homicide, into aggravating factors which the jury is urged to weigh on death's side of the scale.

17. California's statutory scheme is particularly death-biased in felony-murder cases.

a. As noted above, California's scheme is particularly death-biased in felony-murder cases, such as petitioner's case, because the California felony-murder rule itself is exceedingly broad.

b. Additionally, pursuant to Penal Code section 190.3(a), a California penalty phase jury is instructed to weigh in aggravation of sentence any special circumstance that it found true at the guilt phase. (Cal. Penal Code § 190.3(a); CALJIC No. 8.84.1.) And, after a first degree murder conviction and special circumstance finding based on felony-murder, the penalty phase jury is instructed to weigh the same felony-murder "crime circumstances," Cal. Penal Code § 190.3(a), and the same felony-murder special circumstance(s) as factors in aggravation. Thus, a defendant convicted of first-degree murder under a felony-murder theory is therefore automatically eligible for a duplicating special circumstance, Cal. Penal Code § 190.2(a)(17), et seq., and a duplicating penalty phase aggravating factor, Cal. Penal Code § 190.3(a), by the nature of the charge.

c. By contrast (and capriciously), a defendant accused of a premeditated killing does not automatically have a built-in special circumstance. Something more must be found to make that defendant eligible for death, and to support a sentencer's decision to impose death. This disparity between premeditated and felony-murder is incongruous, and violates the due process guarantees of the Eighth and Fourteenth Amendments, as well as the Fourteenth Amendment's equal protection clause.

d. California's effort to comply with the Eighth Amendment's narrowing requirement by special circumstances findings fails because the special circumstance of a felony-murder (Cal. Penal Code § 190.2(a)(17), et seq.) duplicates exactly the elements of the underlying crime. The effect of this flaw is augmented by having the jury consider the special circumstance finding as a penalty phase aggravating factor. (Cal. Penal Code § 190.3(a).) This triple use of facts in a capital felony-murder case violates the Eighth Amendment's prohibition against cruel and unusual punishment, the Fourteenth Amendment's due process clause, and the enhanced capital case due process protection of both. This is a process biased in favor of death that does not genuinely narrow the pool of murderers to those most deserving of death.

18. Individual prosecutors in California are afforded complete discretion to determine whether to charge special circumstances and whether to seek death, thereby creating substantial risk of county-by-county arbitrariness.

a. The California murder and death penalty statutory scheme, contained in Penal Code sections 187-190.5, affords the individual prosecutor complete discretion to determine whether special circumstances will be charged and whether a penalty hearing will be held, in violation of the Eighth and Fourteenth Amendments, thereby creating a substantial risk of county-by-county arbitrariness. There are no statewide standards to guide the prosecutor's discretion.

b. Some offenders, under the California statutory scheme, are chosen as candidates for the death penalty by one prosecutor, while

others with similar factors in different counties are not. This arbitrary determination can be made at the charging stage, prior to trial, after the guilt phase, and during or even after the penalty phase. This range of opportunity, coupled with the absence of any standards to guide the prosecutor's discretion, permits reliance on constitutionally irrelevant and impermissible considerations, including race, ethnicity, sexual orientation, and/or economic status. Additionally, the prosecutor is free to seek death in virtually every first-degree murder case on either a lying-in-wait theory or a felony-murder theory, and to argue that death should be imposed based on nothing more than the same facts that substantiated a conviction for first-degree murder.

c. Petitioner would not have been charged with the death penalty had he been charged with the same crimes in many other counties in California. The California statutory scheme, by design and in effect, improperly produced arbitrary and capricious prosecutorial discretion throughout the capital case process, in charging, prosecuting, submitting the case to the jury and opposing the automatic motion to modify the sentence.

19. The California death penalty scheme contains none of the safeguards common to other death penalty schemes to protect against the arbitrary imposition of death.

a. In addition to its failure to genuinely narrow the class of death-eligible defendants and its provision of unfettered charging discretion to individual prosecutors, the California murder/death penalty statutory scheme, as written and applied, contains none of the safeguards against the arbitrary imposition of death common to other death penalty

sentencing schemes. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances outweigh the mitigating circumstances and that death is the appropriate penalty. Not only is inter-case proportionality review not required, it is not permitted.

b. Other jurisdictions with a death penalty have at least one of these safeguards, in order to avoid the imposition of random or vindictive death sentences. None is a part of California's death penalty law.

c. Twenty-five states require that factors relied on to impose death in a penalty phase be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions. Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. 10.95.060(4) (West 1990).) Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (West 1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to address the matter by statute.

d. California does not require that a reasonable doubt standard be used to determine whether a death sentence should be imposed. However, this heightened standard is employed for matters of much less importance to an individual than life or death, i.e., commitment to a mental hospital, or appointment of a conservator. In fact, California's failure to

provide any standard of proof for aggravating or mitigating circumstances, or the weighing process, and failure to assign such a burden to either party, is an additional unconstitutional failure of the statute.

e. Three states require that the jury base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment. A fourth state, Utah, has reversed a death judgment because that judgment was based on the same standard of proof as applied in California, i.e., less than proof beyond a reasonable doubt.

f. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.

g. Of the twenty-two states that, like California, vest the responsibility for death penalty sentencing on the jury, fourteen require that the jury unanimously agree on the aggravating factors proven, and unanimously agree that death is the appropriate sentence. California does not have such a requirement.

h. Petitioner's jurors were never told that they were required to agree on which factors in aggravation had been proven. They could have made their decision to impose death using any of the improper considerations described ante, or still other similar, improper matters. Absent a requirement of unanimous jury agreement as to the existence of

any aggravating factors, and written findings thereon, the propriety of the judgment herein cannot be reviewed in a constitutional manner. Moreover, each juror could have relied on a factor which could potentially constitute proper aggravation, but was different from such factors relied on by the other jurors; i.e., there was no actual agreement on why petitioner should be condemned.

i. Thirty-one of the thirty-four states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the state Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) This provision was approved by the United States Supreme Court, holding that it guards "further against a situation comparable to that presented in *Furman v. Georgia*, 408 U.S. 238 (1972)." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Towards the same end, Florida has judicially "adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida* (1976) 428 U.S. 242, 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.

j. Penal Code section 190 does not require that either the trial court or the California Supreme Court undertake a comparison between this and other factually similar cases to examine the proportionality of the sentence imposed, i.e., inter-case proportionality review. The statute also does not forbid such review. This Court has made it clear, however, that neither trial courts nor reviewing courts are permitted in California to perform inter-case proportionality review. This blanket prohibition on the

consideration of any evidence showing that death sentences are not being charged by California prosecutors or imposed by California juries on similarly situated defendants, regardless of the circumstances of a particular case, violates the United States Constitution.

20. Because almost all first-degree murders in California fall within the special circumstances enumerated in Penal Code section 190.2, the individual prosecutors in California are afforded complete discretion to determine whether to charge special circumstances and seek penalties of death, and the California statutory scheme contains none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death, California's death penalty statute fails to narrow genuinely the class of death eligible murderers in violation of the Eighth and Fourteenth Amendments and permits the imposition of death sentences in an arbitrary and capricious manner.

21. Because petitioner was prosecuted under this overly inclusive and unconstitutional statute, his death sentence is invalid and a writ of habeas corpus should issue reversing his penalty.

22. To the extent that this Court concludes that trial counsel and/or appellate counsel failed to object to the constitutionality of the California death penalty statute and/or raise this challenge on appeal, despite the non-record facts presented in support of this claim, petitioner has been prejudicially deprived of effective assistance of counsel.

W. CLAIM 23: PETITIONER'S CONSTITUTIONAL AND STATUTORY RIGHTS WERE VIOLATED BY THE PROCESS USED TO SELECT AND IMPANEL THE JURY.[26]

Petitioner's conviction, sentence, and confinement are unlawful and his Fifth, Sixth, Eighth and Fourteenth Amendment rights, and his rights under Article I, sections 1, 4, 7, 15, 16, and 17 of the California Constitution, to due process, a fair trial by a jury drawn from a fair cross-section of the community, effective assistance of counsel, confrontation, presentation of evidence, equal protection, protection against self-incrimination, and a fair, reliable, and non-arbitrary sentencing were violated due to the systematic underrepresentation of Hispanics in the venire and at all stages of jury selection and trial counsel's failure to properly challenge the jury selection procedures. State statutory mandates were also violated by the selection process.

The following facts, among others to be presented after full investigation, access to discovery and the Court's processes, and an evidentiary hearing, support this claim:

1. Petitioner was denied his right to a jury drawn from a fair cross section of the community, as guaranteed by the federal and state constitutions. (*Duren v. Missouri* (1979) 439 U.S. 357; *People v. Bell* (1989) 49 Cal.3d 502, 525.)

a. Hispanics are a distinctive group for purposes of this constitutional analysis. (*Castenada v. Partida* (1977) 430 U.S. 482, 495; *People v. Ramos* (1997) 15 Cal.4th 1133, 1154.)

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[26] This Claim qualifies as a Category 1 claim.

b. According to the 1990 census, Hispanics constituted 27.7 percent of the population of Kern County. The number of Hispanics who were at least eighteen years old comprised approximately 22 percent of those eighteen and over in Kern County. The true percentages are actually higher than those set forth here since the census undercounts Hispanics by approximately 5 percent.

c. Hispanics were underrepresented in the jury pool in Kern County at the time of petitioner's trial. As far back as 1981, trial counsel in other cases were litigating this underrepresentation. (*See, e.g.*, *People v. Sanders* (1990) 51 Cal.3d 471, 491; *People v. Alexander* (1985) 163 Cal.App.3d 1189.)

d. At petitioner's trial, the trial jury panel included 195 prospective jurors. (1 RT at 155-60, 2 RT at 289-94, 387-92.) Approximately 24 of the prospective jurors were Spanish-surnamed. (*Ibid.*) Thus, Hispanics were 12.3 percent of the trial jury panel. Since Hispanics eighteen years and older are approximately 22 percent of the adult population of Kern County, the absolute disparity in the underrepresentation of Hispanics is 9.7 percentage points. The comparative disparity is 44 percent. This underrepresentation is not fair and reasonable in relation to the number of Hispanics in the community.

e. Petitioner is confined to an analysis of the trial jury panel in his case because of the County of Kern Jury Commissioner's Office's refusal to provide petitioner's counsel with any relevant data, including names of prospective jurors who were summoned at or around the time of petitioner's trial and the jury source lists from that time. Trial

counsel's failure to investigate the jury selection process, seek discovery, and prepare and present arguments by way of objection and/or motion further limit petitioner's analysis and amounts to ineffective assistance of counsel.

f. This underrepresentation is due to the systematic exclusion of Hispanics in the jury selection process. A full presentation of the suspect mechanisms of the selection process will have to await access to discovery, subpoena power, and a hearing since the information necessary to definitively prove this systematic exclusion is within the possession of the County of Kern Jury Commissioner's Office and has not been provided to current counsel despite repeated requests. Current counsel is further limited by trial counsel's failure to investigate the jury selection process, seek discovery, and prepare and present arguments by way of objection and/or motion, which amounts to ineffective assistance of counsel. The mechanisms that that might create a disparity include, but are not limited to, the following:

(1) The failure to include in the venire prospective jurors who reside in the eastern portions of Kern County. (1 RT at 58-59.) Although the exact areas excluded from the jury selection process are not currently known to petitioner, this wholesale exclusion of prospective jurors contributed to the underrepresentation of Hispanics. Data from the 2000 census indicate that some census tracts in eastern Kern County have populations that are over 25 percent Hispanic.

(2) The failure to use random selection procedures throughout the jury selection process.

(3) The failure to use more than the list of registered voters and the Department of Motor Vehicles list as the source lists for the selection of jurors.

(4) The failure to properly merge and purge the source lists of duplicate names before creating the master list of prospective jurors.

(5) The failure to update the source lists and the master jury list.

(6) The failure to follow up on prospective jurors who do not complete and return juror questionnaires or who fail to appear when summoned for jury service.

(7) The failure to properly apply juror qualification and exemption criteria.

(8) The failure to properly review and excuse prospective jurors for undue hardship.

(9) The failure to make adequate transportation available to prospective jurors.

(10) The failure to comply with the statutory mandates for the selection of jurors set forth in the Penal Code and the Code of Civil Procedure.

2. The exclusion of Hispanics from the jury selection process in Kern County violated the equal protection guarantee of the state and federal constitutions. (*Castenada v. Partida* (1977) 430 U.S. 482.)

a. As noted above, Hispanics are a cognizable group capable of being singled out for different treatment. (*Castenada*, 430 U.S. at 495; *People v. Ramos* (1997) 15 Cal.4th 1133, 1154.)

b. The 9.7 percentage point absolute disparity and 44 percent comparative disparity of Hispanics is constitutionally substantial underrepresentation.

c. The jury selection process in Kern County is subject to abuse and is not class neutral. The selection system is filled with discretionary and ad hoc decision-making by the jury commissioner and his/her staff. The jury commissioner does not comply with the statutory mandates governing the selection of jurors. As detailed above, the jury commissioner excludes prospective jurors from the eastern portion of the county. The exact manner and extent to which these jurors are excluded is not known. This exclusion evidences the susceptibility of the Kern County jury selection system to abuse.

3. The arbitrary exclusion of groups of citizens from jury service violated equal protection, due process and jury trial guarantees afforded petitioner under the state and federal constitutions. (*People v. Fields* (1983) 35 Cal.3d 329, 350-351.)

a. The complete exclusion of prospective jurors from the eastern portion of Kern County is not rational or reasonable. The exclusion of other persons based on asserted hardships, and qualification or exemption criteria is similarly unreasonable.

4. Petitioner's right to a competent and impartial jury was violated by the selection of his jury in an arbitrary and discriminatory

manner in violation of the federal and state constitutions and state statutes. (*Peters v. Kiff* (1972) 407 U.S. 493, 502-04.)

5. The process used to select petitioner's jury materially violated California mandatory statutory and decisional laws concerning jury selection. (Code Civ. Proc. §§ 191, 197, 198, 203, 204, 209, 218, 219, 222, 228.) These material departures from state mandates resulted in a selection process that was so inherently defective that reversal is mandated. Moreover, the violation of state mandates deprived petitioner of a state-created liberty interest and due process of law (*Hicks v. Oklahoma* (1980) 447 U.S. 343), a fair and impartial jury drawn from a fair cross-section of the community, and equal protection of the laws.

6. The reliability of the jury's fact-finding process was compromised by the constitutional and statutory violations that occurred in the selection of jurors in petitioner's case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *McCleskey v. Kemp* (1987) 481 U.S. 279, 309-10.)

7. Petitioner's counsel was constitutionally and prejudicially ineffective for not investigating the jury composition, for failing to seek discovery from the jury commissioner, for failing to raise the issue before the trial court, for acceding to the exclusion of prospective jurors from eastern Kern County, and for failing to request a hearing wherein she would have presented evidence of these violations of petitioner's constitutional and statutory rights.

X. CLAIM 24: PETITIONER'S CONVICTION AND DEATH SENTENCE ARE UNLAWFUL BECAUSE THEY WERE OBTAINED IN VIOLATION OF THE PROVISIONS OF THE VIENNA CONVENTION ON CONSULAR RELATIONS AND THE CONSULAR CONVENTION BETWEEN THE UNITED MEXICAN STATES AND THE UNITED STATES OF AMERICA.[27]

In violation of the treaty obligations established by the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. ("VCCR") and the Consular Convention between the United Mexican States and the United States of America of August 12, 1942, 57 Stat. 800 ("Bilateral Consular Convention"), which are binding on local, state, and federal law enforcement authorities as the law of the United States under Article VI of the Constitution of the United States, Kern County law enforcement officials failed to notify petitioner, a Mexican national, upon his arrest and again later upon his incarceration of his right to communicate with his consulate. Specifically, Kern County authorities (1) failed to inform petitioner during and after his arrest of his right to seek the assistance of Mexican consular officers, as required by Article 36(1)(b) of the VCCR; (2) failed to notify directly Mexican consular officers that petitioner, a Mexican citizen, had been arrested, as required by Articles I and VI of the Bilateral Consular Convention; and (3) failed to provide the Mexican government through its consular officers a meaningful opportunity to provide consular assistance to petitioner, as required by both the VCCR and the Bilateral Consular Convention.

Petitioner was prejudiced by the failure of the local law enforcement

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[27] This Claim qualifies as a Category 1 claim.

authorities to abide by these mandates. Petitioner suffered substantial harm resulting from law enforcement agencies' abdication of duties binding upon them pursuant to the Supremacy Clause of the United States Constitution.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The United States signed the VCCR on April 24, 1963, and ratified it on December 24, 1969. Mexico signed the VCCR on February 20, 1965, and ratified it on June 16, 1965. The VCCR is therefore in force as between the United States and Mexico. The VCCR is binding on the federal government and the several states under the Supremacy Clause of the United States Constitution: "all Treaties 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." (U.S. Const. Art. VI, §2.)

2. Article 36 of the VCCR requires law enforcement authorities to promptly inform arrested foreign nationals of the right to consular assistance. Article 36(1)(b) provides: "If an arrested national so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state, if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner." Article 36(1)(c) adds: "consular officers shall have the right to visit a national of the sending state who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to

visit any national of the sending state who is in prison, custody, or detention in their district in pursuance of a judgment."

3. Enacted with the stated purpose of bringing state law into compliance with federal law under the VCCR, California Penal Code section 834c currently provides, in relevant part, "(a)(1) In accordance with federal law and the provisions of this section, every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country . . . . If the foreign national chooses to exercise that right, the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified."

4. Under the VCCR, the notification to the arrested individual by law enforcement is mandatory. Furthermore, the VCCR mandates that, at the request of the foreign detainee, law enforcement authorities notify the individual's consulate "without delay" and permit consular officials to have access to the arrestee for the purposes of conversation, correspondence, and arrangement of legal representation. Under the VCCR, consular officers have the right to visit their nationals in custody and to provide them assistance to secure legal representation.

5. The United States and Mexico entered into the Bilateral Consular Convention on August 12, 1942; the United States ratified it on February 16, 1943, and Mexico ratified it on April 29, 1943. The Bilateral Consular Convention is in effect between the United States and Mexico,

and, like the VCCR, is binding on the federal government and the states under the Supremacy Clause of the United States Constitution.

6. Article 1, Section 2 of the Bilateral Consular Convention provides, in relevant part, that consular officers of the United States and Mexico shall "[e]njoy reciprocally in the territories of the other High Contracting Party *all the rights, privileges, exemptions and immunities which are enjoyed by consular officers of the same grade of the most favored nation*, there being understood by consular officers Consuls General as well as Consuls and Vice Consuls who are not honorary" (emphasis supplied). This provision, granting Mexican and United States consular officers to all of the entitlements of consular officers of "the most favored nation" mandates that Mexico receive immediate and mandatory notification of the arrest of any Mexican national, because the United States, through other bilateral treaties, has granted to consuls of other nations these benefits.

7. Furthermore, Article 6 of the Bilateral Consular Convention provides: (1) "Consular officers of either High Contracting Party may, . . . address the authorities, National, State, Provincial, or Municipal, for the purpose of protecting the nationals of the State . . . in the enjoyment of rights accruing by treaty or otherwise . . . . Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through the diplomatic channel . . . ."; (2) "Consular officers shall . . . have the right . . . (d) to assist the nationals . . . in proceedings before or relations with authorities of the State"; and (3) "Nationals of

either High Contracting Party shall have the right at all times to communicate with the consular officers of their country."

8. Thus, detained Mexican nationals have the right, at all times, to communicate with Mexican consular officials, and authorities in all law enforcement agencies in the United States which arrest, prosecute, or incarcerate Mexican nationals are required under both Article 36 of the VCCR and Articles 1 and 6 of the Bilateral Consular Convention immediately to notify both the detainees and Mexican consular officers of such detentions.

9. The right of a Mexican national to communicate with his or her consular officers is meaningless if a detained Mexican national is not informed of that right and if the Mexican consulate is not informed of the detention of the national. At no time was petitioner notified of this right, nor did Kern County law enforcement authorities advise the nearest Mexican consular office in Fresno, California of petitioner's arrest and incarceration.

10. The recent authoritative June 27, 2001 decision of the International Court of Justice ("ICJ") in the *LaGrand Case (Germany v. United States),* 2001 ICJ 104 (Judgment) affects all cases of foreign nationals sentenced to severe penalties who have alleged a violation of Article 36 and is directly applicable to petitioner's case. The ICJ's jurisdiction in *LaGrand* was founded upon the Optional Protocol to Article 36 of the VCCR. Under the Optional Protocol, the United States chose to submit all "[d]isputes arising out of the interpretation or application of the [Vienna] Convention" to the ICJ for resolution. (Optional Protocol

Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. 1, 21 U.S.T. 325.) As a result, the ICJ's decision is binding on the United States under the Optional Protocol, Article 94 of the U.N. Charter, and under customary international law.

11. The *LaGrand* court resolved several issues that had divided the lower courts of the United States. First, the ICJ unequivocally held that Article 36, paragraph 1 creates an individual right to consular notification and access. (*LaGrand*, ¶¶ 77, 128(3).) Second, the court held that a foreign national deprived of his Article 36 rights, and sentenced to a "severe penalty," is entitled to "review and reconsideration" of his conviction and sentence. (*Id.* ¶ 128(7).) Third, the court held that domestic rules of procedural default, as applied in the case of the LaGrand brothers, violated the United States' obligation to give "full effect" to the purposes of Article 36. (*Id.* ¶¶ 91, 128(4).) Thus, *LaGrand* definitively establishes that foreign nationals such as petitioner are entitled to a judicial review of their Article 36 claims.

12. The ICJ also established important guidelines for judicial review of such arguments. In *LaGrand*, Germany argued that there was a causal relationship between the breach of Article 36 and the ultimate execution of the LaGrand brothers. (*Id.* ¶ 71.) Specifically, Germany argued that consular officials would have been able to present persuasive mitigating evidence that would have changed the outcome of the LaGrands' cases. (*Id.*) The United States countered that such arguments were speculative, and challenged Germany's assertions that it would have provided such assistance in 1984. (*Id.* ¶ 72.) The Court ultimately

concluded that it was "immaterial" whether consular assistance from Germany would have affected the verdict. Put differently, the Court rejected the notion that a foreign national must demonstrate he was prejudiced by the Article 36 violation before he is entitled to an effective remedy for the violation.

13. Finally, the ICJ addressed the question of remedies for Article 36 violations. The United States had argued Germany was entitled to no more than an apology for the breach of Article 36. The court squarely rejected this argument, observing that an apology was an insufficient remedy in any case where a foreign national was not advised without delay of his rights under Article 36, paragraph 1, of the Vienna Convention, and was facing prolonged detention or a severe penalty – such as the penalty of death. (*Id.* ¶¶ 63, 123, 125.)

14. While numerous state and federal courts have grappled with the application of Article 36 of the VCCR, only two have squarely addressed the application of the ICJ's decision in *LaGrand.* A federal district court has expressly ruled, in an original opinion and again after reconsideration, that the interpretations of the VCCR by the ICJ are binding upon domestic courts. (*United States ex rel. Madej v. Schomig* (N.D. Ill. Sept. 24, 2002) 2002 WL 31133277; *United States ex rel. Madej v. Schomig* (N.D. Ill. Oct. 22, 2002) 2002 WL 31386480 [denying, with a written opinion, Respondent's Second Motion to Reconsider].) A state court, while declining expressly to follow the *LaGrand* ruling that state procedural default rules cannot preclude the adjudication on the merits of VCCR claims, nevertheless took into consideration evidence discovered because of

the involvement of the Mexican consulate after all appellate and postconviction proceedings with the exception of clemency were exhausted, and recognizing the devastating prejudice resulting from the failure to obtain assistance from the Mexican consulate before and during trial, reversed the sentence of death. (*Valdez v. State* (Okla. Crim. App. 2002) 46 P.3d 703.)

15. The United States District Court for the Northern District of Illinois recently confronted a capital petitioner's claim that his VCCR rights were violated in *United States ex rel. Madej v. Schomig* (N.D. Ill. Sept. 24, 2002) 2002 WL 31133277, *United States ex rel. Madej v. Schomig* (N.D. Ill. Oct. 22, 2002) 2002 WL 31386480 [denying, with a written opinion, Respondent's Second Motion to Reconsider].) The federal district court observed that, according to Illinois law, Mr. Madej's VCCR claim was filed fourteen years too late. However, the court determined that the ICJ's ruling in *LaGrand* trumps United States Supreme Court's earlier decision in *Breard v. Greene* (1998) 528 U.S. 371, which held that state procedural default rules may preclude the consideration of VCCR claims. Furthermore, the *Madej* court ruled that the ICJ opinion "conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question most American courts (including the Seventh Circuit [and the Ninth Circuit, *see United States v. Lombera-Camorlinga,* 206 F. 3d 882 (9th Cir. Cal. 2000) have left open." (*Madej*, at 2002 WL 31133277, *10.)

16. The *Madej* court set out a two-prong test for obtaining relief on a VCCR claim: A petitioner must show (1) that his VCCR rights were

violated, and (2) that the violation had a material effect on the outcome of the trial or sentencing. (*Madej,* 2001 WL 3138640 at *11.) Applying this test to Mr. Madej, a Polish national living in Chicago, the federal district court determined that there was no dispute that Mr. Madej's VCCR rights were violated, and since the Polish consulate "almost certainly" would have "provided petitioner with an attorney who would have assisted in obtaining constitutionally effective assistance at the sentencing hearing," Mr. Madej was entitled to penalty relief. (*Madej*, 2001 WL 3138640 at *2.)

17. The Oklahoma Court of Criminal Appeals also addressed a VCCR violation claim in the case of Mexican national Gerardo Valdez. In that case, Oklahoma law enforcement officials involved in Mr. Valdez's arrest, incarceration and prosecution never informed Mr. Valdez of his rights of consular notification, nor did they inform the Mexican consulate of his detention. Almost twelve years after his conviction, after all of Mr. Valdez's appeals and post-conviction proceedings had been exhausted, and less than two months before Mr. Valdez's scheduled execution, one of Mr. Valdez's relatives informed the Mexican consulate in El Paso of Mr. Valdez's situation. The Mexican consulate immediately contacted Mr. Valdez and retained experienced counsel to work with federal habeas counsel, and hired a bilingual neuropsychologist to evaluate Mr. Valdez and a bilingual mitigation specialist to investigate Mr. Valdez's life history in Oklahoma and in Mexico. These experts discovered that Mr. Valdez "suffers from severe organic brain damage; was born into extreme poverty; received limited education; . . . grew up in a family plagued by alcohol abuse and instability" and "experienced head injuries in his youth which

greatly contributed to and altered his behavior." (*Valdez v. State* (Okla. Crim. App. 2002) 46 P.3d 703, 706.) These findings were presented to the Oklahoma Pardon and Parole Board, which as a result, voted to recommend clemency to the Governor of Oklahoma. The Governor granted a stay to consider the clemency recommendation, but then denied the recommendation. Mr. Valdez filed a Second Application for Post-Conviction Relief in the Oklahoma Court of Criminal Appeals, which ordered an indefinite stay of execution pending consideration of the issues presented in the Second Application, including whether the Oklahoma court was bound by the ICJ's decision in *LaGrand.*

18. The Oklahoma Court of Criminal Appeals eventually determined that Mr. Valdez's VCCR claim was procedurally defaulted, despite the ICJ's decision in *LaGrand*, because "the United States Supreme Court in *Breard* specifically rejected the contention that the doctrine of procedural default was not applicable to provisions of the Vienna Convention and until such time as the supreme arbiter of the law of the United States changes its ruling, its decision in *Breard* controls this issue. [Mr. Valdez] cannot be afforded review under our statutes on the ground that the ICJ's interpretation of the Convention in *LaGrand* constitutes a new rule of constitutional law." (*Valdez,* 46 P.3d at 709.) Notwithstanding that ruling, the court reversed Mr. Valdez's death sentence on ineffective assistance of counsel grounds. The court recognized that the Mexican consular officials had been instrumental in funding and assisting in investigation that should have been conducted at an earlier stage in his litigation, and that Mr. Valdez's previous counsel was ineffective for failing

to contact the Mexican government for assistance. Though the Oklahoma state court declined to follow the ICJ ruling in *LaGrand*, its decision was based upon the clear prejudice at trial resulting from the lack of involvement of the Mexican consulate.

19. Under the binding authority set forth in the *LaGrand Case (Germany v. United States),* 2001 ICJ 104 (Judgment), petitioner need not prove prejudice in order to obtain relief from the violation of his VCCR rights. Nevertheless, petitioner did suffer extraordinary prejudice as a result of this violation.

20. Petitioner's rights to consular notification under the VCCR were violated by the Kern County law enforcement authorities.

a. Petitioner is a monolingual Spanish-speaking Mexican migrant farm-worker who grew up in a small impoverished community in the province of Jalisco, Mexico. Although aware of petitioner's nationality, at no time following petitioner's arrest did Kern County officials advise petitioner of his rights or notify the Mexican consulate.

b. Had Kern County officials complied with the binding obligations under the VCCR, petitioner would have been afforded his right to consular assistance, which would have permitted him to obtain proper translation and understand his right to counsel during police questioning and subsequent phases of the legal proceedings.

c. The violation of petitioner's VCCR rights had a material effect on the outcome of the guilt and penalty phases of his trial:

(1) The Mexican consulate would have helped petitioner understand his rights, helped obtain documents and

witnesses from Mexico, and advocated for him with his defense counsel.

(2) Had the Fresno office of the Mexican Consulate been officially involved by local law enforcement authorities in petitioner's case in a timely fashion, consular officers would have been able to contact trial counsel in the early stages of the case to offer assistance.

(3) Mexican consular officers would have attended trial proceedings and recognized that the court interpreters assigned to the case were inadequate. The officials, in turn, would have provided petitioner with a competent, qualified interpreter to ensure his participation in and understanding of the legal proceedings.

(4) Mexican consular officers familiar with criminal law proceedings in the United States would have realized that the police failed to give petitioner Miranda warnings when interrogating him about Consuelo's injuries and that the state mistranslated the Miranda warnings when giving them to petitioner at a second interview, and failed to adequately ensure that petitioner, who is brain damaged, understood his rights.

(5) Mexican consular officers would have been able to identify and transport petitioner's family and friends to Bakersfield, California, to attend and testify on petitioner's behalf at the guilt and penalty phases of the trial.

Y. CLAIM 25: PETITIONER WAS DEPRIVED OF HIS RIGHT TO A JURY DETERMINATION OF FACTS NECESSARY TO SENTENCE HIM TO DEATH.[28]

Petitioner's conviction, death sentence, and confinement were unlawfully obtained in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to trial by jury, due process, to be free of arbitrary and capricious sentencing, to effective assistance of counsel, to an individualized sentencing proceeding, to be free of cruel and unusual punishment, to equal protection of the laws, the presumption of innocence, and a fair and impartial jury because petitioner's jurors were not instructed that all aggravating factors must be proven beyond a reasonable doubt, that aggravation must be found weightier than mitigation beyond a reasonable doubt, that death must be found to be the appropriate penalty beyond a reasonable doubt and that they must unanimously agree on the circumstances in aggravation that supported their verdict.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances." (Penal Code § 190.3.)

a. Before the process of weighing aggravating factors against mitigating factors can begin, the jury must find the presence of one or more aggravating factors.

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[28] This Claim qualifies as a Category 1 claim.

(1) In this case, the trial court explained that an "aggravating factor is any fact, condition or event attending the commission of a crime which increases its [sic] guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (19 RT at 3778.)

(2) The court did not require the jury to find unanimously the existence of an aggravating factor beyond a reasonable doubt.

b. In California, before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors.

(1) Accordingly, the trial court here instructed petitioner's jury that "to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death, instead of life without the possibility parole." (19 RT at 3779.)

(2) The trial court did not require the jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors.

c. The trial court also failed to require the jury to find that death is the appropriate punishment beyond a reasonable doubt.

2. Recent United States Supreme Court authority creates significant doubt about the continuing vitality of California's current death penalty scheme with respect to sentencing procedures and determinations.

a. With the issuance of three recent opinions, *Jones v. United States* (1999) 526 U.S. 227, *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) __ U.S. __, 122 S. Ct. 2428, the United States Supreme Court has dramatically altered the landscape of capital jurisprudence in a manner that has profound implications for penalty phase instructions in California capital cases. Capital defendants have repeatedly asserted, as petitioner does herein, that the California death penalty scheme is unconstitutional because it does not assign to the prosecution the burden of proof beyond a reasonable doubt.

b. The Supreme Court plainly contemplates the application of the reasonable-doubt standard in the penalty phase of a capital case, as evidenced by the series of Supreme Court cases that began with *Jones v. United States*.

(1) In *Jones*, the Court held that under the due process clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment, any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. (*Jones*, 526 U.S. at 243 n.6.)

(2) *Jones* involved a federal statute, but in *Apprendi v. New Jersey*, the Court extended the holding of *Jones* to the states through the Fourteenth Amendment, concluding:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum

> must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range or penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

(*Apprendi,* 530 U.S. at 490 [quoting *Jones*, 526 U.S. at 252-53 (Stevens, J., concurring)].)

(3) *Apprendi* considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second-degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi,* 530 U.S. at 471-72.)

(4) The United States Supreme Court found that the sentencing scheme at issue violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of

facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Apprendi,* , 530 U.S. at 471-72.) The Court explained:

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," . . . and the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," . . . . Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."

(530 U.S. at 476-77 (citations omitted).)

(5) In *Ring*, the Court applied the principles of *Apprendi* in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring*, 122 S. Ct. at 2442.) It considered Arizona's capital sentencing scheme, where the jury determines guilt, but has no participation in the sentencing proceedings, and concluded that the scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. Although the Court had previously upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to

be irreconcilable with *Apprendi*: "Capital defendants, no less than non-capital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Ring*, 122 S. Ct. at 2432.)

(6) Although *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings "necessary to put [a defendant] to death," regardless of whether those findings are labeled "sentencing factors" or "elements" and whether made at the guilt or the penalty phase of trial. (*Ring,* 122 S. Ct. at 2443.) The Court concluded:

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.

(*Ibid.*)

(7) Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first-degree murder with special circumstances. Although it is true that a finding of a special circumstance, in addition to a conviction of first-degree murder, carries a maximum sentence of death (Penal Code § 190.2), neither a judge nor a jury may impose such a sentence based solely on the guilt phase findings.

As with the Arizona stature, the California statute "authorizes a maximum penalty of death only in a formal sense." (*Ring*, 122 S. Ct. at 2440 [emphasis added] (quoting *Apprendi*, 530 U.S. at 541 (O'Connor, J. dissenting)).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus a finding that the aggravating factor or factors outweigh any mitigating factors. (Penal Code § 190.3.) These two additional factual matters are absolutely required in order to impose an increased punishment, and it is this fact-finding that triggers *Apprendi*: these findings are "essential to the imposition of the level of punishment that the defendant receives," *Ring*, 122 S. Ct. at 2444 (Scalia, J., concurring) – they increase the punishment beyond "that authorized by the jury's guilty verdict." (*Apprendi*, 530 U.S. at 494.)

(8) The Supreme Court's intervening decision in *Ring v. Arizona*, which overruled *Walton*, requires that this Court's rejection of *Apprendi* be re-examined. This Court's determination, made in reliance on *Walton*, that the jury's role as fact-finder is complete upon the finding of a special circumstance, is no longer tenable. Both *Apprendi* and consistent application of California precedent require that the reasonable doubt standard be applied to all penalty phase determinations, including the ultimate determination of whether to impose a death sentence.

3. The court's failure to require a finding beyond a reasonable doubt as to the existence of any and all aggravating factors renders

petitioner's death sentence constitutionally infirm, thus mandating a reversal and the imposition of a life sentence.

4. Petitioner's death sentence must be vacated and a life sentence imposed because the trial court failed to require that the finding that weighing of aggravating circumstances against mitigating circumstances be made by a jury and proved beyond a reasonable doubt. Read together, the *Ring* trilogy render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (*Apprendi*, 530 U.S. at 494.)

a. In California, the entitlement to impose a death sentence includes a "factual assessment" that the aggravating circumstances exist and outweigh the mitigating circumstances. If these factual assessments are resolved in favor of the defendant, he is ineligible for death consideration. (See Penal Code § 190.3 [the jury "shall impose" a sentence of confinement in state prison for a term of life without possibility of parole if mitigating circumstances outweigh aggravating circumstances]; see also *Boyde v. California* (1990) 494 U.S. 370, 377.)

b. Accordingly, whether the weighing assessment is labeled an enhancement, eligibility determination or balancing test, *Ring*, *Apprendi*, and *In re Winship* (1970) 397 U.S. 358, require that this most critical "factual assessment" be made beyond a reasonable doubt.

c. In addition, California law requires the same result. The reasonable doubt standard is routinely applied in this state in proceedings with less serious consequences than a capital penalty trial, including proceedings that deal only with a penal sentence. (See, e.g., Penal

Code § 2966(b) [regarding proceedings to determine eligibility for commitment under the mentally disordered sex offender law]; *People v. Burnick* (1975) 14 Cal.3d 306, 332 [proceeding for commitment under former MDSO law]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [similar for *Lanterman-Petris-Short* conservatorship]; and *In re Winship* (1970) 397 U.S. 358, 364 [similar for juvenile proceedings].)

5. The trial court's failure to require a finding beyond a reasonable doubt that death is the appropriate sentence renders petitioner's sentence constitutionally void. The death sentence must be vacated and a life sentence imposed.

6. Petitioner's sentence must be reversed because the trial court failed to require a unanimous jury finding as to sentencing issues. *Apprendi* and *Ring* confirm that jury unanimity is required before a particular circumstance can be considered in aggravation at a capital trial.

a. The jurors were not instructed that their findings as to any of the aggravating circumstances were required to be unanimous.

b. The court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warrants the sentence of death.

c. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. The failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner and slanted the sentencing process in

favor of execution in violation of petitioner's right to a fair trial, a reliable and fair jury determination of penalty, and due process.

d. A unanimity requirement is an integral element of the reasonable doubt standard that *Apprendi* and *Ring* hold is applicable to penalty phase findings essential to imposition of a death sentence. Justice Scalia recognized as much in his concurring opinion in *Ring*, where, in criticizing *Furman*'s requirement that the states adopt aggravating factors, he identified what that requirement entailed:

> Better for the court to have invented an evidentiary requirement [the finding of specific aggravating factors] that a judge can find by a preponderance of the evidence, than to invent one that a unanimous jury must find beyond a reasonable doubt.

(*Ring*, 122 S. Ct. at 2444 [Scalia, J. concurring].)

e. This Court's holdings that no unanimity is required must now be reconsidered. In overruling Walton, the United States Supreme Court has called into question the continuing constitutional validity of this Court's ruling in *People v Bacigalupo* (1993) 6 Cal.4th 457, 468.

f. The failure to require unanimous – or even majority – agreement regarding aggravating circumstances undermines the reasonable doubt standard by vitiating the deliberative function of the jury, which guards against unreliable factual determinations.

g. The right to a unanimous jury verdict whenever facts are required to be found by a jury has deep roots in California law. The first

sentence of Article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." If the United States Constitution, as interpreted in *Ring*, requires that a fact or set of facts be found by a jury, then California law requires that such finding be made by a unanimous jury.

h. The failure to require that the jury unanimously, or even by a majority, find the aggravating factors true also stands in stark contrast to rules applicable in California to non-capital cases. California law requires a unanimous finding in all other contexts in which a jury is entrusted to determine a defendant's alleged criminal activity, including criminal conduct alleged to establish noncapital sentencing enhancements. Adoption of precisely the opposite approach in capital cases flies in the face of the United States Supreme Court's mandate that procedural protections afforded capital defendants must be more rigorous than those provided non-capital defendants and in petitioner's case, singles him out for less procedural protection than other individuals not charged with a capital offense.

i. Applying the *Apprendi* reasoning here, jury unanimity is required. Given the constitutionally significant purpose served by jury deliberation on factual issues, the enhanced need for reliability in capital sentencing and the weight given aggravating factors by a jury, a procedure that allows individual jurors to impose death on the basis of factual findings that they have neither debated, deliberated or even discussed is unreliable and, therefore, constitutionally impermissible.

7. The failure to impose a reasonable doubt standard and require unanimity as to penalty phase determinations is structural error that is not subject to harmless error analysis.

a. *Ring* now requires that *Apprendi* be applied to the California death penalty sentencing scheme to preclude standardless individual juror determinations of aggravating factors and death verdicts. In this case, the trial court's instructions did not require that the jurors unanimously find all the alleged aggravating circumstances only upon proof beyond a reasonable doubt. The jurors were not instructed that the weighing process – the most critical inquiry and the one that actually authorized the jury to return a verdict of death – must be proved to their satisfaction beyond a reasonable doubt.

b. Like other errors denying a defendant's right to an instruction concerning the finding of the essential elements of an offense beyond a reasonable doubt, the error infects the very structure in which the capital sentencing proceeds and can never be harmless. (*Cage v. Louisiana* (1990) 498 U.S. 39.)

c. The failure to properly instruct on unanimity and the burden of proof is a structural error "without which [the penalty trial] cannot reliably serve its function." (*Sullivan v. Louisiana*, (1993) 508 U.S. 275, 281.) It is, therefore, reversible per se.

8. Notwithstanding petitioner's right to be resentenced based on the trial court's failure to require unanimous reasonable doubt findings as to the aggravators, that aggravating factors outweigh mitigating factors and that death is the appropriate sentence, if this Court reduces or vacates any of

the counts or special circumstances, the matter should be remanded for a new sentencing hearing to permit the jury to reconsider its death judgment.

a. Petitioner's penalty phase jury was instructed in accordance with Penal Code section 190.3 that it "shall consider, take into account and be guided by" the presence of enumerated factors, including, *inter alia*, "the circumstances of the crime of which the defendant was convicted." (19 RT at 3778, 3775.)

b. A reduction or reversal of any the charges would clearly fall within the rubric of factors permissibly considered by petitioner's jury in setting the penalty of death in this case. Both the rape and special circumstance were critical to the prosecution's call for the death penalty in this case. They were not repetitive or mere labels to describe conduct already found to be true.

c. The reliability of the death judgment would be severely undermined if it were allowed to stand despite the reduction or reversal of any of the counts. Accordingly, to meet the stringent standards imposed on a capital sentencing proceeding by the Eighth Amendment, as well as article I, section 17 of the California Constitution, petitioner must be granted a new penalty trial, to enable the factfinder to consider the appropriateness of imposing death.

d. If this Court reverses or reduces any of the convictions or special findings, the delicate calculus juries must undertake when weighing aggravating and mitigating circumstances is necessarily skewed, and there no longer remains a finding by the jury that the aggravating factors outweighed the mitigating evidence beyond a reasonable doubt.

This Court cannot conduct a harmless error review regarding the death sentence without making findings that go beyond "'the facts reflected in the jury verdict alone.'" (See *Ring*, 122 S. Ct. at 2432 [quoting *Apprendi*, at 530 U.S. at 483].)

e. Accordingly, because jury findings regarding the facts supporting an increased sentence are constitutionally required, a new jury determination that aggravating factors outweigh mitigating factors and that death is the appropriate sentence must be made if any count or special circumstance is reversed or reduced.

PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully requests that this Court:

1. Take judicial notice of the contents of the certified record on appeal and all pleadings filed in People v. Benavides, Case No. 48266;

2. Order respondent to show cause why petitioner is not entitled to the relief sought;

3. Grant petitioner the right to seek sufficient funds and time to secure additional investigative and expert assistance as necessary to prove the allegation in this petition;

4. Permit petitioner to issue subpoenas for documents and depose witnesses, particularly those persons whose age and health make it unlikely that they will be available to testify at an evidentiary hearing should the state dispute the material facts presented in this petition;

5. Order the Kern County District Attorney to disclose all files pertaining to petitioner's case and grant petitioner leave to conduct discovery, including the right to take depositions, request admissions, propound interrogatories, issue subpoenas for documents and other evidence, and afford petitioner the means to preserve the testimony of witnesses;

6. Order an evidentiary hearing at which petitioner will offer this and further proof in support of the allegations herein;

7. Permit petitioner a reasonable opportunity to supplement the evidentiary showing in support of the claims presented here and 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;

8. After full consideration of the issues raised in this petition, considered cumulatively and in light of the errors alleged on direct appeal, vacate the judgment and sentences imposed upon petitioner in Kern County Superior Court No. 48266.

9. Grant petitioner such further relief as is appropriate and just in the interests of justice.

Dated: April 22, 2008

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: MICHAEL LAURENCE

By: CRISTINA BORDÉ

By: MÓNICA OTHÓN

Attorneys for Petitioner:
VICENTE BENAVIDES FIGUEROA

VERIFICATION

MICHAEL LAURENCE declares as follows:

I am an attorney admitted to practice in the State of California. I represent petitioner VICENTE BENAVIDES FIGUEROA herein, who is confined and restrained of his liberty at San Quentin Prison, Tamal, California.

I am authorized to file this amended petition for writ of habeas corpus on petitioner's behalf. I make this verification because petitioner is incarcerated in a county different from that of my law office. In addition, many of the facts alleged are within my knowledge as much or more than petitioner's.

I have read the petition and know the contents of the amended petition to be true.

Executed under penalty of perjury on April 22, 2008, at San Francisco, California.

MICHAEL LAURENCE

PROOF OF SERVICE

I, Carl Gibbs, declare that I am a citizen of the United States, employed in the City and County of San Francisco, I am over the age of 18 years and not a party to this action or cause, and my current business address is 303 Second Street, Suite 400 South, San Francisco, California 94107.

On **April 22, 2008**, I served a true copy of the following:

CORRECTED AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND PETITION EXHIBIT VOLUMES I THROUGH XXIII IN SUPPORT THEREOF IN THE CASE OF *IN RE VICENTE BENAVIDES FIGUEROA*, CASE NO. S111336

in said cause by placing true copies with first class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

KELLY LEBEL
Deputy Attorney General
1300 I STREET
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

VICENTE BENAVIDES FIGUEROA
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SAN QUENTIN STATE PRISON
SAN QUENTIN, CA 94974

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CALIFORNIA APPELLATE PROJECT
101 SECOND STREET, SUITE 600
SAN FRANCISCO, CA 94105

KENT BARKHURST
State Public Defender
OFFICE OF THE STATE PUBLIC DEFENDER
221 MAIN STREET, 10TH FLOOR
SAN FRANCISCO, CA 94105

Service upon Vicente Benavides Figueroa will be completed by utilizing the 30-day post-filing period within which we will hand deliver a copy to him at San Quentin State Prison.

I declare under penalty of perjury that the foregoing is true and correct. Executed on **April 22, 2008**.

Carl Gibbs